Sheriffdom of Tayside Central and Fife at Dundee

Judgement of Sheriff Gregor Murray

in causa

BF , Pursuer

against

Scottish Social Services Council, Defender

DUN-B480-16

Act – I.G. Mitchell KC, instructed by MML Law

Alt – Lindsay KC, instructed by SSSC

Dundee, 20 December 2022

The Sheriff, having resumed consideration of the cause:-

i. sustains the Pursuer's plea-in-law and repels the Defender's pleas-in-law;
ii. recalls the decision of the Defender's Conduct sub-Committee dated 17 June 2016;
iii. appoints parties to be heard on further procedure and the issue of expenses on 26 January 2023

Overview

1. In this case, the Pursuer appeals under s.51 of the Regulation of Care Scotland Act 2001 ("the Act") against the Defender's decision ("the Decision") dated 17 June 2016, by which it determined the Pursuer had committed Misconduct as defined the Scottish Social Services Council (Conduct) Rules 2013 ("the Rules") and ordered removal of her name from the Defender's Register of Social Workers ("the Register").

2. As parties agreed it was unnecessary for evidence to be led, I heard submissions from Senior Counsel at a final hearing on 5 September 2022, following which I made *avizandum*. The length of the Judgement below directly correlates to the 3,000 pages of transcripts, productions and authorities to which the submissions referred. The footnotes below, unless otherwise stated, refer to page numbers of documents within a Joint Inventory lodged beforehand.

Legal Framework and Agreed Facts

3. The legal framework and the events before and during the Hearing are variously explained by the Act, admitted on record, proved in the Joint Inventory and/or were explained without contradiction in submissions.

4. The Act imposes a duty upon the Defender to promote high standards of conduct and practice among social service workers[1]. *Inter alia* it also obliges the Defender to prepare and publish Codes laying down standards of conduct and practice expected of social service workers[2], maintain the Register[3] and a procedural framework within which any application to remove a social worker's name from the Register can be determined[4]

5. The Defender has published a Code of Practice for Social Services Workers and Employers[5], to which registered workers and their employers must have regard[6]. Employers must also take it into account when making any decision about the conduct of a worker[7] and must inform a worker and the Defender of any misconduct which might call the former's registration into question[8].

6. In 2009, the Defender accepted the Pursuer's application to include her name on the Register. The Defender came to be employed as a social worker by Redacted ("the Council").

7. On 15 May 2013, the Defender promulgated the Rules, as the Act obliged it to do[9].

8. On 1 June 2013, the Council summarily dismissed the Pursuer from employment as a social worker by reason of gross misconduct. In terms of the Code, the Council thereafter notified the Defender of that decision.

9. In 2015, the Defender served a complaint ("the Complaint") on the Pursuer alleging Misconduct. The Complaint provided the Pursuer with certain key dates by which she required to provide information to the Defender[10].

10. The Complaint alleged that as a Council employee, the Pursuer dishonestly submitted false Financial Assistance forms, travel expenses and parking reimbursement claims and failed to follow Council procedures designed to vouch Council funds paid to service users[11].

11. By the time the Complaint was served, the Pursuer had relocated to South Africa.

12. As the Pursuer did not consent to removal of her name from the Register, the Defender was obliged to refer the Complaint to its conduct sub Committee[12] ("the Committee") to determine whether the Pursuer had committed Misconduct and, if so, any sanction to be imposed[13].

13. The Defender appointed the complaint to a Hearing ("the Hearing") to enable evidence to be led before the Committee and initially assigned six days in late September and early October 2015 for that purpose[14].

14. On 1 June 2015, the Defender convened a Pre Hearing Review ("PHR") in terms of the Rules[15]. It was attended by the Committee's Legal Adviser, the Defender's Presenter and BF barrister a Direct Access English barrister who represented the Pursuer. The PHR was continued to 17 August 2015 then again to 24 August. Minutes of the PHRs are contained in the Joint Inventory[16].

15. The Hearing commenced on 22 September. BF barrister represented the Pursuer, who was not in attendance. The day was entirely taken up with whether or not the Hearing should be adjourned as IT difficulties prevented BF barrister from contacting the Pursuer. The Committee refused to adjourn the Hearing.

16. The hearing continued on 23, 24, 29 and 30 September, when the evidence of ZZ the Defender's first witness, was taken in part. On each day, BF barrister represented the Pursuer, who was not in attendance.

17. On 1 October, the last of the initial six days assigned, neither the Pursuer nor BF barrister attended.

18. The PHR was reconvened on 15 December 2015. A Minute of it is contained in the Joint Inventory[17].

19. The Defender assigned 11 further days in January, April, May and June 2016 to conclude the Hearing.

20. On 12 January 2016, the Pursuer sought adjournment of the Hearing days on 21 and 22 January. On 14 January, the Convener refused her request.

21. Neither the Pursuer nor BF barrister attended the Hearing on 21 and 22 January. On each date, the Committee refused to adjourn and decided to proceed in their absence. On the latter date, the Hearing was continued to 27 and 29 April, the next of the assigned dates.

22. On 26 April 2016, the Pursuer again sought adjournment of the Hearing. She also intimated that she had returned to reside in the UK and that BF barrister could not attend.

23. Neither the Pursuer nor BF barrister attended the Hearing on 27 and 29 April. The Committee refused to adjourn and decided to proceed in their absence on each of the remaining assigned dates.

24. Thereafter, the Hearing continued in the absence of the Pursuer and BF barrister Evidence was led on three further days in May, when the Presenter closed her case. On 12 May, after hearing submissions from the Presenter, the Committee adjourned to consider its decision. On 10 June, the Committee found Misconduct proved then, after hearing from the Presenter, ordered the Pursuer's name be removed from the Register. The Decision was subsequently issued on 17 June.

25. I discuss some of these events in more detail below.

Agreed Legal Principles

26. Senior Counsel agreed the principles which a regulatory body must consider when deciding whether to proceed with a hearing in absence were contained in *R v Hayward* (2001) QB 862 and *General Medical Council v Adeogba* (2016) 1 WLR 3867, as recently approved by the Inner House (*Burton v Nursery and Midwifery Council* (2018) CSIH 77 at [20]; *Thomson v Architect Registration Board* (2022) SLT 762 at [24]).

27. In the leading judgement in *Adeogba*, it was held: -

"it was not in dispute … that the relevant Panel (as appropriately advised by its legal assessor) must approach the decision…whether to proceed in…absence… by reference to the principles developed by the criminal law in relation to trial in the absence of a defendant.

Thus, the starting point is (Hayward) in which an experienced Court of Appeal …distilled the domestic and Convention authorities and set out guidance…at para 22:-

"(3) The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.

(4) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.

(5) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

(i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;

(ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;

(iii) the likely length of such an adjournment;

(iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;

(v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;

(vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;

(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;

(viii) the seriousness of the offence, which affects defendant, victim and public;

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(x) the effect of delay on the memories of witnesses;

(xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present."

The decision in relation to the second of the three cases then considered by the court was the subject of further appeal to the House of Lords...where Lord Bingham of Cornhill (with whom Lord Nolan, Lord Hoffmann, Lord Hutton and Lord Rodger of Earlsferry agreed) approved the guidance set out above …and emphasised…that the discretion to continue in the absence of a defendant should be "exercised with great caution and with close regard to the overall fairness of the proceedings".

