

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

**Substantive Hearing
5 - 9 September 2022
Friday 11 November 2022**

**Remitted Hearing
Monday, 5 August 2024 – Tuesday, 6 August 2024**

Virtual Hearing

Name of registrant: Andrea Burdon

NMC PIN: 04K0539E

Part(s) of the register: Registered Nurse - Sub Part 1
Mental Health Nursing - March 2005

Relevant Location: Oldham

Type of case: Misconduct

Panel members: Sophie Lomas (Chair, Lay member)
Vicki Harris (Lay member)
Linda Pascall (Registrant member)

Remitted Hearing (5 – 6 August 2024)
Andrew Harvey (Chair, Lay member)
Deepa Leelamany (Registrant member)
Alex Forsyth (Lay member)

Legal Assessor: Tim Bradbury (5 - 9 September 2022)
Lachlan Wilson (11 November 2022)

Remitted Hearing (5 – 6 August 2024)
Jayne Salt

Hearings Coordinator: Margia Patwary

Remitted Hearing (5 – 6 August 2024)
Tyrena Agyemang

Nursing and Midwifery Council: Represented by Simeon Wallis, Case Presenter

Remitted Hearing (5 – 6 August 2024)

Represented by Helen Guest, Case Presenter

Miss Burdon: Not present and unrepresented

Facts proved: Charges 1), 2), 2.1), 2.2), 3), 3.1), 3.2), 4), 5), 5.1), 5.2), 5.3) and 5.4)

Fitness to practise: Impaired

Sanction: **Strike Off order**

Interim order: **Interim Suspension Order (18 months)**

Initial Substantive Hearing

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Miss Burdon was not in attendance and that the Notice of Hearing letter had been sent to Miss Burdon's registered email address on 3 August 2022.

Mr Wallis, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the allegation, the time, dates and link to join the virtual hearing and, amongst other things, information about Miss Burdon's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence. The panel concluded that the Notice of Hearing complied with the requirements of Rule 11(3) of the Rules.

In the light of the information available, the panel was satisfied that Miss Burdon has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Miss Burdon

The panel next considered whether it should proceed in the absence of Miss Burdon. It had regard to Rule 21 and heard the submissions of Mr Wallis who invited the panel to continue in her absence. He submitted that Miss Burdon had voluntarily absented herself.

Mr Wallis referred the panel to the documentation concerning proceeding in absence and summarised the contact with Miss Burdon chronologically since her case was referred to the Fitness to Practice committee. He took the panel through the bundle, referred to the relevant documents, and the emails sent to Miss Burdon.

Mr Wallis submitted that the last email sent to Miss Burdon on 2 September 2022 stated there may be an application to adjourn this hearing. He told the panel that there was an error in listing this hearing due to the new listing system. This had led to insufficient time for the case coordinator to inform the witnesses of the date/time set for the hearing and when their attendance was required. Mr Wallis informed the panel that the case coordinator was trying to contact the witnesses to give live evidence and that he would contact Miss Burdon by email and via telephone to invite her to take part in the hearing. The panel then adjourned the case to 6 September 2022 for further attempts to contact Miss Burdon to be made.

On the morning of 6 September, Mr Wallis informed the panel that an email had been sent to Miss Burdon on 5 September 2022 at 4:02pm, informing her that the NMC would be seeking to proceed on 6 September 2022 and that an NMC application to adjourn would not be pursued. He told the panel that there was an attempt to call Miss Burdon, however the telephone number appeared to be *“no longer connected”*.

Mr Wallis further informed the panel that there was no response from Miss Burdon to the email. He submitted that due to Miss Burdon’s non-engagement with the NMC, since December 2021 in relation to these proceedings there was no reason to believe that an adjournment would secure her attendance on some future occasion.

The panel accepted the advice of the legal assessor.

The panel noted that the discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised *‘with*

the utmost care and caution' as referred to in the case of *R v Jones (Anthony William)* (No.2) [2002] UKHL 5.

The panel decided to proceed in the absence of Miss Burdon. In reaching this decision, the panel considered the submissions of Mr Wallis, and the advice of the legal assessor. It had particular regard to the factors set out in the decision of *R v Jones* and *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment had been made by Miss Burdon;
- Miss Burdon had not engaged with the NMC since December 2021 and had not responded to any of the emails sent to her about this hearing;
- Miss Burdon had not provided the NMC with details of how she may be contacted other than her registered email address and a telephone number had been proved to be unobtainable;
- There was no reason to suppose that adjourning would secure her attendance at some future date;
- Two witnesses had been warned to attend the hearing to give live evidence, and not proceeding would potentially inconvenience the witnesses, their employer, and for those involved in clinical practice their clients who need their professional services;
- The charges related to events that occurred in 2020 and further delay might have an adverse effect on the ability of witnesses to recall accurately events; and
- There was a strong public interest in the expeditious disposal of the case.

