

Nursing and Midwifery Council

Fitness to Practise Committee

Restoration Hearing

13 April 2022 and 27 May 2022

Virtual Hearing

Name of Applicant: **Malcolm Percy Philip Fisher**

NMC PIN: 05G1579E

Part(s) of the register: Registered Nurse – Sub-part 1
Mental Health nursing (November 2005)

Relevant Location: Essex

Panel Members: Scott Handley (Chair, Lay member)
Claire Rashid (Registrant member)
Keith Murray (Lay member)

Legal Assessor: Justin Gau (Day 1)
Attracta Wilson (Day 2)

Hearing co-ordinator: Ruth Bass (Day 1)
Philip Austin (Day 2)

Mr Fisher: Present and unrepresented

Nursing and Midwifery Council: Represented by Harriet Gilchrist (Day 1) and
Gulcan Olurcan (Day 2), Counsel instructed by
the NMC

Outcome: Application granted subject to the completion
of a return to practice course and conditions of
practice order (12 months)

Determination of application for Restoration to the Register:

This is a hearing of your first application for restoration to the Nursing and Midwifery Council (NMC) Register. A substantive order review panel of the Conduct and Competence Committee directed on 23 November 2016 that your name be removed from the NMC Register based on its findings with regard to the facts of your case and the impairment of your fitness to practise. This application is made by you in accordance with Article 33 of the Nursing and Midwifery Order 2001 (“the Order”), as at least five years have now elapsed since the date of the striking-off order.

At this hearing the panel may reject your application or it may grant your application unconditionally. It may grant your application subject to your satisfying the requirements of Article 19(3) and it may make a conditions of practice order.

The panel has considered your application for restoration to the NMC’s Register.

Decision and reasons on application for hearing to be held in private

At the outset of the hearing, Ms Gilchrist made a request that matters relating to your health be held in private pursuant to Rule 19 of the ‘Nursing and Midwifery Council (Fitness to Practise) Rules 2004’, as amended (the Rules).

You told the panel that you were happy for the panel to proceed however it deemed appropriate.

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

Having heard that matters concerning your health will be raised in this hearing, the panel was of the view that such matters should be dealt with in private.

Background (as taken from the substantive hearing)

'The panel heard that Mr Fisher was employed as a nurse by North Essex Partnership NHS Trust ("the Trust") since 2005 and was re-deployed to Gosfield Ward Lakes on 20 December 2007. The panel heard that Mr Fisher's performance at the Lakes was being monitored. He had experienced difficult relationships with his colleagues at the Lakes and for these reasons on 14 January 2013, Mr Fisher moved to Peter Bruff Adult Mental Unit ("PBU") to work as a staff nurse.

The panel heard that, whilst Mr Fisher was at PBU, he first appeared to settle in well. However, soon it became necessary for Mr 2, Ward Manager of PBU, to have regular informal meetings with Mr Fisher to discuss various concerns surrounding his practice which had been raised by the team.

On 1 July 2013, Mr 2 sent a letter to Mr Fisher advising him of a meeting to discuss the First Formal Stage of Capability.

On 18 July 2013, the First Formal Stage of Capability Meeting was held between Mr 2 and Mr Fisher. It was agreed at this meeting that Mr Fisher be placed on an individual Performance Action Plan ("IPAP") which was agreed with Mr Fisher. Rather than there being very clear pass/fail criteria in Mr Fisher's IPAP, it was left open to allow a subjective interpretation of his performance.

In December 2013, further concerns were raised regarding Mr Fisher.

On 22 December 2013, Ms 1, Senior Health Care Assistant on PBU, experienced difficulties with a male patient who had been acting in an antagonistic and threatening manner with female staff on PBU. Mr Fisher was in the nursing office when Ms 1 approached him asking for assistance. It is alleged that this request was ignored by Mr Fisher. Later that day Mr Fisher is alleged to have said to Ms 1 words to the effect of "why should I clear up the mess you make with patients?"

