

Nursing and Midwifery Council

Fitness to Practise Committee

Substantive Order Review Meeting

Wednesday 13 December 2023

Nursing and Midwifery Council, 2 Stratford Place, Montfichet Road, London, E20 1EJ

Name of Registrant Nurse: Paul Warren Zirker

NMC PIN: 96I7043E

Part(s) of the register: Registered Nurse – Sub Part 1
Adult Nursing – September 2000

Relevant location: Cardiff

Panel Members: Bernard Herdan (Chair, lay member)
Lisa Punter (Registrant member)
Jane McLeod (Lay member)

Legal Assessor: Nigel Ingram

Hearings Coordinator: Ruth Bass

Order being reviewed: Suspension Order (12 months)

Fitness to practise: **Impaired**

Outcome: **Impaired – order to lapse upon expiry in accordance with Article 30 (1), namely at the end of 24 January 2024**

Decision and reasons on service of Notice of Meeting

The panel noted at the start of this meeting that the Notice of Meeting had been sent to Mr Zirker's registered email address by secure email on 8 November 2023.

Further, the panel noted that the Notice of Meeting was also sent to Mr Zirker's representative at the Royal College of Nursing (RCN) on 8 November 2023.

The panel took into account that the Notice of Meeting provided details of the review that the review meeting would be held no sooner than 11 December 2023 and invited Mr Zirker to provide any written evidence seven days before this date, which Mr Zirker has provided.

The panel also noted that the Notice indicated the review would be undertaken in a meeting unless Mr Zirker requested a hearing seven days before the scheduled meeting date. He did not request such a hearing.

The panel accepted the advice of the legal assessor.

In light of all of the information available, the panel was satisfied that Mr Zirker has been served with notice of this meeting in accordance with the requirements of Rules 11A and 34 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (as amended) (the Rules).

Decision and reasons on review of the current order

The panel decided to make a finding of impairment and allow the current order to lapse. This order will therefore lapse at the end of 24 January 2024 in accordance with Article 30(1) of the Nursing and Midwifery Order 2001 (as amended) (the Order).

This is the first review of a substantive suspension order originally imposed for a period of 12 months by a Fitness to Practise Committee panel on 21 December 2022.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved by way of admission which resulted in the imposition of the substantive order were as follows:

'That you, a registered nurse:

1. *On or around 28 June 2017, extended a negative pressure dressing applied to Patient A to cover a second, previously uncovered, wound;*
 - a. *When a negative pressure dressing had not been prescribed for this wound;*
 - b. *In direct contradiction to the instructions for this wound left by the Tissue Viability Nurse;*
2. *On or around 28 June 2017, failed to record that you had applied a negative pressure dressing to a wound of Patient A's that was not already covered by the negative pressure dressing;*
3. *On 4 July 2017, gave colleagues incorrect advice as to the application of negative pressure dressings;*
4. *On 30 January 2019, in relation to Patient B;*
 - a. *Acted outside your competence by carrying out a rectal examination;*
 - b. *Administered a Microlax enema without a prescription;*
 - c. *Asked Doctor 1 to make a retrospective prescription for the Microlax enema;*
 - d. *Signed the patient chart retrospectively to suggest that the Microlax enema had been administered after the prescription had been made;*
5. *Your conduct at charges 4.c and/or 4.d was dishonest in that you intended for anyone reading Patient B's medical records to believe that the Microlax*

enema had been prescribed when you administered it, when it was in fact prescribed by Doctor 2 after you had administered it;

6. *On 30 January 2019, in relation to Patient C, failed to keep accurate records, in that you;*
 - a. *Signed the medicine chart to indicate that Patient C had refused prescribed paracetamol at 08:00 and 12:00 when said medication was not prescribed until 15:30;*

And, in light of the above, your fitness to practise is impaired by reason of your misconduct.'

The original panel determined the following with regard to impairment:

'The panel had regard to the case of Grant and considered limbs a, b, c and d to be engaged in this case. It determined that Mr Zirker had exposed patients in his care to an unwarranted risk of harm and he had acted in a way that would have brought the nursing profession into disrepute. Furthermore, Mr Zirker had breached fundamental tenets of the nursing profession and had behaved in a dishonest manner.

In considering whether Mr Zirker has addressed the issues identified, the panel had regard to the factors set out in Cohen. The panel noted that clinical deficiencies are often easier to remediate than behavioural concerns, in principle. However, in having regard to Mr Zirker's reflections, as set out in the provisional CPD agreement, the panel was satisfied that he had demonstrated a certain level of insight into his clinical and behavioural concerns. Mr Zirker repeatedly stated in his reflections that he was "not thinking clearly" and, specifically in relation to the incident involving Patient B, said: "On reflection, I realise I was arrogant and not believing that I was doing wrong, when actually I was in breach of my code, and was very lucky no harm came to the patient". Whilst Mr Zirker attempted to rationalise some of his actions due to the busy working environment, the panel

determined that Mr Zirker has demonstrated an understanding of how his actions could have adversely impacted upon patient safety. He has also displayed an element of remorse.

