



Professional Disciplinary Update



Professional Discipline: General Procedural Guidance, Strategy and Tactics

Sunyana Sharma

Professional Disciplinary Bodies

NMC

CQC

GDC

HCPC

RCVS

GCC

GOC

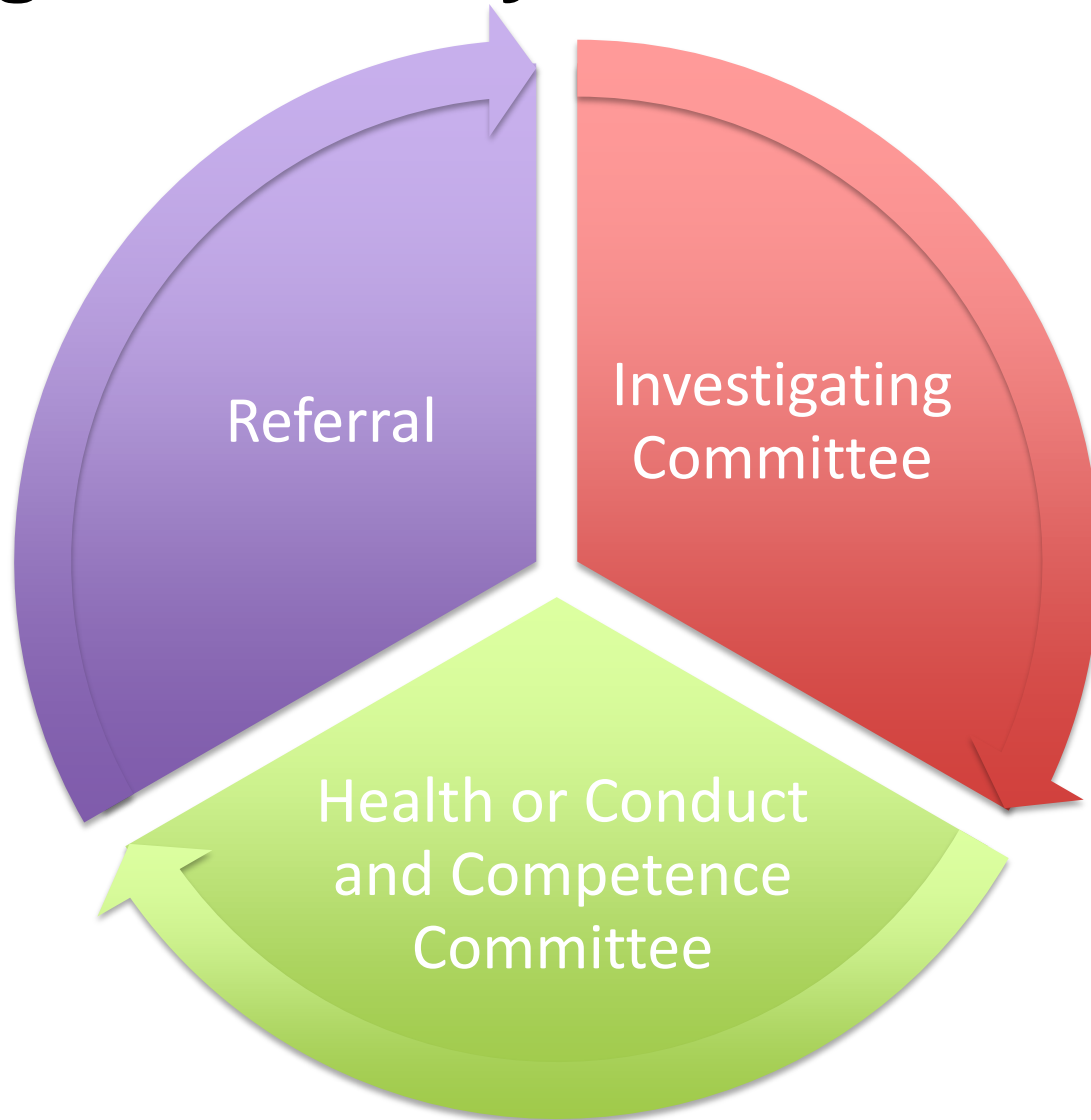
GMC

GOsC

...and there's more...

- Architect's Registration's Board
- Financial Conduct Authority
- Pensions Regulator
- General Teaching Council
- OFQUAL/OFSTED
- Solicitor's Regulation Authority
- Bar Standards Board
- Advertising Standards Authority
- Charity Commission
- Animal Medicines Training Regulatory Authority
- Medicines and Healthcare Products Regulatory Agency
- Professional Standards Authority for Health and Social Care