On 22 December 2013, Mr Fisher, whilst not under supervision in accordance with his IPAP and without obvious reason, is alleged to have dispensed and administered medications to patients on PBU whilst another staff member, Ms 4,

was 1:1 with a patient. Later that day staff had telephoned Mr Fisher at home to clarify if certain medications had been administered as there were medications that had not been signed for. It was reported that Mr Fisher picked up his home telephone when he was called but did not reply to the staff member who was attempting to establish contact with him.

On 26 December 2013 it was also alleged that Mr Fisher dispensed all medications without attempting to have them checked by another qualified nurse which was again in breach of his IPAP.

On 27 December 2013, Mr 2 met Mr Fisher regarding a report from a colleague on PBU, Ms 4, that Mr Fisher had undertaken medication rounds on his own despite not being permitted to do so as per his IPAP. Mr Fisher could not explain why he had done so.

On 3 January 2014, Ms 3 subsequently held a meeting with Mr Fisher to discuss the allegations which had been raised by the PBU Team.

Following the outcome of these meetings Mr 2 commissioned a disciplinary investigation into the following allegations:

- ***Allegation One:*** *That on 22 and 26 December 2013 Mr Fisher dispensed and administered medication to service users on PBU without being under the supervision of another First Level Nurse, which breached reasonable management instructions as set out in Mr Fisher's Individual Performance Action Plan dated 18 July 2013. This allegation constituted a failure to follow reasonable management instructions which was also a breach of the Trust's Disciplinary and Policy Procedure;*
- ***Allegation two:*** *That on 22 December 2013 Mr Fisher did not provide assistance to a female colleague when she asked for assistance, Health Care Assistant [Ms 1], leaving her to manage a challenging situation on her own, which breached Mr Fisher's agreed Individual Performance Action Plan dated 18 July 2013;*
- ***Allegation three:*** *That this behaviour had breached the NMC Professional Code of Conduct.*

On 7 January 2014, Ms 3 wrote to Mr Fisher informing him that the Trust regarded such allegations as Gross Misconduct and an investigation would take place in accordance with the terms of the Trust's Disciplinary Policy and Procedure.

Ms 3 was appointed as Investigation Officer and interviewed a number of witnesses as part of the disciplinary investigation: Ms 4; Ms 1; Ms 5; Mr 2; and Mr Fisher.

During Mr Fisher's interview during the disciplinary investigation, he admitted to dispensing medication on medication rounds on 22 and 26 December 2014 without another qualified member of staff which was against written actions in his IPAP.

Ms 3's final conclusion in her report was that there was a case to answer for allegation one, two and three and therefore this matter should proceed to a disciplinary hearing.

On 2 September 2014, a disciplinary hearing for Mr Fisher subsequently took place. He gave evidence at the disciplinary hearing and admitted allegation one; denied allegation two; and denied allegation three. Mr Fisher confirmed at the hearing that he did undertake a medication round unsupervised at 08:00 on 22 December 2013, however, he said he did not undertake the medication round at 14:00 medication round on 22 December 2013. It was explained to Mr Fisher during this hearing that members of staff had to telephone him when he was at home to see if he had given the 14:00 medications on PBU. When asked, Mr Fisher denied ever receiving this telephone call. After further questioning of Mr Fisher, he then admitted that he did in fact undertake the 14:00 medication round.

The disciplinary hearing concluded that a Final Written Warning for 24 months and referral to the NMC would be appropriate for Mr Fisher and recommended reviewing Mr Fisher's competency action plan to address the identified and outstanding issues along with revised timescales.

On 22 October 2014, a reconvened hearing took place to hear allegation two. Mr Fisher had denied allegation two at the hearing on 2 September 2014. However the allegation was proven.

The disciplinary hearing concluded that the sanctions issued on 2 September 2014 remained and were to commence on Mr Fisher's return to work. If Mr Fisher did not show satisfactory improvement then this would lead to his dismissal.

After the hearing had ended on 27 October 2014 Mr Fisher went on sick leave. He did not return to work at the Trust.

On 19 February 2015, Mr Fisher's employment with the Trust was terminated upon the basis that he declined all alternative offers of support at work.

[PRIVATE]. Mr Fisher's employment was terminated on the grounds of ill health. Mr Fisher has submitted an appeal to his dismissal, and the HR of the Trust is currently dealing with this appeal.'

