Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
Thursday 12 October 2023 – Thursday 26 October 2023
Monday 11 March 2024 – Friday 15 March 2024
Monday 1 July 2024- Tuesday 2 July 2024
Thursday 4 July 2024- Friday 5 July 2024
Monday 29 July 2024
Monday 16 December – Wednesday 18 December 2024

Virtual Hearing

Name of Registrant:	**Jaden Rachel Dios Hole**
NMC PIN:	92C1878E
Part(s) of the register:	Registered Nurse – Sub Part 1 Mental Health – 21 May 1995
Relevant Location:	West Sussex
Type of case:	Misconduct
Panel members:	Avril O'Meara (Chair, Lay member) Des McMorrow (Registrant member) Geraldine O'Hare (Lay member)
Legal Assessor:	Kenneth Hamer (Thursday 12 October 2023 – Tuesday 24 October 2023, Monday 16 December 2024 – Wednesday 18 December 2024) Marian Gilmore KC (Wednesday 25 October 2023 – Thursday 26 October 2023) Kenneth Hamer (Monday 11 March 2024- Friday 15 March 2024) Charlene Bernard (Monday 29 July 2024)
Hearings Coordinator:	Ruth Bass (Thursday 12 October 2023 – Friday 13 October 2023) Amanda Ansah (Monday 16 October – Thursday 26 October 2023) Charis Benefo (Monday 11 March 2024) Samantha Aguilar (Tuesday 12 March 2024- Friday 15 March 2024 Anya Sharma (Monday 29 July 2024, Monday 16 December 2024 – Wednesday 18 December 2024)

Nursing and Midwifery Council:	Represented by Robert Rye (Thursday 12 October 2023 – Thursday 26 October 2023 Monday 11 March 2024 – Friday 15 March 2024), Case Presenter Represented by Susan Jean (Monday 29 July 2024, Monday 16 December 2024 – Wednesday 18 December 2024), Case Presenter
Ms Hole:	Present (Thursday 12 October 2023 – Thursday 26 October 2023, Monday 16 December 2024 – Wednesday 18 December 2024) and represented by Khaled Hussain-Dupré Not Present (Monday 11 March 2024-15 March 2024, Monday 29 July 2024) and represented by Khaled Hussain-Dupré on behalf of Sequentus
Facts proved by admission:	Charges 4, 5a, 5b and 6
No case to answer:	Charges 7, 8 (in respect of 5b, 6 and 7)
Facts proved:	Charges 1, 2, 3, 8 (in respect of 1 (partially), 2, 3, 4, and 5a)
Fitness to practice:	**Impaired**
Sanction:	**Striking-off order**
Interim order:	**Interim suspension order (18 months)**

Details of charges

That you a registered nurse, whilst employed as a Ward Manager at the Sussex Partnership NHS Trust;

1) Around 2015/2016/2017 spoke to Colleague A using words to the effect, "*Who are you? The man from the plantation?"*

2) Around December 2018 at a restaurant with work colleagues, spoke to Colleague C, using words to the effect *"Are you some sort of Nazi?"*

3) Around October 2018/2019 whilst out with work colleagues, spoke to Colleague A using words to the effect that Colleague A was "*My Nigger/Nigga"'*

4) Around June 2020 after Colleague B called in sick, used words to the effect 'I wonder which witch doctor she was going to get that sick note from'

5) On an unknown date, spoke to Colleague A using words to the effect;

a) "*Have you met your lot yet?"*

b) "*You know, your BAME members."*

6) On an unknown date after being challenged for putting a white sheet over your head to scare a BAME colleague, used words to the effect *'I was hardly one of the Ku Klux Klan was I? it's just a ghost outfit.'*

7) On an unknown date after an intoxicated patient demonstrated challenging behaviour, used words to the effect '*Why are you surprised when 3 black men go to get him!*'

8) Your actions in one or more of charges 1, 2, 3, 4, 5, 6, & 7 were racially abusive/motivated by an intention to be racially abusive.

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

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

At the outset of the hearing, Mr Hussain-Dupré, on your behalf, made a request that parts of this case be held in private. He provided written submissions as set out below:

'1. The Registrant seeks an order under Rules 19(2) and 19(3) of The Nursing and Midwifery Council (Fitness to Practise) Rules 2004 that parts of the substantive hearing be held in private.

2. Rule 19(3) states: Hearings other than those referred to in paragraph (2) above may be held, wholly or partly, in private if the Committee is satisfied— (a) having given the parties, and any third party from whom the Committee considers it appropriate to hear, an opportunity to make representations; and (b) having obtained the advice of the legal assessor, that this is justified (and outweighs any prejudice) by the interests of any party or of any third party (including a complainant, witness or patient) or by the public interest.

[PRIVATE]

[…]'

Mr Rye, on behalf of the Nursing and Midwifery Council (NMC) did not oppose the application. He submitted that your right to privacy did outweigh the public interest in this case and invited the panel to go in and out of private session as and when required.

The legal assessor reminded the panel that while Rule 19(1) of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004' as amended (the Rules) 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 accepted the submissions of the parties and noted that Mr Rye did not oppose the application. The panel did not require hard copy evidence of abusive social media posts received by you.

Having heard that there will be reference to [PRIVATE], the panel determined to hear these parts of the hearing in private in order to protect your right to privacy. The panel was satisfied that your interests, to hold these parts of the hearing in private, [PRIVATE], outweighed the public interest.

Decision and reasons on application to amend Charge 8

Having heard that there was some discussion between the parties about the meaning of Charge 8, as drafted, the panel invited Mr Rye and Mr Hussain-Dupré to make submissions on amending Charge 8.

Mr Rye submitted that the amendment would be in line with the NMC guidance on drafting charges. He further submitted that the NMC position is that Charge 8 is essentially two charges rolled into one, that the panel must first consider objectively, whether your alleged actions were racially abusive and then go on to consider whether subjectively, your actions were motivated by an intention to be racially abusive.

Mr Rye further submitted that the approach the panel should adopt has clearly been set out in the written submissions he provided and reminded the panel that this was how he opened the case. He submitted that Charge 8 is perhaps *"clumsily written"* however the intention behind the draft was to have the consideration of the NMC guidance in mind. He reminded the panel that the NMC guidance states that where the NMC consider charging racially abusive intention to be racially abusive or motivated as it is commonly known, it has to consider whether to charge that separately or not.

Mr Hussain-Dupré submitted that he agreed that the proposed amendment should be made. He submitted that the panel should consider the objective and subjective elements of Charge 8. He submitted that his position is that there are 14 elements to

the 7 charges and that it will be for the panel to consider whether or not both elements of each charge have been made out.

Mr Hussain-Dupré further submitted that with regard to the construction of Charge 8, the NMC guidance on charging states that adding racial motivation should substantially increase the seriousness and it is not designed as an alternative to racially abusive.

The proposed amendment was to remove the forward slash and insert the words “and also”. Both Mr Rye and Mr Hussain-Dupré agreed that it would be appropriate to make this amendment and that it would provide greater clarity to the charge:

> “That you, a registered nurse:
>
> 8) Your actions in one or more of charges 1, 2, 3, 4, 5, 6, & 7 were racially abusive~~/~~ **and also** motivated by an intention to be racially abusive.’”

The panel accepted the advice of the legal assessor and had regard to Rule 28 of the Rules.

The panel was of the view that such an amendment was in the interest of justice. The panel was satisfied that deleting the forward slash and replacing it with *“and also”*, clarified the charge and the approach that the panel should take. The parties agreed that the approach the panel should take is as follows: the panel should first consider whether the alleged actions in the above charges were racially abusive, and this is an objective test. Then it should go on to consider whether the actions were motivated by an intention by you to be racially abusive and this is a subjective test.

The panel was satisfied that there would be no prejudice to you and no injustice would be caused to either party by the proposed amendment being allowed. It noted that both Mr Rye and Mr Hussain-Dupré indicated that they are content that the forward slash can be deleted and replaced with the words *“and also”*. The panel determined therefore that it was appropriate to allow the amendment.

Details of charges (as amended)

That you a registered nurse, whilst employed as a Ward Manager at the Sussex Partnership NHS Trust;

1) Around 2015/2016/2017 spoke to Colleague A using words to the effect, "*Who are you? The man from the plantation?"*

2) Around December 2018 at a restaurant with work colleagues, spoke to Colleague C, using words to the effect *"Are you some sort of Nazi?"*

3) Around October 2018/2019 whilst out with work colleagues, spoke to Colleague A using words to the effect that Colleague A was "*My Nigger/Nigga"'*

4) Around June 2020 after Colleague B called in sick, used words to the effect 'I wonder which witch doctor she was going to get that sick note from'

5) On an unknown date, spoke to Colleague A using words to the effect;

a) "*Have you met your lot yet?"*

b) "*You know, your BAME members."*

6) On an unknown date after being challenged for putting a white sheet over your head to scare a BAME colleague, used words to the effect *'I was hardly one of the Ku Klux Klan was I? it's just a ghost outfit.'*

7) On an unknown date after an intoxicated patient demonstrated challenging behaviour, used words to the effect '*Why are you surprised when 3 black men go to get him!*'

8) Your actions in one or more of charges 1, 2, 3, 4, 5, 6, & 7 were racially abusive and also motivated by an intention to be racially abusive.'

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

Background

The charges arose whilst you were employed as a ward manager on The Hazel Ward, a Low Secure Mental Health Ward at The Chichester Centre (the Centre), by the Sussex Partnership NHS Trust (the Trust). The allegations were made by or relate to people who worked in the team that you managed. You had been the ward manager of Hazel Ward since 18 August 2014. Concerns were raised under the Trust's 'Raising Concerns' policy that you allegedly made a number of comments that were racially offensive or abusive.

You were suspended from the Trust following the local investigation and a referral to the NMC was received on 24 May 2021.

Decision and reasons on application of no case to answer

The panel considered an application from Mr Hussain-Dupré that there is no case to answer for Charge 7 and Charge 8 in respect of Charges 2, 5a, 5b, 6 and 7. This application was made under Rule 24(7) of the Rules which states:

'24 (7) Except where all the facts have been admitted and found proved under paragraph (5), at the close of the Council's case, and –

(i) either upon the application of the registrant …

the Committee may hear submissions from the parties as to whether sufficient evidence has been presented to find the facts proved and shall make a determination as to whether the registrant has a case to answer.'

In relation to this application, Mr Hussain-Dupré provided written submissions as set out below:

"*The Standard of Proof*

1. *The principals in relation to seriousness and the standard of proof are well established. In Re: Dellow's Wills Trusts [1964] 1 WLR 451, Ungoed-Thomas J distilled the concept thus:*
   The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.

2. *In R v H [1996] AC 563, at para 73, Lord Nicholls, citing Dellow's, went further, setting out that when the court is assessing a case on the balance of probabilities:*

   …the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

3. *It is argued that all of the charges are serious in nature, particularly when conjoined with Charge 8 which introduces the racial element. If the panel ultimately finds against the Registrant on Charge 8, the consequences for her career could be catastrophic.*

No basis for a safe inference and considering the wider case

4. *In its determination of this application the panel's attention is drawn to Holroyde J in Soni v General Medical Council [2015] EWHC 364 (Admin) at paras 67-69, that there being 'no direct evidence and no basis for a safe inference' that the panel had no grounds upon which to reasonably reject the registrant's alternative explanations which were raised in evidence in the GMC's own case.*

5. *The Legal Assessor will not doubt advise the panel on Razak v General Medical Council [2004] EWHC 205 (Admin).*

6. *It is also argued that McLennan v General Medical Council [2020] CSIH 12*

does not apply in that the submissions on behalf of the Registrant which follow in the application are not the Registrant setting out her case or offering reasonable alternative explanations but based purely on an insufficiency of evidence at half time.

The definition of 'racially motivated'

7. *In Lambert-Simpson v Health and Care Professions Council [2023] EWHC 481 (Admin), Fordham J approved counsel's encapsulation of when an "inappropriate" and/or "offensive" communication would be considered "racially motivated", at para 21.*

   When I asked Mr Micklewright for his encapsulation of when an "inappropriate" and/or "offensive" communication will be "racially motivated", his answer was that there are really two elements: (i) that the act in question (here, the posting of the content) had a purpose behind it which at least in significant part was referable to race; and (ii) that the act was done in a way showing hostility or a discriminatory attitude to the relevant racial group.

   - *This two-limb test underpins the definition of "racially motivated" in the context of regulatory proceedings, aligning it with that of criminal proceedings and is the appropriate measure of whether the NMC has provided sufficient evidence to make out its case in respect of the subjective element of Charge 8.*

8. *The panel has heard from* [Witness 1] *that the first part of his local investigation fell under the Trust's Freedom to Speak Up policy. The policies covering the relevant periods are included in the bundle.*

9. [Witness 1] *further accepted that whilst the members of staff who he had interviewed had stated that their complaints or elements of their complaints about the Registrant's behaviour had been officially reported or raised in supervision, none of these records were obtained by* [Witness 1]. *The NMC*

has not obtained or presented any further evidence in this regard.

10. *As the panel is aware, by virtue of the earlier Rule 22 application to require the attendance of [*Ms 3*, Matron of the Centre], the Registrant attempted to secure some of the records mentioned above, however, the Trust either declined to disclose or stated that no such records existed.*

NO CASE TO ANSWER

Charge 7 - On an unknown date after an intoxicated patient demonstrated challenging behaviour, used words to the effect 'Why are you surprised when 3 black men go to get him'

11. *In her live evidence,* [Witness 2] *confirmed that she could not offer any specific details about this incident. In her witness statement she had questioned the relevance of 'three black men' but in live evidence she accepted that there had been previous incidents on the ward involving racially abusive patients and that [you were] responsible for putting policies in place to avoid BMA staff from being exposed to abuse. She further conceded that the racial mix of staff dealing with a patient indeed relevant. Even if the panel were to find Charge 7 proven, it would still need to consider whether or not the comment was motivated by race in Charge 8.*

12. *As a result of the vagueness of* [Witness 2]*'s account,* [Witness 1] *gave evidence that it was not not (sic) possible to investigate the allegation any further, nor has any additional evidence been put before the panel.*

Charge 8

In respect of Charge 2 - "are you some sort of Nazi?"

13. *The Registrant denies using the words as set out in Charge 2.*

14. *The NMC relied on* [Witness 2]*'s evidence that the words had been used by the Registrant. The only context that* [Witness 2] *was able to offer was that the comment came in relation to food and the Registrant asking* '[Mr 1]' *to share.* [Witness 2]*'s evidence was that she herself was offended because* '[Mr 1]*' is Polish, but did not give any indication that the comment was directed at '*[Mr 1]*' because of his ethnic origins, or that the Registrant was being abusive.*

15. [Witness 1] *confirmed the position set out in the summary of the the (sic) local investigation [Exhibits p6], which confirms that the person* [Mr 1] *to whom the questions was purportedly addressed, by the Registrant, declined to give evidence even though obliged as an employee to do so.*

16. [Witness 1] *gave evidence that he did not pursue his investigation into this particular allegation due to a lack of evidence and cooperation from* [Mr 1].

In respect of Charges 5a and 5b - "your lot"

17. *The Registrant admits using the words set out in Charges 5a and 5b.*

18. *The dictionary definition of 'lot' is as a countable noun which 'refers to a set or a group of things or people' or a singular noun, referring to 'a specific group of people as a particular lot' on an informal basis.*
19. *The context provided by the witnesses for the NMC is that the Registrant was asking whether* [Witness 4] *had met with his BAME network - a group of staff within the Trust who identify as Black, Asian or Minority Ethnic - BAME being a widely used term.*
20. [Witness 4] *accepted that the BAME Network was one of the diversity groups within the Trust and that the Registrant was the leader of the LGBTQ+ Network. By way of context it was also accepted that the incident occurred during the Covid-19 pandemic and that the various networks had struggled to meet owing to the government restrictions that were in place.*

21. [Witness 4]*'s evidence was that the conversation was about whether he had completed risk assessments for BAME people in relation to Covid-19. The language referenced in the charges bears no relation to risk assessments.*

22. *The term 'lot' is common parlance and is not assumed automatically to be derogatory and thereby cannot be objectively viewed as being racially abusive. 'Lot' has no clear racial connotation.*

23. *There is no evidence that the questions or use of the word 'lot' were hostile and related to race in order to satisfy the subjective element of Charge 8, given the context of the BAME Network.*

24. *That* [Witness 4] *did not take immediate offence to the question further supports this (Exhibits p50). The witness statement of* [Witness 4] *further supports the evidence given during the local investigation, stating at para 17 "I didn't think much of the comment at the time".*

25. *With respect to Charge 5b, the question that the registrant asked was in direct reference to the BAME Network of which* [Witness 4] *was a member. Furthermore,* [Witness 4] *uses the acronym himself to describe members of staff that he was supervising at the time (Exhibits p50] even though in his evidence he explained that the term was now considered outdated. It is therefore impossible to argue that the Registrant should not have used the term BAME.*

In respect of Charge 6 - "I was hardly one of the Ku Klux Klan was I? it's just a ghost outfit."

26. *The Registrant admits using words to the effect as set out in Charge 6.*

27. *Implicit in the specificity of the charge is that it relates to the words used by the Registrant and not the events of the evening before, a position supported*

by [Witness 1]*'s evidence in respect of the scope of the local investigation.*

28. *During the local investigation and in his evidence before the panel* [Witness 1] *accepted that the Registrant's explanation was "reasonable" and accordingly he had not sought out any additional evidence by interviewing of* [Ms 2] *or any other members of staff involved in the incident.*

29. *No evidence has been presented to suggest that any other staff member, including* [Ms 2] *herself, assumed that the Registrant's actions were motivated by anything other than Halloween-based fooling around.*

30. *The NMC relies on* [Witness 2]*'s account to set out the context of the charge, however* [Witness 2] *was not present during the incident. In her evidence,* [Witness 2] *was no longer sure whether it was she herself or another member of staff who challenged [you] about the incident.* [Witness 2] *could not say whether or not she had discussed the incident with the black member of staff who was involved. She also introduced the idea that a patient had found the incident offensive. However, the charge is not concerned with the incident itself, but the words used the following day.*

31. *Having heard about the incident secondhand*, [Witness 2] - *or in her inconsistent account, possibly another member of staff - accused the Registrant of something approximating racist or racially motivated behaviour. As set out by* [Witness 2], *the Registrant's use of the words was a direct response to an accusation, to deny that she had been dressing up as a member of the Ku Klux Klan (KKK).*

32. *There is no evidence that the Registrant's mention of the KKK was designed to be offensive, or motivated by hostility and race in combination. Mere mention of the KKK, particularly when defending oneself against an accusation cannot be construed as racial motivation unless it is targeted.*

In respect of Charge 7 - "Why are you surprised when 3 black men go to get him."