Nursing & Midwifery Council

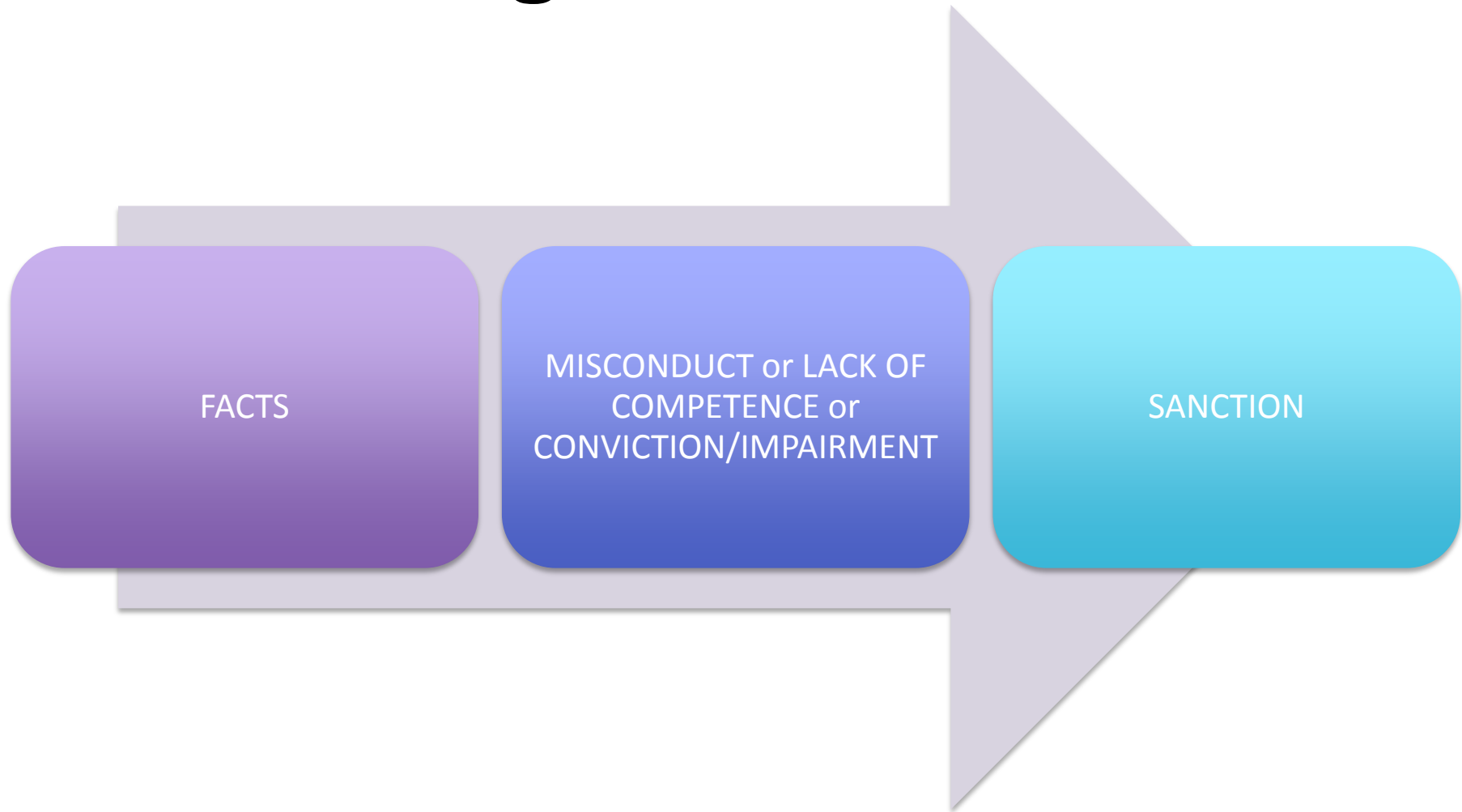


Nursing & Midwifery Council

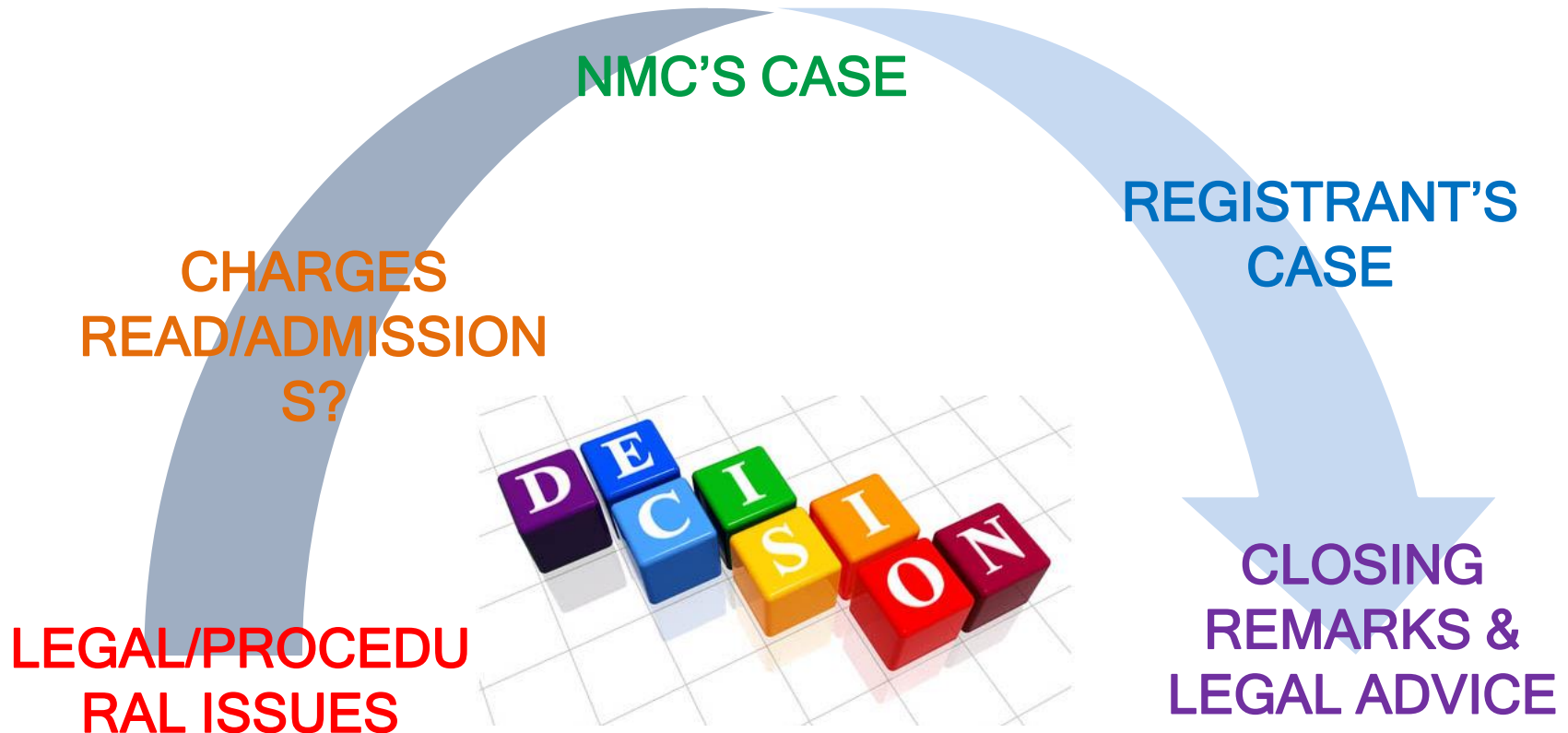
1. **REFERRAL:** commonly known as 'complaint'
2. **TYPE:** Fitness to practice impaired by reason of Misconduct, Lack of Competence, Physical or Mental Health, Conviction/Caution
3. **INVESTIGATION:** Case is investigated. Registrant has right to respond
4. **IC COMMITTEE:** Case examiners consider whether there is a case for Registrant to answer
5. **HEARING:** The Trial