These matters were considered by a panel of the Conduct and Competence Committee at a substantive hearing from 11 -13 November 2015. The panel at that hearing found the following charges proved in your absence:

'That you, whilst employed as a Registered Nurse on the Peter Bruff Adult Mental Health Ward ('PBU') at Clacton & District Hospital:-

1. On 22 and/or 26 December 2013, without being under the supervision of another registered nurse, dispensed and administered medication to service users on PBU in breach of your action plan.

2. On 22 December 2013, whilst acting as the nurse in charge of the shift, you did not assist a female colleague with an aggressive male patient when she asked you to do so.

3. [Not proved].

And, in light of the above, in charge 1 and 2, your fitness to practice is impaired by your misconduct”.

The last reviewing panel at the substantive order review hearing on 23 November 2016 determined that your fitness to practise was impaired for the following reasons:

“In its consideration of whether Mr Fisher had remedied his practice, the panel took into account that he has not presented any evidence to illustrate that he has addressed the concerns highlighted by the previous panel. The panel noted that although encouraged to do so, Mr Fisher did not attend this review. In his telephone call on 13 September 2016, he stated that he saw no point in attending the hearing and had no representation and that he would not beg. He has not provided the panel with any reflection addressing his misconduct. The panel noted the recent matter which has been brought to its attention. It concluded that Mr Fisher has shown contempt for the NMC regulatory process. Furthermore he has sought to blame others for his present predicament, as evidenced in his comments on Facebook. The panel also considered the harm and distress which Mr Fisher’s comments may have caused to those named by him on social media.

The panel was of the view that on the balance of probability, it was indeed Mr Fisher who had made the comments on Facebook. He admitted that posting them on Facebook was a big mistake. The panel concluded that the concerns of the previous panel have been realised, and furthermore have been compounded by his actions since the substantive review.

In the absence of the required evidence demonstrating insight, and considering the recent matter which has been brought to the panel’s attention, the panel concluded that there remains a risk of repetition of Mr Fisher’s past failings. The panel concluded that Mr Fisher’s fitness to practise remains impaired for this reason and that this finding is also required on public interest grounds.”

The last reviewing panel also determined the following with regard to sanction:

‘The panel next considered imposing a further suspension order. The panel noted that Mr Fisher has not provided evidence to show that he has begun to

remediate his failings. The panel was deeply concerned about Mr Fisher's postings on Facebook and his subsequent comment that he was not thereby in breach of any rules. The panel was of the view that Mr Fisher, by way of his conduct since the substantive hearing has actually made the case even more serious.

The panel considered that Mr Fisher had been provided with an opportunity to submit evidence of remediation. He had not taken it. Mr Fisher has not demonstrated any insight and has not expressed any remorse. The panel had no evidence that he could or would respond to opportunities to remediate.

The panel determined that a further period of suspension would not serve any useful purpose in all the circumstances. Mr Fisher's recent actions on social media have shown there to be a serious attitudinal problem which has compounded his misconduct. The panel was of the view that he has shown a complete disregard for the profession and the public. The panel determined that it was necessary to take action to prevent Mr Fisher from practising in the future and concluded that the only sanction that would adequately protect the public and serve the public interest was a striking-off order."

Submissions and evidence

The panel took into account the documentary evidence, which included the contents of your application for restoration dated 2 December 2021, three character references, and the reasons from the substantive order review hearing on 23 November 2016.

The panel had regard to the submissions of Ms Gilchrist, on behalf of the NMC, and those made by you, together with your oral evidence.

Ms Gilchrist outlined the background of the case and the facts which led to the striking-off order. She referred this panel to the substantive order review hearing panel's decision which resulted in your removal from the NMC's Register and reminded the panel of the test set out in Article 33(5) of the Order. Ms Gilchrist submitted that you must satisfy the panel that you are a *'fit and proper person to practise as a registered*

nurse'. She reminded the panel that should you be allowed to return to practise, you would need to complete a Return to Practise ("RtP") course or undertake a Test of Competence Course in line with NMC standards.