33. The Registrant denies using the words set out in Charge 7.

34. On the same basis that Charge 7 is not made out, and [Witness 2] *accepting that racial mix is relevant staff dealing with abusive patients, this element of Charge 8 should accordingly be treated as no case to answer.*

Conclusion

35. The panel is invited to find that the Registrant has no case to answer in respect of all or parts of the charges as set out in the submissions above."

Mr Rye provided the following written submissions in response to Mr Hussain-Dupré on the application for no case to answer:

*"**Preliminaries***

1. *These submissions are in response to the submissions put forward on behalf of [you] that there is no case to answer in respect of charges 7, and charge 8 in respect of charges 2, 5a, 5b, 6 and 7.*

2. *To assist the panel the NMC's case in respect of all charges are as follows:*

3. *Charges 1 through to 7 are based on the alleged comments as set out by the witnesses in their NMC witness statements together with their respective exhibits. Charge 8 is in effect two charges rolled into one charge. The basis of charge 8 is, first the panel are to consider each of the comments set out in charges 1 to 7 and decide if one or all of them are racially abusive or offensive. If the panel concludes that one or all the charges are racially offensive (applying an objective test as set out in the cases of Ali and Lambert-Simpson), then the panel will go onto consider if one or more of the charges were racially motivated (the subjective test as set out in the case of Lambert-Simpson).*

4. *For the avoidance of any doubt regarding the charges and how to approach them has been carefully considered in line with the NMC's guidance that can be found at **PRE-2e**, headed Particular features of misconduct charging, which states that in relation to racial motivation the following should be considered:*

> *In all cases relating to racially abusive misconduct, we should ensure that:*
>
> - *the charges specify the alleged misconduct*
> - *the charges specify that the conduct was racially abusive, and*
> - *we carefully consider whether a racially abusive motivation should be separately charged. For example, it may be appropriate for the charge to state that the conduct was both "racially abusive" in nature and also motivated by an intention to be racially abusive.*
>
> *Our decision whether "racially abusive motivation" **should be separately charged** will always depend on the facts of the particular case. The key questions we will consider are whether there is evidence that the professional intended their behaviour to be racially abusive and whether charging motivation will add substantially to the seriousness of the charges.*

5. *The lawyer when drafting charge 8 in my submission had this guidance in mind.*

No case to answer test:

6. *The test on whether there is a case to answer is that laid down in the case of Galbraith (a criminal case). The first limb of the test is that if there is no evidence supporting a charge or charges then there will be no difficulty in ruling that there is no evidence to support that charge or charges resulting in that charge falling away. It is submitted that this limb of the test is not applicable in relation to all charges.*

7. *The second limb of the Galbraith test is when evidence in relation to each charge or charges could be regarded as being of a tenuous nature due to inherent weaknesses, vagueness or inconsistency with other evidence. If the NMC's case taken at its highest is such that a panel upon direction could not properly find a charge proved then the case should be stopped in respect of that charge. However, where evidence in relation to a charge depends is such that its strength of weakness depends on the view to be taken by a witness's reliability, or other matters which are within the province of the panel, and where on one possible view of the facts there is evidence on which the panel could conclude that a charge or charges could be found proved, then the matter should be allowed to remain with the panel.*

8. *It is submitted that matters relating to the cogency of the evidence are not relevant for the purposes of whether there is sufficient evidence that a panel properly directed could find matters proved. Such directions relating to such matters are to be dealt with when the panel are to retire to consider the charges and whether they are proved or not.*

Submissions:

9. *It is submitted that in relation to all charges that there is sufficient evidence that you (the panel) when properly directed could find matters proved to the requisite standard of proof.*

10. *The defence submit that the evidence in relation to charge 7 is vague and as such falls within limb two of the Galbraith test. It is submitted that* [Witness 2]*'s evidence is sufficient in relation to this charge, as set out in her local interview (p.29 Exhibit 2). The evidence is not vague or inconsistent with other evidence, and although [you do] not recollect making such a statement does not equate to the comment being vague or inconsistent. It will be a matter for the panel to consider the strength of this evidence at the appropriate time after hearing all the evidence in this case; at the conclusion of the defence case.*

11. *Charges 8 in respect of charges 2, 5a, 5b, 6 and 7 it is submitted that there is again sufficient evidence to (a) suggest that such comments were racially abusive/offensive and, (b) that [you] intended to be racially abusive/offensive when the comments were uttered.*

12. *It is submitted that the defence submissions in relation to these charges fall within the realms of evidential matters that you (the panel) will assess at the conclusion of the defence case. It is submitted that when applying a common sense approach there is more than a reasonable inference that the comments when viewed objectively could be regarded as being racially abusive/offensive, and therefore there is a case to answer at this stage based on an objective assessment of these comments.*

13. *What each of the witnesses say about the comments are factors that you are entitled to take into consideration. However, it is your assessment of the comments that count according to the standards of ordinary decent/reasonable people. You judge such comments considering factors such as racial tropes/micro-aggressions/black history in relation the slavery and judged by your knowledge of what the Ku Klux Klan and Nazi's stood for.*

14. *In relation to motivation there is sufficient evidence for the panel, upon direction, could find such charges proved to the requisite standard.*

15. *Motivation/intention are within the realms of the panel to be decided upon at the conclusion of the defence case. There is sufficient evidence to go past half time and this is based on there being a reasonable inference/s that [you] intended to be racially abusive/offensive at the time she uttered these comments. The basis of such inferences are, (a) the nature of the comments, (b) the number of comments that occurred over a significant period of time, (c) the ethnic background and/or national origins upon which the comments were directed towards, (d) the treatment by [you] towards colleagues, in particular* [Witness 4].

16. *The defence point to the lack of evidence obtained when investigated at local level. It is submitted that such evidence, if deemed relevant, at best attaches itself to the reliability of the witness, thus falling outside limb two of the Galbraith test. Such evidence therefore should be judged, with the appropriate weight to be attached to such evidence, at the conclusion of the defence case.*

17. *Members of the panel you are entitled when considering the defence application to have regard to [your] explanations provided at local level. However, in my submission such explanations are to be adjudged in line with the inferences set out that are relevant to intention/motivation (point 14 above). [your] explanations at local level were not provided under oath or assessed to the standards applicable to hearings of this nature. Moreover, it should be noted that the investigation that was undertaken at local level dealt with different considerations relating to employment matters which are wholly different to the task that the panel has to undertake here.*

18. *To accept such explanations without regard to the proper inferences that could be drawn regarding intention/motivation in my submission would be inappropriate at this stage. Your task, in my submission, at this stage is to decide if there is a case to answer and based on the inferences that could be drawn there is a case to answer. If for example there were no basis for a safe inference, then of course you would be entitled to accept [your] explanations provided at local level (**Soni v. GMC**). However, as submitted there are safe inferences that could be drawn from the evidence that requires [your] local statements to be tested accordingly, albeit advanced prior to giving evidence (**McLennan v. GMC**).*

Conclusion:

19. *In conclusion it is submitted that there is sufficient evidence on all charges relating to the defence application that you (the panel) when properly directed could find the charges proved to the requisite standard."*

Panel's decision

The panel took account of the written and oral submissions made by Mr Hussain-Dupré and Mr Rye and accepted the advice of the legal assessor.

The legal assessor referred the panel to the test in considering such applications, as set out in the judgment of Lord Lane LCJ in *R v Galbraith [1981] 1WLR 1039*. In relation to these proceedings the test can be put as follows:

1. If there is no evidence that a crime has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

2. The difficulty arises where there is some evidence, but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

The panel considered the application carefully in respect of the charges it was referred to. The panel had regard to all the evidence adduced by Mr Rye and Mr Hussain-Dupré, both written and oral. The panel was mindful of the test in considering such applications, as set out in the judgment of Lord Lane LCJ in *R v Galbraith [1981] 1WLR 1039*.

The panel was mindful that it was not deciding whether any of the disputed charges was proved, only whether, applying the *Galbraith* test to the NMC evidence, it could find the charges proved.

The legal assessor provided further written legal advice that included the following:

> *"…assuming you consider that there is sufficient evidence to support the allegations in one or more of charges 1 – 7, the committee may find that the registrant has no case to answer that her words or actions were racially abusive or racially motivated; or that she has a case to answer that her words or actions were racially abusive but not racially motivated; or she has a case to answer that they were both racially abusive and racially motivated."*

In reaching its decision, the panel has made an initial assessment of all the evidence presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it *could* find the facts proved and whether you had a case to answer in respect of the following relevant charges:

Charge 7 – On an unknown date after an intoxicated patient demonstrated challenging behaviour, used words to the effect '*Why are you surprised when 3 black men go to get him!*'

There is no case to answer for this charge.

The panel had regard to the evidence provided by Witness 2 in the local investigation interview dated 28 August 2020 where she stated: "*A patient returned drunk once and the 3 people that went to get him were all BAME and he kicked off and [you] said 'why are you surprised when 3 black men go to get him?' I said 'why is that relevant?'*"

In oral evidence Witness 2 stated that she did not witness this incident, rather, that she heard about it in conversation with other staff. The panel noted that Witness 2 could not recall where or when the incident took place. She said that she thought it took place on a male ward and did not believe you were responsible for managing the incident. Witness 2 could not say whether the patient was being racist because she was not present at the time.

The panel determined that the first limb of the *Galbraith* test is satisfied as there is some evidence from Witness 2 to support Charge 7. In relation to the second limb of *Galbraith*, the panel noted that Witness 2 was not present during the alleged incident and her evidence was hearsay. The panel determined that Witness 2's evidence was vague and weak, and the only evidence that supported Charge 7. The panel determined that when taken at its highest, the evidence it has for this charge is insufficient.

The panel determined that there was insufficient evidence presented that a properly directed panel could find the charge proved and determined that there is no case to answer under Charge 8 in respect of Charge 7.

Charge 8 (in respect of charge 2) – Your actions in relation to Charge 2 (Around December 2018 at a restaurant with work colleagues, spoke to Colleague C, using words to the effect *"Are you some sort of Nazi?")* were racially abusive and also motivated by an intention to be racially abusive.'

There is a case to answer in relation to the allegation that your actions were racially abusive and in relation to the allegation that your actions were motivated by an intention to be racially abusive.

The panel noted that you denied using these words. However, it has been asked to consider Charge 2 only in relation to Charge 8, namely whether there is evidence that your alleged actions were capable of being racially abusive, and also motivated by an intention to be racially abusive.

The panel firstly considered objectively whether there is any evidence that the comments *"are you some sort of Nazi"* could be racially abusive. The panel had regard to the definition of 'Nazi' in the Oxford Advanced Learner's Dictionary which included:

> *"using power in a cruel way; having extreme and unreasonable views, especially racist or anti-Semitic views."*

The panel determined that the term Nazi is a very derogatory and racist term to use and has racially abusive connotations.

The panel then considered subjectively whether there is any evidence that the comments were capable of being motivated by an intention to be racially abusive. It noted that the evidence it had before it was from Witness 2 who stated that the context in which the alleged comments were made were in relation to food at a work Christmas party and that you were asking Mr 1 to 'share'.

Witness 2 stated in her NMC statement dated 27 January 2022:

> *"I challenged [you] for the wording [you] used and [you] said it was just a joke, or was meant to be funny. I was more outraged because [you] said these words to a Polish person and didn't appreciate how these words could be taken."*

In Witness 2's oral evidence she also stated that Mr 1 is Polish and you *'cannot call him a Nazi.'*

At the local investigation stage, Witness 2 stated:

> *"On a Xmas night out. We were sat at a revolving table* – [Mr 1] *(Polish support worker) said something about the table – [you] said 'are you a Nazi' I challenged this and [you] said it was just a joke/funny."*

The panel determined that there is some evidence that your comments were capable of being racially motivated. The panel noted the use of the word 'Nazi' and that it was directed at a Polish colleague.

The panel then went on to consider whether the evidence of Witness 2 showed hostility or a discriminatory attitude to a relevant racial group. The panel was not satisfied that the evidence presented to it was capable of showing hostility. However, the panel was satisfied that the alleged actions *could* show a discriminatory attitude to a relevant racial group.

The panel determined that there is a case to answer under Charge 8 in respect of Charge 2.

Charge 8 (in respect of charge 5a) – Your actions in relation to Charge 5a (On an unknown date, spoke to Colleague A using words to the effect; "*Have you met your lot yet?")* were racially abusive and also motivated by an intention to be racially abusive.'

There is a case to answer in relation to the allegation that your actions were racially abusive and in relation to the allegation that your actions were motivated by an intention to be racially abusive.

The panel noted that you admitted using the words set out in Charge 5a. However, it has been asked to consider Charge 5a only in relation to Charge 8, namely whether there is evidence that your alleged actions were capable of being racially abusive, and also motivated by an intention to be racially abusive.

The panel firstly considered objectively whether there is any evidence that the comments *"Have you met your lot yet?"* could be racially abusive. It had regard to Mr Hussain-Dupré's written submissions in which he defines the word 'lot' and submitted that it is the collective and countable noun referring to a specific group of people on an informal basis, and objectively, it is not assumed automatically to be derogatory and cannot objectively be viewed as racially abusive as the word has no clear racial connotation. The panel also noted Mr Hussain-Dupré's submissions on the subjective element in which he stated that there is no evidence that the use of the word 'lot' was hostile or relating to race given the context of the BAME network.

The panel also noted Mr Rye's submissions that a common-sense approach should be applied when looking at these comments objectively and with regard to the subjective approach, reasonable inferences could be drawn.

The panel noted Witness 2's evidence within the local investigation interview dated 28 August 2020 in which she stated *"The most recent incident was about two weeks ago. In reference to the BAME network, [you] asked* [Witness 4] *'have you met your lot yet?'* [Witness 4] *said 'who?' She said 'you know your BAME members.' We looked at each other and* [Witness 4] *left the office."* The panel also noted Witness 2's NMC witness statement in which she stated:

> *"I also on a separate occasion that [you] said to* [Witness 4]*, "have you met your lot yet".* [Witness 4] *said "who?" and [you] said, "you know, your BAME members", referencing the Black Asian and Minority Ethnic ("BAME") network. I*

can't remember when she made that comment but I recall that this was said around the time that it became apparent that the BAME community were suffering worse from Covid-19 than people of other ethnic backgrounds. [Witness 4] *and I didn't say anything, everyone in the room just looked at each other and* [Witness 4] *eventually left the office."*

The panel also considered Witness 4's evidence at the local interview stage:

"[Witness 1] - *another example that has been described to us is apparently in reference to the BAME network, [you] asked you 'have you met your lot yet?' and when asked who, she allegedly said 'you know your BAME members.'*
[Witness 4] - *yes I remember. I blanked that to be honest - again, I couldn't say I thought it was racist - I couldn't say it wasn't racist she could have meant the people I supervise because I have two BAME staff. So it could be reference to 'my lot' in that sense. I didn't think much about it - I just answered her and said I'd done the risk assessments. I couldn't tell you the context - to someone looking from outside it could have looked like she was referring to BAME people.*
[Witness 1] - *what was your gut feeling?*
[Witness 4] - *I don't know."*

The panel also noted Witness 4's NMC witness statement dated 25 February 2022 in which he stated:

"I don't remember exactly when this was but it was brought up by the local investigator. I believe this was around the time that people of colour were known to be at high risk of Covid-19 and the government said that we needed to complete risk assessments for ethnic minorities. The registrant asked me "have you met your lot yet?" and when I asked her who this was, she said "you know your BAME members". I didn't think much of the comment at the time."

The panel also noted Witness 4's oral evidence in which he stated that he *"did not think much of it at the time"*, *"didn't think deep into it"* and that *"the choice of words maybe wasn't appropriate, your lot what does that refer to when we are dealing with Black and*

Ethnic Minorities". Witness 4 also stated in his oral evidence that the comments were unprofessional. When asked if you were referring to black people in general, Witness 4 answered *"only she can answer that. My lot were BAME, who I was conducting risk assessments for."*

The panel determined that there is evidence that objectively the comments made by you are capable of being racially abusive. It determined that there is evidence for this on the basis that the comments were made to Witness 4, a black man, made in the context of referring to a Black and Minority Ethnic group *"your BAME members".* Therefore, in the circumstances, the panel determined that there is some evidence that the comments objectively speaking are derogatory, have segregation connotations, and are capable of being racially abusive. The panel then went on to consider the sufficiency of that evidence and it determined that there was sufficient evidence and that Charge 5a could be found proved on the basis of racial abuse.

The panel considered whether there is evidence that your comments were capable of being motivated by an intention to be racially abusive. The panel carefully considered the evidence before it, including that of Witness 2 and Witness 4 who were present when you made the comments. There was no evidence before the panel that your comments indicated hostility. However, the panel considered that there was evidence, which when taken at its highest, showed a discriminatory attitude towards a relevant racial group (BAME). The panel was satisfied that there was sufficient evidence on which a reasonable inference could be drawn that your comments were motivated by an intention to be racially abusive.

The panel therefore determined that there is a case to answer under Charge 8 in respect of Charge 5a.

Charge 8 (in respect of Charge 5b) – Your actions in Charge 5b (On an unknown date, spoke to Colleague A using words to the effect; "*You know, your BAME members"*) were racially abusive and also motivated by an intention to be racially abusive.'

There is no case to answer for this charge.

The panel noted that you admitted using the words set out in Charge 5b. However, it has been asked to consider Charge 5b only in relation to Charge 8, namely whether there is evidence that your alleged actions were capable of being racially abusive, and also motivated by an intention to be racially abusive.

The panel noted that there was no evidence before it that when objectively viewed, the comments "*You know, your BAME members"* were racially abusive. It noted in particular that the evidence from Witness 2 and Witness 4 was that referring to *'BAME members'* would have been an appropriate way to reference this group at the time.

The panel therefore determined that there was no case to answer under Charge 8 in respect of Charge 5b.

Charge 8 (in respect of Charge 6) – Your actions in Charge 6 (On an unknown date after being challenged for putting a white sheet over your head to scare a BAME colleague, used words to the effect *'I was hardly one of the Ku Klux Klan was I? it's just a ghost outfit.'*) were racially abusive and also motivated by an intention to be racially abusive.'

There is no case to answer for this charge.

The panel noted that you admitted using the words set out in Charge 6. However, it has been asked to consider Charge 6 only in relation to Charge 8, namely whether there is evidence that your alleged actions were capable of being racially abusive, and also motivated by an intention to be racially abusive.