The panel also had sight of two testimonials provided on behalf of Mr Zirker, attesting positively to his nursing practice and his caring nature.

Whilst the panel considered Mr Zirker's misconduct to be capable of remediation, the panel had no evidence before it of him having done so. There was no evidence of Mr Zirker having strengthened his nursing practice through retraining, and there was nothing outlining what Mr Zirker would do differently if faced with a similar set of circumstances. The panel also noted that Mr Zirker is not currently working as a registered nurse, as he is now employed in a different profession.

In taking account of all the above, the panel was satisfied that Mr Zirker had demonstrated some insight and remorse, but he was lacking in the area of remediation. It determined that Mr Zirker would need to strengthen his practice in the areas of concern. Until such time, the panel considered there to be a real risk of repetition.

The panel had no evidence before it to allay its concerns that Mr Zirker may currently pose a continuing risk of unwarranted harm to patients in his care, should adequate safeguards not be imposed on his nursing practice. The panel decided that a finding of impairment is necessary on the grounds of public protection.

The panel also bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health, safety and well-being of the public and patients, and to uphold/protect the wider public interest, which includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions. It concluded that public confidence in the nursing profession

would be undermined if a finding of impairment was not made in this case. The panel was of the view that a fully informed member of the public would be concerned by Mr Zirker's conduct and behaviour. It determined that, in this case, a finding of impairment on public interest grounds was required.

Having regard to all of the above, the panel was satisfied that Mr Zirker's fitness to practise is currently impaired on the grounds of public protection and public interest.'

The original panel determined the following with regard to sanction:

'The panel then went on to consider whether a suspension order would be an appropriate sanction.

The panel considered whether the seriousness of this case required temporary removal from the NMC register and whether a period of suspension would be sufficient to protect patients and satisfy the public interest. When considering seriousness, the panel took into account the extent of the departure from the standards to be expected of a registered nurse and the risk of harm to the public interest caused by that departure.

The panel decided that although there had been clear breaches of fundamental tenets of the nursing profession and a significant departure from a number of the provisions in the Code, Mr Zirker has, nonetheless, demonstrated some insight and remorse for his actions.

The panel had specific reference to the NMC's guidance on dishonesty. It noted that it found Mr Zirker's dishonesty to be capable of remediation, despite difficulties associated with this type of concern. The panel bore in mind its finding at misconduct that dishonesty is always serious for a registered nurse, however, it noted that this incident appeared to be a single event. Furthermore, Mr Zirker has developed an understanding of how his behaviour, as well as his clinical practice, fell significantly below the standards expected of a registered nurse.

The panel was of the view that Mr Zirker should be afforded the opportunity to demonstrate to a future reviewing panel that he has developed further insight, is remorseful, and has sufficiently remediated his misconduct. It decided that a suspension order would be an appropriate and proportionate sanction in Mr Zirker's case. The panel determined that a suspension order for 12 months, subject to a review, was appropriate in all the circumstances. It was not yet satisfied that it could exclude the risk of repetition of the misconduct found proved at the current time.

The panel also went on to consider whether a striking-off order would be an appropriate sanction in Mr Zirker's case. However, in having regard to all the above, the panel concluded that it would be disproportionate at this stage. Mr Zirker has recognised his wrongdoings and has provided positive testimonials from colleagues in support of his nursing practice. The panel has not found there to be deep-seated attitudinal issues present in this case.

The panel was of the view that the lesser sanction of suspension would satisfy the public protection and public interest elements of this case. The panel decided that public confidence in the nursing profession and in the NMC as regulator can be maintained by the imposition of a suspension order for 12 months, with a review prior to the order expiring. The panel bore in mind that if Mr Zirker could demonstrate further insight, remorse, and remediation, it could be in the public interest to retain an experienced registered nurse, should Mr Zirker wish to return to nursing practice at some point in the future.

As such, the panel decided that Mr Zirker's misconduct is not fundamentally incompatible with continuing registration and that the public interest can be sufficiently addressed by a less severe outcome than permanent removal from the NMC register.'

Decision and reasons on current impairment

The panel has considered carefully whether Mr Zirker's fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's suitability to remain on the register without restriction. In considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. Whilst it has noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel has had regard to all of the documentation before it, including the NMC bundle, email correspondence between Mr Zirker and the NMC dated 8 November 2023 and a letter from the RCN, on Mr Zirker's behalf, dated 30 November 2023.

The panel heard and accepted the advice of the legal assessor.

In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether Mr Zirker's fitness to practise remains impaired.