Ms Gilchrist told the panel that you have been in semi-retirement since being removed from the NMC Register. She referred the panel to the three character references provided and submitted that they were limited with regard to information about any employment, but did state that you wanted to get back to helping others.

Ms Gilchrist submitted that it is a matter for the panel's discretion as to whether you should be restored to the NMC Register. However, should the panel find that your registration should be restored it could allow a restoration with conditions.

In your oral evidence, you told the panel that you accepted that the reasons given for being struck-off were valid. You have not worked since being struck-off and are currently undertaking an Open University course in Social Sciences which, once completed will qualify as a degree, and you have one more year to complete.

You told the panel that since being struck-off the NMC Register, you have had time to reflect on what you did wrong. You expressed that you are truly sorry for the hurt and upset that you caused to people. You told the panel that you are a different person now. [PRIVATE]. You said "*I have learnt to adjust and re-wire my thinking, my way of dealing with things is different*". [PRIVATE].

You explained to the panel that when you were going through your disciplinary process, you were told that you should not have contact with any members of staff or patients and were taken off your normal nursing duties for a year and placed doing paperwork in isolation. You expressed that on some days you would not have any work to do from 09:00 to 17:00 hours and that the isolation exacerbated your [PRIVATE]. [PRIVATE]. You told the panel that you were a Band 5 nurse at the time, but the paper work you were asked to do was Band 6 level and you did not receive any training. You expressed that you did not have union support at the time or any friends in the Trust and you used Facebook as a means to offload and vent your feelings. You further expressed to the panel that your reason for not attending the substantive hearing was that you could not

afford the train fares required for the three days. You told the panel that you were not trying to use these matters as an excuse, but was trying to show how the circumstances at the time impacted your [PRIVATE] and how that led to you inappropriately putting your thoughts on Facebook as a way of coping with your [PRIVATE] at the time. You expressed that you felt as though you had lost everything, had nothing further to lose and in effect this is how you ended up in this position today.

[PRIVATE].

You expressed your frustration with how the Trust dealt with your health condition.

You told the panel that you have not been in a nursing environment since being dismissed and your nursing skills are now below par and you will need to undertake training. You told the panel that you had made some preliminary enquiries in to RtP courses for mental health nursing and will follow up with those enquiries should you be allowed to return to the NMC Register.

You told the panel that were you allowed to return to practise, you would be looking at part time work, either with an agency, or working for a Trust. You explained that you had not sought any roles as a nursing assistant as you felt that no one would consider you for a post as you had been struck-off the NMC Register.

You expressed that getting back to nursing was important to you, you had worked hard to become a nurse and had re-applied as soon as you were able to. You told the panel that during the COVID-19 pandemic, you felt that you could have done something to help the situation in a small way, however, you were unable to do anything because of the situation that you had created.

You told the panel that you are truly sorry for your comments on Facebook, stating that your comments were abhorrent, unprofessional, and caused upset to a lot of people for which you are truly sorry, and did not do you any good.

You told the panel that you had done some voluntary work with Age Concern for a short time.

You told the panel that in the future, if you were practicing and felt anger and frustrated, you would not respond as you did previously. You were now in a different '*head space*'

and if you had grievances you would use the appropriate '*corridors*' to speak to people, rather than vent on social media.

With regard to your nursing practice in the future, you told the panel that despite your actions having been taken with the best interests of the patients in mind in providing them with medication, and notwithstanding any future staff shortages, you would follow the policies in place. You accepted that you should not have dispensed the medication by yourself and in future would consider other '*avenues*' that you know are available.

You told the panel that you had learnt from your mistakes and would adhere to the policies in the future.

The panel accepted the advice of the legal assessor.

The legal assessor referred the panel to the test provided in Article 33(5) of the Order. Firstly, you must satisfy the panel that you satisfy the requirements of Article 9(2)(a) (approved qualification and prescribed education, training and experience) and Article 9(2)(b) (capable of safe practice). Secondly, you must satisfy the panel whether, having regard in particular to the circumstances which led to the making of the striking-off order in 2016, you are a '*fit and proper person to practise as a registered nurse*'. The legal assessor advised the panel that it is for you to satisfy the panel of these matters and it is for the panel to use its own independent judgment as to whether it is so satisfied.