The panel noted that the action of putting a white sheet over your head to scare a BAME colleague was not separately charged. In this regard the panel noted the evidence within the local investigation that *"a reasonable explanation"* was provided. The panel noted that your defence statement says that the incident occurred around Halloween where a number of patients and staff were involved in dressing up as ghosts

and celebrating. Witness 1, who conducted the local ‘Freedom to Speak Up’ investigation into the allegations, stated in his oral evidence that your explanation was reasonable and that is why he did not investigate any further.

The panel also noted Witness 2’s evidence in the local investigation interview dated 28 August 2020:

> *“The worst one was after a night shift and [you] had put a white sheet over [your] head and waited for someone to come out of the toilet, [you] then scared them (this was* [Ms 2]*, a black staff member), I asked [you] in the morning about this and [you] said 'it's not the Ku Klux Klan, it's just a ghost'. I was outraged and my colleagues talked about what had happened – [you] kept saying '*[Ms 2] *wasn’t bothered by it - you’ve taken it out of context'*

The panel further noted your evidence at the local investigation interview dated 1 October 2020 in which you stated:

> *“yes, there were a load of us who did it, including patients. It was around Halloween time and we put the sheets on our head; no one inferred it was racial. We were being humorous, we didn’t have them over our heads, and it was a fraction of a shift after I'd done medication.* [Ms 2] *joined in she thought it as funny. The next morning, someone said it could be construed as Ku Klux Klan - I thought no, it was an act of humour between people.”*

The panel also noted that you expanded on this in your documentary evidence and stated:

> *“When I was aggressively challenged about the use of a white sheet over my head I inferred from the challenge that they considered as racist, which, of course, was not the intent. I believed from the challenge that they were accusing me of representing an image of the KKK. The comparison in my response was directly in relation to that belief.”*

The panel was of the view that when objectively viewed, these were not racially abusive comments.

It is clear from the evidence that you were responding to a challenge or an allegation of inappropriate behaviour. The panel considered that your comments were not directed at any specific person or group, and it could not reasonably be inferred from the context that your actions were objectively racially abusive. The panel therefore concluded that there was no case to answer under Charge 8 in respect of Charge 6.

Charge 8 (in respect of Charge 7) – Your actions in one or more of (Charge 7 - On an unknown date after an intoxicated patient demonstrated challenging behaviour, used words to the effect '*Why are you surprised when 3 black men go to get him!*') were racially abusive and also motivated by an intention to be racially abusive.'

There is no case to answer for this charge.

As the panel found that there is no case to answer for Charge 7, this charge automatically falls away as a result.

Decision and reasons on facts

At the outset of the hearing, the panel heard from Mr Hussain-Dupré, who informed the panel that you made full admissions to charges 4, 5a, 5b, and 6.

The panel therefore finds charges 4, 5a, 5b, and 6 proved in their entirety, by way of your admissions.

In reaching its decisions on the disputed facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Mr Rye on behalf of the NMC and by Mr Hussain-Dupré.

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 1: General Manager for Forensic Health Care Services at Sussex Partnership NHS Trust.
- Witness 2: Occupational Therapist Technician at Sussex Partnership NHS Trust.
- Witness 3: Senior Occupational Therapist (Band 6) at Chichester Centre at Sussex Partnership NHS Trust.
- Witness 4: Ward Manager at Chichester Centre, Hazel Ward, at Sussex Partnership NHS Trust.

The panel also heard evidence from you under oath.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the witness and documentary evidence provided by both the NMC and Mr Hussain-Dupré.

[PRIVATE]

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

Charge 1

‘Around 2015/2016/2017 spoke to Colleague A using words to the effect, “*Who are you? The man from the plantation?*”

This charge is found proved.

In reaching this decision, the panel took into account all the witness evidence. Witness 2 and Witness 4 both stated that it took place a long time ago and were less clear in terms of their recollection of when and where it took place. Witness 4 in his local investigation interview and NMC witness statement believed it took place in or around 2015 or 2016. Witness 2 was unsure, and the panel noted her local investigation interview was silent on this, but her NMC witness statement referred to the incident taking place in 2018. The panel noted that in your interview dated December 2020, you stated that you believed the incident occurred approximately four years ago. In your oral evidence you told the panel that the incident occurred six years ago. On the basis on all of the information provided the panel was satisfied that it is more likely than not that this incident took place around 2015/2016/2017.

The panel considered the local investigation interviews in which responses from you, Witness 2 and Witness 4 were provided in respect of your comments associated with this allegation. It also considered the NMC witness statements provided by Witness 2 and Witness 4.

The panel noted the investigation interview of 1 October 2020 in which you stated:

> *"*[Witness 4] *was wearing a linen suit and I said 'you look like… you know the guy on the advert with the oranges on a plantation' I was describing the man from Delmonte…"*

The panel also noted that during the investigation interview of December 2020, you stated:

> *"yes, the incident occurred approximately 4 years ago I was in the nursing office when* [Witness 4] *came in, it was the first time I'd seen him that day. I jokingly said 'you look like the guy in the advert, the one stood next to an orange*

plantation' [Witness 4] *objected I became flustered; I was talking about the Man from Delmonte…"*

The panel further noted that during the disciplinary hearing in April 2021 your response to this allegation was as follows:

"This incident occurred approximately 5 years ago. [Witness 4] *walked into the office wearing a white linen suit. I commented 'you look like the man from…the guy from the advert, you know the one stood next to an orange plantation. I was referring to the advert for Delmonte orange juice.'*

The panel was of the view that you have provided consistent responses throughout the three interviews and in your oral evidence about what it is you said in relation to this allegation.

The panel noted that Witness 2 in her local investigation interview dated 28 August 2020 stated:

"[Witness 4] *once came to work dressed in cream trousers and shirt – [you] said 'who are you? the man from the plantation?' I said 'how dare you actually saying that to a black man?'* [Witness 4] *told me to leave it. There were other people in the office at that time. It was a long time ago, I can't remember when exactly."*

Witness 2 in her NMC witness statement also stated:

"I remember that on another occasion around 2018, [Witness 4] *came to work dressed in cream china* [sic] *trousers and a t shirt and [you] said "who are you? The man from the plantation?"*

The panel also noted Witness 4's NMC witness statement in which he stated:

"I can't recall exactly when this was but I think that sometime during 2015 or maybe 2016, I came to work dressed in cream trousers and white shirt. [You]

said "who are you? The man from the plantation?". The planation is a slavery connotation where on a plantation, you are a slave."

The panel considered the oral evidence provided by the witnesses. Witness 2 could not remember whether you provided any comment as to why you said it, she stated that Witness 4 *"did not react after the comment was made, rolled* [his] *eyes, and shook his head".* She further stated that Witness 4 left the office, and this made her think he was cross. Witness 4 in his oral evidence stated: "*the word plantation speaks volumes, refers to slavery times, that hurt that in this day and age that thing would come to their mind."*

Having considered all of the evidence from yourself, Witness 2 and Witness 4 in relation to this comment, the panel was satisfied that you, when speaking to Colleague A, referred to Witness 4 in relation to the clothes he was wearing, used the word plantation. There is consistent evidence from you and the witnesses throughout the local investigation and during this hearing that you made reference to *"a man"* or *"a guy"* from *"a plantation"* or *"the plantation"*.

The panel noted that in your evidence you stated that you were referring to Witness 4 reminding you of a man from a television advert. However, the key words in the charge are *"man from the plantation"* and despite the context you provided with regard to the advert, this cannot be disputed. The panel determined that whether you stated, *"who are you the man from the plantation?"* or *"you look like the guy…on a plantation"* the key point is that you were talking about a man on a plantation. The panel was satisfied that even on the basis of what you stated you had said, when speaking to Colleague A, you used words to the effect *"Who are you? The man from the plantation?".* The panel therefore finds this charged proved.

Charge 8 (in respect of Charge 1)

'Your actions in Charge 1 (Around 2015/2016/2017 spoke to Colleague A using words to the effect, "*Who are you? The man from the plantation?"*) were racially abusive and also motivated by an intention to be racially abusive.*'*

This charge is found partially proved.

In reaching this decision, the panel took into account the evidence it considered above when it found Charge 1 proved. The panel noted the legal assessor's advice in which he provided definitions for racist: *"hostile or discriminatory towards a relevant racial group"* and abusive: *"extremely offensive or insulting."* The panel then considered whether the evidence outlined above from an objective view when applying these definitions, could be found to be racially abusive.

The panel was of the view that the words used are extremely offensive and insulting. The panel has determined that you stated, *"who are you the man from the plantation?"* or words to that effect and it was satisfied that this comment is racially abusive because of the nature of the words and the context in which they were said. The panel determined that the use of the word "plantation" and the connotations it has with regard to slavery, could objectively, be extremely offensive and insulting, especially when said to a black person. It was of the view that a reasonable person who heard this comment being made to a black person would find that comment to be racially abusive.

However, when considering all of the evidence put before it in relation to whether you were motivated by an intention to be racially abusive, the panel was not satisfied that the NMC has made its case. The panel was of the view that the evidence provided shows that the comments that you made were in relation to Witness 4's cream clothing. The panel noted that this was common evidence between you and the witnesses to this incident. The panel was satisfied that whether express or implied, there was enough information around what you said for someone witnessing your comments, to link it to the advert you said was in your mind at the time. The advert in question, was of a white man in cream or white clothes visiting a plantation to check if the fruits were ripe enough to be harvested. The panel accepted that you did not make these comments in relation to Witness 4's race or ethnicity. The panel was not satisfied that a reasonable inference could be drawn from what you said that you were motivated by an intention to be racially abusive.

The panel therefore finds this charge partially proved in that the comments were racially abusive, but not motivated by an intention to be racially abusive.

Charge 2

> 'Around December 2018 at a restaurant with work colleagues, spoke to Colleague C, using words to the effect *"Are you some sort of Nazi?'*

This charge is found proved.

In reaching this decision, the panel took into account evidence from you, Witness 1 and Witness 2. It notes that Witness 2 states that the incident took place in December 2018. During the local investigation stage when this incident was put to you, you stated that you could not remember referring to someone as a Nazi. During your oral evidence, you told the panel that you were not given any context at the time of the local investigation about this matter, including that it related to Mr 1. During the disciplinary hearing, you stated:

> *"I have tried to recall this incident. However I have not attended a sit-down Christmas meal on for (sic) Hazel ward since 2016. I have gone over photographs of ward social events and my memory and have concluded that* [Witness 2] *must be referring to when we were eating after our away day on the 13th October 2017."*

The panel noted that in your oral evidence you also stated that you believe it took place during a Christmas party in 2017. Further, you referred to *"about 6 years ago"* when being asked about this incident and you said that when you were given details about who you were alleged to have said this to, you were better able to identify and recall when it took place. You said that Mr 1 was not working for you at that point, but later became a Healthcare Assistant. You believe the incident happened around Christmas 2017 as Mr 1 was working as domestic staff at the time. The panel was of the view that your oral evidence at the hearing expanded on the response you provided at the disciplinary hearing.

The panel then considered Witness 2's evidence around the timing of this incident. Within her NMC witness statement dated January 2022, Witness 2 was unsure about the date of this incident as she stated:

> "*on a X-mas night out about 4 years ago (so around 2018 but I am not sure), [you] said "are you some sort of Nazi, share" to a Polish support worker colleague,* [Mr 1]*."*

The panel noted that the evidence is unclear and inconsistent as to whether this incident occurred in December 2017 or December 2018. The panel has not heard any evidence from Mr 1 who may have been better placed to shed more light on the incident. However, it was satisfied that an incident regarding Mr 1 occurred around either December 2017 or December 2018 with a Polish colleague at a Chinese restaurant, therefore the panel went on to consider whether words, or words to the effect, set out in Charge 2, were used by you.

The panel noted that Witness 1 (the investigating officer for the Trust) did not investigate the allegations (set out in Charge 2) further as Mr 1 refused to be interviewed and you could not remember making such comments.

The panel considered Witness 2's NMC witness statement where she stated "*[you] said "are you some sort of Nazi, share".* It further considered her local investigation interview where she stated:

> *"On a Xmas night out. We were sat at a revolving table* – [Mr 1] *(Polish support worker) said something about the table – [you] said 'are you a Nazi' I challenged this and [you] said it was just a joke/funny."*

The panel also noted your evidence at the disciplinary hearing where you stated:

> *"I have tried to recall this incident. However I have not attended a sit-down Christmas meal on for Hazel ward since 2016. I have gone over photographs of*

ward social events and my memory and have concluded that [Witness 2] *must be referring to when we were eating after our away day on the 13th October 2017. The meal was in a Chinese restaurant and the tables had rotating centrepiece. Through reviewing the statements the Polish person concerned has been identified as* [Mr 1] *I am now able to recall a situation that* [Witness 2] *may be referring to. We were sat eating dinner and* [Mr 1]*, who was not employed as a member of Hazel ward team at the time, and whom I knew socially outside of work, entered the restaurant with other colleagues from support services. He came up to the table and helped himself to the food. I jokingly said 'oi that's our food' he jokingly responded 'I take what I want' I jokingly replied 'what are you some kind of fascist?' he responded 'what is a fascist' and I answered you know like a Nazi. He laughed and moved on.* [Witness 2] *shouted 'you can't say that' I turned to* [Mr 1] *and said sorry were you offended? And he replied that he was not."*

Having considered the evidence from Witness 2 and you in particular having careful regard to the words you said you used, the panel is satisfied that you referred to Mr 1 as some sort of fascist. When asked to explain what you meant by fascist you responded to Mr 1 by saying *"you know, like a Nazi."* The panel noted that you have been consistent with the words you used with regards to this incident. The panel determined that by referring to Mr 1 as a fascist and then going on to explain that this was "*like a Nazi"* that you used words to the effect set out in Charge 2.

The panel was therefore satisfied that this charge is found proved.

Charge 8 (in respect of Charge 2)

'Your actions in Charge 2 (Around December 2018 at a restaurant with work colleagues, spoke to Colleague C, using words to the effect *"Are you some sort of Nazi?"*) were racially abusive and also motivated by an intention to be racially abusive.*'*

This charge is found proved.

In reaching this decision, the panel took into account the evidence it considered above when it found Charge 2 proved. The panel noted the legal assessor's advice in which he provided definitions for racist: *"hostile or discriminatory towards a relevant racial group"* and abusive: *"extremely offensive or insulting."* The panel then considered whether the evidence outlined above from an objective view when applying these definitions, could be found to be racially abusive.

The panel was of the view that from an objective perspective, the comments could be found to be racially abusive. It noted that the words *"fascist"* which has its own negative, derogatory, insulting, and abusive connotations, and the word "Nazi", further qualified by you when asked by Mr 1 what you meant by fascist, fall into the category of extremely offensive and insulting. The panel noted that these comments were made to a Polish person. The panel bore in mind the historical abuse that Polish people suffered, particularly Polish Jews, during World War II by a Nazi regime.

The panel then went on to consider whether your actions in Charge 2 were motivated by an intention to be racially abusive. It noted that your evidence was that Mr 1 was not at the work event yet came into the restaurant towards the end of the meal and helped himself to food. Further, your evidence is that you were de-escalating a situation where Mr 1 was taking food when he was not party to the dinner. However, in Witness 2's NMC witness statement, she states that Mr 1 was helping himself to some food and you were waiting for your turn when the comment was made. You told the panel that you knew Mr 1 was Polish, but you did not intend to be racist.

The evidence the panel has heard indicates that the incident began when you attempted to challenge Mr 1 for helping himself to food. The panel noted Witness 2's response to the incident as stated in her NMC witness statement:

> *"I challenged [you] for the wording [you] used and [you] said it was just a joke, or was meant to be funny. I was more outraged because [you] said these words to a Polish person and didn't appreciate how these words could be taken."*

The panel reject your explanation that the words were said as a *"joke/funny"* to de-escalate the situation. It was not satisfied that you made these comments jokingly. The panel considered that given your comments and the context with which they were made, that you demonstrated a hostile and discriminatory attitude towards a relevant racial group i.e. by suggesting that Mr 1, a Polish man, was some sort of Nazi.

The panel therefore found this charge proved.

Charge 3

> 'Around October 2018/2019 whilst out with work colleagues, spoke to Colleague A using words to the effect that Colleague A was "*My Nigger/Nigga*.'

This charge is found proved.

In reaching this decision, the panel took into account the legal advice provided in that the forward slash denotes alternatives and that it need not find both words were used, only that either one or other of them was used.

The panel noted that your evidence is that you used the words *"my nigga"* and not "*my nigger"* in October 2017 during a work away day.

The panel had regard to Witness 2's evidence that the incident happened around 2018/pre-2019 and the evidence from Witness 4 that the incident happened around 2018/2019. The panel noted that the evidence is unclear and inconsistent as to whether the incident occurred in October 2017 or around 2018/2019. However it is satisfied that an incident took place around either 2017 or 2018 where you used words *"my nigga"* when referring to Witness 4.

The panel noted that you denied the charge because you did not admit to using the word *"nigger"*, but only the word *"nigga".* The panel was of the view that phonetically, the words still denote the same meaning.

The panel had regard to your evidence at the disciplinary hearing:

> *"This was in October 2017 In attempting to express my admiration of* [Witness 4]*. Linked to the song being played in the car by snoop dog (Mill, YG & Snoop Dogg | That's My Nigga | 2017) I used the term 'My Nigga in the context of the term used in the song'."*

The panel noted that this charge will be found proved if it is found that you used either *"my nigga"* or *"my nigger"*, and you have admitted using the words *"my nigga"*, therefore the charge is found proved.

Charge 8 (in respect of Charge 3)

> 'Your actions in Charge 3 (Around October 2018/2019 whilst out with work colleagues, spoke to Colleague A using words to the effect that Colleague A was "*My Nigger/Nigga*) were racially abusive and also motivated by an intention to be racially abusive.*'*

This charge is found proved.

In reaching this decision, the panel took into account the evidence it considered above when it found Charge 3 proved. The panel noted the legal assessor's advice in which he provided definitions for racist: *"hostile or discriminatory towards a relevant racial group"* and abusive: *"extremely offensive or insulting."* The panel then considered whether the evidence outlined above from an objective view when applying these definitions, could be found to be racially abusive.

The panel was of the view that the words *"my nigga"* used are racially abusive. The panel considered that the words are disparaging, derogatory and extremely offensive and insulting. It is the panel's view that any reasonable person would find these words to be racially abusive towards a black person.

