

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

**Substantive Hearing
Thursday, 18 - Friday, 26 January 2024
Monday, 15 – Friday, 19 July 2024**

Virtual Hearing

Name of Registrant: Tracy Lee Chapman

NMC PIN: 15B0701E

Part(s) of the register: Registered Nurse: Sub Part 1
Adult Nursing (Level 1) – 6 September 2015

Relevant Location: Bedford

Type of case: Misconduct

Panel members: Caroline Rollitt (Chair, lay member)
Jodie Jones (Registrant member)
Karen Shubert (Registrant member)

Legal Assessor: John Donnelly

Hearings Coordinator: Franchessca Nyame / Hazel Ahmet

Nursing and Midwifery Council: Represented by Leesha Whawell, Case
Presenter

Mrs Chapman: Present and represented by Sharmistha
Michaels, instructed by the Royal College of
Nursing (RCN)

Facts proved at this stage: 3d, 4c, 4d, 4e, 4f, 4g, 5a, 11

Facts not proved at this stage: 1, 2, 3a, 3b, 3c, 4a, 4b, 4h, 4i, 4j, 5b, 6a, 6b, 6c
7a, 7b, 8, 9, and 10

Fitness to practise: Impaired

Sanction:

Conditions of Practice Order (6 months)

Interim order:

Interim Conditions of Practice Order (18 months)

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

Ms Michaels, on your behalf, made an application for parts of this case be held in private on the basis that proper exploration of your case involves [PRIVATE]. She added that, when references are made to your [PRIVATE], such matters should be dealt with in private. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Ms Whawell, on behalf of the NMC, indicated that she did not oppose the application.

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

Having heard that there may be reference to [PRIVATE], the panel decided to go into private session as and when such issues are raised.

Decision and reasons on application to amend the charges

The panel heard an application made by Ms Whawell to amend the wording of Charges 2i, 4i and 6a.

The proposed amendment to Charges 2i and 4i were to add the words “*and/or other lines*” as, on some occasions within the documents, the word ‘*line*’ is plural and the NMC’s case for these charges is not restricted just to the Hickman line. The proposed amendment to Charge 6a was for it to instead read “*must have gone to sleep around half past 3 for 30 minutes*” given that the phrase ‘*dozed off for 30 minutes*’ does not appear in the minutes from the fact-finding meeting. It was submitted by Ms Whawell that the proposed amendments would more accurately reflect the evidence.

“That you, a registered nurse

...

2) On or around 19 April 2021, whilst you were asleep and/or lying down on Child A’s sofa, did not:

...

i) Reposition Child A if he became tangled in his Hickman line **and/or other lines**;

...

4) During a night shift commencing on 1 May 2021 between approximately 12am and 3am did not:

...

i) Reposition Child A if he became tangled in his Hickman line **and/or other lines**;

...

6) On 11 May 2021 at a fact-finding meeting with First Option Healthcare, said that you:

a) ~~'dozed off for 30 minutes'~~ **'must have gone to sleep around half past 3 for 30 minutes'** or words to that effect, when you fell asleep for approximately 3 hours;"

Ms Michaels did not oppose the application to make the proposed amendments.

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 amendments, as applied for, were in the interest of justice. The panel was satisfied that there would be no prejudice to you and no injustice would be caused to either party by the proposed amendments being allowed.

The panel decided that it was therefore appropriate to allow the amendments, as applied for, to ensure clarity and accuracy.

Decision and reasons on application to admit hearsay evidence

The panel heard an application made by Ms Whawell under Rule 31 to allow the hearsay evidence in paragraph 10 of Witness 1's statement into evidence. Paragraph 10 reads as follows:

'On the night of 18 to 19 April 2020, the Nurse worked their usual Saturday night shift at the house to look after and observe Child A. The Agency have the records of who works when, I do not have these. On the morning of 19 April 2020 once the Nurse had finished their shift and gone home, I spoke with Child A and they said "Nanny, I woke up last night and the Nurse was asleep". I asked Child A how they knew the Nurse was asleep and they informed me it was because they heard the Nurse snoring. I said to Child A, "why didn't you wake them up" and they said "oh no, I didn't want to wake her".'

In addition to paragraph 10, Ms Whawell informed the panel that the hearsay evidence is reiterated in Witness 1's statement dated 6 May 2021 and Colleague A's email dated 5 May 2021.

Ms Whawell made reference to the cases of *El Karout v NMC* [2019] EWHC 28 (Admin) and *Thorneycroft V NMC* [2014] EWHC 1565 (Admin) and submitted that the hearsay evidence of Child A contained in Witness 1's statement is relevant as it goes directly to Charges 1, 2, 6c and 10. Therefore, she added, if the panel agree that the evidence is relevant, the only real consideration for the panel is whether admitting the evidence would be fair, the factors for which are set out in *Thorneycroft*.

In relation to these factors, Ms Whawell submitted that the hearsay evidence is the sole and decisive in support of Charges 1, 2, 6c and 10. She further submitted that the hearsay evidence is supported by an email sent by you to First Option Healthcare ('the Company') dated 7 May 2021 regarding a conversation had between yourself and Colleague A in which you stated:

'[17/04, 14:51] Tra: Hi [Colleague A]. Sorry to message at weekend. Reality has just struck me that 3 shifts may actually kill me lol.

...

is honestly gonna be a struggle... Just thinking of the reality and travel on top adds to tiredness.'

Ms Whawell submitted that, accepting that the hearsay evidence is sole and decisive evidence that you were asleep on or around 19 April 2021, the above is corroborative evidence that you were in fact tired on the weekend of 17-19 April 2021.

Regarding the nature and extent of the challenge to the content of the statement, Ms Whawell submitted that the hearsay evidence can be tested but that the panel would need to understand the basis on which you wished to challenge the evidence. She added that, if you wished to challenge the veracity of the hearsay evidence, then it would need to be understood whether you are saying either Child A is lying about your being asleep or that Witness 1 is lying about Child A telling them you were asleep. Ms Whawell submitted that Witness 1 would be the best witness to answer such questions.

Ms Whawell submitted that there has been no suggestion that the Child A had reason to fabricate their allegations, and that, taking into account the impact of adverse findings on your career, the charges are serious.

In relation to reasons for Child A's non-attendance at these proceedings, Ms Whawell submitted that Child A has complex health needs and it would not be appropriate to require any child to provide a witness statement in the circumstances, and therefore not appropriate for them to give evidence. For this reason, she added, reasonable steps were not taken to secure their attendance. She also clarified that you were given notice that the NMC would seek to rely on paragraph 10 of Witness 1's statement.

Ms Michaels opposed Ms Whawell's application and that paragraph 10 of Witness 1's statement as well as any evidence linked to the alleged incident on or around 19 April 2021 should be excluded in their entirety.

