IN THE LEEDS ADMINISTRATIVE COURT
NCN: [2018] EWHC 3662 (Admin)

Case No: CO/3671/2018

Courtroom No. 17

The Courthouse
1 Oxford Row
Leeds
LS1 3BG

Friday, 14th December 2018

Before:
HIS HONOUR JUDGE SAFFMAN

B E T W E E N:

MS BRYCE

and

HEALTH & CARE PROFESSIONS COUNCIL

MR J BOURNE-ARTON appeared on behalf of the Appellant
MR C CATSAMBIS appeared on behalf of the Respondent

JUDGMENT
(Approved)

HHJ SAFFMAN:

Introduction

1. The appellant is a registered occupational therapist employed by Sheffield Health & Social Care NHS Foundation Trust (the Trust). In May and August of this year she appeared before the Health & Care Professions Council (the Panel), to answer an allegation that she had been guilty of misconduct affecting her fitness to practice, in that, on 8 July 2015 she and a Colleague (Colleague A) had sexual intercourse in the home of a patient, and thus a service user of the Trust, while that patient/service user was absent from the home because he was in hospital.
2. Colleague A was also a therapist employed by the Trust, but his professional background differed from that of the appellant in that he was a cognitive behavioural therapist. It is not disputed by the appellant that it would have been highly improper for her and Colleague A to have had consensual sexual intercourse in the home of the patient. Nor is it disputed that conduct, if it were consensual, would have affected her fitness to practice.
3. She does not dispute that sexual intercourse occurred on 8 July, in this patient's property, but her assertion is that it was not consensual. She asserts that she was in an abusive and coercive relationship with Colleague A, with the result that she had no power to prevent sexual intercourse on this occasion and indeed had no power to prevent it on the many other occasions that she accepted sexual intercourse took place over a period commencing in 2012. Her assertion was that the relationship had always been coercive and abusive. Colleague A had consistently abused the dominant position which he held over her. The incident on 8 July was simply another occasion on which he exercised that dominance.
4. Colleague A, on the other hand, has consistently asserted that his sexual relationship with the appellant was entirely consensual and that includes the intercourse at the patient's home on 8 July.
5. The Panel had to assess whose account to accept. By its decision of 17 August 2018, it accepted the account of Colleague A. It concluded that the intercourse on 8 July had '*occurred in circumstances where the appellant was not deprived of the ability to refuse to act as she did'*. Accordingly, the Panel held that her fitness to practice was impaired. The sanction imposed by the Panel was to place a caution against her HCPC registration for a period of three years.
6. The appellant appeals the finding by the Panel that she consented to sex on that day but if that challenge fails, she does not challenge the finding that her conduct affected her fitness to practice and nor does she challenge the sanction.

The Panel's Decision and Grounds of Appeal

7. It is clear that the Panel reached its conclusion on the basis that they preferred the evidence of Colleague A over that of the appellant. At paragraph 9 of their decision, they set out reasons for their reservations concerning the appellant's reliability as a witness and which resulted in their hesitation in accepting her evidence. It is as well, I think, to set out what they have to say:

> *'The panel found that there were significant aspects of the registrant's actions that were implausible. The registrant's first complaint to the trust was sent less than six weeks after the incident at the service user's home and the lengthy and particularised complaints to Colleague A's regulator was sent less than 10 weeks after the incident. Neither referred to the incident. The registrant sought to explain the omission by contending that she intended that it should be included in her complaint that sexual activity had taken place in several locations including my home, work environment*

and some outdoor locations. The panel reject this explanation. The panel does not accept that the service user's home can sensibly be described as a work environment. Furthermore, the form used for the referral to the regulator asks where the incidents take place. Various locations are specified but not the service user's home. This was also inconsistent with the formal interview with the investigating officer, when the registrant was asked why she had not included this incident in the initial complaint raised by Colleague A to his regulator. The registrant said that this was an oversight. The panel also do not accept as credible the reason advanced by the registrant for not having messages that she claimed were on her personal mobile telephone. She said that she copied messages from her personal mobile phone to her work tablet device and then deleted the messages from her personal phone. Again, the panel could not accept the registrant's evidence that she feared that Colleague A would disclose incriminating photographs of her in view of her actions on 8 August 2015 when Colleague A was photographed, and an image or images were subsequently sent to his wife. In cross-examination before the panel there were occasions when the registrant was assertive but when challenged more closely, she became tearful. These reservations, on the part of the panel, concern the registrant's reliability as a witness had the consequence that the panel hesitated in accepting her evidence.