The panel noted that the original panel found that Mr Zirker had '*demonstrated some insight and remorse, but... was lacking in the area of remediation*'. At this meeting, the panel had regard to the letter from the RCN dated 30 November 2023 and noted that Mr Zirker '*accepts that his fitness to practise remains impaired as he has not remediated his practice.*'

Despite the previous panel having acknowledged that Mr Zirker had demonstrated some insight, this panel had no evidence before it to show Mr Zirker has developed his insight nor taken any steps to strengthen his practice and was now safe to practise unrestricted. Further, it had regard to Mr Zirker's email dated 8 November 2023 advising that he is '*now a self employed carpenter and will not be returning to nursing professionally ever again. [PRIVATE].*' The panel acknowledged that Mr Zirker has not practised as a nurse since January 2019 and had no intention of strengthening his practice with a view to returning to nursing. In light of Mr Zirker's lack of remediation, the

panel determined that Mr Zirker would be likely to repeat matters of the kind found proved were he to return to practise as a nurse. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, given the finding of dishonesty made by the original panel, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that Mr Zirker's fitness to practise remains impaired.

Decision and reasons on sanction

Having found Mr Zirker's fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Article 30 of the Order. The panel has also taken into account the 'NMC's Sanctions Guidance' (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

The panel had regard to its previous findings on impairment in coming to this decision. It bore in mind that its primary purpose is to protect the public and maintain public confidence in the nursing profession and the NMC as its regulator. The panel therefore considered the written request from the RCN which states *'Mr Zirker has fully engaged with the NMC process throughout. However, his nursing registration is only active because of the substantive order currently in place. If that order is revoked or allowed to lapse, Mr Zirker's registration would immediately lapse and his name would no longer appear on the NMC register.'* It therefore considered the NMC's guidance *'Allowing orders to expire when a nurse or midwife's registration will lapse'* which states:

'Taking this option is likely to be appropriate if:

- *the nurse or midwife's registration is only active because of the substantive order being in place,*

- *the nurse or midwife doesn't want to continue practising, and*
- *the public are protected because the panel have made a clear finding that the nurse or midwife's fitness to practise is currently impaired so that this can be drawn to the attention of any future decision-maker if the nurse or midwife attempts to re-join the register.*

If nurses and midwives don't pay their fee and complete revalidation, their registration would usually lapse. However, if a nurse or midwife is on a conditions of practice order, or a suspension order, their registration cannot lapse because of the existence of the order. If the panel decide to allow the order to expire, the nurse or midwife who has not paid their fee or completed revalidation would no longer be registered with us, and would not be able to practise.'

The panel determined that this case met the requirements necessary for allowing an order to expire when a nurse or midwife's registration will lapse. In coming to this conclusion, the panel had regard to the following:

- The written submissions from the RCN confirming that Mr Zirker's registration is being *'kept artificially active by virtue of these proceedings.'*
- Mr Zirker's email dated 8 November 2023 advising that he no longer wishes to continue practising as a nurse and setting out that he has pursued a career in carpentry;
- Mr Zirker's declaration dated 29 November 2023 which states: *'I accept that my fitness to practise is currently impaired. I do not want or intend to continue practising. I understand that if I were to apply for readmission to the register, I will be required to demonstrate that I have remediated any concerns and can meet the requirements for character and am capable of safe and effective practice.'*
- The panel's finding of current impairment.

The panel also gave much consideration to the RCN's letter dated 30 November 2023, and the submissions set out for revoking the order or allowing the order to lapse. In particular it had regard to the reference made to the Court of Appeal case of *Clarke v General Optical Council* [2018] EWCA Civ 1463 (*Clarke*) and was satisfied that Mr Zirker had made it clear that he has no intention of practising as a nurse in the future. The panel appreciated that Mr Zirker had continued to engage with the NMC. It further

took into consideration the time that has elapsed since the misconduct occurred (namely in 2019), the fact that Mr Zirker had demonstrated a fair level of insight during the earlier stages of this matter, and that the previous panel had determined that a striking off order would be disproportionate. The panel was of the view that, in accordance with the case of *Clarke*, a striking off order at this stage would be disproportionate to the circumstances of the case.

The panel was satisfied that its finding of current impairment would protect the public from risk of harm in the future, as the registrar would have to take into account its finding on impairment prior to any decision being made to readmit Mr Zirker to the register. The panel was of the view that its finding of current impairment also satisfied the public interest as Mr Zirker would not be able to practise as a nurse until issues surrounding his impairment had been addressed fully, thereby maintaining the integrity of the register.

Taking account of all of the above, the panel determined that the most appropriate and proportionate outcome, which achieved the panel's overarching objective of public protection and served the wider public interest, was to take no further action and allow the suspension order to expire at the end of 24 January 2024. The panel did not consider there was any exceptional reason for the order to lapse immediately. This will bring these fitness to practise proceedings to an end and, as a result, Mr Zirker's NMC registration will lapse and he will no longer be able to practise as a nurse.

This will be confirmed to Mr Zirker in writing.

That concludes this determination.