

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2026] SC DUN 103

DUN-B716-25

JUDGMENT OF SHERIFF GREGOR MURRAY

in the cause

RA

Pursuer

against

SCOTTISH SOCIAL SERVICES COUNCIL

Defender

Pursuer: Pursuer's father as Lay Representative

Defender: Heeps, SSSC

2 July 2026

Introduction

[1] As a registered childcare practitioner, the pursuer is subject to regulation by the defender under the Regulation of Care (Scotland) Act 2001.

[2] The defender brought a complaint against the pursuer which alleged that in the course of her employment on 20 September 2023, she stated to a child in a raised voice "stop this carry on and go to sleep" and that by doing so, she caused the child distress. As the pursuer denied the allegations, determination of the complaint was referred to a Fitness to Practise Panel convened under the defender's Combined Fitness to Practise Rules 2021.

[3] The Panel heard witness evidence and submissions over 11 days at a hearing which began on 26 August 2024 and concluded on 13 October 2025. On 16 October 2025, the Panel

issued a written decision in which it found the allegations proved, held that the pursuer's fitness to practise was impaired and imposed a warning and conditions on her registration.

[4] The pursuer now appeals the Panel's decision to this court in terms of section 51 of the 2001 Act and asks the court to either quash the Panel's decision or to remit the complaint for reconsideration before a differently constituted Panel. I heard submissions on the appeal on 1 June 2026, parties having agreed in advance that no evidence required to be heard. They also lodged helpful electronic bundles of documents and authorities. At the appeal hearing, the pursuer's father acted as her lay representative, as he did before the Panel; the defender was represented by Ms Heeps.

The grounds of appeal

[5] On record, the pursuer refers to ten grounds of appeal, each of which the defender disputes. However, during the appeal hearing the pursuer's father only spoke to five of them: whether the Panel erred by twice refusing to adjourn hearing dates; whether the Panel erred by concluding the hearing in the pursuer's absence; whether the Panel erred in the manner by which it treated the evidence of the defender's witness referred to in the decision as ZZ; whether the Panel's decision provided adequate reasons for its findings regarding the evidence of ZZ; and whether the cumulative effect of the Panel's errors rendered the hearing unfair. I have not further considered the grounds which were not insisted on.

[6] During the appeal hearing, the pursuer's father also referred to a number of other grounds, to which Ms Heeps objected as they were not pled on record. After discussion, it transpired that all but one of those grounds were narrated in a document which had not been served on or intimated to the defender. The exception was the pursuer's father's oral

submission that he was not given notice of what further procedure would take place prior to an adjourned Panel hearing in February 2025.

[7] Against that background, I make the following preliminary observations.

[8] As this case is a statutory appeal, procedure in it is regulated by the Sheriff Court Summary Application Rules and previous authoritative cases. Though the pursuer is not legally represented, she is still responsible for any failures on her part to follow court rules or procedures (*Wilson v North Lanarkshire Council* (2014) CSIH 26 at 13 per Lord Menzies; *Khaliq v Gutowski* (2018) CSIH 66 at [34] - [35] per Lord President Carloway).

[9] Summary Application Rule 2.31 confers wide discretion on the court to make such order as it thinks fit to progress any case. In this instance, on 4 December 2025, the court allowed parties period to adjust the initial writ and defences and appointed the clerk to assign a final hearing, as subsequently occurred. That afforded the pursuer an opportunity to adjust the writ to include the additional grounds, or to do so by incorporating the document which narrated almost all of them into her pleadings. However, she did not do so.

[10] A party is not entitled to pursue a case which is not raised in its written pleadings and of which an opponent has not had prior notice: *Morrison's Associated Co's Ltd v James Rome and Son Ltd* (1964) SC 160 at p 190.