The Hearing Process



Facts



Second Stage

MISCONDUCT:

- Matter of professional judgment
- Definition: *Roylance v. General Medical Council (No.2)* [2000] 1 AC 311
- “A word of general effect, involving some act or omission which falls short of what would be proper in the circumstances’
- What is proper is found in The NMC Code: Professional Standards of practice and behaviour for nurses and midwives
- Breach of code does not necessarily amount to misconduct
- Serious professional deficiency

LACK OF COMPETENCE:

- Matter of professional judgment
- Definition: Lack of knowledge, skill or judgement that makes the nurse or midwife not fit to practise safely

**ABILITY TO REMAIN
ON REGISTER
UNRESTRICTED**

REMORSE

**IMPAIRMENT
(CURRENT)**

INSIGHT

REMEDICATION

Impairment Cases

Overriding principle when considering if Registrant's fitness to practise is impaired:

- *Protection of public*
- *Wider public interest:*
 - Declaring & upholding proper standards of conduct & behaviour
 - Maintaining confidence and the reputation of the profession
- *R (on the application of Dr Malcolm Calhaem) v. General Medical Council [2007] EWHC 2606 Admin:*
Held that before a single episode of treatment could form the basis of impairment through deficient professional performance, exceptional circumstances needed to exist.

Impairment Cases (2)

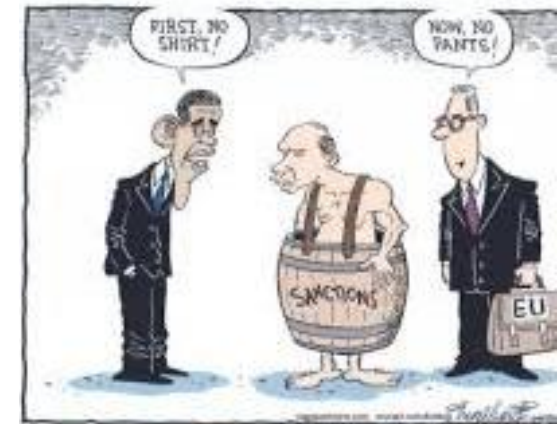
- *Ronald Jack Cohen v. General Medical Council* [2008] EWHC 581 Admin: The panel is obliged to consider all relevant factors known to the panel at the impairment stage. This includes the opinion of experts, the practitioner's unblemished record and whether the conduct was 'easily remediable'.
- *Council for Healthcare Regulatory Excellence v. (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 Admin: Dame Janet Smith formulated a test for impairment in the 5th Shipman Report, which was relied upon in *Grant*.

Impairment Cases (3)

Question posed: Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

- a) *Has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
- b) *Has in the past and/or is liable in the future to bring the medical profession into disrepute, and/or*
- c) *Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
- d) *Has in the past acted dishonestly and/or is liable to act dishonestly in the future.*

- No test or rule for imposing a sanction
- The Panel must exercise its professional judgement
- The sanction must be proportionate & necessary and not punitive
- They are made to protect the public, uphold standards of conduct and maintain public confidence in the profession
- Consider aggravating and mitigating factors including insight, remediation, previous good character, references, etc.
- It is a balancing exercise
- Read the Indicative Sanctions Guidance



Possible Sanctions

No further action

Caution Order (1 to 5 years)

Conditions of Practice Order (Up to 3 years)

Suspension Order (Up to 1 year)

Strike Off (Can apply for restoration after 5 years)

General  Optical Council

**General
Dental
Council**

protecting patients,
regulating the dental team

RCVS | SETTING
VETERINARY
STANDARDS



GOC

- Opticians Act 1989, GOC FTP Rules 2013 & GOC Standards of Practice (5 areas)
- Case Examiners: 'realistic prospect test' (if no unanimous decision by CE – goes to IC)
- CE have power to issue a warning, offer advice and take no further action
- FTPC: 5 members (2 Registrant members)
- FTP not impaired (warning), Impaired: No further action, financial penalty, conditions, suspension, erasure or with DPP – conditions on speciality.



GDC

- Dentists Act 1984, General Dental Council (FTP) Rules 2006 & Standards for the Dental Team
- Case Examiners: 'real prospect test' (if no unanimous decision by CE – goes to IC)
- CE have power to request undertakings, issue warning, offer advice and take no further action
- FTPC: 3 members (Lay, Dental Professional and Chair)
- FTP Impaired: No further action, reprimand, conditions, suspension, erasure.



RCVS

- Veterinary Surgeons Act 1966, Veterinary Surgeons and Veterinary Practitioners (Disciplinary Committee) (Procedure and Evidence) Rules Order of Council 2004 & Code of Professional Conduct for Veterinary Surgeons & Veterinary Nurses
- Case Examiners, Preliminary Investigation Committee and Disciplinary Committee
- CE have power to offer advice and take no further action
- FTPC: 5 to 7 panellists
- Standard of proof: Satisfied so as to be sure
- FTP Impaired: Struck off, suspended, formal reprimand or postpone for up to 2 years with undertakings

“Unacceptable Professional Conduct”



General
Chiropractic
Council



Architects Registration Board

Dr Peter Spencer and General Osteopathic Council [2012] EWHC 3147 (Admin): Mr Justice Irwin defines unacceptable professional conduct: ‘there is in my view an implication of moral blameworthiness, and a degree of opprobrium is likely to be conveyed to the ordinary intelligent citizen.’

