

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

**Substantive Order Review Hearing
18 April 2024**

10 George Street, Edinburgh, EH2 2PF

Name of Registrant: Chi Keung Chan

NMC PIN: 12I0872S

Parts of the register: Registered Nurse – Sub Part 1
Mental Health Nurse – Level 1 – September 2015

Relevant Location: Renfrewshire

Type of case: Misconduct

Panel members: Darren Shenton (Chair, lay member)
Carole McCann (Registrant member)
David Anderson (Lay member)

Legal Assessor: Nigel Pascoe KC

Hearings Coordinator: Leigham Malcolm

Nursing and Midwifery Council: Represented by Mr Alastair Kennedy, NMC Case Presenter

Mr Chan: Not present and represented by Ms Jennifer McPhee, of Anderson Strathern

Order being reviewed: Suspension order (6 months)

Fitness to practise: Impaired

Outcome: **Order to lapse upon expiry in accordance with Article 30 (1), namely 26 May 2024**

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

At the outset of the hearing Ms McPhee, on your behalf, made a request that this case be held in private on the basis that it involved matters relating to your health. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Mr Kennedy, on behalf of the Nursing and Midwifery Council (NMC), indicated that he supported the application to the extent that any reference to your health should be heard in private.

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.

The panel decided to hear your entire case in private, in accordance with Rule 19, in order to keep your health matters confidential.

Ms McPhee addressed the panel as to your absence, as you were not present. She explained that she was fully instructed to represent you at this hearing and that you wished the matter to proceed in your absence. The NMC had no objection to this course of action and the legal advice confirmed that matters could proceed. The panel agreed to proceed with the hearing as you were represented by your legal counsel.

Decision and reasons on review of the substantive order

The panel decided to allow the order to lapse upon expiry in accordance with Article 30 (1).

The panel decided to allow the current order to lapse upon expiry at the end of 26 May 2024 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is the first review of a substantive suspension order originally imposed for a period of six months by a Fitness to Practise Committee panel on 27 October 2023.

The current order is due to expire at the end of 26 May 2024.

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 08 January 2020:

2) *Contrary to Resident A's care plan which did not allow for her movement to be managed in this way, restrained Resident A by placing two chairs either side of her as a form of barricade*

3) *Told Resident A to "shut up".*

4) ...

5) ...

6) ...

7) ...

8) ...

9) ...

10) Said to Resident A *"I warned you about this, you will fucking die tonight"* or words to that effect.

11) Repeatedly slapped Resident A's hand away when she tried touching her eye, when you were attempting to clean her eye following a fall.

12) Threatened Resident A by telling her *"she would be staying on the floor, she does this all the time"* or words to that effect.

13)...

14) Told Resident A *"no, you're staying on the floor, that'll teach you"* or words to that effect.

15) ...

16)...

17)...

18) ...

19)...

20) On 20th January 2019, did not update Resident C's rest and care plan.

21)...

22)...

23) On an unknown date, told Resident D to *"fuck off"* or said words to that effect.

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

The substantive panel determined the following with regard to impairment:

The panel next went on to decide if as a result of the misconduct, Mr Chan's fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

In this regard the panel considered the judgment of Mrs Justice Cox in the case of CHRE v NMC and Grant in reaching its decision. In paragraph 74, she said:

'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's "test" which reads as follows:

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

- a) *has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*

- b) *has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*

- c) *has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*

- d) *...'*

The panel considered that limbs a), b) and c) of Dame Janet Smith's test as set out in the Fifth Shipman Report were engaged by Mr Chan's past actions. The panel found that Mr Chan's use of inappropriate language towards Resident A, as well as his failure to cooperate with Witness A in providing proper care, put a vulnerable individual at risk of emotional and psychological harm. The panel considered that members of the public would not expect a registered nurse, particularly when acting as the nurse in charge, to behave in such a manner. The panel therefore considered that Mr Chan's actions brought the profession into disrepute and also breached fundamental tenets of the profession.

The panel went on to consider whether Mr Chan is liable in the future to place patients at risk of harm, bring the profession into disrepute and breach fundamental tenets of the profession. In doing so, the panel assessed Mr Chan's levels of insight, remorse and remediation.

The panel had regard to the test set out in the case of Cohen. The panel determined that Mr Chan's conduct is remediable. It noted that no attitudinal concerns were identified, as Witness 2 testified to the unusual nature of his behaviour during that one shift, emphasising that it was completely out of character for him.

The panel took into consideration Mr Chan's reflections on the incidents. Notably, he demonstrated some insight into his actions by admitting that he fell short of expected standards and expressing deep regret for his behaviour. Mr Chan also maintains that his actions were neither deliberate nor intended to cause harm.