8. The appellant takes issue with this approach to her evidence. In her grounds of appeal, she argues that the Panel's conclusions as to her reliability are based to a material extent on its conclusion that, in connection with the complaints that she had made about Colleague A, she had failed to mention firstly to the Trust and secondly to his professional body, that Colleague A had forced her to have non-consensual sex at the patient's home. It is contended by her that this is simply wrong in fact and that, in reaching that conclusion, the Panel has ignored the fact that on 1 October 2015 in a complaint to the Trust, she specifically mentioned that she had been coerced and manipulated into having sex with Colleague A.

9. The grounds of appeal recognise that the Panel considered that it had to make contextual findings in order to determine whether, as the Panel put it "*the incident occurred in circumstances where she had no ability to prevent the incident occurring'*. But it is argued that there has been no regard, or inadequate regard, by the Panel to the significant documentary evidence which clearly indicates that the context in which this sexual intercourse took place was an abusive relationship and, in so far as that evidence has been considered, no reasons were given by the Panel for its rejection.

10. I should mention that is a procedural dispute between counsel as to the parameters of this appeal revolving over the way that the appeal is presented. Mr Bourne-Arton, counsel for the appellant, seeks to, as he puts it, add flesh to the appeal in his skeleton and oral arguments. In a nutshell he argues that, in addition to the Panel erring in rejecting the appellant's account on the basis that she did not specifically refer to the instance of sexual intercourse on 8 July, or in failing to have proper regard to the significance of the documentary evidence provided by the appellant in support, it also erred in failing to have regard to the implications of being a victim of sexual abuse. He argues that evidence shows that there is no set pattern of behaviour for those who have been subjected to sexual abuse. In effect, his assertion is that the Panel justified its conclusions that the appellant was unreliable without having regard to the effect on her of having been subjected to an abusive relationship, not just on 8 July 2015, but for a period running into years.

11. Mr Catsambis, counsel for the respondent, argues that, in fact, the skeleton and oral argument do more than "add flesh" to the grounds of appeal but rather they add to them substantively and that, as a result, the appellant purports to argue the appeal on different grounds to her pleaded grounds. The pleaded grounds are really, he argues, a complaint that insufficient

reasons have been given for the conclusions that the Panel reached. He argues that, in the assertion by Mr Bourne -Arton that the Panel failed to have regard to the proper context, the basis of the appeal has been impermissibly extended. I shall deal with this shortly.

The Legal Framework

12. I think I need simply mention that the jurisdiction of the Panel to hold the disciplinary hearing in respect of the appellant arises under the Health and Social Professions Order 2001. The right to appeal is provided by Article 38 of that Order and pursuant to sub-Section 3, the court may either dismiss the appeal or allow it and quash the decision appealed against. It may also substitute the decision appealed against by any other decision that it was open to the Panel to make or remit the case to be re-heard.

13. This is not therefore a judicial review of the Panel in the ordinary sense that that is understood in the Administrative Court, it is simply an appeal against a decision and the test to be applied in determining whether to allow the appeal is the one set by CPR 52.21(3) whereby the court will allow an appeal where the decision of the lower court was: (a) wrong; or (b) unjust because of a serious procedural or other irregularity of the proceedings in the lower court.

