

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 48

EDI-B1526-17

JUDGMENT OF SHERIFF T WELSH QC

in the Summary Application of

GARY WHEELER

Pursuer

against

THE SCOTTISH MINISTERS

Defender

Pursuer: Oliver; Hann & Co, Edinburgh
Defender: Neilson; Scottish Government, Edinburgh

Edinburgh, 21 August 2018

The issue

[1] The defenders are required by section 1 of the Protection of Vulnerable Groups (Scotland) Act 2007 [the Act] to keep a list of persons considered by them to be unsuitable to work with vulnerable adults (or children) in Scotland. On 12 October 2017, the defenders included the pursuer in the adults' list. As a listed person, the pursuer is barred from engaging in regulated work, paid or unpaid, with vulnerable adults, by reason of section 92 of the Act. This prohibition encompasses a very wide range of activities and positions described in and proscribed by schedule 3 of the Act. The pursuer has invoked section 22 of the Act, which provides a right of appeal to the sheriff against the decision to blacklist him in this way.

Background

[2] It is not disputed that the pursuer was employed by NHS Lothian as a Nursing Assistant until he was dismissed on 20 May 2016 following an NHS Disciplinary Tribunal Hearing for gross misconduct held on 25 April 2016. Specifically, between 15 December 2014 and 20 May 2016, he was employed as a Nursing Assistant in a nursing home in Edinburgh. An allegation was made against him by another Nursing Assistant, Adele Mason, that, on 14 July 2015, in W ward of the nursing home he inappropriately restrained an elderly female patient, FS (then 83) (now deceased), who was suffering from vascular dementia and incontinence. It was alleged the pursuer grabbed FS around the neck and dragged her into a toilet to be changed. It was further alleged that in the toilet he deliberately stood on her toes and made inappropriate comments about her. The pursuer was suspended immediately following the complaint. FS was never interviewed about the incident. She was medically examined and found to have no injuries or marks on her skin as a result of the alleged manhandling/assault. Before the Disciplinary Tribunal the pursuer denied the allegations but was disbelieved. The Disciplinary Tribunal heard evidence from Adele Mason, Nursing Assistant; Cheryl McDermid, Catering Assistant; and Iraide Beascoehea Artaraz, Staff Nurse. The pursuer was not legally represented at that hearing. He did not appeal his dismissal from NHS Lothian.

[3] During his suspension the matter was referred to Police Scotland for investigation. The pursuer was interviewed by police on 16 February 2016 in relation to an alleged assault on FS on 14 July 2015 in W ward. He denied the alleged assault. Following investigations he was charged and the matter referred to the Procurator Fiscal. The pursuer was prosecuted summarily. At an adjourned trial diet on 10 May 2017 the case was not called because an

essential Crown witness, Cheryl McDermid, had again failed to attend court in answer to her citation. The case was abandoned.

[4] On 23 October 2017 Disclosure Scotland informed the pursuer of the decision of the Defenders, following their consideration *inter alia* of the disciplinary process and the prosecution to list him on the adults' list from 12 October 2017. Persons are normally listed for a period of 10 years.

[5] Parties agreed that the defenders should lead at the proof.

The evidence

Robert John Crispin BSc (42)

[6] The witness is the senior Charge Nurse at the nursing home the pursuer worked in. He qualified in 1997. He said the pursuer initially worked in R ward before moving to W ward. The witness explained that Nursing Assistants require to complete specified training modules which are delivered using a computer based system called Learn Pro which delivers e-learning modules in specific relevant areas of training. He said certain modules for Nursing Assistants are mandatory *e.g.* Health and Safety, Fire Procedure, Food Handling. There are other additional modules for Care of Dementia Patients, Control and Restraint Techniques, etc. The witness stated that in 2015 he contacted Learn Pro and discovered that the pursuer had not activated his training account. He said the pursuer had to do training modules relating to handling violent and aggressive patients. He booked the pursuer onto an appropriate course on 3 August 2015. The witness explained the training module structure. The witness explained the violence and aggression training module must be repeated every two years and the pursuer's training was out of date. He indicated that the pursuer when interviewed thought his training was up to date.