The panel acknowledged some disadvantage to Miss Burdon in proceeding in her absence. However, the evidence upon which the NMC relied had been sent to her at her registered email address, she had made no response to the allegations beyond disputing the facts of the alleged incidents. The panel further acknowledged that Miss Burdon would not be able to challenge the evidence relied upon by the NMC in person and would not be

able to give evidence on her own behalf. However, in the panel's judgement, this could be mitigated. The panel could make allowance for the fact that the NMC's evidence would not be tested by cross-examination and, of its own volition, it could explore any inconsistencies in the evidence which it identified. Furthermore, the limited disadvantage was a consequence of Miss Burdon's own decision to absent herself from the hearing, waive her right to attend, and/or be represented, and not provide evidence or make submissions on her own behalf.

In these circumstances, the panel decided that it is fair, appropriate and proportionate to proceed in the absence of Miss Burdon. The panel would not draw any adverse inference from Miss Burdon's absence in its determination of the facts.

Details of charges (as amended)

That you, a Registered Nurse, on 5 May 2020, while working on Appleton Ward at All Saints Hospital:

1. Refused a request by Patient A that a different nurse administer their medication **(proved)**
2. Attempted to check Patient A's glucose levels **(proved in its entirety)**
 - 2.1 Without consent
 - 2.2 With excessive force
3. While in Patient A's room, used one or more of the following words or words to the effect of the following toward Patient A **(proved in its entirety)**
 - 3.1 'I'll fucking hit you back'

3.2 'Go on, do it. I'll knock you out you fucking fat bastard'

4. Poked and/or pushed Patient A (**proved**)

5. While in or near the main Ward area, shouted the following words or words to the effect of one or more of the following in respect of Patient A: (**proved in its entirety**)

5.1 That Patient A was a 'fat cunt'

5.2 'If he hits me I'll fucking kill him'

5.3 'I'll knock him the fuck out.'

5.4 On one or more occasions other than at 5.3 above 'I'll knock him out'

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

Decision and reasons on application to amend the charge

The panel heard an application made by Mr Wallis, to amend charge 5.3, to remove the words "*I've done this before*". He stated that in relation to the wording in this charge, there was no evidence to suggest there was a previous incident involving Miss Burdon of a similar nature. He stated the wording in the proposed amended charge aligned with the evidence on which the NMC relied, and the proposed amendment avoided any risk of prejudice to the registrant. Accordingly, he submitted that the amendment could be made without injustice to Miss Burdon.

The panel accepted the advice of the legal assessor and had regard to Rule 28 of 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel considered that the removal of the words "*I've done this before*" in charge 5.3 would avoid confusion and make the charge clear. The panel was satisfied that the amendment did not change the nature of the misconduct alleged and would not prejudice Miss Burdon in any way. The panel therefore accepted the proposed amendment and altered the wording of the charges to provide more clarity.

Decision and reasons on application to admit hearsay evidence

The panel heard an application made by Mr Wallis under Rule 31 to allow the written statements of Witness 1 and Witness 2 into evidence. He explained that the two witnesses in this case would not be in attendance, due to an administrative error which led to both witnesses having been given insufficient notice of the hearing. He informed the panel of the efforts that the NMC had made in the short time available to ensure that the witnesses were present, but they had been unable to secure their attendance. Consequently, the NMC applied to adduce their evidence as hearsay.

Mr Wallis submitted that the NMC propose to rely on the following evidence as hearsay:

- a. Witness Statement of Witness 1 dated 4 July 2021;
- b. Witness Statement of Witness 2 dated 9 June 2020 and 14 August 2021;
- c. Records of interviews with Witness 1 dated 10 June 2020 and Witness 2 dated 9 June 2020.

Mr Wallis reminded the panel that hearsay evidence is admissible in proceedings brought before a fitness to practise committee of the NMC by virtue of the Nursing and Midwifery Council (Fitness to Practise Rules 2004) and referred the panel to:

“Evidence

Rule 31 (1) – Upon receiving the advice of the legal assessor, and subject only to the requirements of relevance and fairness, a Practice Committee considering an allegation may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings (in the appropriate Court in that part of the United Kingdom in which the hearing takes place).”

In his written submissions, Mr Wallis referred the panel to the case of *Thorneycroft v Nursing and Midwifery Council [2014] EWHC 1565 Admin*, which sets out the factors the panel should take into account when deciding whether or not to admit hearsay evidence.

The panel heard and accepted the legal assessor’s advice in respect of this application. This included that Rule 31 provides that, so far as it is ‘*fair and relevant*’, a panel may accept evidence in a range of forms and circumstances, whether or not it would be admissible in civil proceedings.

In considering whether to admit the hearsay evidence of Witness 1 and Witness 2, the panel took account of the content of their witness statements, and the investigation interviews of the incident. The panel noted that the evidence was relevant. Witness 1’s statement gave direct evidence as to some of the facts in issue in particular, paragraphs 3.2, 5.3 and 5.4 of the charges. Witness 2 provided relevant evidence as to the context of the allegations and the local investigation into the allegations.