**REVIEW
ALLEGATIONS
CAREFULLY**

**OFFER CPD OR
UNDERTAKINGS**

**RESPOND TO
THE INTERIM
ORDER
APPLICATION**



**HEARSAY
EVIDENCE**

**ENGAGE EARLY
WITH CLIENT &
REGULATOR**

**INSTRUCT AN
EXPERT**



QUESTIONS & ANSWERS

Sunyana Sharma

sunyana.sharma@3pb.co.uk

Specialising in:

Commercial | Crime | Employment | Family | Personal Injury & Clinical Negligence
Property & Chancery | Public Law & Regulatory | Technology & Construction
Asset and Tax Recovery | Banking & Finance | Business & Commercial
Mediation | Public Access | Sports Law



Dishonesty

'Honesty is the best policy.'
Benjamin Franklin

Shruti Sharma

Overview

- **Introduction:** Why is honesty and integrity so important in these professions?
- **Basics:** the *test* used by disciplinary panels for determining whether the actions of a registrant were dishonest;
- **Determination:** what the outcome of the case will usually be in cases where a panel have made a finding of impairment;
- **Early tactics:** how to advise the client/liaise with the regulator where they are pursuing allegations of dishonesty

Why is honesty and integrity so important?



Why is honesty and integrity so important?

Vulnerability of the
service user

Integral to maintaining
reputation of the
profession

Honesty and
Integrity

Often described as a
fundamental tenet of the
profession

Breach of principles of
honesty and integrity has
serious consequences



Why is honesty and integrity so important?

NMC Code of Conduct for Nurses

The NMC Code of Conduct for 2014 demands that nurses: “*Be open and honest, act with integrity and uphold the reputation of your profession*“ (preamble). The code is then broken down into the following sections:

Act with integrity

48. You must demonstrate a personal and professional commitment to equality and diversity
49. You must adhere to the laws of the country in which you are practising
50. You must inform the NMC if you have been cautioned, charged or found guilty of a criminal offence
51. You must inform any employers you work for if your fitness to practise is called into question



Why is honesty and integrity so important?

NMC Code of Conduct for Nurses (Cont.)

Deal with problems

52. You must give a constructive and honest response to anyone who complains about the care they have received
53. You must not allow someone's complaint to prejudice the care you provide for them
54. You must act immediately to put matters right if someone in your care has suffered harm for any reason
55. You must explain fully and promptly to the person affected what has happened and the likely effects
56. You must cooperate with internal and external investigations



Why is honesty and integrity so important?

NMC Code of Conduct for Nurses (Cont.)

Be impartial

- 57. You must not abuse your privileged position for your own ends
- 58. You must ensure that your professional judgment is not influenced by any commercial considerations

Uphold the reputation of your profession

- 59. You must not use your professional status to promote causes that are not related to health
- 60. You must cooperate with the media only when you can confidently protect the confidential information and dignity of those in your care
- 61. You must uphold the reputation of your profession at all times”



Why is honesty and integrity so important?

GMC Good Medical Practice

The GMC's Good Medical Practice sets out the core standards expected of all registered doctors and states in its preamble that doctors must 'be honest and open, and act with integrity [and] must never abuse patient's' trust...or the public's trust in the profession.

Domain 4 deals with provisions in relation to honesty and integrity

Honesty

65. You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.
66. You must always be honest about your experience, qualifications and current role.
67. You must act with honesty and integrity when designing, organising or carrying out research, and follow national research governance guidelines and our guidance.



Why is honesty and integrity so important?

GMC Good Medical Practice (Cont.)

Communicating information

68. You must be honest and trustworthy in all your communication with patients and colleagues. This means you must make clear the limits of your knowledge and make reasonable checks to make sure any information you give is accurate.
71. You must be honest and trustworthy when writing reports, and when completing or signing forms, reports and other documents. You must make sure that any documents you write or sign are not false or misleading.



Why is honesty and integrity so important?

GMC Good Medical Practice (Cont.)

Openness and legal or disciplinary proceedings

72. You must be honest and trustworthy when giving evidence to courts or tribunals. You must make sure that any evidence you give or documents you write or sign are not false or misleading.

Honesty in financial dealings

77. You must be honest in financial and commercial dealings with patients, employers, insurers and other organisations or individuals.



Why is honesty and integrity so important?

The HCPC's Standards of Conduct, Performance and Ethics states that a Registrant must:

8. Be open when things go wrong

Openness with service users and carers

8.1. You must be open and honest when something has gone wrong with the care, treatment or other services that you provide by:

- informing service users or, where appropriate, their carers, that something has gone wrong;
- apologising;
- taking action to put matters right if possible; and
- making sure that service users or, where appropriate, their carers, receive a full and prompt explanation of what has happened and any likely effects.



Why is honesty and integrity so important?

The HCPC's Standards of Conduct, Performance and Ethics states that a Registrant must:

8. Be open when things go wrong (Cont.)

Deal with concerns and complaints

8.2. You must support service users and carers who want to raise concerns about the care, treatment or other services they have received.

8.3. You must give a helpful and honest response to anyone who complains about the care, treatment or other services they have received.



Why is honesty and integrity so important?

The HCPC's Standards of Conduct, Performance and Ethics states that a Registrant must:

9. Be honest and trustworthy

Personal and professional behaviour

- 9.1. You must make sure that your conduct justifies the public's trust and confidence in you and your profession.
- 9.2. You must be honest about your experience, qualifications and skills.
- 9.3. You must make sure that any promotional activities you are involved in are accurate and are not likely to mislead.
- 9.4. You must declare issues that might create conflicts of interest and make sure that they do not influence your judgement.

The two-stage test for dishonesty

Test for dishonesty in disciplinary hearings is set out in two cases:

R v Ghosh [1982] QB 1053

Two stages:

- 1) *Objective test*: whether according to ordinary standards of reasonable and honest people what was done by the registrant was dishonest?
- 2) *Subjective test*: whether the practitioner himself/herself must have known that what s/he was doing was, by those standards, dishonest.

The two-stage test for dishonesty

Twinsectra Limited v Yardley [2002] 2 AC 164

- 1) *Objective test*: that the practitioner conduct was dishonest by the ordinary standards of reasonable and honest people and
- 2) *Subjective test*: that the practitioner knew / realised that what he was doing was, by those standards dishonest.