Adele Mason (42)

[7] The witness explained she had 21 years' experience working as a Nursing Assistant. She had no nursing qualifications as such but had practical experience working with dementia sufferers. On 14 July 2015 the witness said she was working on W ward. An incident occurred. She was working in the dining room. There was a disturbance. She saw the pursuer with FS whom she had known for many years in W ward and in other care homes. The witness said FS was very distressed. The pursuer had his right arm around FS's neck and was moving her into a toilet. The witness was distressed by what she saw and ran to the toilet. The witness ran over to the toilet. When she entered there was a lot of shuffling and disorder. There was a staff nurse, FS and the pursuer in the toilet. The witness asked the pursuer if he had his 'control and restraint'. She said the pursuer was not using the proper control and restraint method. The witness used a forearm restraint on FS. The witness said the pursuer was standing on FS's foot to restrain her. The witness said she did not know what the pursuer was trying to do. She asked him to remove his foot from FS. He did this but not immediately. The witness asked the pursuer what he trying to do. He ignored her. The pursuer was saying 'What a smell' 'What a stink' in front of the patient. The witness asked the pursuer to stop this. The witness said FS was changed then. After that she took FS to a quiet area to settle her and give her a glass of milk. The witness said she reported the incident to the Charge Nurse straight away. The witness said she did not really know the pursuer. The witness said she gave evidence against the pursuer at the disciplinary hearing. The witness said she spoke out against the pursuer and that she is not lying. In cross examination the witness said she saw the pursuer with his arm around the neck of FS and he was dragging her backwards into the toilet. At that point she did not see the staff nurse but ran over to the toilet. She said it was a small single toilet room. It was put to the witness she

had previously complained about the pursuer and said he had sexually assaulted her by brushing past her. It was also put to her that she objected to male nurses attending to needs of female patients. The witness said FS always needed 3 members of staff to care for her. Two, to restrain her and one to administer care. The witness said she has full training in restraint and control of violent patients.

Cheryl McDermid (35) Catering Assistant

[8] The witness said she had worked at the nursing home in the capacity of a Catering Assistant. She did not know the pursuer. She said it was 2.30pm and she was serving tea to the patients. She saw the pursuer with FS going into the toilet. She said the pursuer had FS by the back of the neck, pushing her into the toilet. She said Adele Mason also saw the incident and that Adele panicked and ran over to FS. She heard Adele say 'I'm not having that'. The witness said she was shocked by the way FS was being treated by the pursuer. She said she went immediately to the Charge Nurse and told him what she had seen. She said that at the Disciplinary Tribunal the pursuer had said 'We were all liars'. The witness said she did not attend the criminal trial because she was nervous. She said she was not lying in her evidence. She said she had never 'done this' before. She said the pursuer made her feel nervous at the disciplinary hearing. In cross examination she said FS was being pushed from behind. She said the staff nurse was inside the toilet. The witness said she did not attend the trial on the second occasion because Adele Mason phoned her and told her the trial was off. She said FS could be difficult at times. FS did not like being handled or touched.

Mike Holligan (58)

[9] The witness said he was a Clinical Services Development Manager with NHS Lothian. He said part of his duties included investigating complaints. The witness explained he had presented the management case against the pursuer at the disciplinary tribunal. He visited the ward to examine the locus. He interviewed the pursuer in 2015 about the allegation when the pursuer became agitated. The meeting was terminated. The witness explained the training system for Nursing Assistants and stated the pursuer had said his training was up to date but the electronic records disclosed he was not up to date. The witness expressed the opinion that to take an 83 year old patient by the neck was an inappropriate way to handle a vulnerable patient with dementia. He said it is never appropriate to restrain by the neck. He said it is never appropriate to stand on the toes of a patient to restrain her. The witness stated the staff nurse did not see any inappropriate behaviour occur. It was put to him in cross examination that there were 3 versions of what happened, Adele Mason's account, Cheryl McDermid's and the version of the staff nurse in her statement. The witness said a Disciplinary Tribunal is convened when there are issues in dispute. If the facts were all agreed a tribunal is not necessary for disposal of the case.

Gary Wheeler (56)

[10] The pursuer gave evidence. He is employed as a carer for his mother. He does some part-time security work. He said that on 14 July he was working on W ward. He knew the patient FS. The staff nurse on the ward asked him to help her because FS needed her incontinence pads changed. He said nothing was done until the staff nurse got the pack of pads. Then, FS was told she needed to be changed. The witness said FS needed prompting. He had one hand on her arm and one hand on her waist. The patient's arms were flaying.