Lord Bingham observed that if attributable to involuntary illness or incapacity it would very rarely "if ever" be right to exercise discretion in favour of commencing the trial unless the defendant is represented and asks that the trial should begin.

As for the guidance, Lord Bingham considered it "generally desirable" that a defendant be represented even if he had voluntarily absconded but also made it clear, at para 14:-

"I do not think that 'the seriousness of the offence, which affects defendant, victim and public'… is a matter which should be

considered. The judge's overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged be serious or relatively minor."

Lord Hoffmann (agreeing with Lord Rodger) expressed himself, at para 19, "not comfortable" with the notion of waiver which required "consciousness of the rights which have been waived"; he preferred to say that they "deliberately chose not to exercise their right to be present or to give adequate instructions to enable lawyers to represent them".

These principles were considered by the Judicial Committee in Tait v Royal College of Veterinary Surgeons [2003] UKPC 34, which concerned an application for a second adjournment of a disciplinary hearing on the grounds of ill health (hypertension) unsupported by medical evidence. The refusal to adjourn was quashed on the grounds that the direction did not comply with the requirements in R v Jones [2003] 1 AC 1. Although citing the Court of Appeal's checklist in (Hayward) as approved by the House of Lords on appeal in R v Jones case, the Board identified, at para 5, "the seriousness of the case against the defendant" as a relevant factor. In that regard, it does not appear that the Board's attention was drawn to the exception that Lord Bingham specifically made in relation to seriousness of the offence constituting an exception to Lord Bingham's approval."

28. In *Adeogba*, it was also held:-

"17…(the decision to) continue a disciplinary hearing…must also be guided by the context provided by the main statutory objective of the GMC, namely, the protection, promotion and maintenance of the health and safety of the public as set out in section 1(1A) of the 1983 Act. In that regard, the fair, economical, expeditious and efficient disposal of allegations made against medical practitioners is of very real importance.

18. It goes without saying that fairness fully encompasses fairness to the affected medical practitioner (a feature of prime importance) but it also involves fairness to the GMC (described in this context as the prosecution in R v Hayward, para 22(5)). In that regard, it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far. Steps can be taken to enforce attendance by a defendant; he can be arrested and brought to court. No such remedy is available to a regulator.

19. There are other differences too. First, the GMC represent the public interest in relation to standards of healthcare. It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed."

29. Finally, a practitioner was professionally obliged to engage with a regulator:-

"20. …there is a burden on …all professionals … to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."

Pursuer's Submissions

30. The Committee fundamentally erred by deciding to proceed on both 22 and 23 September in the absence of the Pursuer and, separately, in the absence of herself and [BF barrister] on and after 1 October, 2015.

31. On each occasion, the Committee failed to properly follow the *Hayward* checklist. *Separatim*, its decisions were unreasonable. Further,

cumulatively and individually, the Committee breached the rules of natural justice and Article 6. While s.51 permitted the court to remedy the Article 6 failure, the Decision required to be recalled first.

32. Rule 20, which permitted a Committee hearing to proceed in absence accorded with the common law in England but not in Scotland (*Jones* at [43] - [44]*)*, which had led to statutory intervention. The *Hayward* guidance, which applied similar principles to regulatory proceedings, was carefully structured.

33. The first question was whether the accused had waived his right to be represented at trial. A finding to that effect was a precondition to the exercise of any discretion as to whether a trial should take place or continue in absence.

34. Thereafter, great care must be taken in the exercise of any discretion, and then only in rare and exceptional circumstances (*Hayward* at (4); *Jones* at [6]).

35. These authorities had heavily influenced the approach of professional tribunals. In the exercise of such discretion, fairness to the defence was of prime importance and fairness to the prosecution must also be taken into account. The result was a balancing exercise with greater weight to be given to the defence.

36. Though it ought not to be considered as a departure from the test, the *Hayward* factors ought to be considered even if a defendant had waived his right to be represented. That better reflected the manner in which the checklist should be applied, in particular the primary need to balance fairness to a defendant against fairness to the prosecution. The starting point was the deliberate failure of the practitioner to engage (*Hayward* at (19)).

37. Though Rule 20 was arguably *ultra vires*, it was unnecessary for the point to be argued in the interests of expedition and, if it was not invalid *per se*, the Pursuer required to have waived her right to be present before the Committee could exercise its discretion to proceed in her absence.

38. The *Hayward* factors provided for a balancing exercise weighted in favour of a practitioner. In England a hearing was permitted to proceed in absence only in rare and exceptional cases. However, as Scots common law did not permit proceeding in absence, such cases should be even more rare and exceptional. In this case, even applying the English standard, the Hearing should not have proceeded in the absence of the Pursuer and BF barrister

39. Article 6 provided that everyone is entitled to a fair and public hearing. It was a cardinal principle of Natural Justice that each side should be heard (*Inland Revenue Commissioners v Hood Barrs* 1961 SC (HL) 22 at 30). Any failure to allow both sides to be heard was a failure to provide a person with a fair trial for the purposes of article 6. Such rights required to be practical and effective, not theoretical or illusory (*Airey v Ireland* 6289/73 at [24]). If a party was represented, his right to communicate with his advocate out of the hearing of a third person was one of the basic requirements of a fair trial in a democratic society (*Viola v Italy,* 45106/04 at para 61).

40. Nonetheless, as there was no ECHR obligation for provision of an appeal mechanism, the court could remedy the Defenders' failures as the whole proceedings, including the appeal, required to be article 6 compliant. In that way, the court could either rectify the non-compliance (in which event the whole procedure would have been compliant) or not (with the opposite effect).

41. That point brought into focus the Defender's disputed averments that the Committee's earlier decisions were not subject to review and that medical evidence which was not before the Tribunal was irrelevant. Whether or not the earlier decisions could be formally opened up, they

nonetheless formed part of the *acquis* upon which the Committee formed its final decision; it was impossible to determine an appeal against the Decision stripped of the cumulative errors which led to it being made. However, if the scope of the appeal did not allow consideration of those matters, the entire proceedings, including the Appeal, would not be convention compliant.

42. It followed that the disputed issue was the scope of section 51. Though its scope was un defined, s.3(1) of the Human Rights Act 1998 provided that primary legislation required to be read and given effect to in a convention compatible fashion.

43. It was clearly possible to construe s.51 in that way, as a right of full appeal which permitted review of previous decisions and consideration of the medical evidence. Such a construction had already been approved (*Smith v SSSC* 2015 SLT (Sh Ct) 103 at [14]). There could be no violation of the Convention if the Committee's decision was subject to subsequent control by the court if the latter provided the guarantees required by art.6(1). There was no need ''*for the procedure to be viewed in separable and discrete parts*''.

44. Looking at the proceedings and the appeal as a whole, the proper question was whether the Pursuer's entitlement to an art.6(1) compliant process had been satisfied. The Committee ought neither to have been careless nor ignorant of art.6 in the proceedings before it. The scheme of the legislation envisaged that the Committee was best placed to determine whether misconduct had occurred; for that to be so, the Defender ought to structure of any Committee and any proceedings before it in an art 6 compliant manner; by doing so, unnecessary corrective s.51 appeals would be avoided. Equally, it was erroneous for the Defender to submit that a breach of art.6 could only be determined by looking exclusively at such proceedings.

45. On that analysis, the Defender erred in law by failing to properly to apply the *Hayward* factors and in any event failed to give her a fair hearing consistent with the principles of Natural Justice and art 6.