The two-stage test for dishonesty

Key distinction in disciplinary cases:

Criminal standard
of proof: BEYOND
REASONABLE
DOUBT

Civil Standard of
proof: ON
BALANCE

Likely outcome in cases where a finding of dishonesty has been made:

***Council for Healthcare Excellence v (1) NMC, (2) Paula Grant* [2011] EWHC 927 (Admin) at paragraph 76, summarised the guidance of Dame Janet Smith in the following terms:**

Do the findings of fact in respect of the practitioners misconduct, show that his/her fitness to practise is impaired in the sense that s/he:

- has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm;
- has in the past brought and/or is liable in the future to bring the medical profession into disrepute;
- has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession;
- has in the past acted dishonestly and/or is liable to act dishonestly in the future.

Likely outcome in cases where a finding of dishonesty has been made:

Bolton v Law Society [1994] 1 WLR 512

Master of the Rolls: considerations which would normally weigh high in mitigation of punishment **have less effect** on the exercise of this kind of jurisdiction than the ordinary run of sentences imposed in criminal cases...it often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family, the consequences of striking off and suspension would be little short of tragic. All these matters are relevant and should be considered **but the reputation of the profession is more important** than the fortunes of any individual member.

Likely outcome in cases where a finding of dishonesty has been made:

Mvenge v General Medical Council [2010] EWHC 3529 (admin)

Matters of mitigation advances to a fitness to practice panel of the General Medical Council by a doctor who had been erased from the medical register carried little weight where the standing of the profession was brought into issue. Confirms the approach in *Bolton*.

Parkinson v Nursing and Midwifery Council [2010] EWHC 1898 (admin)

Nurse having acted dishonestly is always going to be at severe risk of having his/her name erased from the register. A nurse who has acted dishonestly, who does not appear before the panel to remonstrate remorse and an undertaking that there will be no repetition, **forfeits the small chance** of persuading the panel to adopt a lenient or merciful outcome **and to suspend for a period rather than to direct erasure.**

Likely outcome in cases where a finding of dishonesty has been made:

Professional Standards Authority for Health and Social Care and 1) General Medical Council and 2) Parvan Kaur Uppal [2015] EWHC 1304 (Admin)

Lang J, noting established case-law and guidance, reiterated the importance of the Panel undertaking a separate assessment of impairment even in cases of proven dishonesty - there should not be an automatic assumption of impairment of fitness to practise; **not every act of dishonesty results in impairment**. Considering the case law on this issue she concluded that “the Panel was correct to assess whether or not Dr U’s fitness to practise was currently impaired, having regard to her conduct since the misconduct occurred, as well as the nature and serious extent of her misconduct”. Furthermore, she noted as important relevant factors the fact “it does appear, on the evidence, that this was an isolated lapse in an otherwise unblemished career, and that the risk of repetition was extremely low, not least because of her insight and the steps taken to remediate”.

Likely outcome in cases where a finding of dishonesty has been made:

Professional Standards Authority for Health and Social Care and 1) General Medical Council and 2) Parvan Kaur Uppal [2015] EWHC 1304 (Admin) (Cont.)

The judge commented that lying to a senior colleague was a serious breach of trust and professionalism that **would likely result in impairment in many cases, but that this was an exceptional case.** The judge accepted that the FTP panel in the first instance were best placed to assess the doctor's character and insight. However, having found the Panel had not fallen into error in not finding impairment, the judge did conclude that in all the circumstances the failure to issue a warning was unduly lenient, given the nature of the misconduct. The GMC guidance on warnings and the Indicative Sanctions Guidance emphasised the gravity of dishonesty in the course of professional practice and this was a clear breach of the principles in Good Medical Practice. The imposition of a warning would uphold proper standards of behaviour that the public would expect from the profession.

Likely outcome in cases where a finding of dishonesty has been made:

***Professional Standards Authority for Health and Social Care and
1) General Medical Council and 2) Parvan Kaur Uppal [2015]
EWHC 1304 (Admin)...(Cont.)***

This confirms the view that it is possible to remediate against dishonesty, and that a dishonesty finding does not automatically result in a finding of impaired fitness to practise. It reiterates the importance of demonstrations of remorse and emphasises that a junior doctor's relative inexperience or a senior consultant's long, otherwise unblemished record, remain valid points to raise.

Likely outcome in cases where a finding of dishonesty has been made:

Professional Standards Authority for Health and Social Care and 1) General Medical Council and 2) Parvan Kaur Uppal [2015] EWHC 1304 (Admin)...(Cont.)

Welcome also is the judge's comment that the very fact that the practitioner had been scrutinised at an FTPP hearing before her regulator and had a finding of misconduct on her record was sufficient to maintain public confidence in the profession, **without the need necessarily for a finding of impairment** (para 34 of the judgment). A finding of no impairment still left open the option for a warning which further protected the public interest.

Likely outcome in cases where a finding of dishonesty has been made:

Professional Standards Authority for Health and Social Care and 1) General Medical Council and 2) Parvan Kaur Uppal [2015] EWHC 1304 (Admin)...(Cont.)

Whilst it will remain unusual for a registrant with a dishonesty finding against him/her, even an isolated one, to avoid a finding of impairment, this case is nevertheless a welcome antidote to the line of cases including *Parkinson v NMC*, regularly cited in such proceedings to the effect that, not only will an impairment finding almost inevitably follow a finding of dishonesty, it will necessarily lead Panels to consider the highest sanctions of suspension and erasure.