She was moaning and screaming. The patient didn't want to go into the toilet. FS was 'prompted' into the toilet. The witness said he stood in front of the patient while the staff nurse changed her from behind. Adele Mason came into the toilet. She asked if they needed a hand and the witness told her that would be helpful. He said the patient was moving and resisting being changed. The witness said Adele asked if his training in violence and aggression was up to date. The witness said he indicated it was. The witness said the entire episode lasted 6 minutes. The witness denied he had his hands near the patient's neck. He denied making any inappropriate remarks about the smell. He denied standing on the patient's toes. The next day the witness said he was suspended and was eventually dismissed. The witness said he was not a union member and had no representation at the Disciplinary Tribunal. The witness last had violence and aggressive handling training in 2010. He did not know it was out of date. He had manual handling training in 2014. W ward, the witness said, was for patients with complex needs. He felt he was not liked in the ward. The witness said he did nothing wrong and does not feel he should be listed.

[11] Parties agreed by Joint Minute the statement given by Staff Nurse Iraide Beascoehea Artaraz as part of the NHS investigation on 2 March 2016. In that statement she asserts that in the toilet '...she had not noticed anything that seemed harmful otherwise she would have intervened and raised concern herself.' In a handmade annotation on the face of the statement she states she did not say to the investigators that '...there had obviously been something that had been unprofessional' in respect of the pursuer's handling of FS in the toilet, although that phrase appears in the typewritten statement.

The law

[12] In respect of inclusions in the Adults' List, the Act at section 22 provides that:

- (1) An individual listed under section 16 may appeal to the sheriff against Ministers' decision to list the individual in the adults' list.
- (2) Such an appeal must be lodged–
 - (a) within 3 months of the date on which the individual was listed, or
 - (b) by such later date as the sheriff may, on cause shown, allow.
- (3) The sheriff must determine an appeal under subsection (1)–
 - (a) where the sheriff is satisfied by information relating to the individual's conduct that the individual is unsuitable to work with protected adults, by confirming Ministers' decision to list the individual in the adults' list, or
 - (b) where the sheriff is not so satisfied, by directing Ministers to remove the individual from the adults' list.

Accordingly, if I am satisfied by information relating to the pursuer's conduct that he is unsuitable to work with protected adults I must confirm the Ministers' decision to list the pursuer. If I am not so satisfied I must direct the Ministers to remove the pursuer from the list. I am not conducting a review of the Ministers' decision. I require to make my own independent assessment and decision based on the evidence I have heard and accept.

Submissions

[13] Ms Neilson invited me to uphold the decision of the Ministers. She relied on the evidence of Adele Mason and Cheryl McDermid whom she said were credible and reliable. They both witnessed the pursuer inappropriately manhandling FS into the toilet. Adele Mason spoke to the inappropriate remarks made by the pursuer and the fact he deliberately stood on the patient's toes to restrain her. I was also asked to take into account the fact that the pursuer had failed to keep his training, in control and restraint, up to date.

[14] Mr Oliver addressed me on the evidence and invited me to direct the Ministers to remove the pursuer's name from the adults' list. In so doing he referred to a number of objections he had taken to lines of evidence during the proof. I will deal with these now.

- i. During the course of the evidence of Robert John Crispin the defender's agent sought to lead general evidence relating to the pursuer's background. Objection

was taken on the basis that there was no specification in the record to justify this line. There was no record beyond what was called 'the index incident'. Ms Neilson indicated she wished to lead general evidence relating to what she called 'disquiet' about the pursuer's background. I sustained the objection.

- ii. During the evidence of Adele Mason, Mr Oliver made a series of objections to her specific account of what allegedly happened on 14 July 2015 on W ward on the basis that the defender's answers are lacking in such specification. He said she was giving evidence of an assault and clear and explicit averments were needed. Ms Neilson said the pursuer was well aware of the allegations against him. I allowed the evidence subject to competency and relevancy. Having considered the matter more fully I am of the view the objection is without substance. The pleadings on both sides are voluminous and lack focus but I am satisfied that the closed record gives the pursuer sufficient notice of the basis of the defender's decision to list him. The vast number of documents lodged by the pursuer himself relating to the NHS investigation and Disciplinary Tribunal demonstrate that the pursuer is well aware of the basis of the defender's decision to list him. The Pursuer's productions 1 and 2 as well as Defender's productions 1 and 8 contain the letter of 23 October 2017 from Disclosure Scotland setting out in detail the reasons for the defender's decision and the letter from NHS Lothian giving a detailed account of the evidence and outcome of the Disciplinary Tribunal which resulted in the pursuer's dismissal. To assert that the pursuer has had insufficient notice of the basis of the Ministers' case is disingenuous. Accordingly I repel that objection. The evidence objected to, is therefore at large and available for consideration by me.