The panel then went on to consider whether your actions in Charge 3 were motivated by an intention to be racially abusive. It noted that the evidence from you and Witness 4 is that you were good friends and that the incident occurred when you were travelling home from a work event. Your evidence and that of Witness 2 is that you and Witness 4 were intoxicated. Witness 2 was the driver of the car, and [PRIVATE]. It was your evidence that you used the word in relation to a song that was playing in the car and you intended it as a compliment to Witness 4 in the analogy of that song:

> *"Linked to the song being played in the car by snoop dog (Mill, YG & Snoop Dogg | That's My Nigga | 2017) I used the term 'My Nigga in the context of the term used in the song'. The term 'My Nigga' means your partner through thick and thin. someone who will always help you out, no matter the situation. Having spent the day in team building exercise* [PRIVATE] *that I viewed that* [Witness 4] *had the strengths of having my back and that we were partners at work. I did not direct the statement directly to* [Witness 4]. *I understand now that I used a term of affection exclusively reserved for use by black people.* [PRIVATE]*. At the time I believed (from personal experience) that it was a term that could be used interracially with a black friend if both parties understood what it meant."*

The panel noted that the evidence of Witness 2 and Witness 4 is that the words were not used in the context of music, and they have no recollection that the song referred to above was being played at the time you used these words. The panel noted that Witness 2 was the designated driver, not intoxicated at the time and her evidence was consistent with that of Witness 4. The panel also noted that initially you had no recollection of this incident and it returned gradually during the Trust's disciplinary investigation and hearing. The panel was not satisfied that your evidence about the context in which you used the words was reliable.

The panel determined that whilst your attitude in using the words *"my nigga"* may not have been hostile, it was directed to a relevant racial group, namely Witness 4, a black colleague, and discriminatory.

The panel therefore finds this charge proved.

Charge 8 (in respect of Charge 4)

> 'Your actions in Charge 4 (Around June 2020 after Colleague B called in sick, used words to the effect 'I wonder which witch doctor she was going to get that sick note from) were racially abusive and also motivated by an intention to be racially abusive.'

This charge is found proved.

In reaching this decision, the panel noted that you made admissions to Charge 4. The panel noted the legal assessor's advice in which he provided definitions for racist: *"hostile or discriminatory towards a relevant racial group"* and abusive: *"extremely offensive or insulting."* The panel then considered whether the evidence outlined above from an objective view when applying these definitions, could be found to be racially abusive.

The panel took into account evidence provided by Witness 2, Witness 3, Witness 4 and yourself in relation to this charge. The panel noted that these witnesses are consistent in their accounts of when the incident took place. Witness 2 mentions June 2020 in the local investigation and in her NMC witness statement. Witness 3 refers to the incident happening in June 2020 in lockdown. Witness 4 also refers to June 2020 in the local investigation. The panel noted that you did not disagree with this as you outlined in your evidence that the incident happened during lockdown, and you were the only manager on duty as others had been off sick. The panel is satisfied that it is more likely than not that the incident occurred in June 2020.

The panel went on to consider whether the words were racially abusive and whether you were motivated by an intention to be racially abusive. The panel looked at the words "witch doctor" that you used, and it was of the view that these words were extremely offensive and insulting, and referable to race from an objective point of view as they were made about Ms 4, a black colleague. The panel considered that "witch doctors" are typically associated with Africa and have derogatory connotations with

voodooism, black magic, and other similar practices when used in reference to black people.

The panel noted that although you did not make this comment to Ms 4 directly, you made it about her, following a telephone conversation you had with her about calling into work sick. The panel was satisfied that the comment was made in relation to a racial group namely black people. The panel reject your explanation that the comment was not directed at Ms 4 but rather at GPs. It did not find this explanation to be plausible and was satisfied that you made this comment in relation to a colleague who had called in sick. The panel noted that it has to be directed or referable to a relevant racial group and the panel was satisfied that your comment had this effect.

The panel then considered whether you were motivated by an intention to be racially abusive. The panel noted that the context of this comment being made *after* a black colleague had called in sick, could not possibly be attributed to GPs in the way you had suggested in your evidence. It was of the view that you were annoyed about Ms 4 being sick for so long; she had tested negative for COVID-19, and in your mind was fit to return to work. Witness 3 had provided evidence that Ms 4 had a history of being absent from work. In the context of a busy working environment where many staff members were off sick or shielding from COVID-19, you were of the view that Ms 4 was fit to return to work, and it was this frustration that led you to make the racist comment in question.

The panel was of the view that your attitude was discriminatory towards a racial group as you were essentially asking your colleagues, which *"witch doctor"* was Ms 4, a black colleague, going to get a sick note from when she had called in sick. The panel could not draw any other inference from the comment you made and did not accept your explanation [PRIVATE].

The panel determined that the comment was hurtful, hateful, derogatory, and racially abusive. It was of the view that [PRIVATE], there was hostility and anger that Ms 4 was not returning to work, and it demonstrated a discriminatory attitude towards her. The

comment was made in an open office with three named witnesses who have all made statements that you have used words to this effect.

The panel therefore finds this charge proved.

Charge 8 (in respect of Charge 5a)

> 'Your actions in Charge 5a (On an unknown date, spoke to Colleague A using words to the effect; a) "*Have you met your lot yet?"*) were racially abusive and also motivated by an intention to be racially abusive'.

This charge is found proved.

In reaching this decision, the panel noted that you made admissions to Charge 5a. The panel noted the legal assessor's advice in which he provided definitions for racist: *"hostile or discriminatory towards a relevant racial group"* and abusive: *"extremely offensive or insulting."* The panel then considered whether the evidence outlined above from an objective view when applying these definitions, could be found to be racially abusive.

The panel noted Mr Hussain-Dupré's submissions that the words *"your lot"* are innocent and considered a collective noun that cannot be considered to be racially abusive. Mr Rye submitted that a common-sense approach should be taken and an inference to race can be drawn. The panel noted the definition of racially abusive as above and also noted the evidence you provided when you referred to speaking to Witness 4. You stated that you used these words in the context of being the head of the LGBTQ+ network and not having managed to meet your lot ("*my lot")* (the LGBTQ+ network group). You said you asked whether Witness 4 had met "*his lot*" by which you meant the BAME network. When asked if Witness 4 was the head of the BAME network, you responded by saying that he was not, but was a member of that network.

The panel noted that you had admitted to the charge, so it then went on to consider whether the words were racially abusive and whether you were motivated by an

intention to be racially abusive. It was of the view that your comments in using words to the effect of *"have you met your lot yet?"* could be considered extremely offensive and insulting from an objective point of view when referring to a black person, or a group of black people, in the way that you did. The panel was of the view that the words have connotations with othering and segregation, and were hostile, discriminatory, abusive, disparaging, and unprofessional.

The panel then considered whether you were motivated by an intention to be racially abusive when you used these words. It noted that there were differing views from the witnesses as Witness 4 stated that he was referring to risk assessments for BAME staff and patients who were deemed more at risk of COVID-19, whereas you had stated that you were referring to networks as stated above. The panel noted that there was insufficient evidence to demonstrate that your intention when you used the words outlined in this charge was hostile. However, the panel was satisfied that there was sufficient information that supported the inference that you intended to be discriminatory towards a relevant racial group.

The panel therefore finds this charge proved.

Interim order

As the panel has made a determination on the facts, it 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 your own interests.

Submissions on interim order

The panel took account of the submissions made by Mr Rye. He submitted that an interim suspension order for a period of 8 months should be imposed on the grounds of public protection and public interest, as this will run just past the resuming hearing dates. He submitted that this is primarily a public interest case, and the panel will be

aware of the high bar required for interim orders to be made on public interest only grounds.

Mr Rye referred the panel to the NMC guidance FTP-3. He submitted that when a professional on the register engages in the types of behaviours found proved at this hearing, the possible consequences are far reaching that members of the public may experience less favourable treatment, or they may feel reluctant to access health and care services in the first place. He submitted that it is known that those who face discrimination can be profoundly affected, and fair treatment of staff is linked to better patient care.

Mr Rye reminded the panel that in deciding whether it is necessary for the imposition of such an order, it should consider the background to these matters, that the conduct has not been repeated, and that there has been a considerable period of time since the conduct took place. He also reminded the panel that it should consider your current employment, the references that have been provided on your behalf and your evidence with regards to the support you are receiving. He submitted that it would be a matter for the panel, whether in all the circumstances, an order would be necessary for the purposes of public protection and or in the public interest.

The panel also took into account the submissions of Mr Hussain-Dupré. He submitted that the panel has heard extensively in relation to things that you have put in place since the incidents occurred. The panel have a number of testimonials and information on your supervision with your current employer, and the fact that there has been no repetition of the incidents mentioned in the charges. He reminded the panel that it will be quite some time before the panel decides on impairment and possibly sanction and you have a secure job, [PRIVATE].

Mr Hussain-Dupré submitted that therefore for these reasons you would like to resist the application for an interim order, but it is obviously for the panel to decide.

Decision and reasons on interim order

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

The panel was not satisfied that an interim order is necessary for the protection of the public and is not otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and noted the high threshold for imposing an interim order on public interest grounds.

Although the charges found proved are serious, the panel concluded that an interim order is not necessary in the circumstances of this case. The panel noted that you are in steady employment, there is no evidence of repetition of the conduct set out in the charges, and there have been numerous positive references and testimonials from your current line manager and other colleagues. The panel also noted that you are well supported and supervised and [PRIVATE]. The panel bore in mind the effect an interim order would have on you and your employer. The panel was not satisfied that an interim order was necessary for the protection of the public or otherwise in the public interest.

That concludes this determination.

The hearing adjourned on 26 October 2023

The hearing resumed on 11 March 2024

Ms Hole was not present on 11 March 2024-15 March 2024. Mr Hussain-Dupré informed the panel that Ms Hole has instructed that she was content for the hearing to proceed and with Mr Hussain-Dupré representing her interest in her absence.

Decision and reasons on application for recusal

Mr Hussain-Dupré made an application for the panel to recuse itself. He provided the panel with written submissions on this application, as well as an '*Annexe 1*' which set out the parts of the panel's decision on the facts that Ms Hole took issue with. Mr Hussain-Dupré also referred to his application bundle which included extracts from the

panel's decision and reasons on no case to answer, its decision and reasons on facts, and the transcripts from the part-heard hearing.

Mr Hussain-Dupré submitted that the panel was being invited to recuse itself on the basis of a breach of the rules of natural justice through apparent bias, demonstrated through the lack of cogency or reasoning in its findings, lack of consideration of Ms Hole's evidence and the panel's overall approach to determining the facts in this case. Mr Hussain-Dupré highlighted the panel's duty under Article 6 of the European Convention on Human Rights (ECHR) to act fairly which, in his submission, includes impartiality and an obligation to give reasons.

Mr Hussain-Dupré asked the panel to consider the relevant case law set out in his written submissions, which included the cases of *Porter v Magill* [2002] UKHL 35, [2003] ICR 856, *Laval v Northern Spirit Ltd* [2003] UKHL 35, *R v Bow Street Magistrate, ex parte Pinochet (No. 2)* [2000] 1 AC 119 [132F-G]. He submitted that the panel's duty to act fairly was not just where there was an obvious bias, but where there may be a perception of bias. Mr Hussain-Dupré submitted that there was a real possibility that an ordinary informed observer may perceive there to be the possibility of bias. He submitted that the examples given in '*Annexe 1*' worked together to present a rounded picture, as it was not Ms Hole's case that there was any one concrete example of bias in and of itself, but the combined effect was that there may be a real possibility.

Mr Hussain-Dupré submitted that the panel's decision was not cogent or consistent in some places and did not take into account the evidence or issues that were actually raised. He pointed to '*Annexe 1'* of his written submissions and highlighted where Ms Hole took issue with the panel's decision and the cogency of its reasons.

[PRIVATE]. Mr Hussain-Dupré submitted that this was not an application designed to avoid a hearing or avoid being held to account. He submitted that in moving forward to the next stage of the proceedings, understanding the panel's rationale would help Ms Hole to adequately respond (particularly in respect of her state of mind, whether she was hostile or whether she displayed a discriminatory attitude) and then indicate how she has managed to remediate what she has taken into consideration through reflection

and insight. Mr Hussain-Dupré submitted that the panel's lack of adequate reasons *"deprives"* Ms Hole of the opportunity to address *"concerns"* at the next stage.

Mr Hussain-Dupré submitted that in terms of the effect on Ms Hole, if she were unable to adequately address the next stages in the process, that would mean that time and energy would have been invested in this process for that to be appealed, which would then further delay the process. He submitted that if an appeal was successful, the case would be remitted back to a fresh panel for reconsideration and Ms Hole would be "*back to square one*". Mr Hussain-Dupré submitted that the most effective way of dealing with this would be to go "*back to square one*" at this stage.

In response, Mr Rye indicated that the application for recusal was opposed. He submitted that if the panel agreed with Mr Hussain-Dupré's submissions, then it would have to recuse itself and the case would start again before a different panel. It was Mr Rye's submission, however, that the matters raised within Mr Hussain-Dupré's application were matters that should be dealt with within an appellate jurisdiction. He submitted that these were not matters that this panel was able to deal with, and this was not the correct forum to deal with the concerns raised by Mr Hussain-Dupré.

Mr Rye submitted that it would not be appropriate for the panel to look at its decision and reasons on the facts and consider whether it was biased, or whether there was a real possibility that it was biased based on its findings. He submitted that as set out in Mr Hussain-Dupré's written submissions, the relevant test was in the case of *Porter v Magill* which provides that the question is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Mr Rye submitted that as the test states, this exercise should be considered by someone other than this panel. He submitted that the panel was, in effect, being asked to find bias based on its own allegedly inadequate findings on the facts, and in his submission, this would not be an appropriate task to undertake.

Mr Rye submitted that ordinarily, bias occurs where the tribunal or judge has a vested interest in the outcome of the hearing and did not disclose this prior to the hearing; or where the judge or members of the tribunal are connected to a particular group in

society that would also have a vested interest in the case and how the case concludes, and that comes to light after that stage has taken place. He submitted that the case law therefore suggests that there is a presumption where there is a person with a vested interest, the presumption being that the person has bias or potential bias. Mr Rye submitted that the case of *R v Bow Street Magistrate, ex parte Pinochet*, which was referred to by Mr Hussain-Dupré, fell within the category of cases where a judge had a vested interest. He submitted, however, that this was not the case in these proceedings.

Mr Rye submitted that the test of a fair-minded and informed observer should not be confused with that of the person making the allegation of bias. He submitted that such a litigant lacks the objectivity which is the characteristic of the fair-minded and informed observer. In addition, Mr Rye submitted that the opinion of the fair-minded and informed observer is not to be equated with the presumed or actual views of the practising lawyers.

Mr Rye referred to the case of *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 where the Court of Appeal held that the mere fact that a judge earlier in the same case or in a previous case had commented adversely on a party or witness or found the evidence of a party or witness to be unreliable would not, without more, found sustainable objection. Mr Rye also referred to the case of *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315 where the Court of Appeal held that the general rule was that a judge hearing an application or a trial which relied on the judge's own previous findings should not recuse themselves unless they consider that either they genuinely cannot give either party a fair hearing; or if a fair-minded and informed observer would conclude that there was a real possibility that they could not do so.

Mr Rye submitted that this panel had found facts largely not in favour of Ms Hole, however it should also be noted that it had found in favour of Ms Hole on some charges, which in his submission indicated that the panel did not demonstrate any bias or potential bias towards her. He submitted that on the contrary, such findings demonstrated that the panel had carefully considered all the evidence and made findings upon the evidence using the appropriate burden and standard of proof. Mr Rye

submitted that the defence may be critical [PRIVATE] with the outcome at the fact stage, but such grievances must be dealt with on appeal.

Mr Rye referred to Mr Hussain-Dupré's submission that Ms Hole was unable to put forward a case at the next stage of the proceedings because the panel had not adequately set out its findings as to facts. He submitted that such assertions are "*appeal points*" and not central to any argument for this panel recuse itself. Mr Rye submitted that the findings are such that a registrant is able to submit to the panel whether the charges found proved amount to misconduct or not. He submitted that this is a matter of professional judgment, guided by the principles set out in law. Mr Rye submitted that the panel's findings did not prevent the defence from putting forward arguments as to whether the charges that had been deemed racially offensive or discriminatory and/or racially motivated amounted to serious misconduct or not.

Mr Rye submitted that if Mr Hussain-Dupré on behalf of Ms Hole had concerns on how to approach such matters in light of the panel's findings, then the panel was entitled to split the misconduct and impairment stage (dealing with and handing down on misconduct first and then affording the defence an opportunity to prepare for the impairment aspect of this two-stage process). He submitted that this would allow Ms Hole the opportunity to decide on how to approach impairment. Mr Rye submitted that Ms Hole also has the option to give evidence after the panel has handed down its decision on misconduct and address the panel.

Mr Rye submitted that if Mr Hussain-Dupré remains concerned that the panel's determination on the facts is inadequate, he could invite the panel to retire so that it could elaborate further on such facts where necessary, perhaps as set out in his application at '*Annexe 1*'. Mr Rye submitted that such a measure would meet the public interest in this case coming to a resolution and would demonstrate fairness. Mr Rye submitted that such a course of action did not mean that the panel would undertake a further fact-finding exercise. However, the panel could clarify any ambiguity in its findings, making it clearer for Ms Hole to proceed to the next stage. Mr Rye submitted that it was not his case that the panel take this course of action, but it would be open to

the panel to do this in light of Mr Hussain-Dupré's submissions relating to concerns with the reasons provided.

In conclusion, Mr Rye submitted that there were no grounds for the panel to recuse itself. He submitted that there were viable options that the panel was able to take during this hearing, so that Ms Hole's interests and arguments are put forward at the next stage. However, if Ms Hole was dissatisfied with the panel's decision there is an option for her to appeal the decision to the High Court at the conclusion of these proceedings.

Decision

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

The panel carefully considered Mr Hussain-Dupré's application to recuse itself based on, *'a breach of the rules of natural justice through apparent bias, demonstrated through the lack of cogency or reasoning in its findings, lack of consideration of the Registrant's evidence and the panel's overall approach to determining the facts in this case'.* In doing so, the panel also comprehensively reviewed its findings of facts. The panel bore in mind the leading case of *Porter v Magill [2002] UKHL 35,* [2003] ICR 856 which set out the test:

> *'the question is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'*

Having applied the appropriate test and the panel's reasons on the facts, the panel is not satisfied that a fair-minded observer having considered the facts would conclude that there was a real possibility that the panel was biased. The panel therefore rejected the application that it should recuse itself.