Likely outcome in cases where a finding of dishonesty has been made:

Midwifery Council (Rev 1), Court of Appeal - Administrative Court, July 07, 2015, [2015] EWHC 1999 (Admin)

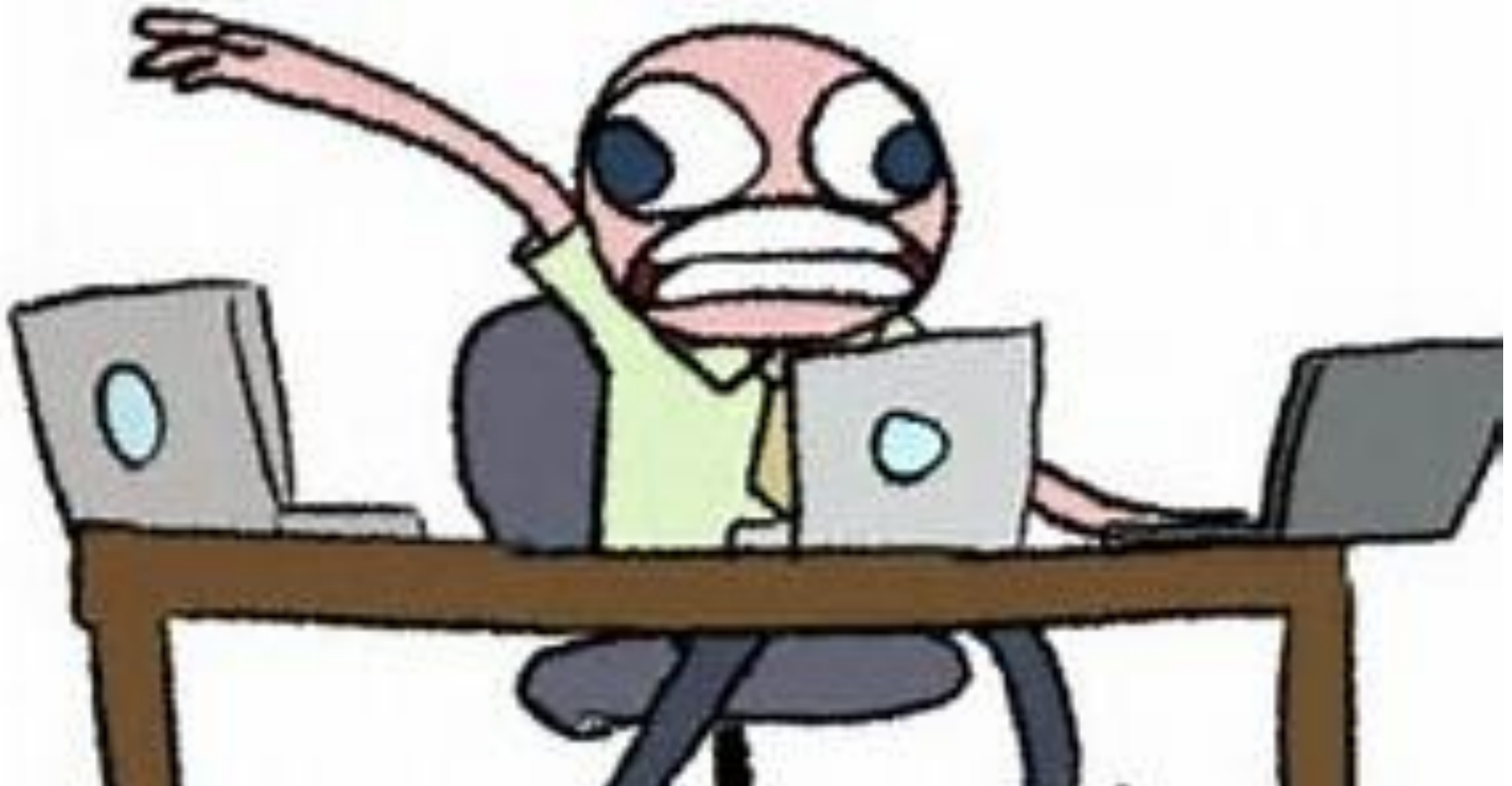
The appellant mental health nurse appealed against the decision of the respondent Nursing and Midwifery Council (the NMC), striking him off the register. The Administrative Court, in dismissing the appeal, held that it might seem severe that the appellant had been struck off fundamentally for theft of a tambourine and two maracas, but his dishonesty could require and justify striking off. Accordingly, it could not be concluded that the NMC's decision and conclusion had been wrong.

Likely outcome in cases where a finding of dishonesty has been made:

Igboaka v General Medical Council [2016] EWHC 2728 (Admin)

In dismissing the Appellant's appeal against the sanction of suspension of his registration for 12 months, Simler J said that however excellent a clinician the Appellant is or was, that does not and cannot mitigate findings of dishonesty. Medical professionalism requires honesty and integrity as well as clinical competence. The profession itself depends on the relationship of trust. Patients, and the public more generally, are entitled to expect medical professionals to be fully competent and honest. In cases of proven dishonesty, a severe sanction is to be expected because the balance will generally fall down on the side of maintaining public confidence in the profession, notwithstanding the fact that the practitioner has had an exemplary professional career.

Tactics when dealing with a charges of dishonesty



Tactics when dealing with a charges of dishonesty

- Take client's instructions at the earliest opportunity – do they accept or deny the charge?
- Explain the two stage process that will be used to decide whether the client acted honestly or dishonestly;
- If the client is denying the charge, weigh their instructions against the evidence being presented by the regulator;
- Explain the likely outcome if a finding of dishonesty is made;
- Instruct counsel at the earliest opportunity.

Case Law Update



QUESTIONS & ANSWERS

Shruti Sharma

shruti.sharma@3pb.co.uk

Specialising in:

Commercial | Crime | Employment | Family | Personal Injury & Clinical Negligence
Property & Chancery | Public Law & Regulatory | Technology & Construction
Asset and Tax Recovery | Banking & Finance | Business & Commercial
Mediation | Public Access | Sports Law



Nurseries - Childminders OFSTED and Wales

Lachlan Wilson

OFSTED Sources

- Early Years Compliance Handbook
- Early Years and Childcare Registration Handbook

OFSTED a Different Beast

APPROACHES ...

- COMPLIANCE
- ENFORCEMENT

OFSTED Authority

Childcare Act 2006, Education Inspections Act 2006:

the person of Her Majesty's Chief Inspector (HMCI), as the regulatory authority for childminding and childcare providers

a duty to ensure that we only register those people who are suitable

Who is regulated?