Ms Michaels agreed that the hearsay evidence is the sole and decisive evidence in relation to Charges 1, 2, 6c and 10. She submitted that there is no direct evidence before the panel that you fell asleep therefore Charge 2 follows as an assumption that if you had been asleep, you could not have carried out your duties. She added that there is a clear dispute in this evidence given that you deny falling asleep on or around 19 April 2021 for any period of time when caring for Child A.

Ms Michaels highlighted that Witness 1's statement is undated and so it is unclear whether it is a contemporaneous document. She submitted that the hearsay evidence cannot be tested because Witness 1 did not directly witness you sleeping, and Child A is not in attendance. Ms Michaels further highlighted that the statement of Colleague A contains multiple hearsay as it repeats what Witness 1 was allegedly told by Child A.

Ms Michaels submitted that your email to the Company dated 7 May 2021 was sent to show them not that you were tired, but that you had been put under emotional pressure forced to work three shifts in a row thus it is not corroborating evidence.

Ms Michaels said that the panel has nothing before it to show that the NMC took any steps to take a statement from Child A, and that the panel was not given a clear explanation as to why Child A could not be called to attend or why a statement could not be taken at the time.

Ms Michaels submitted that all of the evidence linked to Child A's conversation with Witness 1, if it did take place, should be excluded in fairness to you as there would be a prejudice to your case if the hearsay evidence were to be admitted.

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

In reaching its decision, the panel therefore first considered whether the disputed evidence was relevant, and secondly whether it would be fair to admit it as hearsay evidence.

The panel was satisfied that the hearsay evidence was clearly relevant to Charges 1, 2, 6c and 10, and this was accepted by both parties.

When considering fairness, the panel applied the following principles as set out in the *Thorneycroft* case:

'1.1. The admission of the statement of an absent witness should not be regarded as a routine matter. The FTP rules require the Panel to consider the issue of fairness before admitting the evidence.'

1.2. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to the objection to admissibility.'

1.3. The existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence.'

1.4. Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires the Panel to make a careful assessment, weighing up the competing factors. To do so, the Panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The Panel must be satisfied

either that the evidence is demonstrably reliable, or alternatively that there will be some means of testing its reliability.'

The panel therefore acknowledged that it should not admit the hearsay as a matter of routine and that it must carefully consider whether it is fair for it to be admitted.

The panel therefore had regard to the following considerations:

- Whether the hearsay evidence was the sole and decisive evidence in support of Charges 1, 2, 6c and 10;
- The nature and extent of the challenge to the hearsay evidence;
- Whether there was any suggestion that the primary witness had reasons to fabricate the allegation;
- The seriousness of the charge, taking into account the impact which adverse findings might have on your career;
- Whether there was a good reason for the non-attendance of the primary witness;
- Whether the NMC had taken reasonable steps to secure the attendance of the primary witness.

The panel considered each of these points in turn.

The panel's determination on hearsay application

The panel determined that the hearsay evidence is sole and decisive evidence in relation to allegedly falling asleep on or around 19 April 2021. It considered Ms Whawell's submissions regarding the supportive evidence to be tenuous and so took the position that it has no other evidence before it to support those charges.

The panel noted that Colleague A has not provided a statement for these proceedings, nor has the panel been advised as to any attempts to obtain an official statement other than "*she has failed to engage*". The panel further noted that Colleague A had provided an

internal statement and is referenced in an email from you to the Company. In those circumstances, the panel was satisfied that this evidence is hearsay evidence and does not advance the case.

The panel noted the NMC's submission that the hearsay evidence could be challenged and tested by Witness 1, however it was not satisfied that it would get the necessary details to make a decision on facts in relation to Charges 1, 2, 6c and 10.

The panel was satisfied that there was no specific evidence before it to suggest that the hearsay evidence reported in the written statements of Witness 1 had been fabricated.

The panel was of the view that Charges 1, 2, 6c and 10 are serious and could have an adverse effect on your career if found proven.

The panel acknowledged that Child A is particularly vulnerable. However, in relation to the Child A's non-attendance and the steps taken by the NMC, the panel was not provided with any evidence indicating that attempts were made to secure their attendance, and it did not hear cogent reasons as to why. The panel further noted that there were no supportive contemporaneous notes or written statement taken from Child A.

Having regard to its finding that the hearsay evidence is the sole and decisive evidence in relation to Charges 1, 2, 6c and 10, the panel was mindful that, for it to be admissible, it would need to be satisfied that the evidence is demonstrably reliable, or that there is some means to test its reliability. The panel noted Ms Whawell's submission that the hearsay evidence could be tested by Witness 1. Whilst Witness 1 could give oral evidence which would give you the opportunity to cross examine them about the hearsay evidence, the panel was not satisfied that this would be an effective means of testing its reliability given that Witness 1 did not directly witness the alleged incident. Furthermore, having regard to the fact that the hearsay evidence is not supported by any contemporaneous documentation, the panel was not satisfied that it is demonstrably reliable and it would be unfair to admit it in the circumstances.

For the above reasons, the panel therefore refused the application.

Decision and reasons on application to reconsider the admissibility of evidence excluded under the hearsay rule

Ms Whawell submitted that the NMC wish to rely on evidence contained within the statement of Witness 1. She clarified that it is the same evidence that was subject to the hearsay application, and, having heard the panel's determination in relation to that, it is accepted that it cannot be relied upon as hearsay. With that, she submitted that the NMC will be offering no evidence on Charges 1, 2, 6c and 10.

Ms Whawell submitted that the evidence the NMC wish to rely on at paragraph 10 of Witness 1's statement is admissible on the grounds that it is relevant and fair to the background circumstances of this case, specifically why Witness 1 was on heightened alert on the 1 and 2 May 2021 and why they chose to watch the CCTV for such a long period of time.

Ms Whawell further submitted that this evidence is direct evidence of what Child A said to Witness 1. She added that it is therefore unnecessary to reconsider the factors in *Thorneycroft* that relate to hearsay evidence being given to prove a matter in dispute going to the truth of Child A's statement. She submitted that this evidence is for the purpose of background and should be admitted as such.

Ms Michaels reiterated that paragraph 10 of Witness 1's statement, as well as any evidence linked to the alleged incident on or around 19 April 2021, should be excluded in its entirety. She highlighted that the NMC seek to adduce the same information the panel previously determined is not demonstrably reliable and would be unfair to admit, and submitted that the issue of admissibility remains the same.

Ms Michaels stated that the fact of why Witness 1 decided to observe you is not particularly relevant as the panel is aware of those reasons in any event. She suggested that, bearing in mind that the NMC has offered no evidence, a statement could be made to

provide background, and the information can be redacted from the documents before the panel. The statement could state the following:

“As a result of a conversation between Witness 1 and Child A where Child A told Witness 1 that [you] had fallen asleep, Witness 1 decided to watch [you] on CCTV and put a blanket that had previously been on Child A's bed into the cupboard in Child A's room.”.