46. The Defender's fundamental error was to allow the hearing to be held in the absence of the Pursuer and/or[BF barrister] As that error commenced on 22 September 2015 and was then repeated and compounded on subsequent dates, it vitiated the Decision.

47. A consistent thread was the Committee's failure to apply its mind to whether the Pursuer had waived her right to be present. As such, there was no basis upon which it could either have exercised its discretion or have properly found that the Pursuer had waived her said right.

48. *Esto* there was a basis for exercising discretion, it was exercised perversely and unreasonably.

Decisions of 21 and 22 September 2015

49. Though the Pursuer sought to assert her right to attend and was represented by[BF barrister] his representation required to be effective, not theoretical or illusory. As he could not provide effective representation because of communication difficulties,[BF barrister] took a professional decision to seek an adjournment. However, his request was refused by the Committee.

50. The practical result was that until 30 September,[BF barrister] needed to cross-examine the Defender's witnesses without being able to communicate with or to take instructions from the Pursuer. That plainly breached the requirement for effective representation. The Committee's decision was perverse: it was obvious to it that circumstances prevented the Pursuer from participating; the Committee's treatment of that issue as a failure on the part of the Pursuer to perform an obligation demonstrated that as did its subsidiary decision that her failure to perform an obligation was deliberate.

51. The Committee did not consider whether any failure amounted to a waiver by the Pursuer of her right to effective representation. It had no

material before it to reach that conclusion. There was also a handwritten hospital report which showed she had not waived her right. The Committee's refusal to consider it, *inter alia* on the basis that it was handwritten, was also perverse. It was not suggested that it was a forgery or false.

52. No reasonable tribunal, in considering *Hayward*, would have concluded that an effective defence could have been presented, having regard to the difficulties which caused BF barrister to seek an adjournment.

Decision of 1 October 2015

53. The hearing had not properly been convened in terms of Rule 19(3). In any event it was, or ought to have been, clear to the Committee that the Pursuer and BF barrister were absent through genuine misunderstanding. Separately, the Committee did not apply its mind to whether the Pursuer had waived her right to attend. *Esto* it had done so, no reasonable tribunal could have concluded that she had. Again, the Committee's decision was perverse.

Decision of 15 January 2016

54. The Pursuer made it clear that she wished to exercise her Rule 13(1) right to attend the hearing in person. As such, she did not waive it. In determining that the proceedings should continue in her absence due to her medical condition, the Committee failed to take account of the requirement for effective representation.

Decisions of 21 January 2016

55. The Committee's fundamentally erred by failing to consider whether the Pursuer had waived her right to attend. *Esto* it did so and determined that she had not, there was no proper basis to have done so; no reasonable tribunal would have so concluded.

Decisions of 27 April, 2016

56. The Committee had noted the Pursuer's submission that if the hearing proceeded in absence, it would infringe her right to a fair trial. As such, its decision to purportedly set the Pursuer's right to a fair trial against the inconvenience which the Defender suffered through having to cancel arrangements was plainly perverse.

57. To exercise its discretion, the Committee needed a proper basis for determining that Pursuer had waived her right to attend. There was no such basis: the Pursuer had made it clear that she asserted her rights to attend in person and be represented by BF barrister *Esto* the Committee was entitled to weigh denial of her convention right against prejudice to the Defender, no reasonable tribunal could have decided such prejudice outweighed denial of her Human Rights.

58. In any event, she had presented evidence to the Committee that she was suffering from Redacted and could not attend without being represented by BF barrister The Committee had ignored the *Hayward* requirement to attach weight to fairness to the defence.

Subsequent Conduct of the Hearing

59. The die was cast with the Committee's decision of 27 April 2016. The hearing continued over a further eight days in the absence of the Pursuer and/or BF barrister was unable to appear to represent her. Standing the Pursuer's medical condition, it was unreasonable to expect her to attend without representation, nor was she able to do so. That was evident from the face of the medical and other evidence she provided to the Committee. There was no basis for it to conclude she had waived her right to attend. If the court was able to have regard to the medical evidence subsequently obtained, it was even clearer that the Pursuer's absence was caused by her medical condition. The consequences of her failure to attend and participate in the proceedings were self-evident. The principles of Natural Justice had not been followed. She had plainly been deprived of a convention-compliant hearing. Such defects clearly vitiated the Decision.

Mitigation of Penalty

60. The Committee's failure to inform the Pursuer that it was to consider the question of mitigation deprived her of the opportunity to present an argument on that issue. That contravened both Rule 25(3) and her article 6 right to a fair trial.

61. *Sanusi* could be distinguished on its facts. It concerned the different question of whether to grant an adjournment in order to allow representations in mitigation to be made, whether a party had deliberately chosen not to attend and the practitioner had been specifically told of the hearing.

62. In the Pursuer's case, the situation was different. As her absence did not betoken waiver by her of her right to be present, the issue of adjournment did not arise because she had not been informed and was entirely unaware that the Committee was going to consider mitigation.

63. In the circumstances, the Decision should be recalled. Under normal circumstances, the matter should be remitted back to the Committee. However, as the events in question occurred in 2013, as the Committee proceedings took place in 2015 and 2016, even a rehearing before a differently constituted Committee might now be inappropriate. In that event, I was invited to put the case out by order for further discussion.

Defender's Submissions

64. The Defender's second, third and fourth pleas-in-law should be sustained, the Pursuer's plea-in-law repelled, the Decision confirmed and the appeal refused.

65. If the appeal was granted, the case should be remitted to a differently constituted Panel for reconsideration of all issues *de novo*.

66. The court should be reluctant to interfere with the decision of a professional tribunal, should give due and proper regard to its experience of the tribunal and in particular its view on what is required for the protection of the public and the reputation of the profession. The court should not interfere with a decision if it came to the view that a different disposal might have been preferable. On sanction, the test to be applied was whether the penalty was excessive and disproportionate in all the circumstances (*Macaskill v SSSC*, unreported, 11th August 2015 at [29]).

67. In the Decision, the Committee held that the Pursuer had committed misconduct and made a removal order. On the evidence and submissions, those were findings which it was reasonably open to the Committee to have made. They were not vitiated by any error of law, irrationality or procedural unfairness. The finding of misconduct was not irrational or perverse and was supported by reasonably founded findings in fact. Having regard to its specialist expertise, the Committee was in a better position than the court to assess whether misconduct had occurred, a factor to which the court should attach weight. Due regard should be given to the Committee's experience and its view of what is required for the protection of the public and the reputation of the profession (*B v SSSC* 2012 SLT (Sh.Ct.) 199 at 53).

68. The Decision was neither plainly wrong nor inappropriate (*McLaggan v SSSC*, unreported, 3 April 2020, Dundee Sheriff Court at 17). The court, in the exercise of appellate jurisdiction, had no basis to uphold the appeal. There had been no breach of any of the principles of common law natural justice or the Pursuer's Article 6 rights.

69. In any event, if the Pursuer remained a South African resident, she was ineligible for registration as a Social Worker, as only those resident in Scotland were eligible for registration.

70. *Adeogba* was the leading modern authority on whether a regulatory body's decision to hear a case in absence was fair. Fairness was a bilateral issue; the court had to bear in mind fairness to the Defender as well as fairness to the Pursuer (*ibid*, at [18] – [20]).