14. Judicial guidance has been given to the principles to be adopted by the court in approaching the exercise of whether the decision of a disciplinary panel such as this was wrong. I have been referred, in particular, to *Rice v Health Professions Council* [2011] EWHC 1649 (Admin) and *Fish v General Medical Council* [2012] EWHC 1269 (Admin). In *Rice* Lindblom J, quoting from the case of *Bhatt v General Medical Council* [2007] EWHC 783 (Admin) case, had this to say at paragraph 14:

> *'A useful summary of the relevant approach as outlined in the authorities is to be found in the judgment of Langstaff J in Bhatt v General Medical Council. I accept and adopt the approach outlined in these authorities. In particular, that although the court will correct errors of fact or approach: (i) it will give appropriate weight to the fact that the panel is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect; (ii) that the tribunal has had the advantage of hearing the evidence from live witnesses; (iii) the court should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body; (iv) findings of primary fact, particularly if found upon an assessment of the credibility of witnesses are close to being unassailable and must be shown with reasonable certainty to be wrong if they are to be departed from; (v) but that where what is concerned is a matter of judgment in evaluation of evidence which relates to police practice or other areas outside the immediate focus of interest and professional experience of the FTPP, the court will moderate the degree of deference it will be prepared to accord and will be more willing to conclude that an error has, or may have been made, such that a conclusion to which the panel has come is, or may be, wrong or procedurally unfair'.*

In *Fish v General Medical Council*, Foskett J in relying on an earlier case had this to say:

> *'It is plain that where the conclusion of the FTP is largely based on the assessment of witnesses who have been "seen and heard", this court will be very slow to interfere with that conclusion. Nonetheless, the court has a duty to consider all the material put before it on an appeal in order to discharge its own responsibility, appropriate deference being shown to the conclusions of fact reached on the basis of the advantage of having seen and heard the witnesses. Where this court does not feel disadvantaged by not having heard the witnesses, and the issues can be addressed with little emphasis on the direct assessment of the evidence by the Panel, it is in a position to take a different view in an appropriate case'.*

As to what must be contained in a judgment, I have been referred to *Southall v General Medical Council* [2010] EWCA Civ 407. Mr Catsambis cites it in his skeleton argument which I shall simply quote:

> '*It is trite law that there is no general common law duty to give reasons. There is certainly no duty to address every argument or every document advanced by the parties……..... In particular the Court of Appeal held in Southall v General Medical Council, applying Phipps v General Medical Council [2006] EWCA Civ 397, that, in straightforward cases, setting out the facts to be proved and finding them proved, or not proved, would generally be sufficient both to demonstrate to the parties why they won or lost and to explain to any appellate tribunal the facts found. In most cases particularly those concerned with comparatively simple conflicts of factual evidence it would be obvious whose evidence has been rejected and why'.*
>
> '*It is only in cases that can properly be described as exceptional that a few sentences dealing with salient issues was essential'.*

Discussion

15. As I have said, Mr Bourne-Arton argues that there is,an enormous body of evidence in this case which the Panel ignored in reaching its conclusion as to the nature of the relationship between the appellant and Colleague A and that its importance in placing consistency on the appellant's evidence betrays the fact that it has not properly considered the issues in this case because it has failed to make clear that it understands the need for caution when assessing the evidence of victims in coercive controlling relationships.
16. Mr Bourne-Arton points out that in paragraph 9 of the decision which I have recited earlier, the Panel seems to have placed weight, for example, on the fact that at times the appellant was assertive but when challenged became tearful. He argues that, in ignoring the effect of how being in a coercive relationship can manifest itself in how a witness gives evidence, the Panel has erroneously allowed the appellant's presentation at the hearing to play into its conclusions as to her reliability.
17. He argues that the same can be said of the panel's circumspection about the appellant's assertion that she was locked in this abusive relationship for reasons that included the fact that Colleague A appeared to have some explicit photographs of her and she believed that unless she complied with his demands, he would publish them and that thus she was essentially the victim of blackmail. Mr Bourne-Arton argues that the Panel in discounting her evidence in that respect (on the basis that it was inconsistent with what subsequently happened in August 2015 when she herself sent to Colleague A's wife compromising pictures of Colleague A), that the Panel had brought to bear a logic which takes no account of the state of mind that can result from being in an abusive relationship.
18. The Panel had also come to doubt the appellant's reliability on the basis that it found it difficult to accept that the appellant would have deleted abusive messages from Colleague A from her phone. He asserts that that conclusion by the Panel wholly fails to acknowledge that her evidence was that she had only done so after she had transferred them to her work computer and that the Panel were not privy to the contents of her work computer because, despite her request to the respondent that it be produced for the hearing, the respondent had failed to do so.
19. As regard further evidence that the Panel simply overlooked, Mr Bourne-Arton argues that there is indeed some very weighty evidence to support the coercive nature of this relationship to which the Panel appears to have had no regard. He refers me, for example, to a letter from