However, the panel was not provided with sufficient evidence that he had addressed his poor behaviour, such as references addressing his people management skills in his current job, albeit it not being in the nursing profession. The panel was of the view that regardless of one's occupation, it is possible to demonstrate respect and effective communication with others, even in challenging circumstances. In addition, the panel carefully examined his explanation that his actions were a result of a language barrier, citing English not being his native language. However, the panel determined that certain choice of words, such as 'fuck off', 'shut up', and 'you will fucking die tonight', cannot be misconstrued or attributed solely to a language barrier or the need to speak more slowly.

While Mr Chan acknowledges the need for improvement in his understanding and practice of communication and assures that these actions will not be repeated, he has not provided specific steps he intends to take or shown evidence of practical measures to address the concerns raised regarding his communication skills. This could include undertaking online courses focused on effective communication with patients.

The panel recognise the immense difficulties associated with the nursing profession and it acknowledged [PRIVATE]. However, the panel have no evidence to suggest that Mr Chan has actively addressed or developed effective coping strategies for such situations. Consequently, the panel cannot be assured that this conduct will not be repeated in the future. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC; 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 acknowledged that most of the charges for which serious misconduct was identified were as a result of isolated incidents that occurred on a single shift. It recognised that the public may have concerns regarding the use of such language, particularly when it comes from a nurse who is generally expected to be caring and respectful towards patients. However, the panel also considered that an informed member of the public, who is aware that the incident has been thoroughly investigated by the regulatory body and is knowledgeable about the surrounding context and self-reflection on the part of the nurse, would be satisfied that the public interest has been adequately addressed. The panel emphasised that although the nurse's actions were indeed wrong, it did not consider that public confidence in professional standards and the nursing profession would be undermined if no finding of current impairment were made on public interest grounds.

Having regard to all of the above, the panel determined that Mr Chan's fitness to practise is currently impaired on public protection grounds only.

The substantive panel determined the following with regard to sanction:

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel also found that Mr Chan's practice is impaired on the grounds of public protection and there is a risk of repetition of the conduct concerned. It therefore determined that taking no action would not protect the public.

The panel 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 Mr Chan'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 Mr Chan's misconduct was not at the lower end

of the spectrum and that a caution order would be inappropriate in view of the issues identified.

The panel next considered whether placing conditions of practice on Mr Chan's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the SG, in particular:

- No evidence of harmful deep-seated personality or attitudinal problems;*
- Identifiable areas of the nurse or midwife's practice in need of assessment and/or retraining;*
- No evidence of general incompetence;*
- Potential and willingness to respond positively to retraining;*
- The nurse or midwife has insight into any health problems and is prepared to agree to abide by conditions on medical condition, treatment and supervision;*
- Patients will not be put in danger either directly or indirectly as a result of the conditions;*
- The conditions will protect patients during the period they are in force; and*
- Conditions can be created that can be monitored and assessed.*

Upon reviewing the panel's findings, it found that Mr Chan's behaviour does not appear to be in an inherent attitudinal problem. [PRIVATE]. The concerns raised would be challenging to address through specific conditions, but not impossible. However, the panel decided that a conditions of practice order sanction would not mark the seriousness of the misconduct. Additionally, Mr Chan's representative provided written submissions, but the panel determined that these were insufficient in terms of measurability, verifiability, and addressing the seriousness of the case. Consequently, considering the nature of Mr Chan's misconduct, the panel concluded that a conditions of practice order would not adequately protect the public and mark the seriousness of the misconduct.

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 was satisfied that in this case, the misconduct was not fundamentally incompatible with remaining on the register. The panel carefully considered the gravity of the concerns brought forward and determined that a suspension with a review is the appropriate course of action. Although the incident occurred during a single shift, when looking at the overall context, the panel found that the inappropriate language used towards a vulnerable patient, in conjunction with the act of slapping their hand, cannot be disregarded. The panel's utmost priority is to ensure the public is suitably protected and was of the view that Mr Chan should address the outstanding concerns before being allowed back into a nursing environment.

The panel also considered whether a striking-off order would be proportionate but, taking account of all the information before it, and of the mitigation provided, the panel concluded that it would be disproportionate. Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in Mr Chan's case to impose a striking-off order.

Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction.

The panel noted the hardship such an order will inevitably cause Mr Chan. However, this is outweighed by the public interest in this case.

The panel considered that this order is necessary to mark 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 of a registered nurse.

The panel determined that a suspension order for a period of six months was appropriate in this case to mark the seriousness of the misconduct. This timeframe also allows Mr Chan an opportunity to take action and provide evidence of his commitment to addressing the panel's recommendations. During this suspension period, Mr Chan should actively work towards implementing the suggested improvements and demonstrate his dedication to rectifying his actions. By providing this time frame, the panel acknowledges the importance of giving Mr Chan a chance to make amends whilst also ensuring to mark the seriousness of the misconduct.

At the end of the period of suspension, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order.