71. The court also required to recognise and take account of the public interest represented by the Defender; it was also important to consider the related need to prevent a practitioner from frustrating the regulatory process (*Adeogba* at [19}) and a practitioner's professional obligations to engage with the regulatory regime (*ibid* at [20]). Consequently, the Pursuer was obliged to engage with the Defender both in relation to the investigation and ultimate resolution of the allegations against her. While her decision to return to South Africa might have been necessary, the reasons for it were not related to the Complaint. It was not clear whether any adjournment might have led to her appearing. All the problems which occurred were manifestations of her own choices to return to South Africa and to employ a Direct Access English Barrister based in Berlin.

72. The Committee was not generally obliged to adjourn the hearing or to provide the Pursuer with an opportunity to make submissions in mitigation before determining any sanction; the Pursuer ought to have appreciated that if adverse findings were made, she would not be unable to address mitigation in any changed circumstances flowing from those adverse findings; she would have been entirely reliant on any written submissions or representations given in advance of the hearing (*Sanusi v General Medical Council* [2019] 1 W.L.R. 6273 at [68] – [77], [100] & [101]). As the Pursuer had been fully aware of the hearing and the allegations she faced but elected not to attend, there was no good reason for the Panel to adjourn before proceeding to consideration of sanction.

73. The application of these principles inevitably resulted in refusal of the appeal.

74. Moreover, s.51 did not permit review of the Committee's prior orders. Any appeal against them ought to have been taken at the time they were made. Separately, having regard to the evidence and submissions made to it, it was reasonably open to the Committee to have made findings in relation to Misconduct and for removal of the Pursuer's registration. Having regard to its expertise, the Committee was better placed than the court to make such findings. They were not vitiated by error, irrationality or procedural unfairness, nor did they breach the rules of natural justice or Article 6. The sanction imposed was neither excessive nor disproportionate as the Committee had regard to all relevant factors.

75. The Committee's decision to proceed in the Pursuer's absence was one which was reasonably open to it to have made. It took parties' submissions and applicable authorities into account and balanced fairness and potential prejudice to both sides. Any such decision could not be vitiated by error, irrationality or procedural unfairness.

76. Finally, there could be no Article 6 breach as the Decision was subject to a full appeal (*Smith* at [14]). If such a breach had occurred, the court could take any necessary steps to remedy it before the appeal was concluded by reviewing the evidence and productions.

History of the Proceedings

77. As it impacted on events before and at the Hearing, was referred to in submissions and bears upon my decision, it is necessary to narrate the extraordinary progress of the Pursuer's case before the Defender and this court.

78. Though the Council promptly notified the Defender of its decision to dismiss the Pursuer in 2013, it took the Defender two years to investigate and bring the Complaint and a further nine months for the Hearing to be heard and decided. The reasons for those significant delays were not explained to me.

79. Astonishingly, this appeal was brought over six years ago. Around a year of that period was taken up by an early diversion to the Sheriff Appeal Court and a subsequent sist for legal aid. Almost all the remainder was caused by a further sist in April 2018 on the Pursuer's motion, of consent, for a medical report to be obtained.

80. Though the report in question was obtained a month later[18] and appears to vouch that the Pursuer suffered Redacted during at least some of the Hearing[19], the sist was only recalled in April 2022. Why the Appeal was sisted for four years was not explained to me. As I have sustained the appeal, as the Pursuer submitted and as discussed below, questions inevitably arise about what happens next.

81. Separately, the Defender did not meaningfully case manage the complaint before the Hearing. Though Rule 5 conferred wide power on the Legal Adviser to do so, the PHR Minutes do not suggest it was exercised.

82. Had it been, many of the difficulties at the Hearing would have been foreseen, addressed and clarified. Significant amounts of undisputed evidence could have been agreed by Joint Minute. It is plain from the transcripts that at least agreement on the existence and provenance of much of the Council's documentary evidence and its various administrative systems should have been reached.

83. At least equally importantly, some or all of the confusion which arose during the Hearing would have been avoided. In neutral terms, the root causes of it were misunderstanding and disconnect between, on the one hand, BF barrister the Clerk and Presenter and, on the other, the Committee and Legal Adviser.

84. As explained below, the former all knew that BF barrister was to conduct the Hearing in the absence of the Pursuer as she had relocated to South Africa, where she was caring for relatives. However, that information was not communicated to the Committee and Legal Adviser before the Hearing. Separately, the Pursuer and BF barrister caused confusion during the latter stages of the Hearing by either not communicating or doing so ineffectively.

85. One other point needs made. Before and during the Hearing, BF barrister was repeatedly criticised for failing to seek adjournments in advance of Hearing dates. However, it appears the Committee was unaware that the Direct Access scheme did not allow him to conduct litigation; under it, responsibility for the day to day conduct of the case remained with the Pursuer[20]. Consequently, he was unable to correspond with the Clerk or lodge applications himself. As the Pursuer was otherwise unrepresented, she needed to lodge any such applications herself. Though BF barrister referred to this during discussions on the morning of 22 September[21], his point was not picked up on.

Analysis of Events during the Hearing

86. To address the submissions made, it is necessary to analyse events during the Hearing in detail under reference to two of the Rules and documents.

87. Rule 19 provides:-

19. Adjournment of hearing

Subject to the requirements of a fair hearing and after hearing representations from the Parties the Sub-committee may, at any stage of the hearing, adjourn the proceedings for the purposes of seeking further information or for any other purpose.

88. Rule 20 provides:-

20. Attendance at hearing

(1) Where the Registrant fails to attend and is not represented at the hearing, the Sub-committee shall:

(a) have regard to the Certificate of Compliance and whether reasonable efforts have been made to inform the Registrant of the hearing and

(b) inquire whether any reasons for the Registrant's non-attendance have been communicated to the Clerk, or the Council.

(2) The Sub-committee may:

(a) hear and determine the case in the absence of the Registrant

or

(b) adjourn the hearing and give directions.

89. As can be seen, Rule 19 conferred discretion on the Committee to adjourn the Hearing subject to stated provisos. If the Pursuer failed to attend and was not represented, Rule 20 conferred separate discretion on the Committee to either adjourn the Hearing or to hear and determine the case in absence.

90. Much of the underlying context for what occurred on 22 September 2015 is disclosed by the transcript for that day, in particular:-
    a. the Clerk and Presenter both knew long before the Hearing that the Pursuer had relocated to South Africa[22]
    b. both were also made aware on 15 September that the Pursuer was not to attend the Hearing[23]
    c. on 21 September, BF barrister decided he required instructions from the Pursuer on whether to seek adjournment of the Hearing[24]
    d. he gave advance notice of that possibility to the Clerk on the same day[25]
    e. the Clerk replied to say he should raise the issue with the Committee at the Hearing[26]
    f. BF barrister was unable to obtain instructions on 21 September[27]
    g. to do so and to show the Pursuer paperwork, he needed to speak to her by secure video internet link[28]
    h. on the morning of 22 September, he unsuccessfully tried several times to do so[29]
    a. it was difficult for him to telephone her as his mobile telephone connected to South Africa by VOIP and there was no internet connection at the Defender's office[30]
    j. in the absence of instructions, he felt unable to seek an adjournment[31]
    k. he did not initially advise the Committee of the reasons for the Pursuer's absence[32]

91. As the page numbers in the above footnotes show, BF barrister difficulties were not disclosed to the Committee in a sequential or readily comprehensible manner. As noted at least some of the issues raised ought to have been identified and addressed at the PHR or communicated by to the Legal Adviser and Committee by the Defender in advance of the Hearing.