The panel has had sight of all the documentary evidence, and bore in mind that it is a professional panel and must ensure that a fair hearing is extended to all parties.

The panel recognised that there are possible grounds for Witness 1's apparent *“heightened alert”*. However, it determined that this in itself is of no probative value in respect of the allegations upon which the NMC will offer no evidence, or indeed any other remaining allegations.

The panel noted that the NMC suggests Witness 1's state of mind was that of being on high alert. In terms of assessing a witness' state of mind, the panel noted that Witness 1 is open to express their state of mind if asked, and that the panel is entitled to assess Witness 1's state of mind based on inferences or deductions from surrounding cogent evidence.

The panel is satisfied that evidence which it determined is not admissible as hearsay and of no probative value remains as such. The panel therefore refused the application to admit this evidence for a different purpose and thereby avoid prejudice or unfairness to either party.

For completeness, the panel decided to allow the statements and exhibits to remain in their current unredacted form, but reminded all parties that witnesses should be put on notice that certain parts of their evidence are not to be referenced. The panel invited counsel to observe this cautionary note.

Details of charges as amended

That you, a registered nurse

- 1) On or around 19 April 2021 during a night shift providing care to Child A:
 - a) Lay down on Child A's sofa;
 - b) Fell asleep for an unknown amount of time

- 2) On or around 19 April 2021, whilst you were asleep and/or lying down on Child A's sofa, did not:
 - a) Watch over Child A;
 - b) Monitor Child A's blood glucose levels;
 - c) Check Child A's Hickman line;
 - d) Check Child A's drainage bag;
 - e) Take Child A's basic observations (temperature, oxygen saturations, heart rate);
 - f) Check and/or change Child A's continence pad;
 - g) Monitor and/or inspect Child A's Total Parenteral Nutrition;
 - h) Administer medication to Child A if and/or when required;
 - i) Reposition Child A if he became tangled in his Hickman line and/or other lines;
 - j) Close both doors of Child A's bed whilst he was asleep

- 3) During a night shift commencing on 1 May 2021 providing care to Child A:
 - a) Took a blanket from Child A's cupboard;
 - b) Lay down on Child A's sofa;
 - c) Covered yourself with the blanket;
 - d) Slept between approximately 12am and 3am

- 4) During a night shift commencing on 1 May 2021 between approximately 12am and 3am did not:
 - a) Watch over Child A;

- b) Monitor Child A's blood glucose levels;
 - c) Check Child A's Hickman line;
 - d) Check Child A's drainage bag;
 - e) Take Child A's basic observations (temperature, oxygen saturations, heart rate);
 - f) Check and/or change Child A's continence pad;
 - g) Monitor and/or inspect Child A's Total Parenteral Nutrition line;
 - h) Administer medication to Child A if and/or when required;
 - i) Reposition Child A if he became tangled in his Hickman line and/or other lines;
 - j) Close both doors of Child A's bed whilst he was asleep
- 5) During a night shift commencing on 1 May 2021:
- a) Documented observations on Child A's observation chart which you had not taken;
 - b) Documented on Child A's Time in Motion chart that he was asleep between 1am and 7am when you did not know this to be the case because you were asleep between approximately 12am and 3am
- 6) On 11 May 2021 at a fact-finding meeting with First Option Healthcare, said that you:
- a) 'must have gone to sleep around half past 3 for 30 minutes' or words to that affect, when you fell asleep for approximately 3 hours;
 - b) Used your own personal thermometer to take Child A's temperature when you did not;
 - c) Had not fallen asleep on shift before the night shift which commenced on 1 May 2021 when you had
- 7) Your actions as specified at charge 5 were dishonest in that you intended to create a misleading impression that you:
- a) Had undertaken Child A's observations when you had not;

b) Had not been asleep for approximately 3 hours

8) Your actions as specified at charge 6a) were dishonest in that you intended to create a misleading impression that you had not been asleep for as long as you had been

9) Your actions as specified at charge 6b) were dishonest in that you intended to create a misleading impression that you had undertaken Child A's observations when you had not

10) Your actions as specified at charge 6c) were dishonest in that you intended to create a misleading impression that you had not fallen asleep on shift before the night shift commencing on 1 May 2021

11) On an unknown date in August 2021, telephoned Child A's grandmother [PRIVATE] as a result of the NMC referral

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

Ms Michaels informed the panel that you made full admissions to Charge 11.

The panel therefore finds Charge 11 proved by way of your admission.

Offer of no evidence

Ms Whawell referred the panel to the NMC guidance 'DMA-3: Offering no evidence', particularly the following passage:

'It's not in the public interest for us to pursue factual charges against a nurse, midwife or nursing associate if there isn't enough evidence to prove them. Offering

no evidence because there isn't enough evidence to prove the facts, so that there's no longer a realistic prospect, will only be appropriate if:

...

- *the charge relies on the evidence of a witness who cannot attend a hearing, and an application to rely on their statement as hearsay evidence has been rejected...'*

Ms Whawell submitted that the above mirrors the circumstances of this case, therefore the NMC will be offering no evidence on Charges 1, 2, 6c and 10 following the panel's determination that the hearsay evidence is inadmissible as it was the only evidence to support these charges.

Background

You were referred to the NMC on 7 May 2021 by Witness 2.

You commenced your employment with Clinical Mobilisation at First Option Healthcare ('the Company') under a limited contract on 12 November 2020. The Company provides complex care packages for both children and adults with significant clinical needs in the community.

You began caring for Child A on night shifts at their grandparents' home every other weekend from 28 February 2021. You also worked with six other patients, one adult and five children on an ad hoc basis.

Child A has multiple complex health care needs and requires monitoring 24 hours a day. These include an escalation plan for respiratory distress, total parenteral nutrition (TPN), blood sugar level monitoring and a Hickman line. Child A has a tendency to bite and pull at this line, which, if unmonitored, could have serious consequences. Equipment such as CCTV, thermometers and a SATs monitor are in place to support their care.

On 18/19 April 2021, you were working the night shift with Child A. The following morning, Child A allegedly reported to Witness 1 that you had fallen asleep on the sofa and they did not want to wake you. Witness 1 reported their concerns to Colleague A, Recruitment and Mobilisation Manager. It is understood by Witness 1 that Colleague A spoke with all the nurses to remind them of their responsibilities.

On 1/2 May 2021, you worked a further night shift with Child A. Witness 1 described you as flustered on your arrival. Witness 1 said that she checked Child A at about 22:30 and alleges that you were "*laying down on the sofa*". Witness 1 decided not to say anything to you but they planned to raise it with the Company the following day. Witness 1 said that they then went to bed and watched the CCTV for three to four hours as they were worried that you might fall asleep again. Witness 1 said that they could not see you but they recall

hearing you snore on and off, and there was no movement when you should have got up to see to Child A on several occasions.