[11] As tailored to this case, as Lord Brodie also explained in *JD v Lothian Health Board* [2017] CSIH 27:

“30. In Scotland... if a party wishes to present a claim to a court or to defend a claim which has been made against him, he must put his claim or his defence in writing. These written statements of claim or defence are the pleadings in the case. In the (Sheriff Court) the claim is made by way of a document referred to as the (Initial Writ) and the defence is put forward in a document referred to as the defences. A claimant is referred to as the pursuer and the party defending the claim is referred to as the defender. In the (Initial Writ) there is set out in the (craves) the

order which the pursuer wishes the court to make; in the pleas-in-law a brief reference to the legal basis of the claim; and in the condescendence a statement of facts which the pursuer says he can prove and which, if proved, entitle him to the order or orders that he seeks. In the defences the defender admits such of the condescendence as he accepts to be accurate, then states any additional facts which he says he can prove and which give him a defence to the claim made against him. There are also the pleas-in-law for the defender, again a brief reference to the legal principles relied on. The statements of facts, whether by the pursuer or by the defender, are called averments, because they are what the respective parties say to be true and offer to prove. It will be assumed that a party will only make an averment once he has satisfied himself that he can prove it...

31. In (Sheriff Court) procedure the opportunity is given to parties to adjust their pleadings in the light of what the other party has pled with a view to narrowing the issues by admitting averments or providing further detail when that appears necessary in order to strengthen the claim or the defence. Through this process it can be seen where the parties agree and where they differ. The points of difference are the issues in the case. Once finally adjusted parties' pleadings are brought together in a single document referred to as the closed record.

32. The principal function of pleadings is to explain what a party's case is about. The explanation is given to the party's opponent and to the court. That is because the opponent requires to know what case he has to answer and the court requires to know what case it has to adjudicate."

[12] Consequently, as the defender was not given notice on record of the additional grounds referred to by the pursuer's father at the appeal, they cannot be considered.

Pursuer's submissions

[13] The Panel's decision should be set aside and the complaint either dismissed or remitted for determination by a differently constituted Panel.

[14] The Panel erred by twice refusing to adjourn the hearing after the pursuer became ill and, separately, by subsequently determining that the final day of the hearing should be held in her absence.

[15] The Panel also erred by attaching weight to the evidence of ZZ, the only eyewitness to what the pursuer was alleged to have said to the child. ZZ left the hearing before her cross-examination concluded and refused to return. That prejudiced the pursuer, as the

remaining questions to be put to her in cross might have elicited answers which adversely affected the credibility and reliability of her evidence generally. The Panel further erred by unilaterally deciding to carry on with the hearing without hearing submissions on the implications of ZZ's refusal to complete her evidence and by failing to provide reasons in its decision for accepting ZZ's evidence.

Defender's submissions

[16] The defender's pleas should be sustained, the pursuer's pleas repelled and the Panel's decision confirmed.

[17] The determination of a specialist tribunal should be respected. Intervention by the court was only justified if it had been a serious flaw in the process of reasoning. Such a decision should stand unless the court was able to say that it was plainly wrong (*Professional Standards Authority v Nursing and Midwifery Council* (2017) CSIH 29 at paragraph 25) in the sense that no reasonable judge could have reached it or one which was not explained or justified (*Henderson v Foxworth Investments Ltd* (2014) UKSC 41 at paragraphs 62 - 65).

[18] As the Panel's findings of primary fact were founded upon an assessment of witness credibility, they were virtually unassailable and could only be reversed if at paragraph 76) or (c) there had been a serious flaw in its process or reasoning which showed that its decision was plainly wrong (*Professional Standards Authority, op cit*). It was not bound to provide reasons for making findings on matters of fact unless exceptional circumstances existed (*MF v SSSC* (2024) SAC (Civ) 23 at paragraph 9). Exceptional circumstances included cases in which competing evidence was given by a number of witnesses (*Hindle v Nursing and Midwifery Council* (2025) EWHC 373 (Admin) at paragraphs 7 - 8).

[19] The Panel's decisions to refuse to adjourn hearing dates due to the pursuer's ill health were entirely justified. The pursuer did not provide details of her health difficulties or vouch them, despite requests to that effect. The Panel's correctly exercised the discretion afforded to it on the issue by the Fitness to Practise Rules and the defender's Practice Note.

[20] ZZ's evidence needed considered in context. The allegations against the pursuer were serious, but not career threatening. Though the pursuer did not have an absolute right to cross-examine witnesses, her father cross-examined ZZ for over 70 minutes before she departed. ZZ's decision to leave followed intimation by the pursuer's father that he intended to continue to cross-examine her for a further 60 to 90 minutes. The Panel possessed no power to compel ZZ to return. Though it was not obliged to, the Panel gave reasons for attaching weight to the defender's witness evidence. It was entitled to reject the pursuer's evidence and to take no adverse inference from ZZ's failure to return. ZZ's evidence did not need to be corroborated. ZZ's evidence amply justified the Panel's decision. There was no basis for the court to interfere with it.