92. When the Committee first heard of BF barrister difficulties, the Legal Adviser enquired whether there ought to be "*a preliminary discussion*" on the issue of adjournment. However, the Committee was immediately diverted by the Presenter raising whether the Hearing should proceed in the Pursuer's absence[33].

93. Following discussions which the Legal Adviser aptly described as "*circular*"[34], he advised the Committee it should firstly consider whether to adjourn in the absence of any motion from BF barrister If it refused adjournment, it should then ask whether he

intended to withdraw from acting. If he did so, it should then consider how Rule 20 should be applied[35]. The Presenter and BF barrister agreed with his advice[36]. The Legal Adviser then finally confirmed to the Committee that it was "*simply considering the narrow issue of whether (BF barrister communication difficulties represent of themselves a sufficient (sic) to adjourn**[37]***"

94. However, the Committee was then diverted again by BF barrister raising the issue of Article 6, which caused the Adviser to tender further advice[38].

95. Against that background, the Committee retired to consider the matter over lunch. Immediately after, it decided "*to proceed in the absence of the (Pursuer's) counsel's IT connectivity….(and) to hear and determine the case in the apparent absence of a functioning IT or telephone connection between (BF barrister and (the Pursuer) in South Africa**[39]***"

96. The reasons it gave for that decision[40] were that the Pursuer was in South Africa, did not require to attend and had decided not to do so; she was represented by BF barrister it was her responsibility to put a functioning means of IT communication in place and the Defender was not obliged to put such a means in place.

97. BF barrister then intimated that he intended to continue to act, moved separately to adjourn the Hearing[41] and gave reasons for doing so[42]. The Presenter opposed adjournment.

98. Having taken further advice[43] and considered the PHR Minutes, the Committee then decided "*to hear and determine the case in the absence of (the Pursuer) and to refuse (her) application for an adjournment in terms of schedule 2, paragraph 19(1) of the rules*"[44].

99. It gave the following reasons for those decisions[45]:-
    a. the Pursuer had chosen not to attend;
    b. she continued to be represented by BF barrister
    c. she had no funding for legal representation;
    d. she had engaged with the proceedings;
    e. though the Pursuer submitted she was unable to attend the hearing, she had a right to remain in the UK;
    f. her submissions that she had to care for her mother and grandmother, were unsupported;
    g. the Committee had no basis to conclude she would be more likely to attend the Hearing at a later date;
    h. it was the Pursuer's responsibility to put a functioning means of IT communication in place;
    a. the Defender was not obliged to put such a means in place;
    j. as regards whether the Pursuer's attendance was fundamental to compliance with Article 6 and her absence might result in a s.51 appeal or judicial review:-
        i. no judicial review proceedings had not been raised
        ii. any adjournment would be lengthy, until, at earliest, March 2016
        iii. BF barrister had not mentioned any communication or absence issues at the PHRs
        iv. the Pursuer only raised her inability to attend less than a week before the hearing
        v. no earlier attempt was made to adjourn the hearing

100. To comprehend events on 21 and 22 January 2016 in context, it is necessary to review some prior events. ZZ's evidence had not concluded on 30 September 2015. She was unavailable to continue to do so on 1 October, the last of the initially assigned Hearing dates, on which the Committee also required to consider whether to continue Interim Suspension of the Pursuer's registration[46].

101. The PHR was reconvened on 15 December because, it appears, more dates needed assigned. However, as the Minute records[47], by the time it was held the Defender had already assigned 11 further dates in January, April, May and June 2016. BF barrister intimation at the reconvened PHR that he was not available on any of them ought not to have surprised the Defender as he had advised the Committee on 24 September 2015 that he had significant other commitments which greatly restricted his availability after 1 October[48].

102. The reconvened PHR Minute also noted the Pursuer was to return to the UK and would attend the remainder of the Hearing. However, on 12 January 2016, that changed. The Pursuer requested the Hearing be adjourned as she was ill, required Redacted and had been medically advised not to fly. At the Clerk's request, she e-mailed a copy of a holograph letter from her Consultant vouching those points[49].

103. On 14 January, the Convener refused the Pursuer's request. Her stated reasons were[50]:-

"*7. The Convener took into account the representations for both Parties. The Convener took into account the potential prejudice to the (Pursuer) in refusing the postponement application and the potential prejudice to the (Defender) in granting it. The Convener also took into account the expeditious disposal of the case.*

8. In the circumstances, given the difficulties in finalising the evidence of Mairi Morrison and the prejudice to (the Defender), the witness ZZ *and (the Committee) in failing to proceed on 21 and 22 January 2016 and given the apparent availability of representation for (the Pursuer) on those dates, it was appropriate to refuse (the Pursuer's) application for postponement. If (the Pursuer) wished to proceed with any of the other potential bases for postponement which had been canvassed as possibilities on 15 December 2015, then she would require to submit a further application, supported by a detailed explanation of her position."*

104. Six days later, on 20 January, the Pursuer advised the Clerk that she had been admitted to hospital. Later the same day, BF barrister advised the Clerk that he could not attend on 21 and 22 January as he could not travel from Berlin having cracked bones in both feet in an accident.

105. Those developments were only drawn to the Committee's attention during the Hearing on 21 January[51]. At that stage, the Presenter moved that the Committee "*proceed in the absence of* BF *and her representative, simply to conclude the evidence of* ZZ *and then to adjourn to the dates that have already been fixed*".

106. The Committee then took advice[52] and asked to see all the documents relating to the reconvened PHR and the events of the preceding nine days[53]. After hearing briefly again from the Presenter on whether it should then adjourn or proceed in absence under Rule 20[54] and taking further advice[55] the Committee decided to proceed in absence on both 21 and 22 January[56].

107. Its reasons for doing so, as narrated the following morning[57], were that the Pursuer remained in South Africa, continued to be represented by BF barrister and had engaged with the Defender by e-mail and through though she had repeatedly sought adjournments of the Hearing, all her applications had been refused and that BF barrister had neither promptly brought his own medical problems to the Committee's attention nor provided appropriate vouching for them.

108. As the Presenter then elected not to re-examine her[58], ZZ 's evidence then concluded[59]. A discussion on timetabling ensued during which it emerged no evidence could be led the following day as no witnesses were available[60]. On 22 January, after reading out the reasons summarised above, the Committee adjourned the Hearing to the next scheduled dates on 27 and 29 April 2016[61].

109. Again, events in advance of the Hearing dates on 27 and 29 April 2016 influenced what occurred on them. On each of 2 February, 7 and 26 April, the Presenter unsuccessfully tried to contact both the Pursuer and BF barrister 62].

110. At 10.30pm on 26 April[63], the Pursuer e-mailed the Clerk seeking to adjourn the Hearing[64]; in her message, she stated that she was not available to attend in the succeeding three weeks[65]. However, it was possible the Hearing would not conclude until the end of 2016 if an adjournment was granted[66].

111. Neither the Pursuer nor BF barrister attended on 27 April. On the motion of the Presenter[67], after taking advice[68], the Committee decided to proceed in absence on each of the April and May dates and refused to adjourn[69]. Evidence was then led from the Defender's second witness.