Reasons

The panel addressed Mr Hussain-Dupré's submissions that there were *'wide ranging flaws'* in the panel's decision. In particular, Mr Hussain-Dupré submitted:

'*Whilst determining the Registrant's state of mind, particularly in respect of discrimination, the panel has not given any consideration to the key strand of the Council's case - that the Registrant was pervasively discriminatory against Witness 4, with specific examples, even though they were rebutted in evidence by both Witness 4 himself and the Registrant. This ought to have weighed in favour of the Registrant vis a vis her attitude towards colleagues The Case Presenter put various questions to Witness 4 in relation to the alleged examples of discrimination - allocation of annual leave and of bank shifts - with the underlying suggestion that the Registrant treated Witness 4 differently and that caucasian staff would not experience the same issues.'*

The panel's main focus in its decision was in relation to the charges set out by the NMC in the charge sheet. The panel made its findings based on the documentary and live evidence provided to it. There was no specific charge that Ms Hole was *'pervasively discriminatory'* against Witness 4 or discriminatory in relation to the allocation of [PRIVATE] and bank shifts to Witness 4. The panel accepts that this information was provided by way of context and the NMC suggested that it was evidence that Ms Hole was *'pervasively discriminatory towards witness 4'.* The panel clarifies or amplifies its decision that it did not accept the NMC's submission that there was pervasive discrimination or discriminatory in the allocation of [PRIVATE] and bank shifts to Witness 4. The panel accepted Ms Hole's evidence that she was applying the Trust policy and was prepared to be flexible if Witness 4 required emergency leave to deal with a family situation. However, that did not mean that on the specific occasions alleged in the charges Ms Hole acted, or did not act, in the way alleged in the Charge.

The panel next considered Mr Hussain-Dupré's submission that the panel's language in their findings on the facts *'strays in to the territory of dealing with racism, or where specific words are used that suggest that the Registrant is racist rather than simply finding whether or not the charges are made out'.*

The panel noted that legal advice was provided in writing by the legal assessor on 17 October 2023, 19 October 2023 and 24 October 2023. This included advice on the

meaning of racial abuse and racial motivation. It understood that all of the advice was agreed by both counsel, Mr Hussain-Dupré on Ms Hole's behalf, and Mr Rye on behalf of the NMC. The panel also had Mr Hussain-Dupré's written submissions on facts dated 24 October 2023, which was consistent with the legal assessor's written advice.

In reaching its decision on the facts, the panel approached the charges as advised by the legal assessor, taking into account all of the relevant evidence and carefully considered whether Ms Hole's actions were racially abusive and racially motivated. The panel's focus was on the specific charges as set out and the panel does not consider that its decision needs further clarification. In approaching Charge 8, the panel looked individually (as appears from its decision) whether Ms Hole's actions as found proved were racially abusive, or racially abusive and racially motivated, or neither.

The panel considered Mr Hussain-Dupré's submission that:

[PRIVATE]

The panel bore in mind the legal advice as follows:

[PRIVATE]

[PRIVATE]

In relation to the panel's consideration of the [PRIVATE] presented to it, the panel has made the following clarification (in bold) to its decision to read:

[PRIVATE]

The panel then considered the submission from Mr Hussain-Dupré that:

'The decision on the facts was handed down at approximately 17:00 on the final day of the original listing, raising concerns over whether there was a rush to

finalise the decision before the hearing went part heard. This in itself would be manifestly unfair to the Registrant.'

The panel handed down its decision on facts at 16:30 on 26 October 2023 and went on to sit until 17:31, when it handed down its decision on an interim order application. The panel deliberated at great length over 2.5 days on facts and refutes any suggestion that it rushed to finalise its decision, or that the panel was '*determined to find against the Registrant'* or '*was working towards a pre-determined outcome'.*

The panel next considered Mr Hussain-Dupré's submissions in respect of the following charges as set out in *'Annexe 1'*.

Charge 8 (in respect of Charge 1)

Mr Hussain-Dupré submitted that:

'It was not open to the panel to return a finding of 'partially proven' where both racially abusive and also racially motivated were, in its view, not made out.'

The panel's view was that the allegation of racial abuse in Charge 8 (in respect of Charge 1) was made out but not racial motivation. The legal assessor advised as follows:

'In relation to Charge 8, you may find that the registrant's words and actions were neither racially abusive nor racially motivated; or that her words and actions were racially abusive but not racially motivated; or that they were both racially abusive and racially motivated.'

This advice was not challenged.

Mr Hussain-Dupré also submitted that the panel's approach was *'flawed and irrational',* in relation to Charge 8 (in respect of Charge 1). The panel was satisfied that in its decision, it explained why it reached the conclusion that the words used were racially

abusive in the particular circumstances of this case but not racially motivated. There were no *'additional words'* although as stated in its decision panel regarded the words used were in relation to Witness 4's cream clothing. As to the use of the word *'plantation'*, Mr Hussain-Dupré accepted in his written submissions that *'the term plantation may objectively be referable to race'.*

Charge 8 (in respect of Charge 2)

In summary the panel understood Mr Hussain-Dupré's submissions in relation to this charge covered the following matters:

1) The panel's determination *'marked a shift from halftime'* and it *'failed to explain how it concluded on the subjective test that the Registrant had demonstrated a discriminatory attitude'.*
2) The use of the word *'racist'* in the legal advice '*promotes a distinct impression on the panel's approach to the Registrant, where it is not tasked with considering whether she was or is racist, but whether or not her state of mind at the time was hostile or discriminatory.'*
3) The panel failed to explain how it '*concluded that the Registrant's state of mind was both hostile and discriminatory'*, and *'the panel has failed to consider the Registrant's live evidence, over and above the disciplinary meeting.'*

As to 1) above, in its decision on the application of No Case to Answer, the panel accepted that based on the evidence of Witness 2 there was no evidence capable of showing hostility. However, after hearing Ms Hole's oral evidence the panel considered that her actions were motivated by an intention to be racially abusive. The panel rejected Ms Hole's evidence that in addressing Mr 1 she was being *'jokey/funny'.* Ms Hole told the panel that she was *'heavily intoxicated'* at the time and could not remember the incident. The panel also noted that Ms Hole's memory of the incident came to her sometime later on reflection and a review of photographs. Moreover, by Ms Hole's own admissions to the panel, Ms Hole started the incident in relation to Mr 1. The incident began when Ms Hole challenged Mr 1 taking food from the table. Contrary to her evidence, the panel found that she did not deescalate the situation.

As to 2) above and as previously stated, the legal assessor's advice was agreed, and not challenged by Mr Hussain-Dupré. As appears from the transcript, the legal advice was circulated in advance to everyone before being read to the panel.

As to 3) above, the panel did not fail to consider the Registrant's oral evidence as to her state of mind but rejected it given the context and circumstances of the incident.

In summary, the panel is satisfied that it has given adequate reasons in respect of this charge.

Charge 8 (in respect of Charge 3)

In summary the panel understood Mr Hussain-Dupré's submissions in relation to this charge covered the following matters:

1) *'The panel has offered no reasons as to why the evidence led to the conclusion of discrimination, but not hostility, or how it demonstrated the Registrant's state of mind.'*
2) '*the panel's language, suggesting that the N word 'may not' have been hostile, is not a determination of the facts.'*

As to 1) above, as stated in the determination, Ms Hole was good friends with Witness 4 and the incident occurred when they were travelling home from a work event with Witness 2. Whilst Ms Hole showed no challenge or hostility towards Witness 4 in the car and had no intention to be racially hostile towards him, she nevertheless used words that were racially abusive and directed to Witness 4, a black colleague. The words used showed a discriminatory attitude towards a person of a relevant racial group and the panel was satisfied that it was her intention to be discriminatory towards Witness 4.

As to 2) above, the panel clarifies its decision that it did not find the words *'my nigga'* racially motivated on the basis that Ms Hole intended the words to be hostile.

Charge 8 (in respect of Charge 4)

In summary, the panel understood Mr Hussain-Dupré's submissions in relation to this charge covered the following matter:

[PRIVATE]

Charge 8 in respect of Charge 5a

In summary the panel understood Mr Hussain-Dupré's submissions in relation to this charge covered the following matters:

1) *'The panel determined that there was sufficient information that supported the inference of an intention to be discriminatory, but insufficient evidence to demonstrate an intention to be hostile. The panel has failed to explain its evaluation of the evidence on these points.*
2) *The panel gave no explanation as to why a reasonable person would take the words 'your lot' as being racially abusive.'*

As to 1) above, the panel was satisfied that a meeting took place between Ms Hole and Witness 4 to discuss an issue regarding the networks that Ms Hole and Witness 4 represented. Ms Hole used the words *'your lot'* towards Witness 4 when referring to members of the BAME network. The panel found that this language had connotations with othering and segregation, and that a reasonable inference could be drawn from the context and the language that Ms Hole used, that her intention was discriminatory. The panel would like to clarify that notwithstanding Ms Hole's evidence that she was involved in cooperation with various diversity groups, she nevertheless showed a discriminatory attitude on this occasion.

As to 2) above, the panel emphasised that as stated within the determination, the panel considered the words *'your lot'* in its context, were hostile, discriminating and disparaging, from an objective point of view. The panel found that the context in which

the words were said was discriminatory towards a specific racial group and that such use was a derogatory term amongst members of the BAME community.

Recusal

The panel then turned to the question on whether it should recuse itself. For the reasons stated above, the panel rejects Ms Hole's application for the panel to recuse itself either on the grounds that its decision lacks cogent reasons or *'is attributable to some form of bias against the Registrant*'. The panel has comprehensively reviewed its findings of facts and remains unaltered in its primary position on the charges found proved. However, it has sought to clarify certain matters raised by Mr Hussain-Dupré.

The panel is satisfied that a well-informed fair-minded observer, having considered the facts, would not conclude that there was a real possibility that the panel was biased.

The panel noted that Ms Hole has a right to appeal its decision and therefore there is another forum for Ms Hole if she wishes to exercise such a right.

The panel determined it was satisfied that Ms Hole can move onto the next stage of the proceedings. The panel would be open to hear any submissions on whether to deal with misconduct and impairment in two parts, should Ms Hole find this helpful.

Interim order

On 15 March 2024, the panel 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 your own interests.

Submissions

Mr Rye submitted that he was not making an application for an interim order.

Mr Hussain-Dupre submitted that on the basis that nothing has changed since the last hearing, he was not making further submissions.

Decision and reasons on interim order

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

The panel was not satisfied that an interim order is necessary for the protection of the public and is not otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and noted the high threshold for imposing an interim order on public interest grounds.

Although the charges found proved are serious, the panel concluded that an interim order is not necessary in the circumstances of this case. The panel noted that you are in steady employment, there is no evidence of repetition of the conduct set out in the charges, and there have been numerous positive references and testimonials from your current line manager and other colleagues. The panel also noted that you are well supported and supervised [PRIVATE]. The panel bore in mind the effect an interim order would have on you and your employer. The panel was not satisfied that an interim order was necessary for the protection of the public or otherwise in the public interest.

The hearing adjourned on 15 March 2024 after the panel heard submissions on misconduct and impairment.

The hearing resumed on 1 July 2024 with the panel and the legal assessor. On 2 July 2024, all parties were present.

On 2 July 2024, a number of observers were also present, including people from social media groups who stated that they were interested in reporting on the hearing. Mr Hussain-Dupré addressed the panel and stated that he wished to make an application under Rule 19 of the Rules, for the panel to go into private to hand down its decision on misconduct and impairment. Mr Hussain-Dupré stated that he would also be applying

for the Rule 19 application to be heard in private due to the nature of the concerns that he wished to expand upon. [PRIVATE].

[PRIVATE].

Ms Jean submitted that the panel had already determined which aspects of these proceedings should be heard in private and [PRIVATE]. She submitted that the NMC's position in general is that there is no good reason why the panel should now depart from the position that it determined earlier in these proceedings.

Ms Jean invited the panel to consider the NMC Guidance CMT-10:

> *'A decision to sit in private may relate to all or part of a hearing. Given that transparency and open justice will normally require that* [PRIVATE] *hearings are held in public, panels should try to hold as much of a hearing in open session as practical, even if it's occasionally necessary to switch between public and private session.*
>
> *In reaching this decision, a panel should also consider if it would be more appropriate and proportionate to take other steps such as editing documents, anonymising information or concealing the identity of a person referred to in the allegation.*
>
> *The application to hear the case in private can itself be made in private session, if it is reasonable to do so. However, the panel should ask for representations from all interested parties before the full application is heard in private. Any decision on an application to hear matters in private is recorded in writing and given to the parties'*

Ms Jean submitted that her understanding of that guidance is that the panel may need to consider whether it needs to hear submissions from the media observers that are present before making its decision as to whether the subsequent Rule 19 application is heard in private or not.

The panel invited the observers to make representations.

Media Observer 1 informed the panel that she has received no information about this hearing so far and that it was hard to make representations without knowing more information about this case. She informed the panel that she is a member of a group called 'Tribunal Tweets' who referred to themselves as an *"open justice collective",* reporting on cases primarily at the Employment Tribunal and the Medical Practitioners Tribunal Service. She informed the panel that herself and her colleagues are interested in areas of free speech, open justice and the sex and gender debate. She submitted that the application should be held in public in the interests of justice.

Media Observer 2 informed the panel that she wished to observe the hearing for open justice reasons, and she supported Media Observer 1's representations.

Media Observer 3 informed the panel that she is also part of 'Tribunal Tweets'. She submitted that whilst they appreciate that people who go through this process are vulnerable, it is important that justice is seen to be done and the public understand regulatory proceedings.

Mr Hussain-Dupré produced a number of documents including '*screenshots'* of what was currently being *"live tweeted"* about this hearing. He submitted that this further supports his argument about the negative consequences for Ms Hole of the panel handing down its decision on impairment in public.

The legal assessor clarified the position. The panel is required under Rule 24 (12), of the Rules, to announce its decision on misconduct and impairment and give its reasons. It is correct, as a number of members of the public have pointed out, that open justice is the guiding rule and the NMC's guidance document CMT-10, says that hearings will usually be held in public; see Rule 19 (1). There has to be justification for derogation from that open justice principle. Mr Hussain-Dupré is making an application for his substantive application to be heard in private and he says it is reasonable for the panel

to do that. The panel is being asked to decide whether or not Mr Hussain-Dupré's Rule 19 application should be heard in private or in public.

Further submissions were made by the parties on 4 July 2024. Mr Hussain-Dupre submitted that this Rule 19 application only relates to the handing down of the panel's decision on misconduct and impairment. However, he indicated that he may make a future application for the remainder of the hearing to be held in private, should it proceed beyond impairment stage. [PRIVATE]

Mr Hussain-Dupré reiterated that his application is focusing on the consequences for Ms Hole which he submitted should be offset against the open justice principles.

Ms Jean reminded the panel that it should have in the forefront of its mind, the principle of open justice. She submitted that the public should be able to see how the NMC conducts its proceedings. She again referred the panel to the NMC Guidance CMT-10 and reiterated that the panel has the discretion to hear the application in private if reasonable to do so.

The panel invited the media observers to make further representations.

Media Observer 1 made a request that members of 'Tribunal Tweets' are allowed to stay during any part of the hearing held in private and they would not report on this part of the hearing. She submitted that where one of the parties seeks to deviate from the principle of open justice, then the media observers should be afforded an opportunity to hear the parties' submissions and address the panel.

Media Observer 4 informed the panel that members of the 'Tribunal Tweets' should have the right to see the documents that mentions Tribunal Tweets. The panel clarified that documents provided to it by Mr Hussain-Dupré included a copy of *"live tweets"* from the hearing on 2 July 2024.

Media Observer 2 submitted that Ms Hole, in her role as a registered nurse, has been involved in online public events relating to mental health, including for organisations

such as Stonepillow. She submitted that it is appropriate that people understand what she has been accused of. She submitted that although Ms Hole would be considered vulnerable, she does not believe this is grounds to make everything private.

The legal assessor provided the panel with legal advice which it accepted.

Panel decision and reasons

The panel was mindful that it had already made a decision under Rule 19(2) that parts of this hearing are held in private when matters relating to [PRIVATE] are raised.

[PRIVATE]

The panel decided that it would hear the Rule 19 application in private, in the presence of the parties (NMC presenter and Ms Hole's representative), but otherwise excluding the media observers and public, in accordance with Rules 19(4) and Rule 20 of the Rules.

Mr Hussain-Dupré's application for the panel's decision and reasons on Misconduct and Impairment to be announced in private

Mr Hussain-Dupré submitted that Ms Hole had planned to attend the hearing on 2 July 2024. [PRIVATE]

Mr Hussain-Dupré submitted that the issues involve [PRIVATE]. As per the submission from the observers, there is speculation online around her case. He addressed the panel on the documents which he had recently submitted to the panel and stated that *"things have been live tweeted where the registrant* [PRIVATE]*".* He submitted that Media Observer 3 drew a connection between Tribunal Tweets' interest in this case and Ms Hole attending an online professional event and that particular event in 2020, resulted in some of the comments that he has put before the panel.

Mr Hussain-Dupré submitted that to announce the decision in public would be *"effectively pouring fuel on any potential fire"* particularly as the media observers would not have an understanding of what the finding on misconduct and impairment relates to and there would be no clarification that this does not relate to [PRIVATE]. He submitted that it could end up being reported as simply (and to quote Tribunal Tweets) *"a trans identifying man working on a psychiatric ward who is found to be impaired".* He informed the panel that he was not trying to anticipate the panel's decision in respect of misconduct and impairment, however, even if the outcome is favourable to Ms Hole, there is still a risk that conclusions could be drawn and information could be posted online which does not necessarily reflect the panel's decision.

Mr Hussain-Dupré informed the panel that there would undoubtedly be an application to the NMC at a later stage in respect of publication of the panel's substantive decision.

[PRIVATE]

[PRIVATE]

Ms Jean submitted that a Rule 19 application has already been granted by the panel [PRIVATE]. She invited the panel to carefully consider whether there is any good reason at this stage to now depart from that position. She submitted that this hearing has largely taken place in public, and members of the public and media could have attended at any of the earlier stages. The principle of open justice is a very important one. The public, including the media, should be able to see how the NMC conducts its proceedings, subject to the safeguards which are encompassed within Rule 19. She submitted that there is a public interest in the panel's decision being announced in public.

[PRIVATE]

[PRIVATE]

The panel heard and accepted the advice of the legal assessor. This included references to the relevant NMC guidance and rules and *General Medical Council v X* [2019] EWHC 493 (Admin) and *Dixon v North Bristol NHS Trust* [2022] EWHC 1871 QB.

[PRIVATE]. The panel noted that this hearing was also scheduled to continue on 29 July 2024 and given that it was now Friday 5 July 2024, effectively the last day the panel was sitting before 29 July 2024, it decided to allow Mr Hussain-Dupré until 29 July 2024 to provide any supporting evidence he considered relevant to this application.