Witness 1 specifically stated that they noticed that the drip stand had stayed in the exact same place throughout the time they checked the CCTV. Witness 1 says that the drip stand was standing directly between where you were allegedly lying on the sofa and the door to Child A's bed; it is alleged that, if you had made any checks, you would have had to move the drip stand.

Witness 1 goes on to say that the next morning, they checked the observation records and they observed that you had documented observations during the time Witness 1 alleges you were sleeping. Witness 1 adds that the thermometer used to take Child A's temperature two hourly stores the results in its memory and when they checked the thermometer memory banks, the readings did not correlate with the entries you recorded at 02:00 and 04:00. Witness 1 also alleges that you completed the 'Time in Motion' chart and recorded that Child A had been asleep every hour when you had not been awake to check.

Witness 1 reported you to Colleague A who passed on the concerns to Witness 2, and they had no further involvement with you. However, Witness 1 said that you made contact with them again in August 2021. Witness 1 asked you not to contact them again.

Witness 2 said that, with regard to the second incident, they watched the video of the thermometer memory and the observation chart and, although it was difficult to unpick, they found a lack of correlation between the two sets of recordings.

You were suspended pending an investigation and, in your local statement dated 6 May 2021, you admitted to falling asleep on 1/2 May 2021; you made no reference to the first incident. Witness 2 said that, when you were interviewed, you stated that you had used your own thermometer. Witness 2 said they have never seen anyone else use their own thermometer in these situations.

An internal fact-finding meeting was held on 11 May 2021 which you and Witness 2 attended.

Witness 2 told the NMC that your contract with the Company was terminated and, had you been an employee, your alleged actions would have been treated as gross misconduct.

Submissions on no case to answer

Ms Michaels submitted that there is no case to answer in respect of the remaining charges against you, except Charge 3d which you made a partial admission to. This application was made under Rule 24(7).

Ms Michaels made reference to the cases of *R v Galbraith* (1981) 1 WLR 1039, *Tutin, R (on the application of) v General Medical Council* [2009] EWHC 553 (Admin), and *R v Shippey* [1988] Crim LR 767.

Ms Michaels submitted that the basis of her submission is the second limb of the *Galbraith* test which provides:

'...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. Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on the submission being made, to stop the case.'

Ms Michaels stated that the evidence relied upon by the NMC comes from Witnesses 1 and 2, and she submitted that this evidence is unreliable and of a tenuous nature.

Ms Michaels set out the supporting evidence provided by Witness 1 which was:

- Video footage of the observation chart,
- Video footage of the thermometer memory banks, and
- Three screenshots of CCTV footage dated 2 May 2021 taken at 01:43, 02:03 and 02:51 respectively

Ms Michaels said that the panel has not been provided with full documentation as it does not have the care booklet from May 2021, instead it had a care booklet dated October

2021. She submitted that panel therefore does not have a full picture of the observations that took place on the night shift commencing on 1 May 2021.

Furthermore, Ms Michaels submitted that the panel must bear in mind that, by their own admission, Witness 1 was watching television with the sound on whilst reviewing the CCTV footage on their mobile phone. The panel therefore cannot be sure that Witness 1 did not miss you carrying out observations in the time they claimed to have been watching because they were simply not looking at the CCTV.

Charge 3

Ms Michaels submitted that the CCTV screenshots do not show if you were lying down. She added that Witness 1's oral evidence that the floor can be seen and therefore your feet were up and you were lying down is speculative and does not prove anything. Also, in their statement, Witness 1 alleged that they heard you '*snoring*' however, in their oral evidence, they were clear that they could not actually tell if it was snoring or perhaps "*a grunting*".

Ms Michaels maintained that you were misled when questioned during the fact finding meeting as the interviewer stated that the Company had '*pics with a blanket over you*' when Witness 1 has never said there were any pictures of you sleeping with a blanket on or at all.

Ms Michaels further submitted that, in Witness 1's previous statements, it was never said that they put the blanket in the cupboard between the shift of the day nurse and your night shift until she cross examined Witness 1 about the day nurse and access to Child A's emergency bag. Ms Michaels said there is no evidence before the panel of you using a blanket, and that the minutes from the fact finding meeting suggest that you did not know there was a blanket in the cupboard as you believed the blanket was '*on the sofa*.'

Moreover, Ms Michaels highlighted that there is oral evidence from Witness 1 that the cupboard was accessible by others, and that, as they left the house between 19:30 and 22:30, they could not have known who had accessed the cupboard during that period.

Charges 4 and 5

Ms Michaels stated that these charges are predicated on the basis that, if you did fall asleep between 00:00 and 03:00, you could not have carried out the duties listed in the sub-charges. She submitted that the panel has heard and seen little to no evidence to suggest you did not; you completed an observation sheet and a Time in Motion chart, and you explained that you used your own personal thermometer because you had concerns about the observation sheet and the previous thermometer readings.

Ms Michaels noted that the panel had not been provided by the NMC with any of the other documents that you would have completed and, when asked about the care report document by the panel, Witness 2 did not recall if they had seen it during the internal investigation.

Ms Michaels submitted that there is no case to answer on either Charge 4 or 5 as the only evidence the panel has is unreliable in relation to observations.

Charges 6, 7, 8 and 9

Ms Michaels submitted that, for the same reasons stated above, there is no case to answer in relation to Charges 6a, 6b, and therefore there is no cogent evidence of dishonesty for Charge 7 in its entirety and Charges 8 and 9 as the only evidence relied upon for these charges is unreliable.

Ms Michaels referred the panel to the case of *Fish v General Medical Council* [2012] EWHC 1269 (Admin), particularly the following passages from Mr Justice Foskett:

'What, however, seems to be a proposition of common sense and common fairness is this: an allegation of dishonesty should not be found to be established against anyone, particularly someone who has not been shown to have acted dishonestly previously, except on solid grounds. Given the consequences of such a finding for an otherwise responsible and competent medical practitioner, any Panel will almost certainly (without express reminder) approach such an allegation in that way.

An allegation of dishonesty against a professional person is one of the allegations that he or she fears most. It is often easily made, sometimes not easily defended and, if it sticks, can be career-threatening or even career-ending...

...[Dishonesty] is an allegation:

- (a) that should not be made without good reason,*
- (b) when it is made it should be clearly particularised so that the person against whom it is made knows how the allegation is put and*
- (c) that when a hearing takes place at which the allegation is tested, the person against whom it is made should have the allegation fairly and squarely put to him so that he can seek to answer it.*

It is often uncomfortable for an advocate to suggest that someone has been deliberately dishonest, but it is not fair to shy away from it if the same advocate will be inviting the tribunal at the conclusion of the hearing to conclude that the person being cross-examined was dishonest.'