a Susan Morley who works for Sheffield Rape and Sexual Abuse Centre. Her experience with the appellant caused Mrs Morley to take the view that the appellant was suffering from what looked like the symptoms suffered by sufferers of post-traumatic stress disorder. Furthermore, in her sessions with the appellant it became clear to Mrs Morley that the appellant regarded herself as having been in an abusive relationship with Colleague A. Mr Bourne-Arton points out that not only does Ms Morley say that the symptoms look like symptoms described in post-traumatic stress disorder but the letter from Mrs Morley goes on to say that the appellant is suffering from some of the most severe symptoms of PTSD that she has ever encountered in her work.

20. There is a further letter from Wilma Scott, who is currently the appellant's spiritual adviser, to the effect that she was told by the appellant in January 2013, two years or so before the incident which gave rise to the disciplinary hearing, that the appellant had had sex with Colleague A because she felt '*pressurised to have sex with him'* and that she was subject to ongoing sexual abuse from Colleague A. The nature of the dominance of Colleague A in the relationship is also, it is suggested, revealed by the fact that it is not disputed that when this relationship with Colleague A started the appellant was coming out of a relationship with her husband and was vulnerable.

21. Mr Bourne-Arton referred me to an email of 28 October 2011 sent by the appellant to Colleague A before the relationship between the appellant and Colleague A had become physical. It was a long email (which was drawn to the attention of the Panel) in which the appellant set out her domestic background and thoughts and which, it was argued, demonstrated that at that time she was looking to Colleague A for advice and assistance because she was herself in a very vulnerable state. It is suggested that this demonstrates the fact that this was a dominant/servient relationship.

22. Mr Bourne-Arton also points out that in June 2013, I think it was, I will be corrected if I am wrong, the appellant had written to her son's school to ask them to ensure that Colleague A did not have access to her son. To be clear, it is not suggested that, in fact, Colleague A ever intended approach her son but the fact that the appellant contacted the school with that concern is, it is suggested, indicative of her state of mind and the nature of the relationship that she had with Colleague A.

23. Insofar as the Panel attached importance when considering credibility issues to the fact that the appellant had not mentioned in formal complaints the fact that sex had taken place at the service user's home, Mr Bourne-Arton points out that this is not in fact the case and that it had been pointed out in an email of 1 October. Also, in other complaints she formally makes about Colleague A she readily admits that she has had sex with him in the "*workplace environment*" and Mr Bourne-Arton takes issue with the Panel's conclusion that the patient's home cannot be seen to be the work place environment.

24. Mr Bourne-Arton also argues that much weight has been attached by the Panel to inconsistencies in the appellant's evidence to justify a conclusion that she is not to be believed but that inconsistencies in Colleague A's evidence have been rather skimmed over. He points out that Colleague A is clearly a liar; he lied to his wife about his whereabouts on 8 July. He said he was walking the dog when he was in fact with the appellant. He lied to his immediate superior, Mr Bishop, about the occasions when he had had sexual intercourse with the appellant.

25. In addition, there was documentary evidence that Colleague A was regarded by other work Colleagues as a pushy personality and a little egocentric. Mr Bourne-Arton argues that that evidence, which supports the assertion that this was a grossly skewed relationship involving a vulnerable appellant as the victim of an over-bearing person, has been ignored by the Panel.

26. Mr Catsambis argues that in so far as this appeal is based on an absence of a reference by the

Panel to an email of 1 October then it lacks merit. He argues that it is clear that regard was had to this email. The judgment is clear in that it specifically states, at paragraph 8, that the Panel was presented with a considerable body of documentary exhibits and at paragraph 12 the judgment makes clear that Panel had regard to all this evidence and the arguments based on them in reaching its decision.