The hearing resumed in private on 29 July 2024. Ms Hole was not present, but was represented. The panel heard further submissions in relation to the rule 19 application.

The panel took account of the written submissions provided by Mr Hussain-Dupre, [PRIVATE].

The panel also took account of Ms Jean's written submissions. By way of oral submissions, Ms Jean set out that the panel had been referred to the case of *General Medical Council v R (X) [2019] EWHC 493 (Admin)* by Mr Hussein-Dupre. She submitted that the public interest in publishing a decision can be overwritten or overruled by a registrant's Article 2 right, [PRIVATE].

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

[PRIVATE]

[PRIVATE].

The panel took into account the NMC Policy on Safeguarding and Protecting People Policy, last updated September 2023. The panel noted in particular the following:

20.3 Where possible we will engage with the people at risk of harm to ensure we act in a person-centred way that represents their wishes and best interests.

20.4 Appropriate and proportionate measures are put in place to protect from harm all those who work for, or with us, or come into contact with us.

20.5 Where we continue to engage with individual(s) involved, reasonable adjustments will be put in place to support them with their engagement.

[PRIVATE]

The panel was satisfied that the interests of Ms Hole outweigh the public interest in holding the hearing in public for the handing down of the decision on misconduct and impairment.

In relation to the case of *General Medical Council v R (X)*, the panel determined that anonymisation is not a sufficient and appropriate response given that Ms Hole has already been identified, and that to anonymise would therefore not be appropriate. The panel determined that the only proportionate and appropriate response would be to hand down its decision in relation to misconduct and impairment in private.

The panel noted that the publication of the determination is a matter for the NMC, and this decision applies only in relation to handing down on misconduct and impairment.

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 Ms Hole'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, Ms Hole's fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

In coming to its decision on misconduct, 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.* […] *The professional misconduct must be serious.'*

Mr Rye invited the panel to take the view that the facts found proved amount to misconduct. Mr Rye invited the panel to have regard to the terms of 'The Code: Professional standards of practice and behaviour for nurses and midwives (2015) (the Code) in making its decision.

Mr Rye identified the specific, relevant standards of the Code which he submitted were engaged, specifically 1.1, 20.1, 20.2, 20.3, 20.4, 20.5 and 20.8. Mr Rye submitted that Ms Hole's actions were a significant falling short of the standards expected of a registered nurse and amounted to misconduct.

Mr Rye submitted that Ms Hole's actions relate to being racially offensive and are therefore serious. He submitted that Ms Hole's conduct was aggravated by the fact that she was in a leadership role, it was not a single instance of misconduct but rather misconduct which occurred over a significant period of time. Mr Rye submitted that being in such a role requires a level of responsibility and professionalism, ensuring that

colleagues are treated with the utmost respect and not are allowed to practise in a non-hostile environment. Colleagues should be able to look to their manager to ensure that they are able to conduct their tasks without being in fear that certain derogatory/unprofessional/racial comments are made towards them or others. He submitted that Ms Hole has breached her fundamental duty to ensure a safe working space for her colleagues. They worked within an environment in which they were fearful of what could be said by Ms Hole and this behaviour therefore calls into question Ms Hole's professionalism and trust as a registered nurse.

Mr Rye submitted that Ms Hole's conduct is a significant departure from the standards expected of a registered nurse and referred the panel to the NMC Guidance (reference: FTP-3). He submitted that Ms Hole's actions would seriously undermine trust and confidence in the profession. He submitted that the conduct breached the fundamental tenets of the profession and the principles set out in the Equality Act 2010.

Mr Rye addressed the panel that in terms of Charge 5b and Charge 6, although admitted, the panel may question whether they add to the seriousness of the conduct found proved on their own and that the panel may take a view that they are not that serious.

Mr Hussain-Dupré submitted that Ms Hole accepted that her conduct fell below the required standard and that the words used were insensitive and caused offence.

Submissions on impairment

Mr Rye addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. This included reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin)*, Yeong v. MC* [2009] EWHC 1923 (Admin) and *Professional Standards Authority v Health and Care Professions Council (HCPC) and Leonard Ren-Yi Yong* [2021] EWHC 52 (Admin)*.*

Mr Rye submitted that limbs b) and c) of Dame Janet Smith's "test" are engaged and possibly also limb a). Mr Rye referred to the NMC Guidance FTP-3 and submitted that whilst there is no evidence of patient harm, there is a risk to the public when a registered nurse engages in discriminatory behaviour as the public may feel reluctant to access health and care services and may experience less favourable treatment.

Mr Rye submitted that regarding limbs b) and c), Ms Hole breached the fundamental tenets of the profession and brought the profession into disrepute. Ms Hole's conduct fell far below the standards expected of a registered nurse and had the potential to damage the reputation of the profession. Ms Hole, having been in a leadership role at the time of the charges found proved, had a duty to ensure that the working environment is safe and free from such conduct. Mr Rye submitted that Ms Hole failed in this duty and demonstrated a lack of professionalism and trust, which adversely impacted on the profession and that breached the fundamental tenets of the profession.

Mr Rye submitted that the panel should have regard to the following questions:

- Whether the conduct that led to the charge(s) is easily remediable
- Whether it has been remedied
- Whether it is highly unlikely to be repeated

Mr Rye acknowledged that Ms Hole has engaged with the process, provided reflective statements and evidence of further training around the concerns identified. He acknowledged that Ms Hole has also provided evidence that her conduct is unlikely to be repeated in the future. Mr Rye also acknowledged that Ms Hole has demonstrated remorse and an understanding that her conduct has breached the Code.

Mr Rye submitted that the panel has had sight of testimonials/references that not only attest to Ms Hole's progression as a nurse, but also provided an independent view regarding Ms Hole's level of professionalism and insight relating to the conduct, and that there has been no repeat of this conduct to date.

Mr Rye submitted that the conduct found proved is not easily remediable. He submitted that the panel may consider that Ms Hole has demonstrated that the risk of such conduct being repeated is low. However, he invited the panel to bear in mind that Ms Hole denied the allegations relating to the issue of intent and questioned whether the panel's rejection of her explanations regarding her intent go to the very heart of the issues relating to insight, remorse and remediation. Mr Rye asked the panel to consider whether there is some attitudinal conduct that places the risk of repetition higher. Mr Rye submitted that when looking at insight, remorse and remediation, the position regarding the risk of repetition may not be as clear as one would initially think.

Mr Rye submitted that irrespective of the conclusion of the panel in relation to public protection, there must, in this case, be a finding on impairment on public interest grounds. He submitted that a member of the public, knowing the seriousness of the conduct demonstrated by Ms Hole would be surprised and concerned that such a finding was not made on this ground. Mr Rye submitted that Ms Hole's actions are so serious that public confidence in the profession, and the standards expected of nurses would be severely undermined. He referred the panel to the principles of the case of *Yeong v GMC* [2009] EWHC 1923 (Admin)*, PSA v HCPC and Roberts* [2020] EWHC 1906 (Admin)*,* and paragraphs 71 and 74 in the case of *CHRE v NMC* and *Grant* [2011] EWHC 927 (Admin)*.*

Mr Hussain-Dupré drew the panel's attention to the NMC Guidance on impairment and reminded the panel that it must ask itself, *'Can the nurse* […] *practise kindly, safely and professionally'* and drew the panel's attention to *Cohen v General Medical Council* [2008] EWHC 581 (Admin), *Zygmunt v General Medical Council* [2008] EWHC 2643 (Admin), *Professional Standards Authority v The Health and Care Professions Council and Roberts* [2020] EWHC 1906, *Towuaghantse v GMC* [2021] EWHC 681 (Admin) and *CHRE v NMC and Grant.*

Mr Hussain-Dupré submitted that Ms Hole is not impaired on either the grounds of public protection or in the wider public interest.

Mr Hussain-Dupré invited the panel to follow the NMC's guidance (FTP-14a) and consider the issue of whether remediation is possible and whether it has been demonstrated.

Mr Hussain-Dupré submitted that throughout the Fitness to Practise process, Ms Hole has not been subject to any interim order on her practice and, whilst it is the NMC's case that the misconduct occurred over an extended period of time, the incidents were infrequent or irregular. He also asked the panel to bear in mind that a significant amount of time has elapsed with the earliest incident occurring around 2016/2017 and the last incident in 2020.

Mr Hussain-Dupré submitted that during the Trust's disciplinary process, Ms Hole actively sought to remove herself from [PRIVATE] environment. Ms Hole gave evidence that she did not want others to feel uncomfortable and accepted a secondment in a completely different team. Following the outcome of the disciplinary process, Ms Hole [PRIVATE] secured employment with an organisation which works with some of the most marginalised people in society. He reminded the panel that Ms Hole provided references from her current employer and from her clinical supervisors, and has been open and honest with them about the allegations and sought to address these with support.

Mr Hussain-Dupré submitted that there have been no concerns raised about Ms Hole since her referral to the NMC. He submitted that Ms Hole's employer has been nothing short of glowing about Ms Hole and her work. Ms Hole has also undertaken significant and ongoing reflection, and training to address issues such as unconscious bias; reflected on her misconduct and the impact it had on others; and conducted wider research into microaggressions and to incorporate this into her practice.

Mr Hussain-Dupré drew the panel's attention to the Workplace Emotional Intelligence Report from June 2021, which sets out Ms Hole's approach to others and some of her core characteristics. This resulted in her being highly likely to put the needs of others before her own. The charges found proved focussed on her relationship with employees, and there have never been concerns about her interactions with patients.

He submitted that the witness also attested to Ms Hole's highly effective practice in her clinical work, which taken in combination with testimonials from her present employer, Mr Hussain-Dupré invited the panel to conclude that there is no risk to patients or the public.

Mr Hussain-Dupré submitted that Ms Hole has cooperated with the NMC to the fullest and possible extent. In terms of challenging Charges 1 to 7, Ms Hole sought only to clarify the specific words that she had used, where the charges were drafted as *'words of the effect'.* Mr Hussain-Dupré submitted that this should not be weighed against her when considering insight and remediation.

Mr Hussain-Dupré submitted that in respect of the discriminatory attitude, Ms Hole has taken steps during the course of her employment to support Witness 4 as a valued and longstanding friend and colleague. Mr Hussain-Dupré submitted that race was never an issue in Ms Hole's professional dealings with Witness 4, and that Witness 4 made it clear that he did not perceive his treatment to be on the basis of race.

Mr Hussain-Dupré invited the panel to take into account the context of each of the Charges and that Ms Hole has shown great remorse for her use of the words and the harm or distress she may have caused to others. He submitted that Ms Hole's case is not one where she has demonstrated hatred towards a particular protected characteristic. However, this was not to deny that her actions have consequences, particularly for the colleagues concerned, but that such words used were not of a nature that take them into the realms of repugnance.

Mr Hussian-Dupré further submitted that the broader context of the incidents outlined in the charges are such that the public, with an understanding of the nature of the comments, would know that the words were not driven by hatred involve language which could have specific interpretation of specific groups. He submitted that the public would not consider this a deep-seated attitudinal issue requiring a finding of impairment to uphold the reputation of the profession and the NMC.

Mr Hussain-Dupré submitted that Ms Hole accepted that her comments were insensitive and caused unintended offence. He submitted that her approach to staff was more casual than it ought to have been because of the close working relationships that she had with some of the staff. He submitted that she also had to implement extremely unpopular directives from senior management, leaving her in a fairly isolated position professionally.

Mr Hussain-Dupré submitted that Ms Hole has demonstrated through her current employment that she now limits her socialising with work colleagues in order to maintain the necessary professional distance required in her role.

Mr Hussain-Dupré drew the panel's attention to Ms Hole's extensive commitment to championing equality and diversity within the workplace. Ms Hole has expressed shame for her misconduct, particularly because this is incongruous with her wider beliefs. Mr Hussain-Dupré submitted that Ms Hole has extended her efforts to ensure that her current practice in terms of her personal presentation and approach to the workplace, is reflective of her beliefs.

Mr Hussain-Dupré addressed Mr Rye's submissions of Ms Hole's *"rejected defence"*. Mr Hussain-Dupré submitted that Ms Hole is entitled to give a robust defence to the allegations. He invited the panel to note the principles of *Sawati v General Medical Council* [2022] EWHC 283 (Admin). He submitted that the panel must consider whether the defence was a lie, deception or counter allegation. He informed the panel that none of those apply in this particular case.

Mr Rye responded that he did not intend to put forward that a rejected defence should be held against Ms Hole.

In conclusion, Mr Hussain-Dupré submitted that through remedial action that Ms Hole has taken, and her insight, that her fitness to practise is not currently impaired.

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.

The panel determined that Ms Hole's conduct fell significantly short of the standards expected of a registered nurse, and amounted to breaches of the Code. Specifically:

> ***'1 Treat people as individuals and uphold their dignity***
> *To achieve this, you must:*
> *1.1 Treat people with kindness, respect and compassion*
> *1.5 Respect and uphold people's human rights*
>
> ***20 Uphold the reputation of your profession at all times***
> *To achieve this, you must:*
> *20.1 Keep to and uphold the standards and values set out in the Code.*
> *20.2 Act with […] 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.*
> *20.4 Keep to the laws of the country in which you are practising.*
> *20.5 Treat people in a way that does not take advantage of their vulnerability or cause them upset or distress.*
> *20.8 Act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to.*
> *20.10 Use all forms of spoken, written and digital communication (including social media and networking sites) responsibly, respecting the right to privacy of others at all times.'*

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. The panel carefully considered the breaches of the Code in light of its findings on facts.

Charge 1

The panel found that you had used the words, "*Who are you? The man from the plantation?"*, in your communication with Colleague A (Witness 4).

The panel determined that Ms Hole's conduct was serious and fell short of the standards expected from a registered nurse. Ms Hole breached 1.1 of the Code in that she failed to treat Colleague A with kindness, respect and compassion by uttering words that were offensive to Colleague A (Witness 4). The panel also determined that Ms Hole failed to uphold the reputation of the profession and the standards and values set out in the Code and that the following paragraphs 20.1, 20.3, 20.5, 20.8 and 20.10 are engaged. The panel determined that Ms Hole's actions amounted to misconduct.

Charge 8 in respect of 1

The panel found that the words used were extremely offensive and insulting. The panel has determined that you stated, *"who are you the man from the plantation?"* or words to that effect and it was satisfied that this comment was racially abusive (but not racially motivated).

The panel determined that Ms Hole's conduct was serious and fell short of the conduct expected of a registered nurse and breached paragraphs 1.1, 1.5, 20.1, 20.3, 20.5, 20.8 and 20.10 of the Code. The panel noted that Ms Hole apologised for her behaviour and did not intend to be racially offensive. However, the panel determined that Ms Hole's conduct was, in particular, contrary to paragraph 20 of the Code, and undermined the reputation of the nursing profession. Ms Hole's actions therefore amounted to misconduct.

Charge 2

The panel found that Ms Hole spoke to Colleague C (Mr 1) using words to the effect *'are you some sort of Nazi?'*.

The panel determined that Ms Hole's conduct was serious and fell significantly short of the standards expected of a registered nurse, and breached paragraphs 1.1 and 1.5 of the Code. Although the incident took place at a social setting during a work away day, Ms Hole was with her work colleagues when she confronted Colleague C (Mr 1) in a manner which also breached paragraphs 20.1, 20.3, 20.5, 20.8 and 20.10 of the Code. The panel therefore considered that Ms Hole's actions amounted to misconduct.

Charge 8 in respect of Charge 2

The panel determined that the comments made by Ms Hole were racially abusive and motivated by an intention to be racially abusive. It found that the word *"Nazi"* was extremely offensive and insulting.

The panel determined that Ms Hole's conduct was serious and fell significantly short of the standards expected of a registered nurse. The panel was satisfied that other members of the nursing profession would consider this conduct deplorable. The panel determined that Ms Hole's conduct breached paragraphs 1.1, 1.5, 20.1, 20.2, 20.3, 20.4, 20.5, 20.8 and 20.10 of the Code. Ms Hole did not treat Colleague C (Mr 1) with kindness, respect and compassion by making comments that were derogatory, insulting, and abusive. The panel was satisfied that Ms Hole's actions therefore amounted to misconduct.

Charge 3

The panel found that Ms Hole spoke to Colleague A using words to the effect that Colleague A was *"my nigga"*.

The panel determined that Ms Hole's conduct was serious and fell significantly short of the standards expected of a registered nurse. The panel was satisfied that other members of the nursing profession would consider this conduct deplorable. The panel determined that Ms Hole's conduct breached paragraphs 1.1, 1.5, 20.1, 20.2, 20.3, 20.4, 20.5, 20.8 and 20.10 of the Code. Ms Hole did not treat Colleague A (Witness 4) with kindness, respect and compassion by making comments that were derogatory,

insulting, and abusive. The panel was satisfied that Ms Hole's actions therefore amounted to misconduct.

Charge 8 in respect of Charge 3

The panel found Ms Hole's conduct was racially abusive and showed a discriminatory attitude but was not intentionally racially hostile.

The panel found that the words used were disparaging, derogatory and extremely offensive and insulting. The panel determined that this conduct was serious and fell significantly short of the standards expected from a registered nurse. The panel determined that Ms Hole's conduct breached paragraphs 1.1, 1.5, 20.1, 20.2, 20.3, 20.4, 20.5, 20.8 and 20.10 of the Code. The panel was satisfied that Ms Hole's actions therefore amounted to misconduct.

Charge 4

The panel found that after Colleague B (Ms 4) called in sick, Ms Hole used words to the effect, *'I wonder which witch doctor she was going to get that sick note from'* in the presence of other staff members.

The panel determined that this conduct was serious and fell significantly short of the standards expected from a registered nurse. The panel determined that an experienced nurse, in a managerial role, should not have behaved in this manner [PRIVATE]. The panel determined that Ms Hole's conduct breached paragraphs 1.1, 1.5, 20.1, 20.2, 20.3, 20.4, 20.5, 20.8 and 20.10 of the Code. The panel was satisfied that Ms Hole's actions therefore amounted to misconduct.

Charge 8 in respect of Charge 4

The panel found that by using words to the effect *'witch doctor',* Ms Hole was racially abusive and intended to be racially discriminatory. The panel determined that although the comment may have been borne out of frustration, there was hostility and anger in

that Colleague B (Ms 4) was not returning to work, and it demonstrated a discriminatory attitude towards her. The panel therefore found that Ms Hole's conduct in respect of this charge was serious and a significant falling short of the standards expected of a registered nurse and amounted to misconduct.