Any future panel reviewing this case would be assisted by:

- *Testimonials or feedback from employer(s) that specifically address improvements in Mr Chan's language use, [PRIVATE].*
- *Provide evidence of proactive steps taken to address communication issues, such as completion of online training.*
- *A reflective piece:*
 - *exploring the language expected of a professional nurse when interacting with patients and expresses how he intends to adhere to these expectations.*

- *reflect on what he has learned from these past experiences and outline specific actions or approaches he would employ differently [PRIVATE].*
- *Reflect on the impact of his conduct on residents, patients, colleagues and the reputation of the profession.*

Decision and reasons on current impairment

The panel has considered carefully whether your 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 had regard to all of the documentation before it, including the NMC bundle and written submissions from you dated 17 April 2024. It has taken account of the submissions made by both Mr Kennedy and Ms McPhee.

Mr Kennedy highlighted that there was no evidence before the panel of remediation or fully developed insight. In view of this, and given the previous panel's finding of impairment, he submitted that your fitness to practise remained impaired.

Ms McPhee referred the panel to the written submissions provided by you. She highlighted that you have no intention of practising as a nurse in the future, as set out in your written submissions:

"I opted to answer my case by my legal representative to [PRIVATE]. [PRIVATE].

I have no intention to return to nursing or any other regulated work/practice in the future. I have been working as a kitchen staff in a Chinese Takeaway since early 2020. It is my plan to run my own shop soon.

I understand and respect the decision as made by the FtP Pannel when reviewing my case in late 2023. I understand that my action as a nursing staff is open to interpretation by other staff at the scene/the general public and these interpretations could have either a positive or negative impact on the reputation of the nursing profession as a whole.

The FtP Pannel decided a SO as it is difficult to set out conditions of practice in emergency situations. The FtP Pannel has also set out conditions that I have to meet for the SO to be lifted. I agree that these conditions are attainable and I still believe nursing is a meaningful and rewarding career. However, I have no intention of returning and I understand that there would be matters still against my Fitness to Practice and this does not circumvent the process.

After careful consideration, I believe the best way to resolve the paradox is to have my name removed from the NMC register as it could relieve the concern about potential negative impact on the reputation of nursing and public benefit if I continue to practice nursing while putting an end to my case so that me and my family can move on.

I understand that if I were to come off the register then the NMC would still have marked me as impaired, and if I wished to go back to nursing then the SO would still be outstanding.”

Ms McPhee subsequently referred the panel to the NMC’s guidance on allowing orders to lapse (ref REV-3h). The guidance sets out that nurses who are subject to a substantive suspension or conditions of practice order, but no longer wish to continue practising, should be allowed to be removed from the register. The guidance also sets out the circumstances in which the panel may allow an order to lapse.

Ms McPhee accepted that there was no evidence before the panel of remediation or fully developed insight. However, she submitted that your case met the criteria set out in the NMC’s guidance (REV-3h) and in view of your clear intention not to return to nursing, she invited the panel to allow your order to lapse. She conceded on your behalf that your fitness to practise remains currently impaired.

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

The panel considered whether your fitness to practise remains impaired.

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, a finding of continuing impairment on public interest grounds remained required.

There was no evidence before the panel that you had attempted to remediate your misconduct or strengthen your nursing practice. The panel therefore decided that a finding of continuing impairment remained necessary on the ground of public protection.

For these reasons, the panel finds that your fitness to practise remains impaired.

The panel also had regard to your written submissions dated 17 April 2024 and noted your clear intention not to return to nursing. It took account of the guidance on allowing orders to lapse and noted that your registration expired on 30 November 2021, and that you only remain on the register because of the current suspension order.

The guidance (REV-3h) sets out:

“Before allowing a professional to leave the register by lifting a substantive order or allowing it to expire, the panel should make it clear whether they consider the professional’s fitness to practise to be currently impaired. This is because nurses, midwives or nursing associates, whose registration lapses or are removed from the register after a suspension or conditions of practice order expires or is lifted, can apply for readmission. In looking at any application in the future, and deciding whether the nurse, midwife or nursing associate is capable of safe and effective practice and meets the requirements for health and character, the Registrar (or one of our Assistant Registrars who also make decisions on behalf of the Registrar) would be able to take account of the panel’s decision whether the nurse, midwife or

nursing associate's fitness to practise was still impaired when they were removed from the register."

The panel considered the following points:

- Your name remains on the register because of the current Order.
- Renewal and revalidation of your registration was required on 30 September 2021.
- You have expressed a clear wish to have your name removed from the register and pursue a career away from nursing.
- You do not intend to return to nursing as a career.
- Having considered [PRIVATE] it is in your interests to allow the request for the order to lapse.
- The public can be protected by making a finding of current impairment and allowing this order to lapse.

The panel considered that if it were to allow the substantive order to lapse the public would still be protected as the finding of current impairment would remain against your name and these matters would be further considered should you attempt to rejoin the register in the future.

In all the circumstances, the panel decided that your case met the criteria set out in the guidance and determined to allow the substantive order to lapse upon expiry.

This decision will be confirmed to you in writing.

That concludes this determination.