Decision on the application for restoration

The panel has considered your application for restoration to the NMC register very carefully. It has decided to allow the application subject to your successful completion of a return to practice course and a conditions of practice order.

In reaching its decision the panel recognised its statutory duty to protect the public as well as maintain public confidence in the reputation of the profession, which includes the declaring and upholding of proper professional standards. The panel bore in mind that the burden was upon you to satisfy it that you are a fit and proper person who is able to practise safely and effectively as a nurse.

In considering whether you are a fit and proper person, the panel considered the extent to which you had displayed insight and remediation into the incidents which led to you being struck off the register in 2016. The panel was satisfied that you had demonstrated a good level of insight. It had regard to your oral evidence given at the hearing held on 13 April 2022 and was of the view that you had displayed genuine remorse for your actions. It had regard to the reflection you had undertaken over the past 5 years and took note of how you gave context to the issues which lead to your misconduct without trying to blame the Trust, whilst understanding the impact of [PRIVATE] at the time, and acknowledging your complete acceptance of the misconduct. You were able to express to the panel in detail how your [PRIVATE] was exacerbated due to the working environment at the Trust, and how [PRIVATE], and what you would do in the future if you found yourself in a similar situation. You were also able to demonstrate to the panel insight into how your non-engagement with the NMC had negatively impacted the outcome your case.

The panel had regard to your evidence that you had not been able to keep up to date with your professional practice as you had not been working, and financially it was not feasible for you to undertake nursing related courses as there was no guarantee you would be allowed back to practise. It considered the fact that you are undertaking a degree course in social sciences in order to continue your education. You are also keen to get back to nursing and have looked into RtP courses. The panel was satisfied that you had demonstrated some commitment to the profession in this regard. It acknowledged the personal development you have undertaken and your commitment to return to practise as a nurse part-time whilst you continue to study.

The panel had regard to the fact that prior to the misconduct found in this case, it had no evidence of complaints regarding your practice for a period of some 10 years, and the original panel had considered the misconduct to be remediable. This panel was of the view that given the five years you have had to reflect and the behaviours you have demonstrated today, you would be safe to practice following the policies in place at a place of work. You told the panel that you had worked at two places within the Trust and the two places had different policies with regard to administering medication, and your actions in administering the medication without having a second nurse was allowed at the other place of work within the Trust. You told the panel that you decided to

administer the medication to the patient despite there not being another nurse, because it was allowed under another Trust policy and it was not fair that the patient would have to go without their medication because the ward was understaffed and you did not know when another nurse would arrive. You told the panel that in the future you would do what was required of you by the policy. The panel was of the view that this would need to be tested in practice, and could be monitored by way of a conditions of practice order. The panel was also of the view that a return to practice course would cover the medication issues.

The panel was of the view that you had demonstrated what you had learnt from these incidents, and shown an understanding of how you would act differently in the future with regard to following Trust policies for the safety of patients.

Taking all of these circumstances into account, including your level of insight and desire to return to nursing, the panel was satisfied that the incidents which led to the striking-off were unlikely to be repeated. On this basis, the panel considered that you had demonstrated that you are a fit and proper person.

The panel next considered whether you would be capable of safe and effective practice as a nurse. In doing so, it had regard to your employment history since being struck-off noting that you had worked temporarily as a volunteer at Age Concern, but had no other employment beyond this. It had regard to the fact that you had not been working and were not in a financial position to undertake any courses to keep up to date with professional practice. The panel noted that you are currently undertaking an Open University course, and although not related to nursing practice, have continued in education. Despite not having kept up to date with nursing practice, the panel was of the view that the level of insight demonstrated by you had addressed the concerns surrounding your misconduct. You have made some effort in looking into return to practice courses for mental health, have addressed your health issue and undertaken personal development and have acknowledged that returning to work part-time as a nurse would be the best course given your other course commitments. It noted your reflections on this incident during your oral evidence, where you were able to demonstrate to the panel how you would respond differently in the future if a similar situation arose, and was of the view that this further demonstrated insight on your part.