Charge 5a

The panel found that you spoke to Colleague A (Witness 4) using words to the effect *'have you met your lot yet?'.*

The panel determined that Ms Hole's conduct was serious and fell short of the conduct expected of a registered nurse and breached paragraphs 1.1, 1.5, 20.1, 20.3, 20.3, 20.4, 20.5, 20.8 and 20.10 of the Code. The panel therefore found that Ms Hole's behaviour amounted to misconduct.

Charge 8 in respect of Charge 5a

The panel found Ms Hole's conduct was racially abusive and also motivated by an intention to be racially discriminatory.

The panel determined that this conduct was serious and fell short of the standards expected from a registered nurse. The panel determined that Ms Hole's conduct breached paragraphs 1.1, 1.5, 20.1, 20.2, 20.3, 20.4, 20.5, 20.8 and 20.10 of the Code. The panel was satisfied that Ms Hole's actions therefore amounted to misconduct.

Charge 5b

The panel found Charge 5b proved by way of Ms Hole's admission. Ms Hole provided evidence by way of explanation for the comment she made to Colleague A.

The panel noted that there was no evidence before it that when objectively viewed, the comment "*You know, your BAME members"* was racially abusive. The panel noted the evidence from Witness 2 and Witness 4 that referring to *'BAME members'* would have

been an appropriate way to reference this group at the time. The panel determined that what Ms Hole said was not improper or inappropriate and did not amount to misconduct.

Charge 6

The panel found Charge 6 proved by way of Ms Hole's admission. Ms Hole provided evidence by way of explanation for the comment she made to Colleague A.

In an earlier decision, the panel found that Ms Hole made this comment in response to a challenge or an allegation of inappropriate behaviour. The panel also found that Ms Hole's comment was not directed at any specific person or group, and it could not reasonably be said to amount to racial abuse. The panel determined that the words in their context were not improper or inappropriate and did not amount to misconduct.

Summary on misconduct

Having looked at Charges 1, 2, 3, 4, 5a and 8 (in respect of 1, 2, 3, 4 and 5a), the panel was satisfied that individually and cumulatively Ms Hole's actions fell seriously short of the conduct and standards expected of a registered nurse and amounted to misconduct.

The panel was satisfied that Charges 5b and 6 individually and cumulatively did not amount to misconduct, or what has been described in other cases as *'non-serious misconduct'*.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct in Charges 1, 2, 3, 4, 5a and 8 (in respect of 1,2, 3, 4 and 5a), Ms Hole's fitness to practise is currently impaired. In reaching its decision on impairment, the panel paid no regard to its findings of fact in respect of Charges 5b and 6.

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 Ms 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, Ms 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) has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

In considering Dame Janet Smith's "test", the panel determined that limbs b) and c) are engaged in that Ms Hole's actions have in the past brought the nursing profession into disrepute and breached the fundamental tenets of the nursing profession. The panel determined that limb a) was not engaged in this case. It was not satisfied that Ms Hole acted to put patients at unwarranted risk of harm. Limb d) does not arise in this case.

In considering limb b), the panel found that the misconduct was serious, repeated and occurred over a period of time and involved racially abusive comments towards colleagues and junior staff. The panel also found that in relation to Charges 2, 3, 4 and 5a, Ms Hole intended to be racially abusive. Ms Hole was a ward manager and therefore in a senior position and should have led by example. The panel determined that fully informed members of the public would be shocked and appalled by the misconduct. The panel was satisfied that Ms Hole's misconduct brought the nursing profession into disrepute.

In considering limb c), the panel determined that Ms Hole's misconduct breached the fundamental tenets of the nursing profession and the Code. The Code is structured around four *'Principles'* namely, *'Prioritise People', 'Practice Effectively', 'Preserve Safety'* and *'Promote Professionalism and Trust'.* In this case, the panel determined that Ms Hole has failed to *'Prioritise People'* and failed to *'Promote Professionalism and Trust'*. The panel determined that a well-informed member of the public would be concerned to learn that a registered nurse who was found to have behaved in a racially abusive manner towards colleagues, and a well-informed member of the public would become distrustful of the profession.

Remorse

The panel noted that in her oral evidence and in her reflective piece, Ms Hole apologised profusely for her actions and stated that she was sorry for any offence that she may have caused to colleagues. In her reflective piece, Ms Hole said:

> *'I am truly sorry for my actions and the hurt that they caused'*

The panel noted that Ms Hole said that she had let herself and her colleagues down and fallen below the high standards she set for herself. The panel accepted that Ms Hole is remorseful for her actions.

Insight

Although the misconduct involved racial abuse and can be difficult to remediate, the panel determined that it was capable of remediation. The panel went onto consider whether in fact Ms Hole has remediated the misconduct.

The panel considered whether Ms Hole has demonstrated insight into her misconduct. The panel had regard to Ms Hole's defence statement and reflective piece in which she referred to the Charges. The panel noted amongst other things, Ms Hole said:

In relation to Charge 1:

> *'It was wrong to refer to a plantation.*
>
> *The use of humour in the workplace could be seen as inappropriate.*
> *I should be more aware of the connotations associated with that word. I*
> *did not fully acknowledge the effect of using that word or the feelings that It can evoke.'*

In relation to Charge 3:

> *'I shouldn't have engaged in a sensitive discussion whilst intoxicated.*
> *I shouldn't refer to anybody by the n word.*
> *The n word subject is especially sensitive and it my understanding that any discussion involving should be in a planned and safe way and ideally be led by a person of colour.*
> *I understand that a white person can never use that term in solidarity.*
> *It was wrong to think that there is difference in the severity of insult inferred in relation to spelling.*

As a ward manager it is a not professional to become intoxicated to a point that I am not able to maintain professional boundaries.
I should have escalated the discussion for transparency and not left the choice to the staff member.
I didn't consider the effects of using that phrase could have specifically on a BAME staff member and how it can potentially feed into racial prejudice.
I am truly sorry for my actions and the hurt that they caused.'

In relation to Charge 4:

'I was wrong to use the term witch doctor.
I didn't consider the effects of using that word could have specifically on a BAME staff member and how it can potentially feed into racial prejudice.
I was wrong to talk about another member of staff in the company of others
I was wrong to be openly critical of a medical professional.
I would like some advice as to how I can make further reparation for this Incident'

In relation to Charge 5a:

'I was wrong to use a phrase that could have been interpreted as dehumanising or depersonalising or grouping.
I will make sure I am more considered with my words in the future.'

In Ms Hole's written evidence, she said:

'Firstly, I have not engaged in any ward social events involving alcohol for the last 3 years which is an easy but practical way of reducing any external effect on disinhibition.

Whether the reason why I say things that can upset people is due to residual symptoms or due to accidental statement, the effect is the same, I am accountable and have to accept responsibility. I have come to realise that

understanding others' perspective and having compassion towards others enables me to think clearer around the words that I use.

[…]

Since the incident last year and black lives matter, I have worked hard to increase my understanding around the atrocities against people of colour. I have researched black history as well as expanded my understanding of microaggression and its affects in all areas on minority persons.

[…]

[…] *I feel that I am constantly trying to improve to ensure those around me are not negatively affected, that the place we work in is a supportive one and that it is a place where both staff and patients can feel safe.'*

In her oral evidence, Ms Hole told the panel that she has done a lot of work on herself in relation to personal relationships, self-regard and assertiveness. [PRIVATE] The panel accepted Ms Hole's evidence that this has led to better judgment and decision making.

The panel had careful regard to the testimonials provided including from her current employer (Head of Client Services) dated July 2023 who said:

'In the interview process we thoroughly investigated the NMC allegations with Rachel and conducted a risk assessment. We were satisfied that a repetition of the type of allegations were very unlikely.

In the time I have supervised and supported Rachel in her professional roles, I have not received any complaint or witnessed cause for concern regarding the raised NMC allegations.

Rachel demonstrates equal opportunity awareness and adheres to good practice. I have directly observed Rachel's practice and have received regular

positive feedback from peers, subordinates, clients, and external professionals, and stakeholders. Feedback has confirmed Rachel leads by example, with good communication, values and professional boundaries. I have not received any complaint or cause of concern regarding Rachel or her practice.'

The panel considered the parties' submissions on the issue of the *'rejected defence'.* The panel noted that Ms Hole contested some of the allegations including Charge 8. However, the panel determined that this is not a case in which Ms Hole lied in her evidence or sought to mislead the panel.

[PRIVATE]

[PRIVATE]

The panel also accepted that Ms Hole has been open with her employers and her colleagues about the NMC investigation against her. The panel placed particular weight on the testimonial from her current employer noting that they had carried out a risk assessment and found that '*a repetition of the type of allegations were very unlikely'.* The panel accepted that there is no evidence before it that Ms Hole has repeated the type of behaviours (or misconduct) found proved.

The panel determined that from all of the evidence before it that Ms Hole has developed considerable insight into the actions that led to the misconduct.

Strengthening of practice

The panel further took into account relevant training Ms Hole has undertaken since the incidents that led to the misconduct:

- Community Psychology- Understanding Communities dated 19 June 2021
- [PRIVATE]
- Unconscious Bias dated 19 June 2021

The panel also had regard to the Workplace Emotional Intelligence report dated 21 June 2021, and recognised that Ms Hole has engaged in a lot of self-reflective work and practice development work which it accepts she has strengthened her practice.

The panel also noted the positive testimonials provided by Ms Hole from various individuals including a University Chaplain, her current employers, colleagues and a psychotherapist which speak of her positive reflection and insight into the allegations in this case.

Risk of repetition

The panel determined that there is a low risk of repetition of the misconduct. Ms Hole has demonstrated sufficient insight and appropriate remorse, and sufficiently strengthened her practice. Ms Hole has been working unrestricted and no concerns have been raised about her practice and professional conduct.

Public protection

For the reasons stated above, the panel therefore decided that Ms Hole is not currently impaired on the grounds of public protection.

Public confidence

The panel bore in mind that the statutory 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 and conduct for members of those professions.

Mr Hussain-Dupré's submission was:

> *'Further, the broader context of the incidents outlined in the charges is such that the public, understanding the nature of the comments, that they were not driven*

by hatred, but involve language which could have specific interpretations for certain groups, would not consider this a deep seated attitudinal issue requiring a finding of impairment to uphold the reputation of the profession and the Council. All along the Registrant has accepted that her comments were insensitive and caused unintended offence and that her approach to staff was perhaps more casual than it ought to have been, both because of the close working relationships she had with some of the staff, but also having to implement extremely unpopular directives from senior management, leaving her in a fairly isolated position professionally. Through her current employment, the Registrant has eliminated those factors, and thereby the risk of repetition.'

Notwithstanding Mr Hussain-Dupré's submission, the panel accepted Mr Rye's submission on public confidence and determined that a fully informed member of the public, knowing the seriousness of Ms Hole's conduct, which involved racial abuse and an intention to be racially abusive towards colleagues, would be appalled if a finding of impairment was not made on this ground. The panel determined that racially abusive behaviour of the kind found proved is likely to negatively impact the public's trust and confidence in the nursing profession.

The panel determined that Ms Hole's conduct is so serious that public confidence in the profession would be undermined if a finding of impairment were not made in this case. The panel also determined that a finding of impairment is required in order to ensure that the standards and conduct expected of registered nurses is maintained.

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

Interim order

On 29 July 2024, the panel 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 Hole's own interests.

Ms Jean informed the panel that it is obliged to consider whether an interim order is necessary given that the proceedings are being adjourned until December 2024. Ms Jean submitted that having considered the panel's decision in relation to impairment on public interest grounds only, she is not applying for an interim order at this stage.

Mr Hussain-Dupre submitted that an interim order is not necessary in light of the panel's decision and there having been no change in circumstances in the intervening period.

Decision and reasons on interim order

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

The panel was not satisfied that an interim order is necessary for the protection of the public and is not otherwise in the public interest. The panel had regard to its findings in relation to facts and its decision in relation to misconduct and impairment. The panel did not find that Ms Hole was impaired on the grounds of public protection and therefore an interim order is not necessary for the protection of the public. Although the panel found that Ms Hole was impaired on the grounds of the wider public interest, it noted the high threshold for imposing an interim order on public interest grounds.

Although the charges found proved are serious, the panel concluded that an interim order is not necessary in the circumstances of this case on public interest grounds. The panel was not satisfied that the high threshold for imposing an interim order on public interest grounds alone had been reached. The panel noted that the NMC did not submit that an interim order was necessary at this stage.

The panel noted that you are in employment and there is no evidence of repetition of the conduct set out in the charges. The panel bore in mind the effect an interim order would have on you and your employer. The panel was not satisfied that an interim order was necessary in the circumstances.

The parties agreed on the following directions, which were endorsed by the panel:

1. In the event that Ms Hole or her representative intend to make an application for stage three of these Fitness to Practise proceedings to be heard in private:-

a. [PRIVATE]

b. Any such evidence shall be served by 4pm on Monday 18 November 2024. Alternatively, Ms Hole or her representative shall notify the NMC by 18 November if they are not seeking to rely on [PRIVATE].

2. The NMC has permission to obtain [PRIVATE] dealing with the same matters (if so advised) and shall serve any such evidence by 4pm on Monday 9 December 2024.

The hearing adjourned on Monday 29 July 2024.

The hearing resumed on Monday 16 December 2024.

Sanction

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

Submissions on sanction

Ms Jean made the following written submissions on sanction.

1. The NMC invites the panel to impose a striking-off order.

Findings at facts/misconduct/impairment stage

2. *Charge 1 – the panel has found that the words spoken by Ms Hole towards Colleague A were "extremely offensive and insulting" and "racially abusive" (p.38)*

3. *Charge 2 – the words spoken by Ms Hole towards Colleague C were:-*

    - *"racially abusive" (p.43)*
    - *"demonstrated a hostile and discriminatory attitude towards a relevant racial group"*
    - *were "motivated by an intention to be racially abusive" (p.62/86)*
    - *that "other members of the nursing profession would consider this conduct deplorable" (p.86)*

4. *Charge 3 – words spoken by Ms Hole were:-*
    - *"racially abusive" (p.45)*
    - *"disparaging, derogatory and extremely offensive and insulting" (p.45/87)*
    - *"discriminatory" (p.46)*
    - *and that "it was Ms Hole's intention to be discriminatory"*
    - *her use of these words was "deplorable" (p.86)*

5. *Charge 4 – words spoken by Ms Hole in respect of Colleague B were:-*
    - *"extremely offensive and insulting" (p.47)*
    - *"referable to a racial group"*
    - *"hurtful, hateful, derogatory and racially abusive"*
    - *"racially abusive and intended to be racially discriminatory" (p.87)*
    - *"demonstrated a discriminatory attitude" (p.88)*

6. *Charge 5a – words spoken to Colleague A were:-*
    - *"extremely offensive and insulting" (p.49)*
    - *"hostile, discriminatory, abusive, disparaging and unprofessional"*
    - *"intended to be discriminatory towards a relevant racial group" (p.50)*
    - *"racially abusive and also motivated by an intention to be racially discriminatory" (p.88)*

7. *The panel has found that Ms Hole's conduct has fallen significantly short of the standards expected of a registered nurse and identified 9 breaches of the Code (p.84)*

8. *The panel has found that charges 5b and 6 do not amount to misconduct. However the other charges found proved individually and cumulatively amount to misconduct (p. 89).*

9. *The panel has found that Ms Hole was in a senior position as a ward manager and should have led by example. Her misconduct was serious, repeated and occurred over an extended period of time. Members of the public would be shocked and appalled by the misconduct and informed members of the public would become distrustful of the profession (p.91)*

10. *The panel has found that Ms Hole's conduct is so serious that public confidence in the profession would be undermined if a finding of impairment was not made on public interest grounds. Such a finding is also required to ensure that the standards and conduct expected of registered nurses are maintained (p.98).*

Guidance

11. *NMC guidance identifies just how seriously the NMC regards discriminatory behaviour.*

12. ***FTP-3** – **"How we determine seriousness".** Identifies that some behaviours are "particularly serious" including cases involving "discrimination".*

13. *The guidance goes on to indicate that "The NMC takes concerns about bullying, harassment, discrimination and victimisation very seriously…it can have a serious effect on workplace culture, and therefore the safety of people receiving care…"*

14. *It goes on to say* ***"We've made clear that no form of discrimination including, for example, racism, should be tolerated within healthcare.*** *Discriminatory behaviours of any kind can negatively impact public protection and the trust and confidence the public places in nurses, midwives, and nursing associates. We therefore take concerns of this nature seriously regardless of whether they occur in or out of the workplace. These concerns may suggest a deep-seated problem with the nurse, midwife or nursing associate's attitude, even when there's only one reported complaint. When a professional on the register engages in these types of behaviours, the possible consequences are far-reaching. Members of the public may experience less favourable treatment, or they may feel reluctant to access health and care services in the first place. We know that experiences of discrimination can have a profound effect on those who experience it and that fair treatment of staff is linked to better care for people. Where a professional on our register displays discriminatory views and behaviours, this usually amounts to a serious departure from the NMC's professional standards. In such cases where displaying discriminatory views and behaviours is proved, some level of sanction will likely be necessary unless there's been insight at the most fundamental level* ***and the earliest stage*** *[my emphasis]. However, if a nurse, midwife or nursing associate denies the problem or fails to engage with the fitness to practise process, it's more likely that a significant sanction, such as removal from the register, will be necessary to maintain public trust and confidence."*

15. *Whilst the panel have determined that Ms Hole has now demonstrated insight into her misconduct it is submitted that this was not the case "at the earliest stage". She denied a significant number of charges which have been found proved.*

16. ***FTP-3a "Serious concerns which are more difficult to put right" -*** *a number of concerns are so serious that it may be less easy for the nurse, midwife or nursing associate to put right the conduct, the problems in their practice, or the aspect of their attitude which led to the incidents happening. The guidance*

specifies that one such category of case is "discriminatory behaviour that has taken place either inside or outside professional practice"

17. ***FtP-3b – "serious concerns which could result in harm if not put right****". States that discriminatory behaviour may indicate a deep-seated problem even if there is only one reported incident. In Ms Hole's case there have been repeated instances of discriminatory behaviour (albeit that the panel have found that Ms Hole has developed considerable insight and there is a low risk of repetition).*

18. ***FtP-3c – "Serious concerns based on public confidence or professional standards."*** *Indicates that the NMC may need to take regulatory action against a nurse, midwife or nursing associate to promote and maintain professional standards and the public's trust and confidence in the professions we regulate. States that concerns that someone has displayed discriminatory views and behaviours, could have a particularly negative impact on public confidence."*

