

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Order Review Meeting
Tuesday, 31 November 2023**

Virtual Meeting

Name of Registrant: Jillian Anne Birnie

NMC PIN 08A1260E

Part(s) of the register: Nursing, Sub Part 1
RNA, Registered Nurse – Adult (19 June 2008)

Relevant Location: Lancashire

Type of case: Misconduct

Panel members: Shaun Donnellan (Chair, lay member)
Terry Shipperley (Registrant member)
Alice Robertson Rickard (Lay member)

Legal Assessor: Marian Killen

Hearings Coordinator: Franchessca Nyame

Order being reviewed: Suspension order (12 months)

Fitness to practise: Impaired

Outcome: **Order to lapse upon expiry in accordance with Article 30 (1), namely 20 December 2023**

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 Mrs Birnie's registered email address by secure email on 22 September 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 30 October 2023 and inviting Mrs Birnie to provide any written evidence seven days before this date.

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Mrs Birnie 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 allow the current order to lapse upon expiry. This will come into effect at the end of date 20 December 2023 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 imposed for a period of 12 months by a Fitness to Practise Committee panel on 22 November 2022.

The current order is due to expire at the end of 20 December 2023.

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

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

'That you, a registered nurse:

In relation to Cameron House Care Home:

1. *On one or more occasions between November 2018 and December 2020 conducted bed baths on residents;*
 - (a) At unsociable hours. **[Proved]***
 - (b) When they were not warranted. **[Proved]***

2. *On one or more occasions between November 2018 and December 2020 instructed Colleague A to conduct bed baths on residents;*
 - (a) At unsociable hours. **[Proved]***
 - (b) When they were not warranted. **[Proved]***

3. *On one or more occasions between April 2020 and December 2020 instructed Colleague B to conduct bed baths on residents;*
 - (a) At unsociable hours. **[Proved]***
 - (b) When they were not warranted. **[Proved]***

4. *On one or more occasions between November 2020 and December 2020 instructed Colleague C to conduct bed baths on residents;*
 - (a) At unsociable hours. **[Proved]***
 - (b) When they were not warranted. **[Proved]***

5. *By your actions in charges 1 to 4 above you failed to uphold Residents dignity. **[Proved]***

6. *On a date unknown intimidated and/or bullied Colleague A by saying words to the effect of;*
 - (a) "You can get off your fat ass and do some work" **[Proved]***

7. *Your actions in charge 6 lacked integrity in that you knew it was wrong and/or unprofessional to speak to Colleague A in that manner. **[Proved]**'*

The original panel determined the following with regard to impairment:

'In their consideration of current impairment, the panel took account of a number of factors from the registrant's perspective, giving particular consideration to the fact that she was not attending the hearing nor was she represented. This included the numerous extremely impressive references from colleagues and former colleagues (notably the live evidence of Ms 1); Mrs Birnie's reflective piece; and her January 2021 training certificates in Communication Skills, Person-Centred Care and Leadership & Management Skills. The positive attributes and characterisation of the registrant's professional background and practice here stood in stark contrast to the actions on which the panel found multiple charges proven. It was anomalous and left the panel with some unresolved questions as to why this should be the case. The panel explored these matters further in the context of her insight.

The panel went on to give consideration to insight and determined that, in her responses to the charges, Mrs Birnie showed some insight and some remorse. She stated for example, 'I apologise if I have offended anyone and regret deeply what has happened.' Further, the panel was of the view that Mrs Birnie had shown, through her reflective piece, insight into her lack of communication skills. But the panel considered that Mrs Birnie had shown no insight at all into her inappropriate bed bathing practice, which she continued to deny. Also, there is no evidence that any such insight had developed especially into the impact her misconduct has had on her colleagues and the residents of the Home.