- iii. During the evidence of Mike Holligan Mr Oliver objected to the admissibility of the findings of the NHS Disciplinary Tribunal being referred to. Mr Holligan presented the management case at the Disciplinary Tribunal. Ms Neilson said she accepted the court must make its own independent judgement and that she did not rely on the decision of the Disciplinary Tribunal. I allowed this evidence because it is relevant to general background which gave rise to the pursuer's dismissal. It is also relevant to the defender's decision to list the pursuer but not determinative of the issue I have to decide. As I explain below, in making my own independent assessment and decision based on the evidence I heard, I attach no weight to the findings of the Disciplinary Tribunal.
- iv. During the course of Mike Holligan's evidence, Mr Oliver objected to evidence he gave about the appropriate way to restrain and control a violent or agitated patient. It was said Mr Holligan was not impartial. Ms Neilson stated he was giving his evidence in a professional capacity as a senior manager who knew about training. I allowed the evidence for the reason stated by Ms Neilson.

Mr Oliver stated that the listing decision is based upon allegations of misconduct when Mr Wheeler was working as a nursing assistant in NHS Lothian and assisting a nurse move a patient with dementia to the toilet. The pursuer's position put short is that:

- (a) The allegations against him are unfounded.
- (b) The burden of proof rests with the defenders.
- (c) In any event, the defenders neither have sufficient record nor have led evidence as to sufficient facts for a sheriff to be satisfied that the pursuer is unsuitable to work with protected adults.

Objection was taken to the defenders' attempts to lead evidence as to what is or is not an appropriate restraint technique. Had the defenders wanted to lead evidence as to the suitability or otherwise of the restraint they say the pursuer adopted they ought to have obtained an expert report as to what restraint technique would be adopted in the situation in question. The defenders' averments ought to have set this out clearly, allowing the pursuer fair notice to set out his own case. Further objection was taken to the defenders' attempt to lead opinion evidence of Mike Holligan as to the appropriateness of the pursuer's alleged conduct. Mr Oliver stated that given that Mr Holligan investigated and presented the "Management Case" against the pursuer at the Disciplinary Hearing, he cannot be an impartial witness. This is a matter of admissibility rather than weight. His opinion evidence ought to be excluded as inadmissible. Further Mr Oliver asserted the findings of the NHS Disciplinary Panel are irrelevant where the Court is required to make its own decision. The court is to make its own findings of fact based upon its assessment of the evidence. How the NHS Disciplinary Panel assessed the evidence is irrelevant. This is not the case where regard might be had to a body with specialist expertise (such as in immigration cases); this a simple fact-finding exercise. Further and in any event, since the pursuer did not have the opportunity of legal representation before the Panel, Article 6 requires that the Panel's findings not have substantial influence on the Sheriff's decision: *Regina (G) v Governors of X School (Secretary of State for the Home Department and another intervening* [2012] 1 AC 167.

Discussion and decision

[15] I listened very carefully to the evidence in this case. I recognise that in terms of section 22 of the Act I require to reach an independent judgment in relation to the pursuer's suitability to work with protected adults. I note that it is not suggested that FS was not a

protected adult on 14 July 2015. At that time she was accommodated in and provided essential care in a specialist ward of a nursing care home operated by NHS Lothian. She was 83 years of age. She suffered from dementia and incontinence. In those circumstances I am satisfied she was a protected adult, as that term is defined by section 95 of the Act. I base my decision on the evidence which I accepted in relation to the conduct of the pursuer towards FS on 14 July 2015.

[16] I considered Cheryl McDermid to be a credible and reliable witness. She worked as a catering assistant on W ward. She did not know the pursuer and in my opinion had no grudge against him. She was at her work and gave evidence to me of the events she witnessed that day. She was clear that she was shocked by the way the pursuer was handling FS. She said he had her 'by the back of the neck pushing her into the toilet'. Cheryl McDermid was clear that is what she saw. Further she said other things which weighed with me. She said Adele Mason saw it as well and panicked. So, she was able to gauge the quality of Adele Mason's immediate reaction to what she also saw. Then, Cheryl McDermid said that Adele Mason uttered the following words 'I'm not having that'. I consider that evidence demonstrates that in the eyes of Cheryl McDermid something so shocking occurred that Adele Mason ran immediately to intervene. That evidence in my opinion coincides and supports the evidence of Adele Mason. Further Cheryl McDermid stated that she immediately went and reported to the Charge Nurse what had happened and what she saw. I found the evidence of this witness compelling. I concluded that the pursuer had FS by the neck trying to force her into the toilet. I also accepted the evidence that FS did not like to be touched and that may account for the reason why she was resisting being taken to the toilet to be changed. I also accepted that FS needed to be managed by 3 members of staff when she was being changed.