19. ***SAN-2 – "Considering sanctions for serious cases".*** *States the NMC "may need to take restrictive regulatory action against nurses, midwives or nursing associates who've been found to display discriminatory views and behaviours and haven't demonstrated comprehensive insight, remorse and strengthened practice, which addresses the concerns from an early stage."*

20. *The panel must consider the aggravating and mitigating features of the case.*

21. *Aggravating features:-*

- *Pattern of misconduct over a significant period of time; Racially abusive and/or racially motivated conduct took place over significant period of time – at least 2017-2020 [10]*

- *Ms Hole was in a position of authority as Ward Manager;*

- *The discriminatory conduct is linked directly to Registrant's work as directed towards or took place in the presence of work colleagues.*

22. *Mitigating features:-*

- *Admissions to 4 charges;*
- *Positive references from colleagues at Stonepillow, Ms Hole's current workplace (albeit from 2023);*
- *Found that Ms Hole has developed considerable insight into the actions that led to the misconduct (p.96);*
- *Ms Hole has taken steps to strengthen her practice by undertaking relevant training, engaging in self-reflective and practice development work and, as evidenced by positive testimonials from her current employers and others (p.96)*

23. *The panel ust* [sic] *consider which sanction will achieve the overarching objective of public protection and the principle of proportionality.*

24. *Considering sanctions in ascending order of seriousness:-*

25. *The panel has a discretion to make* ***no further order*** *after a finding of impairment. However such a discretion is only exercised rarely. This would not be appropriate in the present case where the panel has decided that the Registrant's conduct has undermined the public's trust in the profession. Facts found proved are very serious and public confidence cannot be maintained unless a sanction is imposed.*

26. ***Caution Order**. Guidance indicates such an order is only appropriate in cases where the conduct found proved is at the lower end of the spectrum of impaired fitness to practise. Cannot be said to be the case here where guidance clearly indicates that discriminatory behaviour should be regarded as very serious.*

27. ***Conditions of Practice Order**. The concerns in this case do not relate to Ms Hole's clinical practice but to her attitude. A conditions of practice order would not be appropriate and insufficient to address the seriousness of the matters found proved.*

28. ***Suspension Order**. Relevant guidance is at **SAN-3d**. Key things to weigh up before imposing such an order include (a) whether the seriousness of the case requires temporary removal and b) whether a period of suspension will be sufficient to protect patients, or to maintain public confidence in the profession. NMC asserts that the panel's findings of repeated discriminatory behaviour in this case are so serious a temporary removal would not be sufficient to maintain professional standards or public confidence in the profession.*

29. *The panel must consider the factors set out in the "checklist" in SAN-3d.*

30. *<u>First factor</u> – "a single instance of misconduct" That is plainly NOT the case here where there have been repeated instances of serious misconduct over a significant period of time towards a number of different colleagues. This militates against the making of a suspension order.*

31. *<u>Second factor</u> – "no evidence of harmful deep-seated personality or attitudinal problems". Discriminatory conduct is plainly indicative of a harmful deep-seated personality or attitudinal problem. However it is accepted that the panel has found that Ms Hole has demonstrated sufficient insight and remorse such that the risk of repetition is low.*

32. *<u>Third factor</u> – "No evidence of repetition of the behaviour since the incident." As indicated above there was more than one incident. The phrasing of this factor*

suggests that it is intended to apply in circumstances where there has been a single incident of misconduct (which is not the case here).

33. *Fourth factor – the Committee is satisfied that the nurse, midwife or nursing associate has insight and does not pose a significant risk of repeating behaviour. It is accepted that this factor is engaged.*

34. *The NMC submits that the factors set out in the checklist indicate that a suspension order is not sufficient to maintain standards or uphold public confidence based upon the very serious findings which the panel has made.*

35. ***Striking-off Order – SAN-3e**. Will be appropriate where the misconduct is fundamentally incompatible with being a registered professional.*

36. *The three key considerations include:-*

- *Do the regulatory concerns about the nurse, midwife or nursing associate raise fundamental questions about their professionalism?*

  Yes – repeated discriminatory behaviour is extremely concerning and highly unprofessional. Ms Hole's conduct has fallen far below the standards of behaviour expected of a registered professional.

- *Can public confidence in nurses, midwives and nursing associates be maintained if the nurse, midwife or nursing associate is not removed from the register?*

  No – 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. Nurses must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession. Discriminatory behaviour strikes at the very heart of that trust and confidence which members of the public place in the profession and may deter the public from seeking medical care.

Public confidence in the profession would be very seriously undermined if Ms Hole is not removed from the register. Reasonable members of the public fully informed of the facts would find Ms Hole's conduct both shocking and deplorable and confidence in the profession can only be maintained by removal from the register.

- *Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?*

  Yes – in view of the seriousness and gravity of the findings you have made a striking-off order is the only order which is sufficient to maintain professional standards and confident in the nursing profession. Discriminatory behaviour in the nursing profession cannot be tolerated due to the severe detrimental impact such behaviour has upon patients, colleagues and members of the public.

37. *The panel is reminded of the words of Lord Bingham in **Bolton v Law Society** [1993] EWCA Civ 32 at para 16 where he stated "The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."*

38. *Whilst such an order will have a detrimental impact upon the Registrant, such an order is necessary to achieve the overarching objective of public protection.*

Mr Hussain-Dupre made the following written submissions on sanction.

1. The panel's attention is drawn to its own findings in respect of impairment, specifically from pages 16 to 22 of the written determination.

2. In summary, the panel concluded that there was a low risk of repetition and that the Registrant had undertaken extensive remediation, including training and through continuing to work without restrictions had numerous testimonials which supported the fact that the Registrant has in indeed strengthened her practice. The public protection ground was therefore not engaged.

3. Whilst the panel determined that the public interest ground was engaged, due to the seriousness to the allegations, which the Registrant has clearly understood, it also noted that there was no finding of a deep seated attitudinal issue and again, no risk of repetition.

4. The panel will of course have reference to the NMC's sanctions guidance SAN-1, which was updated on 2 December 2024.

5. In respect of aggravating factors, it is acknowledged that the conduct took place over a number of years, albeit with limited incidents over that period of time. However the most recent incident was in 2020, without further repetition since. The panel has already noted the Registrant's insight into her actions and there has been no suggestion that the Registrant's conduct has caused any risk of harm to patients.

6. In mitigation, again, I refer the panel to its earlier determination and the Registrant's continuing efforts to ensure that her practice is beyond reproach. [PRIVATE] She first stops to consider the words she might use and whether there is any scope for them to be unclear, misunderstood or in any way offensive. As no deep seated attitudinal issue has been identified, it is submitted that the Registrant is not in any case in the habit of simply blurting out comments which reflect inner prejudices. Also, she has consistently removed herself from work social situations where alcohol may be involved.

7. The panel is invited to attach particular weight to the findings of the workplace emotional intelligence report, which provides a comprehensive view of the Registrant's approach to work and relationships with colleagues.

8. The panel is fully aware of the workplace culture in which the incidents occurred [PRIVATE]*, bridging the gap between staff and senior management. The panel is also aware of the fact that the Registrant has long since moved to a different organisation, supporting the most vulnerable members of society, and*

has heard from the Registrant about her approach to this role and the positive level of support she receives from her manager and colleagues and how this benefits her daily practice.

9. The panel will no doubt also refer to the guidance at SAN-2 regarding cases which may relate to discrimination and the panel is invited to apply its previous findings in respect of the Registrant having engaged in the FTP process from the outset, taken measures to remove herself from the employment situation she was in and taking a secondment so that she would not make colleagues uncomfortable during the local investigation. The specific Page of 25 wording is whether a registrant has not demonstrated "comprehensive insight, remote and strengthened practice" all of which is dealt with in my earlier submissions. There has been no denial, save for the specific words which were set out in the charges and as has already been submitted and the panel has accepted, this is not a "rejected defence" case where there was any intention to mislead or pass blame.

10. On the basis of the above, it is submitted that whilst the charges themselves and particularly the words that the panel found to have been used are without question serious, the broad considerations pertaining to whether the conduct is so serious that is must warrant the harshest sanction, must be viewed in context of the panel's findings on impairment. Those findings are are such that there is no ground for, at sanction stage, the case to be considered so serious that, for example, a strike order must be justified on the public interest ground alone.

11. The Registrant acknowledges that in terms of sanction, the finding that she is currently impaired on the public interest ground would not be adequately reflected were the panel to take no further action.

12. As this is not a clinical case, it is submitted that a conditions of practise order is unlikely to be appropriate, however, if a requirement of continuing supervision were to provide reassurance to the panel and by extension the public, then the Registrant would not be opposed to this.

13. In its consideration of a suspension order, the panel will obviously refer to the guidance at SAN-3d, and in response to what will surely be the NMC's position in terms of the serious nature of the charges, it is submitted that the Registrant having been allowed to continue practising without restriction since the referral was made would almost be contradictory when considering whether a suspension is necessary. As has been previously argued in the context of interim order applications throughout these proceedings, the Registrant is in a stable job, with excellent references and so to suspend her at this stage would be manifestly unfair.

14. At the risk of rehearsing the overarching submissions with which I started, there is no evidence or finding of a deep seated attitudinal problem, no repetition or risk of repetition and the level of insight is very high indeed. There is no evidence or risk of harm to patients or service users.

15. Should the panel be minded to impose a suspension order, it is invited to make such an order for six months, in recognition of the Registrant's efforts and, to an extent, the fact that the hearing of this case has taken some 14 months and relates to a final incident in 2020.

16. Turning then to a strike order - it is submitted that a past course of conduct is not the definitive reflection of the Registrant's professionalism over the course of her career both before and since the incidents.

17. The fact of extensive insight and remediation must weigh in the consideration of whether or not the public's trust and confidence in the profession and the regulator would be undermined were the Registrant's name not to be erased from the register. It is argued that an ordinary reasonable member of the public who was aware of the strengthened practice, insight and no deep seated attitude, would appreciate that a Registrant who has gone to such great lengths to improve herself and demonstrate, particularly through her live evidence to this panel, her beliefs and commitment to equality and diversity, should be given a second chance.

18. It is submitted that a finding of no deep seated attitudinal issue, in the context of a racial abuse case, indicates that the Registrant does not harbour ingrained racist views, such that that nothing less than a strike order would suffice.

19. In the context of the other sanctions available to the panel, it is argued that a strike order would be also disproportionate as it would not sufficiently acknowledge the remediation and the panel's understanding of the Registrant's attitude and approach to the practise of her profession.

20. The panel is therefore invited to make a caution order for a period of three years. It is submitted that this would sufficiently mark the seriousness and satisfy the need to make absolutely clear to the public that the regulator does not take lightly or in any way condone charges of a serious nature as in this case. It would also reflect the Registrant's endeavours since the local investigation and not simply being on the path to remediating her behaviour, but having demonstrably done so. As the panel is aware, the Registrant's entry on the public register would be marked and in the unlikely event of a further regulatory concern arising, the instant case would be resurrected and be taken account of in those future proceedings.

21. It is submitted that although the guidance at SAN-3b indicates that a caution order is likely to be appropriate when a case is at the lower end of the spectrum in terms of impairment, this ought to be a balancing exercise between the nature and seriousness of the charges and the level of remediation.

22. Sanction is a matter of professional judgement for the panel and the sanctions guidance is only guidance, leaving the panel with a level of discretion which allows it to take into account the particular features of each case, which have already been set out. It is therefore submitted that while racial abuse and discrimination cases are inherently and undeniably serious, there does not need to be a presumption of a strike order where there are strong features within the

guidance on other possible sanctions which, it is argued, would ultimately still satisfy the public interest.

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

Decision and reasons on sanction

Having found your fitness to practise currently impaired, the 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:

- A pattern of misconduct, which involved racially abusive and racially motivated behaviour over a period of time, namely 2017 to 2020

- Abuse of a position of trust as a ward manager – your misconduct was linked directly to your work as a registered nurse and either directed towards or took place in presence of work colleagues

The panel also took into account the following mitigating features:

- No evidence of repetition of the misconduct since 2020
- You made early admissions to some of the charges
- You have demonstrated remorse and shown significant insight into your misconduct and strengthened your practise
- You have provided two positive testimonials from your managers at your current workplace

The panel took into account the following when considering the seriousness of your behaviour:

The panel noted its previous findings, namely that in charge 8 in respect of charge 1 you were racially abusive, and that you were both racially abusive and motivated by an intention to be racially abusive in relation to charge 8 in respect of charges 2, 3, 4 and 5a. Your comments and the context in which they were made in relation to charge 2 demonstrated a hostile and discriminatory attitude towards a relevant racial group. In relation to charge 3, your comments were directed to, a member of a relevant racial group, namely a black colleague, and were discriminatory. The words spoken by you in relation to Charge 4 demonstrate a discriminatory attitude, were extremely offensive and insulting and the panel found them to be hurtful, hateful, derogatory and racially abusive. In relation to charge 5a, the panel found your words to be hostile, discriminatory, abusive, disparaging and unprofessional.

In reaching its decision on sanction, the panel had sight of the NMC Guidance How we determine seriousness Reference FTP-3, last updated 27 February 2024, namely:

> *'The NMC takes concerns about bullying, harassment, discrimination and victimisation very seriously…it can have a serious effect on workplace culture, and therefore the safety of people receiving care…*
> *…*
>
> *We've made clear that no form of discrimination including, for example, racism, should be tolerated within healthcare. Discriminatory behaviours of any kind can negatively impact public protection and the trust and confidence the public places in nurses, midwives, and nursing associates. We therefore take concerns of this nature seriously regardless of whether they occur in or out of the workplace. These concerns may suggest a deep-seated problem with the nurse, midwife or nursing associate's attitude, even when there's only one reported complaint.*
>
> *When a professional on the register engages in these types of behaviours, the possible consequences are far-reaching. Members of the public may experience*

less favourable treatment, or they may feel reluctant to access health and care services in the first place. We know that experiences of discrimination can have a profound effect on those who experience it and that fair treatment of staff is linked to better care for people.

Where a professional on our register displays discriminatory views and behaviours, this usually amounts to a serious departure from the NMC's professional standards.

In such cases where displaying discriminatory views and behaviours is proved, some level of sanction will likely be necessary unless there's been insight at the most fundamental level and the earliest stage. However, if a nurse, midwife or nursing associate denies the problem or fails to engage with the fitness to practise process, it's more likely that a significant sanction, such as removal from the register, will be necessary to maintain public trust and confidence'

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 in relation to your discriminatory and racially abusive behaviour, and the public interest issues identified, an order that does not restrict your 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 your 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 misconduct. 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 your 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 of the misconduct in this case. The panel took into account that the misconduct identified in this case was not in relation to your clinical practice, and it did not find impairment on public protection grounds, therefore the impairment identified cannot be addressed through retraining or supervision. The panel concluded that the placing of conditions on your registration would not be appropriate and would not adequately address the seriousness of this case and the public interest concerns.

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 acknowledged that it did not find evidence of harmful deep-seated or attitudinal problems, that there has been no repetition of the behaviour since 2020, that you have gained significant insight and there is a low risk of you repeating the behaviour.

The panel determined, that notwithstanding the points above, the misconduct was extremely serious and repeated over a period of three years. The conduct was a significant departure from the standards expected of a registered nurse. It was a serious breach of the fundamental tenets of the profession and so harmful to the reputation of the nursing profession that it is fundamentally incompatible with you remaining on the register.

In this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, in considering 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?*

The panel determined that your actions were significant departures from the standards expected of a registered nurse and are fundamentally incompatible with you remaining on the register. The panel noted that you have continued to work as a registered nurse, you have provided good testimonials and that you have demonstrated a significant level of insight, [PRIVATE]. However, the panel determined that your behaviour over a three-year period whilst working in a position of responsibility as a ward manager, was serious, in that you repeatedly engaged in behaviour where you were racially abusive with intent, towards staff and colleagues. The panel was therefore of the view that to allow you to continue practising as a registered nurse would undermine public trust and confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors and having taken into account all the evidence before it, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the effect of your 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, consistent with the NMC's over-arching statutory objective, that this order is necessary to mark the importance of maintaining public confidence in the nursing profession, and to send to the public and the profession a clear message about the standards of behaviour and conduct required of a registered nurse.

The panel has noted that this striking-off order will prevent you from working as a registered nurse and, as a consequence, you may be caused financial hardship. However, the panel determined that the need to protect the wider public interest outweighs your interest in this regard.

This decision will be confirmed to you 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 your own interests until the striking-off sanction takes effect.

Submissions on interim order

The panel took account of the submissions made by Ms Jean. She submitted that it is the NMC's application for an 18-month interim suspension order on the grounds of public interest to be imposed, given that the striking-off order will not come into effect for 28 days.

Ms Jean submitted that in light of the panel's findings, to allow Ms Hole to continue to practise would undermine public confidence and public trust in the nursing profession and in the NMC. She submitted that it would therefore be inconsistent with the panel's decision to allow Ms Hole to continue to practise if indeed an appeal is lodged within the next 28 days.

Ms Jean referred the panel to the NMC Guidance on Interim orders, their purpose and when we impose them (Reference INT-1 last updated 25 March 2024). Ms Jean submitted that an interim order is necessary as there would be serious damage to public trust and confidence in the nursing profession if you were allowed to practise during the appeal period. She also referred the panel to the NMC Guidance Decision making

factors for interim orders (Reference INT-2 last updated 2 December 2024), which states that it would be relatively rare for an interim order to be made only on the grounds of public interest. Ms Jean submitted that the threshold for imposing an interim order on this ground is high.

Ms Jean referred the panel to the case of *Sheikh v General Dental Council [*2007] EWHC 2972 (Admin)*,* where Mr Justice Davis stated it is likely to be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest.

Ms Jean submitted that ultimately on the facts of this case, it is necessary to impose an interim suspension order for the reasons the panel has set out in its determination on sanction.

Mr Hussain-Dupré indicated that he does not oppose the NMC's interim order application.

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

Decision and reasons on interim order

In reaching its decision, the panel had sight of the following extracts from Decision making factors for interim orders Reference INT-2 last updated 2 December 2024:

> *'It would be relatively rare for an interim order to be made only on the grounds that an order is otherwise in the public interest, if there is no evidence of a risk of harm to the public, so the threshold for imposing an interim order solely on this ground is high.*
>
> *…*
>
> ***Discrimination and interim orders***

…

The alleged conduct is so serious that if there is no restriction on the professional's practice the public may not feel able to trust the professions we regulate (bearing in mind that it will be relatively rare for an interim order to be justified solely in the public interest).'

The panel was satisfied, in light of its findings, that an interim order is necessary 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 concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. The panel therefore imposed an interim suspension order for a period of 18 months to cover any potential appeal period.

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

That concludes this determination.