27. Mr Catsambis argues that it cannot simply be assumed that those observations by the Panel are no more than lip service, as Mr Bourne-Arton contends. Mr Catsambis argues that if the Panel says in its decision that it has had regard to this evidence, then there is no reason to disbelieve it. He argues that, in any event, it is more likely than not that this evidence was considered, bearing in mind the fact that there can be no doubt that the documents that Mr Bourne-Arton refers to figured repeatedly in the evidence at the hearing before the Panel and in the submissions made at that hearing. It is, Mr Catsambis argues, overwhelmingly likely that they were considered by the Panel. The email of 1 October upon which Mr Bourne-Arton so heavily relies is, after all, referred to in witness statements, skeleton arguments, case summaries and in the re-examination of the appellant.

28. As for Mrs Morley's evidence, it is referred to on no less than five separate occasions during the course of the evidence and the other documents which Mr Bourne-Arton argues the Panel have not taken into account have also been specifically referred to, not only during the course of the evidence, but also in final submissions. Mr Catsambis argues that is clear no less from the grounds of appeal themselves where, at paragraph 13, it is stated that reference was made to the aforementioned documents in the appellant's oral evidence as well as the closing submissions made on behalf of the appellant. Mr Catsambis argues therefore that there is no basis for taking the view that the Panel failed to consider these documents and did not have regard to them in reaching its conclusions.

29. As regards what the Panel's conclusion that a failure by the appellant to mention that sexual intercourse took place at the patient's home supports a finding that she is unreliable, it is a fact, Mr Catsambis argues, that the appellant did not mention sexual intercourse at the patient's home at any stage in complaints to which the Panel refers in paragraph 5 of its judgment. This is so notwithstanding that one of the documents, at page 498 of the appeal bundle, specifically asks where the incidents took place and requires the appellant, to:

> *'Provide the names and address of the hospital, nursing home or place where the incidents occurred. It will also be helpful if you can name the specific ward, department or unit. If incidents occurred in more than one place, please provide the name and address or location where each incident took place'.*

30. It is argued by Mr Catsambis that, in circumstances where one is prompted to set out exactly where the matters complained of occurred, where the appellant still makes no reference to sex at the service user's home and that the closest she gets to it is to say that sex took place at various "indoor locations in and around Sheffield", that is an ample basis upon which the Panel can conclude that the appellant is less than forthcoming and that, in turn, affects her credibility.

31. Mr Catsambis also points out that the Panel's conclusion as to credibility was not just based upon her omission to mention when that could have been expected that the home of the patient had been abused but on the fact that the Panel was not impressed by her explanation for this omission. At one stage she argued that her failure to mention sex having occurred at the service user's home was an 'oversight' whereas at other times she explained the omission on the basis that it was covered by her assertion that sex had taken place in the "work environment".

32. Mr Bourne-Arton argues that the patient's home is the work environment. Putting arguments to one side as to whether that is true but, in this context, disingenuous, the Panel, obviously

took the view that it was troubled by her explanations for not disclosing the site of this sexual liaison in complaints prior to October.

33. As regard the evidence to support her accusations against Colleague A that she says that deleted from her phone, Mr Catsambis argues that it is not improper for the Panel to question whether a person would remove from their telephone evidence upon which they wish to rely. Of course, I do not overlook Mr Bourne-Arton's point that one can well understand why a victim of abuse would not wish these messages to remain on the phone as a constant reminder of that abusive relationship.

34. In the end, I think the point made by Mr Catsambis is that the matter with which the Panel had to grapple was a fairly simple one, bearing in mind that there was no dispute that sex had taken place on 8 July in this service user's home. The issue was whether that sex was consensual or not. The Panel had to make a decision, in making that decision regard had to be had to all the evidence, both oral and written, and the Panel decided that, having heard the evidence over a two day period and having taken account of the documents, it preferred the evidence of Colleague A as to the status of the relationship rather than that of the appellant.

35. He argues that its findings that this was a consensual relationship and was consensual on 8 July were findings of fact and as such, on the basis of *Rice*, they are close to be unassailable and should only be overturned if there is reasonable certainty that they are wrong.

36. Whilst Mr Catsambis accepts that the Panel did not engage with the documentary evidence in any detail in their decision, he argues that it is considerably more likely than not that they did consider those documents, for the reasons which I have already set out and not least the repeated reference to them during the course of the hearing and in final submissions. In addition, there is the fact that the judgment refers to the fact that regard has been had to the documents.