Assessment of submissions

[21] To address the pursuer's submission that the Panel erred by failing to adjourn hearing dates as she was ill and by allowing the final day of the hearing to proceed in her absence, it is necessary to consider some parts of the procedure before the Panel, its decision, parts of the productions bundle, the defender's Fitness to Practise Rules and its Practice Note on applications to adjourn hearings.

[22] By 26 May 2025, the Panel had sat for 7 days over a 9 month period. On that day, the pursuer's father sent an email to the defender in which he intimated that the pursuer would be unable to attend the next hearing dates on 23 and 24 June 2025 as she was recuperating

after surgery the previous week and required further surgery. He asked the defender to contact him in around 6 months so that “we can hopefully arrange a date for the second reconvened hearing” (bundle, p 445). A redacted copy of a letter to the pursuer from a hospital dated 23 April 2025 was attached to his message (p 447). The redactions were such that the defender was only made aware that the pursuer was due to undergo surgery on 14 May 2025 at a hospital in Lanarkshire. The nature of the surgery and the department of the hospital in question were both redacted. On 27 May, the defender’s presenter sent a reply which asked for further details of the pursuer’s condition and an estimate of the time it would take her to recover (p 510). As no response was received, the presenter then sent written submissions to the Panel on 3 June in which she opposed the proposed adjournment as no reply had been received, as vouching for the pursuer’s illness had not been provided, as the hearing had already taken a significant time and as the only outstanding issue was sanction (pp 449 - 450). On 17 June 2025, the Panel Chair refused to adjourn the hearing dates on 23 and 24 June. She provided written reasons for doing so (pp 451 - 452). The hearing proceeded in the pursuer’s absence on 23 and 24 June.

[23] As the hearing did not conclude on those dates, a further date was assigned for 13 October 2025. On 10 October, the pursuer’s father sent a further email to the defender in which he *inter alia* asked to adjourn that date as the pursuer’s recovery from surgery had been complicated, as she continued to suffer pain, was likely to require further surgery and had a further hospital appointment on 6 November (pp 454). Later the same day, the presenter sent written submissions to the Panel opposing the proposed adjournment as the pursuer had still not vouched her condition or prognosis (p 464). On 11 October, the pursuer’s father sent a further email to the defender which he *inter alia* stated that neither he nor the pursuer would be in attendance on 13 October (p 459). The Panel refused the second

application to adjourn on 13 October 2025. It provided written reasons for doing so in its principal decision (paragraph 14). The hearing proceeded in the pursuer's absence on 13 October.

[24] The defender's Fitness to Practise Rules provide, so far as relevant:

"28. Adjournment of hearing

1. Subject to the requirements of a fair hearing and after hearing representations from the parties the Panel may, at any time during the hearing, adjourn the hearing to request further information or for any other purpose...

35. Hearing in absence of worker

1. Where the worker is not present or represented at the hearing, the Panel must:
 - a. have regard to whether reasonable efforts have been made to inform the worker of the hearing; and
 - b. inquire whether the clerk or the SSSC is aware of any reason for the worker's non-attendance.
2. The Panel may:
 - a. hear and decide the case in the absence of the worker; or
 - b. adjourn the hearing and issue directions.

36. Decisions

1. In reaching a decision on any matter a Panel must take into account the decisions, guidance and any practice notes issued by the SSSC.
2. If in any case a Panel does not follow the guidance or comply with the practice notes, it must give reasons for not doing so.
3. A Panel must give detailed reasons for its decisions and must explain how it resolved any controversial issues."

[25] The defender's Practice Note on applications for adjournment of hearings provides, so far as relevant:

"4.5 Where a request for a postponement or adjournment is made on the grounds that the worker is unable to attend due to ill health, independent medical evidence must be presented to the Panel that the individual is unfit to participate in the hearing, and that evidence must clearly demonstrate the individual's condition and explain how and why that condition prevents their participation in the hearing. Such an opinion or prognosis should be based on a proper examination by a relevant medical professional. A fit note (*sic*) from a GP alone may not be enough."