112. On 29 April, the Convener narrated the Committee's reasons for its decisions the previous day. As regards deciding to proceed in absence, they included the Pursuer's continued absence throughout the Hearing[70]; her continued engagement with the Defender[71] and continuing representation[72]; the failure to date of her own and BF barrister applications to adjourn previous hearings[73]; the lateness of her latest application[74]; BF barrister failure to seek postponement of any unsuitable dates since the reconvened PHR in December, unsuccessful efforts to communicate with him[75], his and the Pursuer's failures to specify why they was unavailable[76], the need for the Hearing to be concluded within a reasonable period[77] and the Pursuer's baseless submissions in her latest application that the Committee was discriminatory, obstructive, biased and dismissive[78]

113. The Committee's reasons for refusing to adjourn included the extensive and protracted context[79] including five PHRs, eight Hearing days, four previous rejected applications to adjourn and three previous decisions to hear evidence in absence[80], BF barrister failures to seek postponement of unsuitable dates[81], the stated intention at the reconvened PHR to proceed on the timetabled dates[82], it appeared the Defender would be prejudiced more than the Pursuer if adjournment was granted as the application was made late in the day and arrangements had been made for witnesses to travel and attend who could not be compelled to do so[83] and there was very limited evidential support for the application[84]

114. The Hearing continued in absence on 5, 6, and 11 May, when the Presenter closed her case[85]. On 12 May, the Committee heard the Presenter's submissions on the evidence and law[86] then adjourned to consider its decision[87]. It subsequently adjourned further to 9[88] then 10[89] June for the same reason.

115. On 10 June, the Committee read out its findings in fact and decision to find Misconduct proved[90]. Having confirmed with the Presenter that the Pursuer had no previous record of Misconduct[91], and explained the range of sanctions which the Committee could impose[92], it heard the Presenter's submissions on that issue[93]. After taking legal advice[94] and an adjournment to consider sanction, the Committee gave its decision to make a removal order[95] and its reasons for doing so[96].

116. The reasons included the serious nature of the misconduct, which included dishonesty, risk of harm to colleagues and service users and abuse of both power and trust, its scope, the degree of premeditation involved, the Pursuer's failures to express remorse or to show insight into her actions and their potential consequences and her blatant disregard for the Code, all of which risked undermining public confidence in her profession

Discussion

117. The review above enables some of the Pursuer's submissions to be briefly disposed of.

118. I reject the Pursuer's submission that BF barrister was hampered by the Pursuer's absence on at least the initially assigned dates. As the summary in para 90 above and events up to 30 September show, BF barrister was aware that the Pursuer could not attend the Hearing and was prepared and able to conduct the case in her absence. Had he not been prepared to do so, he would presumably have withdrawn from acting. As he confirmed in the afternoon of 22 September, he was prepared to continue to act.

119. I reject her submissions that in September 2015 the handwritten hospital note showed the Pursuer had not waived her right to representation and that the Committee's refusal to accept the letter was perverse – as shown, the Pursuer did not produce the letter until 14 January 2016. However, I address the letter in its proper context below.

120. I reject the Pursuer's submissions regarding events on 1 October 2015 as they misapprehended what occurred that day. In brief, it may reasonably be inferred that BF barrister decided not to attend that day as on 29 September the Committee decided no evidence was to be led as renewal of interim suspension needed discussed and ZZ was unavailable[97].

121. I also reject the Pursuer's submission that the Committee should not have imposed sanction in the absence of hearing mitigation. It was not obliged to do so (*Sansui*). The factors which the Committee relied on in assessing sanction were relevant and cannot be criticised. It also took account of any mitigating circumstances disclosed. After Misconduct was found proved, a Removal Order was always the most likely sanction, as dishonesty lies at the top end of the spectrum of gravity of misconduct (*see e.g. Tait at para 13*). Consequently, it was neither excessive nor disproportionate in all the circumstances (*Macaskill*).

122. Finally, I reject the Pursuer's submission that if a Registrant such as the Pursuer waives her right to be represented, the *Hayward* factors ought to still be considered. I do not accept that would not amount to a departure from the relevant test. Second, the submission is irrelevant - the Rules did not prohibit representation in absence, the means by which she and BF barrister agreed the Hearing would be conducted, at least initially.

123. For the Pursuer's remaining points to be considered, it is necessary to determine the Defender's argument that the Committee's earlier decisions were not subject to review. I reject that argument for the following reasons.

124. As the Pursuer submitted, the submission ignores the Pursuer's Article 6 right to an appeal to a court with full jurisdiction. The Defender itself has already recognised the scope and importance of it (*Smith*, paras 5 and 14). The Defender is a creature of a statute which also obliged it to create and maintain procedures. The Rules, the means which the Defender chose to implement that obligation, confer significant discretion and powers which may be exercised during the procedural progress of a Complaint and contain provisions and timescales with which a Registrant must comply (*see e.g. Rules 2(3) - (4), 3(1) - (2), 3(9), 4(1), 5(1) - (2), 1)(1) and (3), 11(1), 14, 19 and 20*). However, as that discretion and those powers are conferred on a sub-Committee of the Defender (*Act, s.49(2) and Rules, para 2(1) of Schedule 4*), the effect of the Defender's submission would be that it appeared to regulate it itself and the body it had tasked to review its own decisions to bring complaints. Such a state of affairs would restrict the scope of s.51.

125. As the Pursuer submitted, it would be perverse if cumulative procedural errors which vitiated a Committee's final decision could not be reviewed. In comparable circumstances, the need to discourage unnecessary procedural reviews is often balanced by appellate courts being subsequently able to open and review such decisions (*e.g. Courts and Reform (Scotland) Act 2014, s.112*). If the Committee's procedural decisions could not be appealed, a Registrant would require to seek judicial review, which might delay the expeditious progress of a Complaint and bear upon the grant or continuation of any interim order preventing a Registrant from working. Repeated attempts to judicially review procedural decisions could permit a Registrant to effectively frustrate the Hearing process. Such difficulties might reduce public confidence in the Defender's ability to fulfil its statutory duty to promote high standards of conduct and practice among social workers.

126. For all these reasons, in my opinion s.51 permits a Committee's prior orders to be opened up or brought under review as necessary. Consequently, it is necessary to revisit the Committee's decisions which were the subject of complaint.

127. The IT problem which manifested itself on the morning of 22 September 2015 needs regarded in context. The Committee and Legal Adviser did not know in advance that the Pursuer was not to be present, that BF barrister was to conduct the Hearing in her absence, needed instructions on whether to seek an adjournment and might make a motion to that effect. However, the Clerk and Presenter both knew all these things. In addition, BF barrister was unaware that the Defender had not passed on his prior intimation of those difficulties to the Committee[98].

128. Though that context was disclosed to the Committee in a piecemeal, erratic way, it had sufficient information before it after the Legal Adviser provided it with an agreed "route map" to follow and clarified that it need only decide whether the IT difficulty, in itself, justified adjournment.

129. Against that background, the Committee made the first of a series of errors.

130. Despite taking time to consider what to do, the Committee decided "*to proceed in the absence of the (Pursuer's) counsel's IT connectivity….(and) to hear and determine the case in the apparent absence of a functioning IT or telephone connection between (*BF barrister *and (the Pursuer) in South Africa* ".

131. The first two of its reasons for that decision - the Pursuer chose not to attend but was represented – show it was aware that so long as BF barrister represented the Pursuer, Rule 20 was not engaged. In blunt terms, the Committee conflated Rules 19 and 20. It was asked to decide whether to adjourn under Rule 19; instead, it made a decision to refuse to adjourn and to proceed in absence under Rule 20. Thereby, it plainly erred.