[17] I considered the evidence of Adele Mason to be credible and reliable. She said the pursuer '...had his right arm around FS's neck and was moving her into a toilet.'. This broadly coincided with the evidence of Cheryl McDermid. Mr Oliver argued that the descriptions given by these two witnesses differed. I did not consider the difference in the descriptions given by the witnesses as to how the pursuer manhandled FS was material. Eye witnesses to events which occur quickly and without warning frequently give versions of events which differ. I believed both these witnesses in the essentials of the evidence they gave that the pursuer had FS by the neck and was pulling or pushing her into the toilet. It was that conduct which so shocked Cheryl McDermid that she reported it to the Charge Nurse and motivated Adele Mason to run immediately to intervene. I further accepted the evidence of Adele Mason that inside the toilet the pursuer was using his own foot to restrain FS in an inappropriate manner. I further accepted the evidence that he made the remarks she said he did. I think it improbable that this evidence would be made up by Adele Mason. I attached no weight to the suggestion that she was lying about the behaviour of the pursuer because of a prior complaint she made about him. I considered the evidence of Cheryl McDermid was clear testimony that coincided with the evidence given by Adele Mason which I took to be a safeguard against perjury.

[18] I also considered the evidence of the statement of the Staff Nurse to the effect that nothing unprofessional had occurred in the toilet but that statement was not subject to cross examination. I preferred the actual tested evidence before me of the two eye witnesses.

[19] I considered the evidence of the pursuer but I found him to be a poor witness. His evidence seemed hollow and rehearsed and he lacked conviction. I thought he was lying about what he did.

[20] With regard to the pursuer's suitability to work with protected adults I think that anyone who handles a vulnerable adult patient in this way is not suitable to work with protected adults. In fact, those adults need to be protected from conduct of this kind. I consider the police were correct to charge the pursuer with assault as that appears to have been what happened. The absence of injury on FS does not mean she was not inappropriately handled or assaulted.

[21] The fact that the pursuer's Control and Restraint training was out of date may explain why he resorted to use brute force when dealing with a patient with complex needs.

[22] At one stage in his submissions to me Mr Oliver argued:

"If all or part of the allegations are established then the court has to go on to consider whether or not those findings of fact make the pursuer unsuitable to work with protected adults. It is submitted in order to make a finding of unsuitability the court must make findings as to (a) the pursuer's conduct; (b) the pursuer's training; (c) the standard and conduct that would be expected of a reasonable nursing assistant with the pursuer's training. These findings are required for the court to make a finding as to the extent (if any) that the pursuer's conduct fell short of the conduct expected of him. Without such a finding the court is not, it is submitted, able to make a finding of unsuitability."

I consider this approach to be misguided. The pursuer was dismissed by NHS Lothian for gross misconduct for a catalogue of reasons listed on the penultimate page of the dismissal letter of 16 May 2016 which included the way he treated FS on 14 July 2015 and because the Disciplinary Tribunal found that he lied to his line manager about his training record. The police charged him with deliberate intentional assault of FS and he was prosecuted for that because there was evidence to support that conclusion.

[23] Quite separately, I have concluded, on the evidence I heard, that he is unsuitable to work with protected adults because he deliberately behaved in an inappropriate manner and deliberately used inappropriate force against a vulnerable patient. My decision has nothing to do with an assessment of the pursuer's conduct in the context of his competence

given his level of training. The defenders do not suggest the pursuer was listed because his conduct was substandard arising from a lack of training, rather they suggest it was, in fact, egregious and had nothing to do with his training. Further, quite independently of the disciplinary process and the evidence it heard and conclusion it reached, I agree with an observation in the dismissal letter addressed to the pursuer, referring to his conduct that day in a training context, namely, '.....your actions would not require any form of training to know it was entirely unacceptable and inappropriate.' I agree with that observation on the basis of my own autonomous assessment of the evidence led before me and the independent conclusion I reached. Therefore, I reject any suggestion that I require to make any findings in fact relevant to the pursuer's training and the standard and conduct that would be expected of a reasonable nursing assistant with the pursuer's training as irrelevant to the exercise I have to perform given the factual conclusion I reached in relation to the conduct of the pursuer towards FS on 14 July 2015 in W ward at the material time.

[24] Accordingly, for the reasons stated I am satisfied by information relating to the pursuer's conduct that he is unsuitable to work with protected adults and I confirm the Ministers' decision to list him in the adults' list.

Expenses

[25] Mr Oliver moved me to reserve all questions of expenses. He did not explain why. The pursuer has legal aid. The defenders are a public authority. I shall make no award of expenses due to or by either party in the circumstances.