[26] The Panel's written reasons for refusing to adjourn the June 2025 hearing dates were: her father did not vouch her condition or consider whether she could appear remotely or he could appear on her behalf in her absence; the hearing had already taken a significant time; the Panel had a duty to ensure, and it was in the public and all parties' interests, that the hearing concluded within a reasonable time and was not unduly delayed; the only outstanding issue was sanction, an issue upon which the pursuer had already said she did not intend to make submissions; as her father could attend and address that issue on her behalf, the hearing could proceed in the pursuer's absence.

[27] The Panel's written reasons for refusing to adjourn the October 2025 hearing date were similar: the pursuer had still not vouched her illness, anticipated recovery time or prognosis; as the pursuer had already indicated that the duration of the hearing caused her distress, it was in her interests for the hearing to conclude; as paragraph 4.10 of the defender's Practice Note stated, it was generally not desirable to postpone or adjourn proceedings indefinitely.

[28] Against that background, I draw the following conclusions. In both instances, contrary to the defender's Practice Note, the pursuer did not independently vouch her medical difficulties. The limited evidence which she provided did not disclose her condition or prognosis. As the evidential stage of the hearing had concluded, there was no reason in principle why her father could not deal with the remainder of the hearing in her absence. As the pursuer takes no issue with what occurred during the June hearing dates, it is reasonable to assume that that her absence caused no difficulty. Thereafter, her father indicated that neither he nor the pursuer would attend any further hearing dates. The Panel's written reasons disclose that in both instances, it had regard to relevant rules

and the defender's Practice Note. It was entitled, as it did when reaching all its decisions, to have regard to the stage of proceedings, the need to conclude the hearing expeditiously and the interests of the public and the parties. In context, the grounds of appeal which argue that the Panel erred by refusing to adjourn the June or October hearing dates and by proceeding with them in the pursuer's absence fall to be rejected.

[29] By way of postscript, I fully accept the pursuer's father's submission that the pursuer could not attend the hearing after May 2025, initially because she was recuperating from surgery for a serious condition, latterly because she remained unwell and unexpectedly required further surgery. I further accept that the pursuer finds it difficult to talk about her condition and does not want its nature and extent disclosed to the defender. It was obvious during the appeal that her father finds it upsetting to discuss the topic. However, as explained above, while the pursuer's adjournment applications were well intentioned and potentially of substance, the Panel did not know any of that. Had the pursuer or her father disclosed her condition and prognosis and independently vouched them, even confidentially, it is possible that each application might not have been opposed by the presenter and/or granted by the Panel.

[30] The pursuer's submissions regarding ZZ necessitate review of the transcript of the first day of the hearing (bundle, pp 1 - 319). The defender's presenter led ZZ as her first witness. ZZ's evidence in chief was taken in 16 minutes, during which she spoke to the allegations directly and adopted two prior written statements provided to her employer and the defender (pp 5 - 10). She was then cross-examined by the pursuer's father for 70 minutes on events before and on the day of the allegations (pp 10 - 38) before being allowed a break.

Thereafter, she was further cross-examined for 8 minutes on events after the day of the allegations. The following exchanges then occurred (pp 42 - 45):

“(ZZ) Are you waiting for me for an answer or something?

(Lay Rep) No, no. I'm sorry I'm just looking at my notes to go through the next thing. I'm having to take notes at the same time as I'm asking questions. And please remember, I'm not legally qualified at all, so it's the first time I've done a SSSC hearing, so I would ask for your patience please, that'd be helpful.
(Clerk), could I-...?

(ZZ) I mean, I just feel like I've been answering a lot of questions and the same questions over and over again for near enough an hour and a half now, and I don't understand why it's going on for so long. It is very distressing for me.

(Lay Rep) I can understand that it's stressing for all parties and yourself and (the pursuer).

(ZZ) (Overlapping conversation) answering questions, over and over.

(Chair) Can I just interject here, just if we can take a moment here. Just to check, (ZZ), are you feeling that you want to have a break just now? Are you feeling a bit distressed by this?

(ZZ) I'm just feeling a little bit overwhelmed, and I feel like I've been answering questions over and over again and I don't understand why. I feel like I'm the one on trial here, and it's not a very nice feeling.