Applying *Fish* to the circumstances of this case, Ms Michaels submitted that it would be wholly wrong for the allegations of dishonesty against you to proceed past “*half time*” in light of the inconsistencies in the evidence.

For the above reasons, it was submitted that there is no case to answer in relation to the remaining charges because the evidence is of such a tenuous character that a properly directed panel could not find the allegations proved.

Ms Whawell referred the panel to NMC guidance 'DMA-6: Evidence' which states:

'There will be no case for a nurse, midwife or nursing associate to answer where, at the close of our case, there is:

- 1. no evidence*
- 2. some evidence, but evidence which, when taken at its highest, could not properly result in a fact being found proved against the nurse, midwife or nursing associate, or the nurse, midwife or nursing associate's fitness to practise being found to be impaired.*

...

Where the strength or weakness of our evidence depends on the weight it should be given, a submission that there is no case to answer is likely to fail. That issue is best considered after all the evidence has been heard.'

Ms Whawell submitted that the evidence the NMC has presented in relation to all of the disputed charges, including the live evidence the panel heard from Witnesses 1 and 2, is not of a tenuous nature. In accordance with *Galbraith* and the NMC guidance on no case to answer, she added that the matter as to credibility and inconsistencies in the evidence is a matter for weight which the panel will assess in due course.

Ms Whawell therefore submitted that, at this stage, all the evidence before the panel, when taken at its highest, does support the disputed charges.

Decision and reasons on submissions of no case to answer

The panel considered the submissions made and accepted the advice of the legal assessor.

In reaching its decision, the panel had regard to the NMC guidance on no case to answer 'DMA-6'. The panel also applied the test set out in *Galbraith*.

Accordingly, the panel made an initial assessment of all the evidence that had been 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 disputed charges.

The panel determined that there was evidence which, taken at its highest, was sufficient to support a case to answer in relation to Charges 4c, 4d, 4e, 4f, 4g, 5a, 5b, 6a, 6b and, in turn, Charges 7, 8 and 9 at this stage. The panel accepted that there are some inconsistencies and weaknesses in the NMC's evidence. However, the panel determined that the reliability of this evidence, and the weight ultimately to be attached to it, were matters which fall within its fact-finding function. As such, the panel was not prepared to accede to an application of no case to answer for these charges at this stage.

The panel considered the evidence supporting **Charges 3a, 3b, 3c, 4a, 4b, 4h, 4i and 4j** to be of a tenuous character, weak and wholly unreliable. The panel concluded that the evidence, when taken at its highest, was insufficient to support a case to answer.

Charge 3a

The panel noted that Witness 1 said in their statement that, on the night shift of 1 May 2021, they put the blanket '*inside a cupboard in the bedroom so [you] could not use it*' and, in the morning, '*went in the cupboard and found the throw...screwed up as though it had been used.*'.

The panel had no direct evidence from Witness 1, or any supporting photographic evidence, that you used the blanket. The panel determined that this allegation was based on mere inference.

Charge 3b

The panel accepted that Witness 1 said in their oral evidence that you were laid out on the sofa when they returned home around 22:30. When considering in the context of the whole charge, the panel was not satisfied that you were laying down with the intention of sleeping. In their oral evidence, Witness 1 said that you could not be seen sitting up in the CCTV screenshots. However, the panel determined that this is not evidence that you were laid down and asleep.

Charge 3c

The panel further noted that Witness 2 said in their statement that their understanding is you were '*found by [Witness 1] to have fallen asleep on the sofa in Child A's room with a blanket over [you].*'. However, when questioned by the panel, Witness 2 stated that they were unsure where the allegation that you were found covered by the blanket came from. The panel did not have any supporting photographic evidence of you covered with the blanket as suggested by the interviewer in minutes of the fact finding meeting. The panel therefore determined that this was also mere inference with nothing other than the misunderstanding adopted by Witness 2 to support it.

Charge 4a

The panel considered this charge to be ill-defined and concluded that there was insufficient evidence to support it.

Charge 4b

The panel noted that there was no clarity on whether or not you were required to monitor Child A's blood glucose levels. There was also conflicting oral evidence from Witnesses 1 and 2 with regard to when the blood glucose levels should have been checked in the

event that it needed to be. The panel considered the evidence supporting Charge 4b to be wholly inconsistent and therefore unreliable.

Charges 4h, 4i and 4j

The panel reviewed all of the evidence before it and determined that there was no evidence that Child A needed to be given medication at night, or that Child A was ever tangled during the night shift of 1 May 2021 and needed to be repositioned. Further, it was stated by Witnesses 1 and 2 in their oral evidence that there was no requirement to close the doors to Child A's bed unless you left room and there is no evidence before the panel to suggest that you left the room during the shift in question.

Decision and reasons on application to reconsider the determination at Charge 3b

Ms Whawell drew the panel's attention to the following sentence:

'The panel accepted that Witness 1 said in their oral evidence that you were laid out on the sofa when they returned home around 22:30.'

Ms Whawell accepted that, on an evidential basis, there are two timeframes the panel must consider: 22:30 and 00:00 – 03:00. However, she submitted that, if the panel restricted itself to the timeframe between 00:00 and 03:00, then it must be clarified in the determination.

Ms Whawell also highlighted the following:

'When considering in the context of the whole charge, the panel was not satisfied that you were laying down with the intention of sleeping.'

Ms Whawell submitted that your intention is not part of the charge and therefore should not be part of the panel's consideration at this time. Instead, the panel's consideration should be limited and restricted to whether or not there was sufficient evidence to show that you were laying down on Child A's sofa.

Ms Michaels submitted that the panel does not need to reconsider its decision in relation to Charge 3b, but whether the wording needs amending is a matter for the panel.

The panel reconsidered its determination in relation to Charge 3b. The panel recognised that it was dealing with two timeframes and decided to only consider 00:00 – 03:00. The only evidence for the panel to take into account for this timeframe were the three CCTV screenshots and the oral evidence of Witness 1. The panel determined that there is insufficient evidence you were laying down during that period. For completeness, the panel can confirm that it did not incorporate consideration of any aspect of intent to sleep

within this allegation. The panel has therefore amended the original determination accordingly.

Decision and reasons on facts

In reaching its decisions on the disputed facts, the panel took into account all the oral, documentary, and photographic evidence in this case together with the submissions from Ms Whawell and Ms Michaels.

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: The grandmother of Child A
- Witness 2: Head of Clinical Mobilisation at the
Company

The panel also heard live evidence from you under oath.

Ms Whawell submitted that there is sufficient evidence on each charge on which the panel can find the facts proved.