- childminders and childcare providers caring for children aged from birth to the 31 August following their fifth birthday – these providers must meet the ‘Statutory framework for the Early Years Foundation Stage’ and register on the Early Years Register, unless exempt from compulsory registration
- childcare providers who care for children aged from the 1 September following their fifth birthday until they reach the age of eight, and those who choose to register on the voluntary part of the Childcare Register (later years provision) – these providers must meet The Childcare (General Childcare Register) Regulations 2008
- Ofsted’s role is *to establish whether a registered person is meeting the requirements of the ‘Statutory framework for the Early Years Foundation Stage’ or the requirements for registration on the Childcare Register, and make a decision on whether a person remains suitable for registration.*

OFSTED – Enforcement Action

Suspension of registration

- reasonably believe that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm.

The purpose of suspension is:

- to allow time for an investigation into the risk of harm to children

or

- to allow time for steps to be taken to reduce or eliminate the risk of harm to children.

The initial period of suspension is six weeks.

OFSTED – Enforcement Action (2)

Extension of suspension

If Ofsted cannot complete its investigation within the prescribed six-week period, it may extend the suspension. In this case, the extended suspension should not be for a continuous period exceeding 12 weeks in total, unless one of the following situations applies:

- Ofsted decides to cancel the provider's registration, either by notice or by an emergency application to a magistrate
- Ofsted is unable to complete our investigation for reasons beyond our control, for example where it is not the lead investigating agency.

In these cases, Ofsted may extend the suspension beyond 12 weeks.

OFSTED – Enforcement Action (3)

Enforcement notices for unregistered childminders

An enforcement notice is a legal letter to a person telling them that they cannot provide childminding without being registered with Ofsted. Failure to comply with the notice is an offence.

Notices are issued if Ofsted have reason to believe that:

- a person is providing childminding for which registration is required without being registered with Ofsted

and/or

- a person has not complied with our written request that she or he ceases to act as a childminder without being registered with Ofsted.

Welfare requirements notices

WRN sets out the actions that a provider must take by a certain date to meet the safeguarding and welfare requirements in the Early Years Foundation Stage (EYFS). The provider commits an offence if they fail to carry out the actions set in the WRN.

WRN issued if:

- Ofsted consider that an early years provider has failed, or is failing, to comply with one or more of the welfare requirements in the ‘Statutory framework for the Early Years Foundation Stage’, and/or
- the early years provider has failed to meet any actions set in accordance with the ‘Early years inspection handbook’.

OFSTED – Enforcement Action (5)

Conditions of registration

Rare but the power exists.

Prosecutions

There are a number of offences that Ofsted can prosecute providers for.

General prosecution thresholds:

- the registered person has committed an offence
- the person committed the offence within the last three years
- proceedings begin within six months from the date on which evidence, sufficient in Ofsted's opinion to warrant the proceedings, becomes known to Ofsted
- there is sufficient and reliable evidence to support a prosecution according to the standard of proof needed
- prosecution is in the public interest

OFSTED – Enforcement Action

Cancellation Powers

Childcare Act 2006, - section 68.

- **Ofsted may** cancel the registration of a person under section 68(2) (a)–(e), section 68(3) and (4), or section 68(5).
- **Ofsted must** cancel the registration if the provider has become disqualified from registration by regulations under the Childcare Act 2006 section 75 Childcare Act 2006.

OFSTED – Cancellation Cont. (non-emergency)

Where the only reasons for cancelling are the matters covered in the WRN, Ofsted is not permitted to cancel the registration until the notice time expires.

Ofsted must cancel the registration of a childminder or childcare provider if the person becomes disqualified from registration.

If Ofsted cancel the registration of a childminder or childcare provider, cancellation will apply to all settings covered by the registered person's registration.

OFSTED – Cancellation Cont. (non-emergency) Reasons

Ofsted **may** cancel the registration of a childminder or childcare provider for any one or more of the following reasons:

- the registered person has ceased, or will cease, to satisfy the prescribed requirements for that registration type
- the registered person has failed to comply with a condition of registration
- the registered person has failed to comply with a requirement set out in regulations (this includes failure to comply with requirements relating to suitability checks)
- a childminder or childcare provider on the Early Years Register has failed to meet the legal requirements in the ‘Statutory framework for the Early Years Foundation Stage’

OFSTED – Cancellation Cont. (non-emergency) Reasons cont.

- the registered person has failed to pay the prescribed fee
- a registered childminder has not provided childminding for more than three years during which she or he was registered
- other enforcement action (recommendations/actions/warning letters/welfare requirement notices) has failed to achieve, or is unlikely to achieve, the outcome needed within a reasonable timescale
- successful prosecution is unlikely to achieve the safety and well-being of children
- there is minimal evidence to suggest that the provider is acting purposefully to resolve the matter within a reasonable timescale
- the only way to assure the safety and well-being of children.

OFSTED – Procedure Cancellation (non-emergency)

Notices of intention to cancel registration - in writing under the Childcare Act 2006, section 73(2).

Reasons given in the notice for intending to cancel the registration and inform the registered person of their rights to object.

The notice of intention includes:

- the reasons for the intention
- the relevant part of the 'Statutory framework for the Early Years Foundation Stage' and/or The Childcare (General Childcare Register) Regulations 2008, as amended
- an overview of the evidence to support
- the consequences of cancellation (disqualification)
- the registered person's right to object, in accordance with the Childcare Act 2006, section 73.

OFSTED – Procedure (2) Cancellation (non-emergency)

Notice of decision to cancel

- Following the notice of intention to cancel on the registered person being served, a notice of the decision to cancel the registration can only be served at least 14 days after the notice of intention.
- The notice of decision issued after an objection will include why Ofsted have decided to take the step, including any matters considered during the objection.
- The notice of decision must include information about the registered person's right to appeal to the tribunal against the decision.

OFSTED – Procedure (3) Cancellation (non-emergency)

Monitoring visits following cancellation pending an appeal hearing

The registered person remains registered until 28 days after service of the notice of decision or, where there is an appeal, until the appeal is determined.

If the registered person informs Ofsted that they do not intend to appeal to the tribunal, the decision takes effect at that point, or at the point any appeal to the tribunal is determined.

An appeal may take some months to process so Ofsted considers whether to carry out monitoring visits during that time. During this interim period, Ofsted is likely to consider either emergency cancellation or suspending the registration generally or only in relation to particular premises if there is reason to believe that:

- children's welfare is at risk
- children are suffering or likely to suffer significant harm.