(Chair) I'm sorry that this is having such an impact on you, but I do understand it's been a long time and you've been answering questions for quite a long time. So, I completely understand that. And the last thing we want to do is to make you feel in any way as if you are somehow on, not trial as such, because this isn't a trial, but we're asking you that you've done something wrong. And I'll just make that absolutely clear, that is not the situation. You've just been asked to recognise what you can and you are not under any blame in any way in any of this, as far as the SSSC is concerned you're not the one here who has been asked to account. But what I am going to do, because clearly, you're feeling overwhelmed and it's not in anybody's interest to persist immediately with this if you are not feeling able to answer the questions, how long a break would you like to try and see if you can feel a bit better enough to carry on?

(ZZ) I just want it to be over with. I just want to carry on and get it over with.

(Chair) Right. Can I ask you, Can I ask you, (Lay Rep), how much do you think you've got by way of questioning? I appreciate it's difficult to ask you to estimate,

but it would be helpful if we could get some sort of idea how much longer the questioning might go on.

(Lay Rep) Thank you, Chair. So, the questions I've asked relate to what happened before the incident, during the incident, and I'm now coming to the period post-incident. So, it's quite hard, as you say, Chair, to try and predict, but I'm more than halfway.

(ZZ) More than halfway, my goodness, seriously.

(Chair) Right. Just for the point, just to be clear, (Lay Rep), when we say we're moving into, I think I've understood you, you're moving into a phase after the alleged incident. How much after are you, how far along are we going to be going with that?

(Lay Rep) Unless I look at all the questions. I'd be quite happy to share the questions with you, Chair, if that would be helpful.

(Chair) No, no, you don't have to do that. Certainly you don't have to do that. But can we es—just to get an estimate, obviously, (ZZ) is feeling quite distressed here, we want to do this fairly for everyone concerned, and it's so we get an idea that if there's going to be a lot more questioning, if we're talking about another long period of time, then it may well be that I will make a decision to have a break. But if you can... For example, are we going for days after the incident, or the alleged incident, or are we talking about just in the immediate couple of days thereafter? What are we talking about?

(Lay Rep) If I can just look at my questions then, Chair, if that's all right?

(Chair) Yes, of course.

(Lay Rep) We'll see if I can give you a more informed answer. So, for example, I would like to ask questions about the Facebook Messenger messages exchange between (the pursuer) and (ZZ). I've got to cover all of that.

(Chair) Okay. Please don't misunderstand, I'm not in any way trying to cut back on what questioning you're doing, but it's just so that we can try and get an idea so that we can actually give (ZZ) an idea how much longer we can take decisions around that in terms of breaks, et cetera.

(Lay Rep) I'm not wishing to cause any distress to (ZZ) whatsoever. It's not my intention at all. But I would predict, based on our session so far, somewhere between an hour and an hour and a half.

(ZZ) Seriously?

(Chair) Right. (ZZ)... (overlapping conversation).

(ZZ) I'm not prepared to take any more questions from that, that is ridiculous. That is absolutely ridiculous. You've got my statement, you've seen what I've said in my statement, I've got nothing more to add. And then we went into court the last time, and everything's been sorted. I'm not prepared to do this. I'm not prepared to do this any longer. I've been on for over an hour and a half questions, and you've got another hour and a half questions to ask me. That is ridiculous. Ridiculous.

(Chair) Right, what I'm going to do just now is I am going to take a break. I appreciate where you are with this, (ZZ). I am going to take a break. I am going to ask, I don't know, clerk, if you would mind perhaps speaking privately to (ZZ) to try and explain what's going on and just see how she feels and take her views on that. Would you be able to do that? So, we'll take a break, certainly looking at the time, certainly for the next, say, 15 minutes. What I'll do is ask the clerk to update me as to where we're at with that, and we'll take it from there. So, if we take a break from the panel just now at quarter past—not quarter past, sorry, for the next 15 minutes, (clerk), if you can have a word with (ZZ). It will not be about the evidence base, just to be very clear on that. There will be no discussion of any evidence. It is more around how (ZZ) is feeling and about the process and how we move forward with that. Okay? Is everyone happy with that decision?

(Lay Rep) Thank you, Chair. What time have we to reconvene?

(Chair) What I would ask you to do is, if you can come back in 15 minutes, and hopefully by that time I will have heard from Ms [REDACTED] as to how (ZZ) is feeling, and whether she's still willing to participate moving forward with this, or how best we can do that.