The panel noted that to a large extent the evidence of Witness 1 was corroborated and supported by the evidence of the Witness 3 who was to be called to give evidence and whose account could be tested against the evidence of Witness 1. The panel acknowledged that, with regard to the allegations at paragraphs 3.2, 5.3 and 5.4, Witness 1 was the only witness who gave evidence as to the precise words allegedly used by Miss Burdon. However, it also noted that Witness 3 described the general behaviour and demeanour of Miss Burdon and the use of similar language at the same time as the

relevant incident. The panel also had regard to the partial admissions made by Miss Burdon in interview during the local investigation and subsequently during a police investigation.

In these circumstances the panel concluded that the evidence of Witness 1 was not the sole or decisive evidence against Miss Burdon and that, in the circumstances, it would not be unfair to admit the evidence.

With regard to Witness 2 the panel concluded that the admission of her evidence, limited as it was to matters of context, would not cause any unfairness to Miss Burdon, particularly, given that her evidence was to an extent replicated by Witness 4 who was to be called to give live evidence.

In reaching this conclusion the panel had at the forefront of its mind that it would exercise care and caution in determining what weight it could attach to the evidence given that there had been no opportunity to challenge or test the evidence in the ordinary way.

In these circumstances, the panel came to the view that it would be fair and relevant to accept into evidence the NMC written statement of Witness 1 and Witness 2 as hearsay evidence, but would give what it deemed appropriate weight once the panel had heard and evaluated all the evidence before it.

Background

The charges arose whilst Miss Burdon was employed as a registered nurse at Elysium Healthcare as a Band 5 Clinical Nurse at All Saints Hospital Oldham ('the Hospital'). Miss Burdon was employed at the hospital from 17 September 2019 to 20 July 2020. On 5 May 2020, she was working on Appleton Ward.

Mr Wallis provided the panel with the background and allegations in his written submissions and summarised the following:

Patient A was a paranoid schizophrenic, with a personality disorder. They were also deaf and obese and used walking aids or a wheelchair when out in the community. Due to their condition, Patient A's feelings towards staff changed on a frequent basis. All staff members were aware of Patient A's condition and their care needs and that their mood could change from hour to hour. Patient A had a detailed care plan to manage all aspects of their health, including their challenging behaviour.

On 5 May 2020, Patient A did not want Miss Burdon to administer their medication and requested that another nurse do so. Miss Burdon refused this request and said she would remain in the room until they took their medication. Miss Burdon then took hold of Patient A's hand and/or finger in an attempt to check their blood glucose levels. Patient A pulled their hand away and clenched their fist. Miss Burdon then said, *"Go on then, fucking hit me, I will fucking hit you back"* and poked Patient A in the shoulder area, causing them to fall back onto their bed. Patient A was visibly distressed by this, and Miss Burdon said she would retaliate if they had attacked her.

Witness 3 was present throughout Miss Burdon's encounter with Patient A and reported what they had witnessed to Witness 1. Miss Burdon was immediately suspended and there was a pending further investigation of her alleged conduct. She had admitted threatening to hit Patient A but not poking/pushing him.

On 20 July 2020, Miss Burdon was dismissed by the hospital in relation to her misconduct.

During the local investigation Miss Burdon accepted that she *"shouldn't have grabbed [Patient A's] hand and pulled it back..."*, she confirmed that she *"poked"* Patient A, saying this was *"meant as a joke,"* and that she *"didn't think a poke would be classed as assault"* at the time. Miss Burdon also confirmed that she said *"hit me I will hit you back"* to Patient A. She also said that she took *"full responsibility"* for what happened and apologised for her conduct.

Decision and reasons on facts

In reaching its decision on the facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Mr Wallis on behalf of the NMC.

The panel did not draw any adverse inference from the non-attendance of Miss Burdon.

The panel was aware that the burden of proof rests on the NMC, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that a fact will be proved if a panel is satisfied that it is more likely than not that the incident occurred as alleged.

The panel heard live evidence from the following witnesses called on behalf of the NMC:

- Witness 3: Senior Support Worker and Therapeutic Management of Violence and Behaviour Tutor (TMVA) at Elysium Healthcare at All Saints Hospital
- Witness 4: Director of Clinical Services at Elysium Healthcare at All Saints Hospital

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the oral and documentary evidence provided by the NMC.

The panel then considered each of the charges and made the following findings.

The panel having found that you were, a Registered Nurse, working on Appleton Ward at All Saints Hospital on 5 May 2020 went onto consider each paragraph of the allegation in turn:

Charge 1

1. Refused a request by Patient A that a different nurse administer their medication

This charge is found proved.

In reaching this decision, the panel took into account the signed witness statement and oral evidence of Witness 3, and the written evidence of Witness 1 and Witness 2. In addition, the panel took into account the notes taken during the investigation interview of Witness 3 held on 10 June 2020.

The panel noted that during the investigation interview, Witness 3 had stated Miss Burdon refused Patient A's request that a different nurse administer their medication.