37. Mr Catsambis argues that the clear implication is that the Panel simply regarded this documentary evidence was simply insufficient to enable them to conclude that the appellant was a reliable witness when she said that sex was not consensual. He argues that this is a straightforward case, where the facts to be proved are clear and uncomplicated and there has been a finding against the appellant. He argues that the decision demonstrates why the appellant has lost in sufficient detail to enable the appellant to understand it.

Conclusion

38. I have considered this matter very carefully indeed. I appreciate, of course, how important it is to the appellant, where the evidence suggests that in all other respects, she is an exemplary employee who was well-liked and highly-rated by her colleagues.

39. Nevertheless, I have concluded that I am not persuaded that it is appropriate to find that the Panel was wrong in its conclusions or that there was any irregularity in the procedure. I accept that the Panel decision could have been fuller, but the fact is that this does not give rise to a conclusion that the issues which the appellant raises, and raised at the time, were not considered.

40. I have to have regard to what is said in *Southall v GMC* cited earlier. In my judgment this is a straightforward case and not the sort of exceptional case which requires even a few sentences dealing with the salient issues.

41. I simply cannot be satisfied that the documents were not properly considered by the Panel. The Panel says that they were, and in my view, it would be wrong to treat that as simply a platitude.

42. Moreover, the observations in *Rice* are clearly of relevance. It was a finding of fact. It was essentially the only significant finding of fact the Panel had to make. It is that finding of fact which is being challenged in circumstances where weight must be given to the fact that this was a specialist tribunal and due deference must be given to their conclusions. Additionally,

regard must be had to the fact that the Panel heard a great deal of live evidence and that there must be a slowness to interfere with decisions on matters of fact.

43. Importantly in this case, those findings have been based upon the assessment of the credibility of witnesses who the Panel had the advantage of seeing and hearing. I remind myself of what was said in *Rice* to the effect that those are close to being unassailable and should only be departed from where one is reasonably certain that they are wrong. Even though that observation is persuasive rather than binding, it is the observation of an experienced puisne judge and it is highly persuasive.

44. *Fish* too provides more assistance to the respondent than the appellant. The judge in that case suggested that the circumstances where the court can properly take a view opposite to that of the Panel is confined to where the court does not feel disadvantaged by not having heard the witnesses and the issues can be addressed with little emphasis on the direct assessment of the evidence by the Panel. This does not strike me as a case where there is no disadvantage to the appellate court in not having heard the witnesses when that witness evidence has been given over a period of two days or so and was clearly, on the basis of the evidence of the transcripts, extensive and far-reaching. Mr Bourne-Arton says at paragraph 7 of his skeleton argument that much of the important evidence was contained in agreed documents. That is true but also clearly much of the important evidence was contained in the oral evidence. I am simply not satisfied and certainly not satisfied with any reasonable certainty that insufficient regard was had by the Panel to the documents to which their attention was drawn, such that their decision was wrong just because these are not set out chapter and verse in the judgment.

45. Nor am I satisfied that as a general proposition the decision reveals that the Panel approached this on the wrong basis without regard to the effect of coercive controlling relationship on the victim. That had been drawn to their attention in the documents, and no doubt in the submissions and if it was not there is no reason why it was not. The fact that the Panel may not have referred specifically to it in their decision does not mean that they did not take account of that evidence in reaching their decision.

46. For all these reasons I am driven to the conclusion that this appeal must fail and that is the order which I shall make. I should add in the event that it is not clear, that I have based my decision not on a restrictive interpretation of the grounds of appeal but on the basis of the case put to me in oral submissions and Mr Bourne-Arton's skeleton argument. In short, the issue of whether the appeal was put on different grounds to those presaged in the grounds of appeal is an academic one. The appeal fails even if Mr Bourne-Arton's submissions are not treated as an extension or amendment of those grounds but rather are treated merely a development of those grounds by simply adding flesh to the bones.

47. I am grateful to counsel for their assistance and presentation of this appeal

End of Judgment

This transcript has been approved by the judge.

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