(Lay Rep) Thank you. So 12:55, Chair.

(Chair) Yes. Thank you... Well, no, we'll just all come back in 15 minutes and we'll take it from there, not pre-empting anything. Thank you.

(ZZ) Sorry, I'll just cut this off here then.

(Chair) If you just... I don't know, (clerk), how best can we deal with this? Do you want to maybe phone and speak to her or? I'm trying to think how best we can manage this.

(Clerk) Yes, I'll call you by telephone. Have you got your phone switched on?

(ZZ) Yes, my phone that I'm using for this, so if I come out to answer the phone I can still get back on.

(Clerk) Yeah, you just click on the same link again that I sent you this morning.

(ZZ) Right, thank you.

(Chair) It's just to ensure that you can have a private conversation about how you're feeling, not about the evidence but just how you're feeling and how we move forward with this. Thank you.

(ZZ) Okay."

[31] The hearing then adjourned for lunch. After it resumed, the Chair stated

(transcript, pp 46-47):

"Now... as we broke for lunch...(ZZ) had been giving some evidence and she had become quite distressed. And so, we broke earlier for lunch so that (the clerk) could have a conversation with the witness to see whether she was up to continuing on this afternoon with giving her evidence. As a panel, we broke into a deliberation room to have a discussion around that, and (the clerk) advised the panel that unfortunately, (ZZ) was feeling unable, basically she was feeling unwell and unable to be able to continue on with her evidence today. As a panel, we considered whether we thought it would be likely that she may be able to come back in another day and (the clerk) provided her, basically some information with regards to her conversation with the witness and said that that was not likely, that the witness felt that she had gone as far as she could and that she was not willing to come back on another occasion. And so, as a panel, we had a brief discussion, not about the evidence in substance but really, just around where we had got to in terms of (ZZ's) evidence. Now, we noted that the witness had provided a full statement to the SSSC, and there's also another brief statement in the bundle that was provided from (ZZ) to her employer about the alleged incident that is the subject of these proceedings. And in terms of where we had got, (ZZ) had answered some questions around the incident and the alleged incident and answered some questions with regards to just after the alleged incident, and as I understood it, we were going to be moving on to pick some questioning around the issues around Facebook messages, et cetera. And so, we are where we are, we are going to continue on with the next witness in terms of evidence. And the panel noted that although (ZZ's) evidence is now part heard, she has given a substantial amount of evidence orally. (The pursuer) can obviously give her own evidence with regards to Facebook pages, and of course it will be open to (the lay representative) to make some submissions at the end of these proceedings, well not proceedings, the evidence part of the proceedings with regards to that. So, on that basis, we are going to proceed with our next witness..."

[32] As those excerpts disclose, the Panel was confronted at short notice with an unusual set of circumstances. However, as the following paragraphs show, the Panel failed to appreciate the context within which those circumstances arose, their implications and compounded those failures by the manner in which it dealt with them.

[33] In context, the Panel was convened to determine whether the defender could prove the allegations against the pursuer on the balance of probabilities (Fitness to Practise Rules 32.11 and 32.12). In support, the presenter led ZZ as its only eye-witness to the allegations. The brief duration of ZZ's evidence in chief was a consequence of it being taken by a legally qualified presenter who recognised that she only needed to adduce ZZ's recollection of an incident which lasted seconds and to ask ZZ to adopt two prior written statements. However, ZZ's cross-examination was always likely to take much longer - the pursuer's father was not legally qualified and appeared to have no relevant experience; he required to test the credibility and reliability of ZZ's evidence in chief against events prior to the day in question, her oral recollection in evidence, her two prior written statements, the pursuer's contrary account and subsequent events. As ZZ's cross-examination unfolded, it became more prolonged when the pursuer's father understandably found it difficult to maintain a flow of questions while noting her answers. As he lacked relevant experience and as he had completed most of ZZ's cross-examination, his estimate of the time required to complete it was obviously excessive.

[34] As the Panel Chair was legally qualified, that context ought to have been appreciated and acted upon. Unfortunately, it was not. The Panel made no attempt to explain to ZZ that her cross-examination was likely to conclude more quickly than the pursuer's father anticipated. It failed to recognise that ZZ's evidence might be fundamental to the defender's case, that the defender bore the burden of proof and that ZZ's unwillingness to complete her evidence might cause the defender to reconsider continuing with the hearing. When the difficulty with ZZ came to light, the Panel ought to have asked the presenter for comment.