In relation to Charge 3d, Ms Whawell submitted that there is direct evidence and an admission from you, that you slept for a period of time whilst you were on your waking shift for Child A. The NMC submit that you however, slept for far longer than you admitted to doing so. Ms Whawell submitted that the panel should consider the evidence of Witness 1, in which she had claimed you to have been still on the sofa for three hours between 12

and 3:00 AM. Ms Whawell further submitted that the evidence you had given that you had fallen asleep at 2:00 AM, and not 12:00 AM, goes against the photographic evidence presented in this case. She submitted that the evidence you gave, of having fallen asleep just as the child you were caring for had become unsettled, '*defies logic*'. Ms Whawell submitted that the panel should focus carefully on what was asked to you in the internal interview, and the replies which you had provided.

Ms Whawell submitted that there is clear evidence that you used your jacket to cover yourself in order to settle yourself to sleep, and at the very least, did not concern yourself with the consequences of covering yourself [PRIVATE], with your feet up on the sofa in the early hours of the morning.

Ms Whawell submitted that there is sufficient evidence in relation to this charge to find it proved.

In relation to Charge 4c 4d, 4e, 4f and 4g, Ms Whawell submitted that you were on a waking shift, and responsible for the overall care of Child A between 12:00 AM and 3:00 AM. She submitted that there was no movement in the room during this time, and that you did not perform the functions as set out in Charge 4. Ms Whawell stated that you acknowledged in your evidence, that you failed to provide basic observations, including temperature checks and the changing of the continence pad.

Ms Whawell submitted that your basic duties were not able to have been completed from the sofa in which you were laying down. Therefore, there is sufficient evidence for Charge 4 and the sub sections to be found proved.

In relation to Charge 5 and Charge 7, Ms Whawell submitted that if you did not physically get up from the sofa, then you could not have possibly undertaken the observations required of you. If you therefore did not undertake such observations, then the forms filled out are not an honest representation of that child's position overnight. Ms Whawell

submitted that the NMC believe there to be sufficient evidence on which Charge 5 and Charge 7, including all sub charges, can be found proved.

In relation to Charge 6, Ms Whawell submitted that there is a lack of veracity which is the real issue in relation to this charge. She submitted that the panel should consider the interview you had been involved in, in which you had claimed to have slept for only 30 minutes and used your own thermometer to take the child's temperature. Ms Whawell submitted that there is no evidence to present this claim as true, and that the timing you are claiming you were asleep, is inaccurate. Ms Whawell submitted that there is clear evidence from Witness 2, alongside the video clips that the thermometer memory bank recorded temperatures, that do not correspond to the observation chart. There is very strong evidence that Child A's temperature was not taken overnight by that thermometer. Therefore, the panel must consider whether or not your evidence from the internal statement, that you monitored Child A's temperature with your own personal thermometer, is reliable.

In relation to Charge 8 and Charge 9, it was submitted that your actions were dishonest in that you intended to create a misleading impression that you had not been asleep for as long as you had been, and that you were dishonest in that you intended to create a misleading impression that you had undertaken child A's observations when you had not.

Ms Whawell submitted that the witnesses of the NMC were reliable and credible.

Ms Whawell submitted that when considering you as a witness, you have provided varied and changing accounts in relation to many aspects of the case. these changes or inconsistencies may lead to a conclusion that you have not provided a reliable and credible account.

Ms Michaels submitted that because you have admitted to falling asleep for a short period of time, that it is not the case that you must have failed to carry out your duties, therefore leading to alleged dishonesty.

Ms Michaels submitted that you have never claimed, nor accepted, that you did not move at all between the hours of 12:00 AM and 3:00 AM.

Ms Michaels submitted that there is nothing before the panel that suggests that you did not carry out your duties as set out in Patient A's care plan. She submitted that even though you have admitted to falling asleep briefly, you did carry out all of your observations.

Ms Michaels made clear that in your evidence you said that it was not unusual for observations to not be precisely on the two hourly mark, as it would depend on the child, whether they were unsettled, or for example, upset. She noted that at 2:00 AM you had claimed to have waited for Patient A therefore to return to a more stable state before carrying out your observation.

Ms Michaels submitted that in relation to the taking of observations, there was clearly no particular method followed by any of the agency nurses, but in contrast, that you had completed all of the observations.

Ms Michaels submitted that the NMC have taken you to the CCTV screenshots and suggested that Child A did not move before 2:00 AM. She submitted however, that when the panel look at these CCTV images, you can see the child move over. Nevertheless, Ms Michaels submitted that these images do not show you having been asleep between 12:00 AM and 3:00 AM, in fact, you are unable to be seen at all.

Ms Michaels submitted that you were misled into believing that those within the disciplinary meeting had misled you into believing that they had photographs of you sleeping. She further submitted that the internal disciplinary investigation had found insufficient evidence to support the allegation of falsification of observation notes.
[PRIVATE].

Ms Michaels submitted that the panel should consider the evidence dealing with the telephone call between the NMC and yourself. She submitted that this should be disregarded entirely and cannot be considered or referred to in any form as a business document. Ms Michaels submitted that this document was not produced correctly and should have been the subject of a hearsay application or produced with a statement from the person who created the note.

Ms Michaels submitted that the panel do not have any CCTV footage before it. She noted that the panel has '*no sound*', and it is admitted that there was no snoring to be heard in the footage either. She noted that Witness 2 did not mention you having snored in her two previous statements and is not mentioned until her final statement to the NMC. Witness 2 accepted in her evidence that she had made assumptions based on what she saw as a '*lack of movement*' on the CCTV. Ms Michaels submitted that the CCTV stills are of limited assistance to the panel.

Ms Michaels submitted that from the very beginning, you have claimed to have used your personal thermometer on Child A, which has remained a consistent claim. Ms Michaels submitted that none of the other videos of thermometer readings match the previous nurses' reading times, which may indicate that what you have claimed about having used your own thermometer, is correct. You had claimed to have used your own thermometer as you had concerns about the low readings which had been taken by the previous nurse, which had been recorded within the observation chart.

Ms Michaels submitted that you have recognised how wrong it was for you to have fallen asleep and had emailed your work apologising to them on 6 May 2021. She submitted that there is no evidence that you placed your jacket over you in order to fall asleep, but merely did so as the room was cold.

[PRIVATE]

Ms Michaels submitted that this is the first time you have ever fallen asleep on shift, and the first time you have ever been accused of anything in your entire career as a nurse. This is an isolated incident.

Ms Michaels submitted that you did not want to work [PRIVATE], but were pressured to do so by your workplace, who told you that the family you care for *'rely on'* you. You did not want to *'let [Witness 1] down'*.

Ms Michaels submitted that when considering dishonesty, there is nothing before the panel to consider you as dishonest. Your actions, according to the case of *Ivy v Genting Casinos*, would not be considered dishonest. You have already been through an internal investigation where it was noted there was insufficient information suggest that you had falsified the observations, and therefore, cannot be considered as having been dishonest.

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

For the avoidance of doubt, the panel noted that earlier in the proceedings the NMC had offered no evidence in relation to the following Charges: 1a, 1b, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, 6c, 10. Consequently, these charges were found not proved.