132. In both its morning and afternoon decisions to refuse to adjourn, the Committee compounded that error by failing to recognise and take account of at least two relevant factors - the need for and the Pursuer to communicate due to her absence and the means of communication they intended to use.

133. The need was obvious. While was prepared to conduct the Hearing in absence, he required to update the Pursuer on its progress, to take instructions as necessary and discuss the many documents lodged late during the Hearing. As a Direct Access barrister, could competently take instructions without an agent. However, for the above reasons, he needed a video signal to do so. Unfortunately, when he came to need instructions just before the Hearing, an IT problem prevented him from obtaining them.

134. Consequently while, as the Committee said, it was the Pursuer's responsibility to put a means of communication in place, it failed to take account of the reason for it being needed and the requirement for it to be video based. Moreover, in its reasons, it erroneously attached weight to the Pursuer's responsibility to ensure the functionality of that means - as its functionality was the responsibility of a telecommunications company or internet service provider, the Pursuer could not have been responsible for it. In those respects, it again erred.

135. In the afternoon, the Committee decided *"to hear and determine the case in the absence of (the Pursuer) and to refuse (her) application for an adjournment in terms of schedule 2, paragraph 19(1) of the rules"*

136. In doing so, it repeated its earlier error – BF barrister asked the Committee to adjourn under Rule 19. While it refused to do so, the Committee also decided to proceed in absence under Rule 20 when clearly that provision was not engaged.

137. That decision was not a badly worded refusal of adjournment which reflected the inevitability of the Hearing taking place in the Pursuer's absence. Nor was its reference to "*determine the case*" in the Pursuer's absence an unintentional error. Both possibilities are dispelled by the context and by the Committee's reasons - it had already conflated the purposes of Rules 19 and 20 the previous day; again, it failed to consider the importance and the means of communication adopted.

138. The Committee also attached weight to "*relevant authorities"* such as *Jones* and *Hayward.* In doing so, it again erred. Neither case was in point - both are decisions on when and in which circumstances a case can lawfully be heard in absence. Rule 20 was not in issue on 25 September 2015.

139. For these reasons, the Committee also erred when refusing BF barrister motion to adjourn.

140. Further errors occurred on 21 and 22 January 2016. To identify and explain them, it is again necessary to examine some of preceding events.

141. On 24 September 2015, BF barrister advised the Committee that he had significant other commitments after 1 October. There is no evidence he was consulted about or given advance notice of proposed new dates before the reconvened PHR. As the Minute shows, the Committee intended to proceed regardless on those dates. As such, they were presented to him as a *fait accompli*, less than a month before the Hearing was due to reconvene.

142. As the reconvened PHR Minute also narrates that the Pursuer was to return to Scotland and attend the remainder of the Hearing, the Defender was on placed on notice that BF barrister would no longer conduct the Hearing in her absence**.**

143. However, on 12 January the Pursuer advised the Clerk that she could no longer attend as she was ill, needed surgery and was unable to fly. Any doubt about the veracity of her advice was dispelled by the holograph letter she obtained from her consultant, which she e-mailed to the Defender at its request on 14 January.

144. As is clear from the Convener's reasons for refusing adjournment on 14 January, the Committee concluded that the Pursuer's illness caused no difficulty as BF barrister continued to represent her. However, that conclusion ignored four issues. First, was was available? Second, if he was available, was he able or prepared to conduct the remainder of the hearing in the Pursuer's absence through illness? Third, was the Pursuer was medically fit to provide him with instructions? Fourth, if he was unavailable, Rule 20 would be engaged; in that event, the Pursuer's stated intention to attend the Hearing and her new medical difficulty needed taken into account.

145. The Convener's reasons addressed none of these issues, all of which ought to have been at least recognised and addressed. Had they been, her decision might have been justified. However, they were not.

146. On 20 January, when BF barrister intimated he was unable to attend through injury, any possibility of him continuing to represent the Pursuer in her absence vanished. Albeit at a very late stage, it was obvious that Rule 20 was engaged. As such, there were only two possible outcomes – the Hearing would either continue in the absence of the Pursuer and BF barrister or would be adjourned.

147. The Committee again erred when deciding to refuse to adjourn and to hear evidence in absence on both days. It failed to recognise BF barrister position, failed to consider a number of relevant *Hayward* factors, attached weight to irrelevant factors and failed to consider relevant material before it.

148. In its reasons, the Committee attached weight to BF barrister alleged failures to promptly draw his injuries to its attention and to vouch his injuries. However, it had no basis to do so. First, as the e-mail did not say when BF barrister injured himself, there was no basis for a finding of delay. Second, as it requested the Defender contact him if any issues arose, it could not be suggested he was failing to co-operate. Third, he had no need to vouch his injuries; as an officer of court, his statement that he was unable to attend through injury ought to have been accepted without question. Separately, as his e-mail confirmed he was in fact otherwise available to attend, the Committee ought, but did not, to have considered that factor when considering whether to adjourn.

149. As regards the *Hayward* factors, the Committee did not take great care - had it done so, it would have recognised and appreciated that it was inevitable the Pursuer and BF barrister would both be absent. There were no rare or exceptional circumstances which favoured proceeding in absence. The direct converse was the case: it was not the Pursuer's fault that she was ill or that BF barrister the person she wished to represent her, could not appear. The Pursuer's difficulty was neither deliberate nor voluntary. Adjournment would at least probably have enabled the Pursuer and BF barrister to attend on another date. While adjournment would inevitably delay the Hearing, that needed balanced against the factors above and the Defender's decision to assign new dates for the remainder of the Hearing without reference to BF barrister who had provided advance notice that his availability was restricted. Finally, when attaching weight to failures to seek adjournment of any unsuitable date, it did not consider that he may have been professionally unable to do so.

150. The Committee also attached weight to irrelevant factors and ignored relevant material before it. The Pursuer's continued residence in South Africa was irrelevant, as she had indicated a wish to attend. She could not do so only because she had been independently assessed as unfit to travel as planned. Greater weight ought to have been afforded to her medical problem and no weight ought to have been attached to her being represented, having regard to BF barrister problem. The Pursuer was not potentially prejudiced, as the Committee concluded; on the contrary, she was clearly actually prejudiced.

151. For all these reasons, the Committee's decisions to refuse adjournment and to proceed in absence on 20 and 21 January were also flawed.

152. *Prima facie*, the Committee's decisions on 27 April to refuse the Pursuer's application to adjourn and to continue in absence on the remaining assigned dates were correct. However, as discussed below, other factors suggest they were vitiated by its previous errors.

153. It is possible to argue that none of the Committee's errors directly prejudiced the Pursuer and/or that she contributed to some of them.

154. On 14 January, nothing arguably turned on the Committee's decisions, as the Hearing was adjourned until the following day without evidence being led and the transcripts do not disclose any further communication difficulty on the succeeding days on which BF barrister appeared. As such, the communication problem perhaps resolved itself.

155. On 21 January 2016, the Committee only decided to hear two days' evidence in absence. As the Presenter elected not to re-examine ZZ and as no evidence at all was taken on 22 January, the Pursuer was arguably not prejudiced.

156. It could be argued the Committee's decision on 27 April 2016 was justified. It was entitled to assume BF barrister continued to act. The dates

in question were assigned over four months beforehand. It was entitled to assume he was available. Neither he nor the Pursuer had responded to the Presenter's messages. The Pursuer's reasons for seeking adjournment were inspecific and unvouched. Adjournment would potentially further delay the Hearing until the end of the year.