Witness 3 in their investigation interview stated that:

"[Patient A] started saying that he didn't want AB and requested for AN to give him his medication, AB refused the request and said she was staying there until he took them."

The panel noted this was also consistent with Witness 3's witness statement:

"Andrea refused Patient A's request for Anna to give him his medication and she insisted that she was going to give him the medication. Patient A told her on at least 10 occasions that he wasn't going to take the medication."

The panel noted that this was corroborated by Witness 1's written statement in which they stated:

"I was located on the ward, in the middle area when I heard the person say "no Anna, no Anna"

The panel noted this was also consistent with Witness 1's investigation interview.

The panel, having heard the evidence of Witness 3, considered that he gave a credible account of this incident which was consistent with the account he gave during the course of the local investigation shortly after the event. The panel did not discern any reason why Witness 3 would either embellish or fabricate his account of events and found him to be an honest and straightforward individual who had been genuinely affected by the incident and the events he had witnessed that day. The panel also had regard to the account given by Miss Burdon during the local investigation in which she had described the pressures she was under on that day and how as a result of a number of stressors she *"wasn't in the right mind and my attitude was[nt] right"*. The panel considered it significant that Miss Burdon had, during the course of her first interview, acknowledged that she had in a number of respects not behaved appropriately towards Patient A.

Accordingly, the panel accepted the evidence of Witness 3 and found Charge 1 proved.

Charge 2, 2.1 and 2.2

2. Attempted to check Patient A's glucose levels

2.1 Without consent

2.2 With excessive force

This charge is found proved.

In reaching this decision, the panel took into account the signed witness statement and oral evidence of Witness 3, and the written evidence of Witness 1 and Witness 2. In addition, the panel took into account the notes taken during the investigation interview of Witness 3 held on 10 June 2020.

In relation to Charge 2, the panel noted that there was no evidence to suggest that Patient A had consented to Miss Burdon checking their glucose levels. During Witness 3's oral evidence, Witness 3 confirmed that Miss Burdon had not formally asked Patient A for consent, nor did she communicate with them in sign language as to what she was proposing to do.

On the contrary, Witness 3, whose evidence the panel accepted, described Miss Burdon as simply grabbing Patient A's hand. The panel considered that in the absence of any consent from Patient A the use of any degree of force in an attempt to perform a glucose check would be excessive.

Furthermore, in relation to Charge 2.1 and 2.2, the panel noted that during the investigation interview, Miss Burdon had stated:

"I take full responsibility and I know I shouldn't have grabbed his hand"

And during the investigation interview, Witness 3 had stated:

"Andrea then grabbed Patient A's left hand in an attempt to take his bloods, this was a finger prick test for diabetes. She yanked his hand forwards in a motion towards herself. Patient A has severe arthritis in his left arm and he has a prosthetic elbow on his left. He pulled away and balled up his hand into a fist, Patient A didn't make any physical contact with Andrea whatsoever."

The panel concluded, on the balance of probabilities, that Miss Burdon had grabbed Patient A's hand without their consent, no degree of force was justified and the "*grabbing of the hand*" amounted to excessive force.

Accordingly, the panel found Charge 2, 2.1 and 2.2 proved.

Charge 3

3. While in Patient A's room, used one or more of the following words or words to the effect of the following toward Patient A

3.1 'I'll fucking hit you back'

3.2 'Go on, do it. I'll knock you out you fucking fat bastard'

This charge is found proved.

In reaching this decision, the panel took into account the signed witness statement and oral evidence of Witness 3, and the written evidence of Witness 1 and Witness 2. In addition, the panel took into account the notes taken during the investigation interviews of Witness 1 and Witness 2.

The panel noted during the investigation interview, Miss Burdon admitted saying to Patient A "*hit me, I'll hit you back*" but did not admit to the alleged expletives having been used towards Patient A. However, in the police interview Miss Burdon admitted that, whilst leaving the room she did swear albeit not towards Patient A. The panel considered it more likely than not, given the situation described by Witness 3 and Miss Burdon's partial admission as given in during her local interview, that she did use the words alleged, or words to the same effect.

Further, Witness 1 in their investigation meeting told Witness 4 that she had heard words to the effect of:

“go on then do it I’ll fuckin knock you out fucking fat bastard”

Witness 3 in their witness statement stated that:

“Andrea then shouted ‘go on then, fucking hit me, I’ll fucking hit you back.’”

The panel found that the use of vulgar language towards Patient A, was corroborated by Witness 1’s evidence. For the reasons previously stated, the panel found Witness 3 to be a reliable and truthful witness and given the additional supporting evidence provided by Witness 1 the panel accepted this evidence and found, on the balance of probabilities that Miss Burdon, had used one or more of the following words or words to the effect of the following toward Patient A... *‘I’ll fucking hit you back’* and *“Go on, do it. I’ll knock you out you fucking fat bastard”*

Accordingly, the panel found Charge 3.1 and 3.2 proved.