The panel bore in mind that you have been unable to practise as a registered nurse since being struck-off the NMC Register, and therefore you would not have been able to fully maintain your nursing knowledge and skills during this period of time. However, the panel found that your insight into your misconduct is good, and although it considered a period of testing your compliance was necessary to protect patients, you had demonstrated a genuine desire and commitment to return to nursing in hoping to undertake a return to practice course. The panel was therefore satisfied that you would be capable of practising safely and effectively as a registered nurse in the future, subject to you meeting the NMC's requirements for additional education or training and experience and demonstrating in practice that you are capable of following policies and procedures.

The panel was therefore satisfied that you have demonstrated that you are a fit and proper person who would be capable of safe and effective practice after the further training which you have acknowledged you will need.

Having regard to the context of the concerns which led to the striking-off order being imposed in 2016, the panel considered whether public confidence in the nursing profession would be undermined if you were restored to the NMC Register. It noted that the misconduct was initially deemed remediable, however you did not engage at the time, and therefore a decision was made without the opportunity of hearing from you. Your lack of engagement was partly due to not having funds to attend the hearing at the time. The panel considered that you have displayed sufficient insight into your misconduct. In these circumstances, the panel was satisfied that an informed member of the public would support your restoration to the NMC Register, and that public confidence in the profession and in the NMC as a regulator would not be undermined if your application was granted.

The panel therefore decided to grant your application for restoration subject to the following conditions of practice:

For the purposes of these conditions, 'employment' and 'work' mean any paid or unpaid post in a nursing, midwifery or nursing associate role. Also, 'course of study' and 'course' mean any course of educational study connected to nursing, midwifery or nursing associates.

1. You must send the NMC a bi-annual letter confirming that you are following the policies in place.

2. You must ensure that you are supervised by your manager or supervisor any time you are working. Your supervision must consist of:
 - a) Working at all times on the same shift as, but not always directly observed by, a registered nurse of band 5 or above.

 - b) A quarterly report from your manager or supervisor confirming that you are complying with the policies and procedures in place.

3. You must keep us informed about anywhere you are studying by:
 - a) Telling your case officer within seven days of accepting any course of study.

 - b) Giving your case officer the name and contact details of the organisation offering that course of study.

4. You must immediately give a copy of these conditions to:
 - a) Any organisation or person you work for.

 - b) Any agency you apply to or are registered with for work.

 - c) Any employers you apply to for work (at the time of application).

- d) Any establishment you apply to (at the time of application), or with which you are already enrolled, for a course of study.
 - e) Any current or prospective patients or clients you intend to see or care for on a private basis when you are working in a self-employed capacity.
5. You must tell your case officer, within seven days of your becoming aware of:
- a) Any clinical incident you are involved in.
 - b) Any investigation started against you.
 - c) Any disciplinary proceedings taken against you.
6. You must allow your case officer to share, as necessary, details about your performance, your compliance with and / or progress under these conditions with:
- a) Any current or future employer.
 - b) Any educational establishment.
 - c) Any other person(s) involved in your retraining and/or supervision required by these conditions.

This order will run for 12 months to allow you an opportunity to demonstrate that you are able to demonstrate compliance with policies and procedures put in place to ensure patient safety.

The panel also bore in mind that you have not practised as a registered nurse since 2016 and that you no longer meet the requirements for registration with the NMC on this basis. The panel therefore determined to grant your application subject to you satisfying the requirements for additional education or training and experience, as set out in Article 19(3). Having regard to your length of time out of nursing practice, and bearing in mind the significant developments within the profession that have occurred over that period, the panel determined to allow your application for restoration subject to your completion

of a return to practice course and paying the prescribed fee which satisfies the requirements of Article 19(3) and Article 33(7)(a). This article states:

'The Council may by rules require persons who have not practised or who have not practised for or during a prescribed period, to undertake such education or training or to gain such experience as it shall specify in standards.

(7) On granting an application for restoration, the Committee—

(a) shall direct the Registrar to register the applicant in the relevant part of the register on his satisfying any requirements imposed under paragraph (6) and on payment of the prescribed fee...'

That concludes this determination.

This decision will be confirmed to you in writing.