Findings on Facts

Charge 3d) During a night shift commencing on 1 May 2021 providing care to Child A: Slept between approximately 12am and 3am

In relation to Charge 3d, the panel took into consideration the evidence of Witness 1, who stated that she arrived home at approximately 22:30 PM – 23:00 PM and noted that you were laying on the sofa and did not seem to be your *'usual self'*. Witness 1 said that she went to bed between midnight and 1 AM on this evening, and was concerned about you falling asleep, and so she monitored the CCTV screen in her room where she could see Child A asleep.

The panel noted that Witness 1 said she saw no movement or light in the room, and believes that she heard some snoring, giving a description of *'deep nasal sounds'*. Witness 1 had also noted that the drip stand was in the same position and had not been

moved during this time, which she expected it to have been, due to observations which should have been carried out. Witness 1 had further given evidence that you were with lying down with your feet up. Witness 1 said that she had monitored the CCTV whilst also occasionally watching her television between the hours of 12:00 AM and 3:00 AM.

The panel then considered your evidence. The panel noted that in your oral evidence you claim to have slept between 10 and 40 minutes but cannot be exactly certain on this.

The panel overall found Witness 1's evidence to be generally consistent throughout and she was convinced in her belief that you must have been asleep for several hours. However, when Witness 1 was asked by Ms Michaels, whether or not she was certain that you were asleep or snoring, she replied '*no I can't*'.

The panel concluded that even though Witness 1 was convinced that you had slept for multiple hours, it was only evidence that you had not moved from the couch, rather than that you were asleep. Witness 1 had no clear view of you on the CCTV camera.

The panel noted that there were inconsistencies between your evidence to the panel and in your responses to the local investigation about how long you had been asleep and when. However, it determined that this was more likely to be because you simply did not know how long you had been asleep, rather than a deliberate attempt to lie or deceive the panel. The panel therefore did not treat the inconsistencies in your evidence as a mark of unreliability.

The panel consequently preferred your evidence and determined that at some point between the times stated in the charge, you did in fact fall asleep. However, the panel concluded that the evidence before it is not strong enough to prove that you were asleep for the *entire* period, stated in the charge. Although it cannot determine exactly the period in which you fell asleep, and for how long, the panel concluded that you did in fact fall asleep for a period of time, at some stage, between 12:00 AM and 3:00 AM.

Consequently, on the balance of probabilities, this charge is found proved.

Charge 4c) *During a night shift commencing on 1 May 2021 between approximately 12am and 3am did not: Check Child A's Hickman line;*

In relation to Charge 4c, the panel took into consideration the evidence from you in which you said you undertook the required checks and observations at midnight, and that you did not need to do any physical checks, as all of those that you could do at that current time, could be done from the sofa. The panel highlighted that within your oral evidence, you had once again emphasised that you did not physically get up to check the Hickman Line. The panel noted however, that this presents an inconsistency, as in the care booklet for this patient, you had ticked the Hickman Line check, which was untrue.

The panel further considered the evidence from the three still CCTV photographs, starting at 01:43 AM until 02:51 AM, in which it is clear that the patients' drip stand had not moved. The panel noted that it would have expected for it to have been moved when physically checking the Hickman Line.

The panel also considered Witness 1's evidence in which she said that she did not see you physically check on her grandson between 12:00 AM and 03:00 AM.

The panel were therefore satisfied that given the lack of movement of the drip stand; it was likely that you did not conduct the required physical checks.

Consequently, on the balance of probabilities, this charge is found proved.

Charge 4d) *During a night shift commencing on 1 May 2021 between approximately 12am and 3am did not: Check Child A's drainage bag;*

In relation to Charge 4d, the panel took into account the evidence of Witness 1, in which she had stated that she had not seen you get up and conduct any physical checks between the hours of 12:00 AM and 3:00 AM. The panel further noted its conclusion that the drip stand had not been physically moved at all, which would have been required if physical checks were to have taken place. The panel also took note of your admission that you *'did not need'* to get up off of the sofa in order to conduct your checks.

The panel therefore found it more likely that you did not carry out a check of the drainage bag during these times.

Consequently, on the balance of probabilities, this charge is found proved.

Charge 4e) *During a night shift commencing on 1 May 2021 between approximately 12am and 3am did not: Take Child A's basic observations (temperature, oxygen saturations, heart rate);*

In relation to Charge 4e, the panel took into account the evidence of Witness 1 and noted that the basic observation of taking the temperature of your patient would need to have been done manually. The panel noted your own admission, that you had not taken Child A's temperature, at 02:00 AM. The panel acknowledged that oxygen saturations and heartrate can be conducted from the sofa, but not temperature checks.

The panel are satisfied that you did not take the temperature of the child, but, are not satisfied that you did not note the oxygen saturations and the heart rate of Child A on the monitor, as these were able to be completed from your seated position on the couch.

Consequently, on the balance of probabilities, this charge is found proved in relation to the allegation that between approximately 12:00 AM and 3:00 AM, you did not take Child A's temperature. This charge is not proved in relation to oxygen saturations and heart rate.

Charge 4f) *During a night shift commencing on 1 May 2021 between approximately 12am and 3am did not: Check and/or change Child A's continence pad;*

In relation to Charge 4f, the panel noted that the same reasoning from Charge 4e also applies to this charge, particularly in relation to the lack of movement of the drip stand. The panel noted the evidence from Witness 1 that the check within this charge had to be done physically.

The panel noted that Witness 1 did not see you physically get up to check, there is no evidence of the drip stand moving position on the CCTV still images, and there is no evidence in the care plan either that you had checked the continence pad.

Consequently, on the balance of probabilities, this charge is found proved.

Charge 4g) *During a night shift commencing on 1 May 2021 between approximately 12am and 3am did not: Monitor and/or inspect Child A's Total Parenteral Nutrition line;*

In relation to Charge 4g, the panel determined that this charge relates to a physical check. Witness 1's evidence was that in order to adequately check the Total Parenteral Nutrition Line, you would need to physically move the drip stand and undertake a physical check of Child A underneath his top.

The panel noted that Witness 1 confirmed this check to be a physical one, as in charge 4f. The panel determined that there is no evidence this was done; there is no evidence on the CCTV still images that the drip stand had been moved. Witness 1 did not see you physically get up and conduct the check, and there is no evidence in the care plan that you conducted this observation.

Consequently, on the balance of probabilities, this charge is found proved.

Charge 5a) *During a night shift commencing on 1 May 2021: Documented observations on Child A's observation chart which you had not taken;*

In relation to Charge 5a, the panel considered that it had found that the drainage bag, Hickman line, temperature check, and the TPN line had not been checked during the time of 12:00 AM and 3:00 AM. The panel then noted however, that the care plan shows that you had ticked and documented these observations as having been completed at 2am.