Charge 4

4. Poked and/or pushed Patient A

This charge is found proved.

In reaching this decision, the panel took into account the signed witness statement and oral evidence of Witness 3, and the written evidence of Witness 1 and Witness 2. In addition, the panel took into account the notes taken during the investigation interviews of Witness 1 and Witness 2.

The panel noted during Witness 3’s oral evidence they told the panel that Miss Burdon had poked Patient A and then went on to poke and push them. Miss Burdon, in her interview during the local investigation, admitted that she had poked Patient A and that

this had been meant as a “joke” and, at the time she did not consider it to have been an assault.

Witness 3 in their NMC written statement stated:

“There was about a 5 to 10 second gap between Andrea saying this before she poked Patient A in his upper left shoulder. This was more like a poke-to-push motion and it wasn’t an immediate reaction to seeing Patient A’s balled up first, there was a slight delay.” ... “Patient A fell back on to his bed and was shaking, from his shaking I would say he was more shocked than anything at Andrea’s actions, and he was quite angry. He then rebalanced himself and sat back up.”

The panel considered that the witness statement and oral evidence of Witness 3 in relation to this allegation was somewhat equivocal as to precisely how Miss Burdon had touched Patient A’s chest and whether it was a push or a poke. In these circumstances, the panel was unable to determine whether Miss Burdon pushed or poked Patient A. However, in the light of the evidence of both Witness 3 and the account given by Miss Burdon in interview, the panel found that she had either pushed or poked Patient A and, as a consequence, Patient A either fell or lost his balance and ended up lying on the bed behind him.

Accordingly, Charge 4 is found proved.

Charge 5, 5.1, 5.2, 5.3 and 5.4

Charges found proved

In reaching this decision, the panel took into account the signed witness statement and oral evidence of Witness 3, and the written evidence of Witness 1. In addition, the panel took into account the notes taken during the investigation interviews of Witness 1 and Witness 3.

These paragraphs related to statements allegedly made by Miss Burdon in the ward after she had left Patient A and Witness 3 in Patient A's room.

The evidence of the precise words used was contained within the statement of Witness 1 whose evidence was admitted by way of hearsay. However, some of the words allegedly used, were corroborated by Witness 3 whose evidence was that they had overheard Miss Burdon shouting, calling Patient A a "*fat cunt*" and stating *I'll fucking kill him, I'm not afraid of him*".

Further, during Miss Burdon's police interview she admitted swearing but denied that this had been directed towards Patient A. She also acknowledged that at the time she had got herself "*worked up*".

The panel, for the reasons previously given, accepted the evidence of Witness 3 and considered that the language and behaviour described aligned closely with that described by Witness 1 in her statement. In these circumstances the panel determined, on the balance of probabilities, that the words alleged, or words to a like effect, were used by Miss Burdon.

Accordingly, the panel found Charge 5.1, 5.2, 5.3 and 5.4 proved.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether Miss Burdon's fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's suitability to remain on the register unrestricted.

The panel, in reaching its decision, has recognised its statutory duty to protect the public and maintain public confidence in the profession. Further, it bore in mind that there is no burden or standard of proof at this stage and it has therefore exercised its own professional judgement.

The panel adopted a two-stage process in its consideration. First, the panel must determine whether the facts found proved amount to misconduct. Secondly, only if the facts found proved amount to misconduct, the panel must decide whether, in all the circumstances, Miss Burdon's fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct and impairment

In coming to its decision, the panel had regard to the case of *Roylance v General Medical Council (No. 2)* [2000] 1 AC 311 which defines misconduct as a '*word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.*

Mr Wallis invited the panel to take the view that the facts found proved amount to misconduct. The panel had regard to the terms of 'The Code: Professional standards of practice and behaviour for nurses and midwives 2015' (the Code) and submitted the NMC say Miss Burdon's actions amounted to breaches of the Code and fell short of the standards expected of a registered nurse.

Mr Wallis submitted that the facts found proved covered wide-ranging and serious departures of the practice and behaviour expected of nurses as provided by the Code and they related to Miss Burdon's care. Further, Miss Burdon's misconduct included, but was not limited to, the use and threatened use of force against a patient in her care. Accordingly, he submitted that the proven facts amounted to misconduct that was serious.

On the issue of impairment, Mr Wallis submitted that the limited insight Miss Burdon had demonstrated during the local investigation, had not been reflected in any subsequent engagement with the NMC. He further submitted that, since the incident, Miss Burdon had been subject to an interim suspension order and had expressed a desire not to practice as a nurse again. Accordingly, there has been limited opportunity for remediation and there was no evidence of remediation.

The Law

Misconduct

1. Lord Clyde described misconduct in *Roylance v GMC (No.2)* [2000] 1 A.C. 311: *“Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances.”*

2. It has been repeatedly confirmed that the misconduct must be ‘serious’. See e.g. *Aremu v Health and Care Professions Council* [2018] EWHC 978 (Admin).