In reaching a conclusion the panel found that it on the one hand testimonials describing a caring, reliable professional. It also had examples of her recent training, which suggests she had every reason to take from this set of experiences and learning to guide and change her future practice. However, she did the opposite. The panel noted her denial of the charges suggests she lacked the awareness and insight to help her move forward with her practice. The panel therefore determined that there was a real risk of repetition of the matters in charges 1-4.

The panel went on to consider whether Mrs Birnie's misconduct is capable of remediation and determined that her practice was remediable. The panel identified that Mrs Birnie, in 2018, had taken part in a sleep study course conducted by Salford University. The panel found this commendable and considered that it should have given Mrs Birnie further opportunity to improve her practice. The panel was unable to account why Mrs Birnie had continued to conduct unwarranted bed baths following the completion of this course and continued to practise in a way which was not in the best interests of the residents in her care. This continued over an extended period spanning over two years. The panel therefore concluded that, despite the further training that Mrs Birnie had undertaken, she had failed to strengthen or remediate her practice. Further, as stated above, Mrs Birnie had not provided sufficient evidence of reflection to demonstrate her understanding of the impact her actions had on the residents in her care or her colleagues. Therefore, the panel considered that there is a real risk of repetition and decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objective of the NMC is to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

The panel determined that a finding of impairment on public interest grounds is also required. It considered that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds Mrs Birnie fitness to practise impaired on the grounds of public interest.

Having regard to all of the above, the panel was satisfied that Mrs Birnie's fitness to practise is currently impaired.'

The original panel determined the following with regard to sanction:

'The panel first considered whether to take no action. It concluded that this would be inappropriate in view of the seriousness of the case which breached some of the fundamental tenets of the profession. The panel decided that it would be neither proportionate nor in the public interest to take no further action in light of the number and seriousness of the charges found proved.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Mrs Birnie's practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where 'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.' The panel considered that Mrs Birnie's misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing a conditions of practice order on Mrs Birnie's nursing registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable.

The panel considered that it might be possible to formulate conditions of practice which could address some of the concerns in relation to Mrs Birnie's poor practice. The panel then considered [PRIVATE], the fact she had requested voluntary removal from the NMC register, the fact that she was not working as a nurse at present and her lack of engagement with these proceedings. It concluded that there is no indication Mrs Birnie would and/or could comply or be willing to engage with any conditions imposed, or

that they would provide adequate protection to the public from the risk of repetition.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that suspension order may be appropriate where some of the following factors are apparent:

- A single instance of misconduct but where a lesser sanction is not sufficient;*
- No evidence of harmful deep-seated personality or attitudinal problems;*
- No evidence of repetition of behaviour since the incident;*
- The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour...*

The panel considered the attitudinal concerns raised in relation to Mrs Birnie's conduct. However, it also took into account the extremely positive testimonials provided on her behalf by a wide range of other colleagues she had worked with at the Home. It noted that the attitudinal concerns were only raised by a localised number of Care Assistants, as opposed to her other colleagues who commended her good practice. The panel noted that there is nothing to suggest that Mrs Birnie has repeated the misconduct since the incidents, as she has not worked as a nurse since. The panel considered that Mrs Birnie has shown limited insight into her behaviour and shown some remorse, however, she did not address the issues regarding unwarranted bed bathing.

The panel concluded that a suspension order would be necessary and proportionate to reflect the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required on a registered nurse. It further determined that a suspension order was necessary to protect the public. The panel considered that whilst Mrs Birnie has demonstrated some insight and a degree of remorse and she has not fully addressed the concerns raised, therefore there is a risk of repetition. Furthermore, a period

of suspension would allow Mrs Birnie an opportunity to address [PRIVATE] and to develop further insight into her failings.

The panel carefully considered whether a striking-off order would be appropriate but, taking account of all the information before it, the panel concluded that it would be disproportionate. The panel noted Mrs Birnie has had a long-standing career and is capable of taking action to strengthen her practice. The panel was satisfied that in this case, the misconduct was not fundamentally incompatible with remaining on the register and that it was appropriate to support a nurse of general good character to return to safe practice. Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in Mrs Birnie's case to impose a striking-off order. The panel considered that a suspension order was sufficient to protect the public and address the public interest.

Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction. The panel considered the length of such an order, and since Mrs Birnie has demonstrated remorse and some insight into her failings, it considered that 12 months was proportionate to mark Mrs Birnie's misconduct. It would also provide her an opportunity to strengthen her practice, address [PRIVATE] and to demonstrate a desire to continue in nursing, if she wishes to do so.'

Decision and reasons on current impairment

The panel considered carefully whether Mrs Birnie'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 carried out a comprehensive review of the order in light of the current circumstances. Whilst it noted the decision of the last panel, this panel exercised its own judgement as to current impairment.

The panel had regard to all of the documentation before it, including the NMC bundle.

The panel heard and accepted the advice of the legal assessor who drew the panel's attention to the NMC Guidance in relation to impairment.

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 Mrs Birnie's fitness to practise remains impaired.

The panel noted that the original panel found that Mrs Birnie had demonstrated some insight and remorse. At this meeting, the panel had no additional information to indicate Mrs Birnie had further developed her insight or reflected on her actions.

In its consideration of whether Mrs Birnie has taken steps to strengthen her practice, the panel noted that the original panel was informed that Mrs Birnie had completed a course in relation to communication skills. However, this panel had no evidence before it today in relation to steps taken by Mrs Birnie to strengthening her practice.

The original panel determined that Mrs Birnie was liable to repeat matters of the kind found proved. Today's panel had no information before it to suggest otherwise and it determined that there have been no material changes in Mrs Birnie's circumstances. In light of this, the panel concluded that Mrs Birnie is still liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel bore 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 decided that, in this case, a finding of continuing impairment on public interest grounds is also required.

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

Decision and reasons on sanction

Having found Mrs Birnie'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 also took into account the 'NMC's Sanctions Guidance' (SG) and bore 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 was to protect the public and maintain public confidence in the nursing profession and the NMC as its regulator. In this particular case, the panel was satisfied that the public would be protected, and public confidence maintained by allowing the order to lapse upon its expiry. The panel also noted that Mrs Birnie's registration is only active because of the current substantive order under consideration.

The panel had particular regard to NMC Guidance 'REV-3h: Allowing nurses, midwives or nursing associates to be removed from the register when there is a substantive order in place'. The panel took into consideration the following:

'Allowing professionals to leave the register can be achieved in two ways:

...

b) the nurse, midwife or nursing associate can indicate at a standard review that they no longer wish to continue practising; the panel will then be invited to let the substantive order expire in order to allow the professional to be removed from the Register...

Because nurses, midwives and nursing associates can apply for readmission to the register as soon as their registration lapses, it is important that the panel is sure that the nurse, midwife or nursing associate no longer wants to practise before it decides to let an order expire.'

The panel referred to an email from Mrs Birnie to the NMC dated 13 December 2022 which states:

'[PRIVATE], which has been corresponded several times over the past two years which means I am presently not employed and due to [PRIVATE] I am unable to ever work again. I am unable to return to nursing at any time in the future.'

The panel referred to another email from Mrs Birnie to the NMC dated 7 September 2023 which states, *'[PRIVATE]. I have no intention of going back to work in the future.'*

In light of Mrs Birnie's correspondence with the NMC, the panel was satisfied that she does not intend to return to nursing.

The panel was satisfied that upon expiry of the substantive order, the public and the wider public interest would be protected by the fact that Mrs Birnie would no longer be on the register. Whilst it accepted that Mrs Birnie does not intend to return to nursing, if she were to change her mind, she would have to reapply to join the register and the Registrar would be aware of the panel's finding that her fitness to practise is currently impaired.

Therefore, the panel decided that the substantive suspension order will be allowed to lapse at the end of the current period of imposition, namely the end of 20 December 2023 in accordance with Article 30(1).

This will be confirmed to Mrs Birnie in writing.

That concludes this determination.