[35] Instead, the Panel asked the clerk to approach ZZ during the lunch interval to ascertain whether she was prepared to return to allow her evidence to conclude. It had no

locus to do so, as ZZ was the defender's witness. Worse, after ZZ told the clerk that she was not prepared to return, the Panel decided, without reference to the presenter or the pursuer's father, that the hearing should simply continue. No such power was conferred on it by the 2001 Act or the Fitness to Practise Rules. By acting in those ways, the Panel erred. It then compounded that error by failing to mention the difficulty with ZZ or to explain its basis for acting as it did in its decision, in breach of Fitness to Practise Rule 36.3.

[36] Nonetheless, I accept the defender's submission that any such errors did not vitiate the Panel's decision to find the allegations proved. No issue is taken with the Panel's findings on Impairment and Sanction.

[37] The Panel heard evidence from ZZ which directly supported the defender's allegations that the pursuer shouted at the child, which caused the child distress (decision, paragraph 19). ZZ's oral evidence accorded with her two prior statements. It is not disputed that ZZ completed her evidence in chief and that the pursuer's father fully cross-examined her about the actual circumstances of the allegations. The Panel also heard evidence from three other witnesses led by the defender, each of whom said that the pursuer later admitted to them that she had shouted at the child (paragraph 22). Those admissions tended to lend weight to ZZ's oral evidence and prior statements. The Panel heard and rejected the pursuer's contrary evidence and gave reasons for doing so (decision, paragraphs 23-26 and 28). The pursuer herself accepted that the child showed distress by crying. As the Panel accepted that the pursuer told three other witnesses that she shouted at the child, the reason which she gave for the child crying was, in context, inherently implausible. As ZZ completed at least the majority of her evidence, as the evidence of other witnesses lent weight to what she said and as the balance did not relate to the day of the

incident, it is unlikely that any answers she might have given would have fundamentally affected the reliability and credibility of her other evidence.

[38] Neither party submitted to me or referred me to authority that a witness's failure to complete their evidence causes the witness's remaining evidence to be unreliable, incredible or inadmissible *per se*. There is no suggestion that the presenter or the pursuer's father objected to the Panel's erroneous decision to continue with the hearing. Neither the Act nor the Fitness to Practise Rules conferred power on the Panel or presenter to compel ZZ to return. It follows that the Panel could only reach a decision based on all the evidence led before it. As noted above, it did so. It heard all of that evidence. It was best placed to form a view on its credibility and reliability. Its decision fully summarised the evidence of all the witnesses (paragraphs 19 - 26). It gave cogent reasons for preferring the evidence of the defender's witnesses to the pursuer's (decision, paragraph 22). It follows that there is no basis to ascertain with reasonable certainty that the Panel misread that evidence or plainly went wrong in its determination of it (*M v General Teaching Council for Scotland, op cit*). There is no dispute that the evidence of the defender's witnesses was sufficient in law for the Panel to find the allegations proved on the balance of probabilities.

[39] The Panel ought to have referred to the difficulty with ZZ in its decision. However, as the analysis above demonstrates, that error did not vitiate its decision. In all other respects, the Panel's decision comprehensively explained the basis upon which it found the allegations proved. It cannot be said that the Panel's assessment of the evidence was plainly wrong (*Professional Standards Authority, op cit*) in the sense that no reasonable Panel could have reached it, or that its assessment was not explained or justified (*Henderson, op cit*). It follows that the grounds of appeal which argue that the Panel erred in the manner it

treated ZZ's evidence, that it failed to provide adequate reasons for accepting it and that the cumulative effect of its errors rendered the Panel hearing unfair also fall to be rejected.

Decision

[40] For those reasons, the interlocutor which accompanies this judgement sustains the pursuer's first plea-in-law to the extent that the Panel erred but, as the errors did not otherwise vitiate its decision, *quoad ultra* repels the pursuer's pleas, sustains those for the defender and dismisses the action.

[41] I was not addressed on expenses. If they cannot be agreed within 28 days, parties should advise the sheriff clerk, to enable a hearing on the issue to be assigned.