Impairment

3. Dame Janet Smith’s description of impairment in her fifth report from the Shipman enquiry, endorsed in *CHRE v NMC, Grant* [2011] EWHC 927 (Admin) at §76, includes situations in which a Registrant’s misconduct is found to be [sic] impair their fitness to practice in the sense that he/she

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 [...] profession

into disrepute[.]

The panel accepted the advice of the legal assessor.

Decision and reasons on misconduct

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of the Code and NMC guidance on the professional duty of candour.

The panel was of the view that Miss Burdon's actions did fall significantly short of the standards expected of a registered nurse, and that her actions amounted to breaches of the Code. Specifically:

'1 Treat people as individuals and uphold their dignity

1.1 treat people with kindness, respect and compassion

avoid making assumptions and recognise diversity and individual choice

2 Listen to people and respond to their preferences and concerns

2.1 work in partnership with people to make sure you deliver care effectively

2.2 recognise and respect the contribution that people can make to their own health and wellbeing

2.3 encourage and empower people to share in decisions about their treatment and care

2.4 respect the level to which people receiving care want to be involved in decisions about their own health, wellbeing and care

2.5 respect, support and document a person's right to accept or refuse care and treatment

2.6 recognise when people are anxious or in distress and respond compassionately and politely.

4 Act in the best interests of people at all times

4.1 balance the need to act in the best interests of people at all times with the requirement to respect a person's right to accept or refuse treatment

4.2 make sure that you get properly informed consent and document it before carrying out any action

8 Work co-operatively

8.1 respect the skills, expertise and contributions of your colleagues, referring matters to them when appropriate

8.2 maintain effective communication with colleagues

8.5 work with colleagues to preserve the safety of those receiving care

20 Uphold the reputation of your profession at all times

20.1 keep to and uphold the standards and values set out in the Code

20.2 act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment

20.3 be aware at all times of how your behaviour can affect and influence the behaviour of other people

20.5 treat people in a way that does not take advantage of their vulnerability or cause them upset or distress

20.6 stay objective and have clear professional boundaries at all times with people in your care (including those who have been in your care in the past), their families and carers

20.8 act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to.'

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct or impairment.

The panel determined that Miss Burdon's conduct included abusive language and the use of force towards a vulnerable patient in a patient's bedroom, along with further threatening

behaviour in the vicinity of other patient and staff. The panel acknowledged Miss Burdon's explanation offered in her investigation interview, namely that due to past trauma, experienced and the mannerisms of the patient she felt threatened. However, the panel was of the view that even if this was correct, there was nothing that can justify the use of such language and force towards a patient. The panel determined that Miss Burdon's actions fell significantly short of the standards expected of a registered nurse. It was of the view that Miss Burdon's misconduct was serious and would be considered deplorable by members of the profession and the public.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, Miss Burdon'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. 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 had regard to this test and found that the first three limbs were engaged in this case. The panel determined that Miss Burdon put Patient A at an unwarranted risk of harm. She had not gained consent to take Patient A's glucose levels and had attempted to do so with excessive force. This use of physical force caused Patient A to fall back. The panel also noted that Miss Burdon used threats of violence as well as abusive language towards Patient A which had caused them distress and repeated similar language in the ward area.

The panel considered that Miss Burdon did not adhere to the standards expected of a nurse. This failure had brought the profession into disrepute and breached the fundamental tenets of the profession in that she had failed to provide proper care for her vulnerable patient.

Regarding insight, the panel considered that Miss Burdon has not engaged with this hearing. The panel determined that during the investigation interview on 10 June 2020, Miss Burdon showed some insight into the concerns raised but there was no evidence that this insight had developed further since the interview.

The panel considered whether Miss Burdon's misconduct is capable of remediation and came to the decision that her practice was remediable. However, the panel had no evidence that Miss Burdon had strengthened her practice, for example by developing coping strategies, addressing her past trauma, or attending appropriate courses. Further, Miss Burdon had not provided sufficient evidence of reflection to demonstrate her understanding of the impact her actions had on Patient A 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 Miss Burdon's fitness to practise impaired on the grounds of public interest.

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

Remitted Hearing

Decision and reasons on service of Notice of Hearing on 5 August 2024

Ms Guest, on behalf of the Nursing and Midwifery Council (NMC) took the panel through the background of the case and the reasons as to why this case has been brought before this panel today. She outlined that the Professional Standards Authority (PSA) had referred this matter to the High Court and the decisions that the Court had made. The Court had directed that this case should be referred back to a differently constituted panel for it to reconsider the matter of sanction.

The panel was the informed that Miss Burdon was not in attendance and that the Notice of Hearing letter had been sent to Miss Burdon 's registered email address by secure email on 27 June 2024.

Ms Guest referred the panel the papers before it and stated that the NMC has complied with the 28-day notice period, however some of the content in the Notice of Hearing letter sent to Miss Burdon, was not the correct, relevant content and may have been misleading for Miss Burdon.