157. Finally, even after it twice decided to proceed in absence, the Committee did not close its eyes to the possibility of the Pursuer or BF barrister re-attending. It tailored the remaining Hearing programme accordingly and forwarded transcripts to them for the days on which they did not appear.

158. Nonetheless, as the Pursuer submitted, such arguments ignore the cumulative effect of the Committee's errors and decisions and, possibly, their consequences.

159. In September 2015, the Committee repeatedly erred by failing to follow the Legal Adviser's route map, by conflating Rules 19 and 20 and by attaching weight to irrelevant factors. In January 2016, it erred twice more by failing to take important changes into account, notably the Pursuer's intimation that she was to attend the remainder of the Hearing, her subsequent medical difficulties which meant she was unable to do so and BF barrister similar difficulty. The Committee failed to appreciate and consider the circumstances which caused Rule 20 to be engaged.

160. Those errors cannot be regarded in isolation or excused, as they undeniably influenced the manner in which the Hearing subsequently unfolded. The Committee relied upon the September and January refusals when refusing later adjournment applications and when it ordered that the remainder of the Hearing proceed in absence. It is not certain that the September communication difficulties between BF barrister and the Pursuer resolved themselves. Though the Presenter did not re-examine Redacted on 21 January, the Committee did question her. As a result, BF barrister lost the opportunity to clear up any points which arose.

161. Finally, the errors need considered in light of two further factors the disconnect between the Committee on the one hand and BF barrister the Legal Adviser and the Defender on the other and the deteriorating relationship between the Committee, it Legal Adviser and

162. The disconnect, and the confusion it caused, is partly explained in paras 81 – 85 above. At the pre-Hearing PHRs, BF barrister made plain his dissatisfaction about the Complaint being brought immediately after the conclusion of a two year fraud investigation by the Defender, early Hearing dates being assigned and the Defender disclosing its evidence late in the day. Those complaints may have had some foundation - the first two are matters of fact; moreover, BF barrister advice to the Committee on 22 September that some witness statements were only taken in July and August 2015 (and presumably only disclosed after) was not contradicted[99]. In addition, he felt he had insufficient time to instruct an expert forensic accountant (a desirable witness in a fraud case) and needed to recover and consider documents from the Council when there was little time to do so.

163. However, if those factors did hamper his ability to prepare for the Hearing, others he relied upon did not. He thought the case would be funded by Legal Aid, which is not available for proceedings before the Defender. Whether the Pursuer was to seek judicial review of the Council's decision to dismiss the Pursuer was a stale issue, not least as no such proceedings had been raised.

164. Had more robust case management been exercised at the PHR's, BF barrister weak factors could have been identified and disposed of and those which merited consideration addressed and resolved: the identity of the forensic accountant, how long it would take for his report to be obtained, whether he needed to see any of the papers proposed to be recovered from the Council, the nature of those papers clarified etc. In turn, those points, and the circumstances in which BF barrister came to represent the Pursuer in absence could have been made known to the Committee.

165. However, they were not – the available evidence suggests that the Committee did not see the PHR minutes until 21 January. On 22 September, BF barrister did not know the Committee was unaware of his problems. The cumulative impact of these factors and misunderstandings became evident during some testy exchanges between the Legal Adviser and Committee on the first morning of the Hearing which continued in the afternoon[100].

166. That state of affairs continued during both Redacted subsequent examination in chief **[101]** and her cross examination[102]. may well also have been frustrated when the further Hearing dates were assigned without reference to him. Finally, the Committee subsequently refused to adjourn the January dates although the Pursuer intended to attend but became unfit to do so, as did he.

167. Cumulatively, that evidence suggests it is possible that the Pursuer and deliberately disengaged from the Hearing as a result of what they perceived to be continuing unfairness on the part of the Defender, Committee and Legal Adviser before and during the Hearing.

168. As some of the points above involve a degree of speculation, it is impossible to find that was the case. However, it is equally impossible to discount the possibility that the Defender's own actions caused or contributed to and the Pursuer's absences, contrary to the Defender's submission that the Pursuer frustrated it from exercising its statutory function.

Decision

169. Either way, as the Decision was vitiated by a series of errors which commenced on 22 September 2015 which were repeated and compounded on subsequent dates, the Pursuer's primary submission must be sustained. It is only possible, but not probable, the errors caused or contributed to and the Pursuer's absences after 27 April.

170. For those reasons, the Decision must be recalled. As the allegations which gave rise to the Complaint occurred nearly ten years ago, I have, as suggested by Senior Counsel for the Pursuer, provided for the case to call before me to discuss whether the Defender still wishes the Pursuer's case remitted to a new Committee. In addition, I have yet to be addressed on expenses.

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[1] s.43(1)(b)

[2] s.53

[3] ss.44 and 49(3)

[4] s.49

[5] pp87 - 120

[6] s.53(4)

[7] s.53(3A) and (3B)

[8] Section 5.5

[9] ss.48 – 50 and 57

[10] pp 131-140

[11] pp 135 - 137

[12] Rule 5(5)(b)

[13] Rules, Schedule 4, paragraph 2

[14] Complaint, paragraph 2

[15] Schedule 2, paragraph 3

[16] pp 121 – 130

[17]pp1917 - 1919

[18] pp2896 - 2903

[19] p2902

[20] see www.barcouncil.org.uk/directaccessportal

[21] p1001

[22] p981

[23] p974

[24] p961

[25] pp971 - 972

[26] p972

[27] pp979 - 980

[28] p964

[29] pp960 and 963

[30] p967

[31] p978

[32] pp974 - 977

[33] p973

[34] p1002

[35] p1002 - 1003

[36] *ibid*

[37] p1006

[38] pp1006 - 1009

[39] p1010

[40] pp1010-1012

[41] p1012

[42] pp1015 - 1038

[43] pp1056 - 1059

[44] pp1065 - 1065

[45] pp1066 - 1072

[46] pp1625 - 1626

[47] pp719 - 722

[48] p1456

[49] p2895

[50] pp755 - 757

[51] pp1921 – 1923 and p1929

[52] pp1928 -1933

[53] p1935

[54] p1937

[55] pp1939 - 1946

[56] p1950

[57] p2101 - 2110

[58] p1951

[59] p2086

[60] p2088

[61] pp2110 - 2111

[62] *ibid*

[63] p2133

[64] *ibid*

[65] p2134

[66] *ibid*

[67] *ibid*

[68] pp2140 - 2144

[69] p2145

[70] *ibid*

[71] p2244

[72] p2243

[73] *ibid*

[74] *ibid*

[75] pp2244 - 2245

[76] pp2245 - 2246

[77] *ibid*

[78] pp2246 - 2247

[79] p2247

[80] pp2247 - 2248

[81] pp2248 - 2249

[82] p2249

[83] pp2249 - 2250

[84] p2251

[85] p2662

[86] pp2682 - 2760

[87] p2765

[88] p2772

[89] p2778

[90] pp2782 - 2808

[91] p2809

[92] *ibid*

[93] p2810

[94] p2825 - 2832

[95] p2833

[96] p2833 - 2840

[97] see e.g. p1445

[98]pp971 - 972

[99] pp975 - 976

[100] see e.g. p967-969, 992 – 993, 1013, 1020

[101] see e.g. pp 1231- 1236

[102] see e.g. pp1259 – 1289, p1344, p1371, pp1389 – 90, p1496, pp1501 – 1504, p1518, pp1549 - 1564

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