OFSTED – Cancellation Cont.

Emergency action against a provider

Ofsted may apply for a magistrate's order to:

- cancel the registration
- vary or remove conditions
- impose conditions on the registration.

Emergency action taken if:

- evidence to show that any child who is being, or may be, looked after by that person is suffering or is likely to suffer significant harm
- any other action is unlikely to reduce the risk of significant harm to the child with immediate effect
- taking this action has a less detrimental effect on children than not taking this action.

Care Standards Tribunal (FTT HESC) – Appeals to

<http://carestandards.decisions.tribunals.gov.uk//Public/recentDecisions.aspx>

- the decision to refuse an application to register
- the decision to refuse an application to approve the suitability of additional or different non-domestic premises to those which form part of an existing registration
- the decision to refuse an application from a childminder or childcare provider on domestic premises to provide childcare on non-domestic premises for up to 50% of their total operating time, under their existing registration

Care Standards Tribunal (FTT HESC) – Appeals to (Cont.)

- the decision to suspend a childminder or childcare provider's registration generally or only in relation to particular premises
- the variation, imposition or removal of conditions of registration
- a refusal to waive disqualification from registration as a childminder or childcare provider
- a decision to cancel a registration.

In addition, a provider can appeal to the tribunal against an emergency order imposed by a magistrate.

Appeals Against Suspension - Timetable

- The tribunal will send a copy of an appeal to Ofsted within 24 hours of receipt by the tribunal office.
- The tribunal will fix a hearing date on receipt of an appeal or, in any case, no later than 48 hours after receiving an appeal. The tribunal will give notice to the applicant and to Ofsted of the date of the hearing as soon as it is set.
- Ofsted must respond to an appeal within three working days of receiving a copy of it from the tribunal.
- The tribunal will aim to hear the appeal within 10 working days of receipt of Ofsted's response for an oral hearing and within five working days of Ofsted's response for a paper hearing.
- The tribunal will issue its decision within three working days of the conclusion of the hearing (or may give a decision orally on the day of the hearing).

Appeals Against Suspension

- Childcare Act 2006 - Section 69(1) provides for regulations to be made dealing with the suspension of a registered person's registration. The section also provides that the regulations must include a right of appeal to the Tribunal.
- When deciding whether to suspend a childminder, the test is set out in regulation 9 of The Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 (*SI 2008/976*):

“that the Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm.”

Appeals Against Suspension (2) – Harm?

- “Harm” is defined in regulation 13 as having the same definition as in section 31(9) of the Children Act 1989:
“ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another”.
- The suspension is for a period of six weeks. Suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist.

This imposes an ongoing obligation upon the Respondent to monitor whether suspension is necessary.

Appeals Against Suspension (3) – FTT Powers?

- The powers of the Tribunal are that it stands in the shoes of the Chief Inspector – it can make any decision open to the Chief Inspector.
- The first issue - whether as at the hearing date it reasonably believes that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.
- The burden of satisfying that the threshold is met lies on Ofsted.
- The standard of proof ‘reasonable cause to believe’ falls somewhere between the balance of probability test and ‘reasonable cause to suspect’. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a child might be at risk.

New Street Playground Committee v Ofsted [2016] UKFTT 536 (HESC) (16 September 2016)

The appeal was dismissed and suspension confirmed:

- The standard required to justify a suspension is not a high one. During the short period of the suspension, it is for the respondent to investigate matters to determine if there is a case for longer-term enforcement action, or whether the outcome of the investigation is that there is no longer reasonable cause to believe that children may be harmed.
- The tribunal was satisfied that there may be a risk of harm to a child. The appellant accepted that the setting was not suitable to take children as it stood. There was rubble, wood and stacked crates present which had not been cleared at the date of the hearing. Further, it was reasonable for the respondent to impose a suspension which would allow it to complete its investigations into the current health of the manager.

Suspension Appeals – Risk Assessments

Applying **Ofsted v GM and WM** [2009] UKUT 89 (AAC)

- Regulation 9 sets a low threshold when considering a suspension;
- the mere fact that the threshold is passed does not necessarily mean that the power of suspension in regulation 8 must be exercised.
- the continuation of the suspension at the present time must have a clear purpose, e.g. to enable a police investigations to be completed after which Ofsted will have to take a view regarding the capacity of the applicant to safeguard children and whether adequate and proportionate arrangements can be put in place to safeguard children minded by her.
- The issue is proportionality having regard to the adverse consequences not only for the Applicant and her family but also for the children being cared for and their parents.

Wales – The CSSIW

- [The Regulation of Child Minding and Day Care \(Wales\) Order 2016](#)
- [The Child Minding and Day Care \(Wales\) Regulations 2010](#)
- [The Child Minding and Day Care \(Inspection and Information for Local Authorities\) \(Wales\) Regulations 2010](#)
- [The Child Minding and Day Care Exceptions \(Wales\) Order 2010](#)
- [The Children and Families \(Wales\) Measure 2010 \(Commencement No.2, Saving and Transitional Provisions\) \(Amendment\) and \(Consequential Amendment\) Order 2011](#)
- [Children and Families \(Wales\) Measure 2010](#)
- [The Child Minding and Day Care \(Disqualification\) \(Wales\) Regulations 2010](#)

Wales – The CSSIW

- **Notice of non-compliance**
- **Service of Concern meeting**
- **Enforcement Action**

CSSIW - Enforcement

Immediate imposition (variation or removal) of conditions or immediate suspension.

The notice explains the provider's right to appeal to the First-Tier Tribunal (Health, Education and Social Care Chamber).

Application for urgent cancellation of registration



QUESTIONS & ANSWERS

Lachlan Wilson

Lachlan.Wilson@3pb.co.uk

Specialising in:

Commercial | Crime | Employment | Family | Personal Injury & Clinical Negligence
Property & Chancery | Public Law & Regulatory | Technology & Construction
Asset and Tax Recovery | Banking & Finance | Business & Commercial
Mediation | Public Access | Sports Law