Ms Guest told the panel that there is evidence before it which demonstrates extra effort was taken to ensure Miss Burdon understood the purpose of this hearing. She stated that the notice of hearing gives the dates of this hearing, that the venue would be via Microsoft Teams, all of which is required. The letter also details the charges however they are not being considered as such and it outlines the sanctions available to the panel.

Ms Guest informed the panel that there has been no response to the Notice of Hearing from Miss Burdon, however the panel had before it evidence of other communication with Miss Burdon, including the Case Conference Agenda Form which can satisfy the panel that she is fully aware of the hearing and does not intend to attend.

Ms Guest submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the charges, the time, dates and that the hearing was to be held virtually, including instructions on how to join and, amongst other things, information about Miss Burdon 's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

The panel considered the Notice of Hearing letter and that it should have been drafted to better suit the particular nature of this hearing, to ensure clarity for Miss Burdon.

However, although the oral submission of the NMC in respect of her attendance at the Case Conference was hearsay, the panel was satisfied that she was aware of the hearing and has chosen not to attend.

In the light of all of the information available, the panel was satisfied that Miss Burdon has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Miss Burdon

The panel next considered whether it should proceed in the absence of Miss Burdon. Ms Guest provided the panel with the Proceeding in Absence bundle for its consideration. She told the panel that the bundle contains correspondence with Miss Burdon which includes information relating to her appeal against a decision of the Disclosure and Barring Service. She told the panel that this was not relevant to its considerations today but should be noted for the panel's information.

The panel had regard to Rule 21 and heard the submissions of Ms Guest who invited the panel to continue in the absence of Miss Burdon. She referred the panel to the Case Conference Agenda Form dated 11 July 2024 within the bundle and confirmed that Miss Burdon was in attendance. She directed the panel to the last page of the form where it states the following:

Miss Burdon confirmed she will not be attending the hearing. As stated on the call, Miss Burdon said:

'I'm simply not that interested because as from four years and three months ago, I'm not a nurse, I never want to be a nurse again. I've made that quite clear on several occasions now.'

Ms Guest told the panel that Miss Burdon is not only aware of the hearing today, but she has made a conscious decision not to attend, therefore she submitted that Miss Burdon has waived her right to attendance and that is a very important consideration when the panel goes on to consider whether to proceed in her absence.

Ms Guest submitted that there is no reason to believe that an adjournment would secure her attendance on some future occasion.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised '*with the utmost care and caution*' as referred to in the case of *R v Jones (Anthony William)* (No.2) [2002] UKHL 5 and *General Medical Council v Adeogba* [2016] EWCA Civ 162.

The panel has decided to proceed in the absence of Miss Burdon. In reaching this decision, the panel has considered the submissions of Ms Guest and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v*

Jones and General Medical Council v Adeogba [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Miss Burdon;
- Miss Burdon informed the NMC that she has received the Notice of Hearing and confirmed that she is aware of the hearing, and it could proceed in her absence;
- There is no reason to suppose that adjourning would secure her attendance at some future date;
- The charges relate to events that occurred in 2020; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Miss Burdon in proceeding in her absence. Although the evidence upon which the NMC relies will have been sent to her at her registered address. She will not be able to challenge the evidence relied upon by the NMC in person and will not be able to give evidence on her own behalf. However, in the panel's judgement, this can be mitigated. Furthermore, the limited disadvantage is the consequence of Miss Burdon's decision to absent herself from the hearing, waive her rights to attend, and/or be represented, and to not provide evidence or make submissions on her own behalf.

In these circumstances, the panel has decided that it is fair to proceed in the absence of Miss Burdon. The panel will draw no adverse inference from Miss Burdon's absence in its findings of fact.

Sanction

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Miss Burdon off the register. The effect of this order is that the NMC register will show that Miss Burdon has been struck-off the register.

In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case and had careful regard to the Sanctions Guidance (SG) published by the NMC. The panel accepted the advice of the legal assessor.

Submissions on sanction

Ms Guest outlined what has taken place since the conclusion of the substantive hearing on 11 November 2022 for the panel's consideration. She outlined the charges and told the panel that Miss Burdon was not present at the original hearing and did not make any admissions to the charges. She informed the panel that in the Notice of Hearing, dated 27 June 2024, the NMC had advised Miss Burdon that it would seek the imposition of a striking off order.

Ms Guest submitted that at the impairment stage the previous panel found that Miss Burdon's fitness to practise was impaired both in respect of public protection and also in the public interest. She told the panel that the PSA referred this on the basis that the previous panel's decision was not sufficient for the protection of the public and not sufficient to maintain public confidence in the nursing profession, nor would the decision maintain professional standards and conduct for the nursing profession.

Ms Guest told the panel today that the High Court determined that in relation to sanction, the previous panel had failed to consider Miss Burdon's attitude and whether her conduct indicated attitudinal problems. It also failed to consider Miss Burdon's repeated desire not to work as a nurse again in its consideration of sanction.

Ms Guest told the panel today that the previous panel had failed to recognise that Miss Burdon's insight had also diminished since the local investigation and as a result of each these factors, this case has been remitted.

Ms Guest told the panel that at a local level, Miss Burdon had admitted that she should not have grabbed Patient A's hand and that when she poked him, it was a joke, and she didn't think it was very serious. As Miss Burdon did not engage in the substantive hearing, she

did not make any admissions at that stage. Ms Guest told the panel that Miss Burdon was dealing with an undoubtedly difficult patient, but instead of listening to him, she overrode his will and imposed her will on to the patient, using excessive force.

Ms Guest told the panel that even though the likelihood of the incident being witnessed was high as Patient A required two persons for his care, Miss Burdon was still willing to do what she did. She told the panel that as well as actual harm from Patient A falling backwards after being poked, he also suffered emotional distress.

Ms Guest submitted that Miss Burdon's conduct is undoubtedly attitudinal in nature and members of the public would be shocked and alarmed to hear of a mental health nurse acting in this way to a particularly vulnerable patient.

Ms Guest outlined some mitigating and aggravating features for the panel's consideration. She submitted that Miss Burdon abused her position of trust and members of the public do not expect their loved ones to be treated in this way. She submitted that there is nothing before the panel to demonstrate Miss Burdon has strengthened her practice. She told the panel that Miss Burdon has had a long time to develop her insight, but she has not done so, and in fact her insight has diminished.

Ms Guest told the panel that Miss Burdon has not apologised to the patient, her colleagues or to members of the public for her conduct which is what you would expect from someone with insight. She submitted that the lack of insight is an issue when considering sanctions. She outlined all the available sanctions from the least to the most restrictive for the panel's consideration. She submitted that the only appropriate and proportionate sanction in this case is one of a striking off order as the misconduct in this case is fundamentally incompatible with Miss Burdon remaining on the register.

Decision and reasons on sanction

Noting that the previous panel had found Miss Burdon's fitness to practise currently impaired and that there was no evidence of any improvement in insight, this panel went on to consider what sanction, if any, it should impose in this case. The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel took into account the following aggravating features:

- Miss Burdon's use of force against a vulnerable patient in her care;
- Miss Burdon's actions put patients at a risk of harm, both physical and emotional; and
- Miss Burdon's attitudinal issues demonstrated by her lack of remorse.

The panel also took into account the following mitigating features:

- Miss Burdon's past trauma which had occurred in the workplace;
- Miss Burdon had shown some limited insight during the local investigation.

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 decided that it would be neither proportionate nor in the public interest to take no further action.

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 Miss Burdon'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 Miss Burdon'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 conditions of practice on Miss Burdon's registration would be a sufficient and appropriate response. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature and seriousness of the charges in this case. The misconduct identified in this case was not something that can be addressed through retraining, particularly in light of the attitudinal issues identified.

The panel also noted that due Miss Burdon's lack of engagement that it could not be satisfied that she would engage with any conditions placed on her registration, if the panel were able to formulate conditions. Furthermore, the panel concluded that the placing of conditions on Miss Burdon's registration would not adequately address the seriousness of this case and would not protect the public.

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 conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel noted that the serious breach of the fundamental tenets of the profession evidenced by Miss Burdon's actions is fundamentally incompatible with Miss Burdon remaining on the register.

The panel considered that if it were to impose a suspension order today, Miss Burdon's disengagement and lack of insight meant that any future panel would be likely to be in the same position as today's panel. Therefore, in this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, in looking at a striking-off order, the panel took note of the following paragraphs of the SG:

- *Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?*
- *Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?*
- *Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?*

Miss Burdon's actions were significant departures from the standards expected of a registered nurse and are fundamentally incompatible with her remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Miss Burdon's actions were serious and to allow her to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

The panel considered the particular vulnerabilities of Patient A and that he should have been treated with respect, kindness and fairness. It also considered that there is no evidence before it that the misconduct found proved would not occur again.

The panel again considered Miss Burdon's lack of insight and given the passage of time, that she is now less insightful than she was during the local investigation.

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the effect of Miss Burdon's actions in bringing the

profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct herself, the panel has concluded that nothing short of this would be sufficient in this case.

The panel considered that this order was 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.

This will be confirmed to Miss Burdon in writing.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in Ms Burdon's own interests until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

The panel took account of the submissions made by Ms Guest. She invited the panel to consider imposing an interim suspension order to cover the appeal period, should Ms Burdon decide to appeal the panel's decision.

Ms Guest submitted that the imposition of this interim order would be consistent with the panel's substantive decision and suggested a period of 18 months for the panel's consideration.

Decision and reasons on interim order

The panel was satisfied that an interim order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

The panel therefore imposed an interim suspension order on the grounds of public protection and public interest, for a period of 18 months to cover the 28-day appeal period and the time it will take to conclude any appeal.

If no appeal is made, then the interim suspension order will be replaced by the substantive striking off order 28 days after Ms Burdon is sent the decision of this hearing in writing.

That concludes this determination.