The panel took account of your own admission that you did not undertake these observations at 2:00 AM, which you had completed on the chart, as you did not want to disturb the patient. You explained to the panel that you took these observations around 3:00 AM but did not amend the pre-populated times in the care plan.

Consequently, on the balance of probabilities, the panel found that you had documented observations on the chart which you had not taken at the time shown on the chart, and therefore, this charge is found proved.

Charge 5b) *During a night shift commencing on 1 May 2021: Documented on Child A's Time in Motion chart that he was asleep between 1am and 7am when you did not know this to be the case because you were asleep between approximately 12am and 3am*

In considering Charge 5b, the panel took into account four different factors.

Firstly, the panel noted that in your evidence, you submitted that your entries were not falsified.

Secondly, the panel were not satisfied that it was clear as to what exactly was required on the Time in Motion Chart; they found that this chart was open to interpretation as to

whether it covered checks that were made on the hour, or at some point between a given period of time.

[PRIVATE]

Finally, the panel had already found proved that you had fallen asleep at some point between the hours of 12:00 AM and 3:00 AM, but not for the entirety of that period.

The panel accepted your evidence that you had correctly completed the time in motion chart. It found that your explanation, that you had hourly reminders on your watch and had carried out these checks and documented them properly, was more likely to be the case than that you had made the entries without knowing the true position. The fact that you had been asleep at some point between the hours of 12:00 AM and 3:00 AM, did not necessarily preclude you from carrying out the observations and recording them properly on the time in motion chart.

Therefore, taking into account all of the evidence before it, the panel concluded that the NMC had not proved this charge on the balance of probabilities.

Charge 6a) *On 11 May 2021 at a fact-finding meeting with First Option Healthcare, said that you: 'must have gone to sleep around half past 3 for 30 minutes' or words to that affect, when you fell asleep for approximately 3 hours;*

In relation to Charge 6a, the panel considered the evidence from the investigative meeting in which you said that you must have fallen asleep around about 3:30 AM for a period of 30 minutes. However, the panel noted your evidence that you were not asleep for the full three hours, between 12:00 AM and 03:00 AM.

The panel noted that it is unknown how long you had fallen asleep for, and the NMC have thus not been able to present enough evidence to prove this charge.

Consequently, on the balance of probabilities, this charge is found not proved.

Charge 6b) *On 11 May 2021 at a fact-finding meeting with First Option Healthcare, said that you: Used your own personal thermometer to take Child A's temperature when you did not;*

In relation to Charge 6b, the panel noted that Witness 1 had stated that she does not remember you having told her you had used your own personal thermometer. The panel noted that Witness 1 had explained to you that she had wanted you to use the patients' own thermometer, and not your own. The panel also considered Witness 2's evidence in that it was 'odd' to mix and match equipment. You explained that as a community nurse, you always had your own thermometer with you and you chose to use this as you were not confident of the accuracy of Patient A's thermometer. You referred to low temperatures documented on the shift before yours. The panel took into account that in the internal investigation, you had made your own personal thermometer available for the investigators to examine.

The panel noted that the evidence provided by the NMC regarding the patient's thermometer memory bank readings, they did not correlate to any of the patient temperature recordings within their care plan, nor did they correlate with the preceding or subsequent nurses recordings.

The panel determined that your evidence, from the onset, relating to this charge, has been consistent in the claim that you used your own personal thermometer, and you had given what the panel believe to be good reasons for using your own thermometer; such as the previous readings of other thermometers having been unusually low.

The NMC's submission was that you falsified the entries, however, the panel concluded that it was more likely that the entries were different because you did use your own thermometer.

The panel concluded that it preferred your evidence, accepting it and determining that it was more compelling than the evidence provided by the NMC.

Consequently, on the balance of probabilities, this charge is found not proved.

Charge 7a) *Your actions as specified at charge 5 were dishonest in that you intended to create a misleading impression that you: Had undertaken Child A's observations when you had not;*

In considering Charge 7a, in relation to Charge 5a only, the panel applied the test set out in *Ivy v Genting Casinos*. It first considered your actual state of mind and knowledge or belief as to the facts during the relevant time in this charge.

Your evidence, which the panel had accepted, was that you had documented that you had completed the observations at 2:00 AM, when you had not in fact done so. The panel found that you gave a convincing rationale as to why you did so, which was that you pre-populate the care record to remind you to add the observations in before the end of your shift. The panel also noted that you had claimed to make your observations in a notebook, and later enter them into the care plan. You admitted at an early stage that when you entered them into the care plan, you should have amended the timing to show that you had completed the observations nearer to 3:00 AM as opposed to 2:00 AM.

The panel noted your explanation that the reason you did not complete the observations at 2:00 AM, was in order to not disturb the patient, as they were restless. The panel accepted that there was photographic evidence which showed that Patient A had moved around this time.

The panel found your evidence and explanation to be convincing and accepted it. It was satisfied that you had made an error in recording the observations in that you had recorded them as having been taken at 2:00 AM when they were in fact undertaken some time later but you had not marked the entry to explain this. The panel were satisfied that

there was no intention on your part to mislead anyone but that this was an error in the way you had made the entry in the record.

Secondly, the panel considered, in light of its findings, whether your conduct was honest or dishonest by applying the standards of ordinary decent people.

The panel decided, given that you had made an error in your record keeping and had not tried to mislead anyone, that your conduct would not be regarded as dishonest by the standards of ordinary decent people.

Consequently, on the balance of probabilities, this charge is found not proved.

Charge 7b) *Your actions as specified at charge 5 were dishonest in that you intended to create a misleading impression that you: Had not been asleep for approximately 3 hours*

In relation to Charge 7b, the panel determined that this charge is found not proved, as Charge 5b was found not proved.

Charge 8) *Your actions as specified at charge 6a) were dishonest in that you intended to create a misleading impression that you had not been asleep for as long as you had been*

In relation to Charge 8, the panel determined that this charge is found not proved, as Charge 6a was found not proved.

Charge 9) *Your actions as specified at charge 6b) were dishonest in that you intended to create a misleading impression that you had undertaken Child A's observations when you had not*

In relation to Charge 9, the panel determined that this charge is found not proved, as Charge 6b was found not proved.

Charge 11) On an unknown date in August 2021, telephoned Child A's grandmother [PRIVATE] as a result of the NMC referral

In relation to Charge 11, the panel determined that this charge is found proved by way of your own admission.

Charge 11

On 26 January, the hearing was adjourned part-heard after the panel handed down the decision on facts.

The hearing resumed on 15 July 2024

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 your 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 ability to practise kindly, safely and professionally.

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, your fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

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

Ms Whawell invited the panel to take the view that the facts found proved amount to misconduct. The panel had regard to the terms of 'The Code: Professional standards of practice and behaviour for nurses and midwives (2018' (the Code) in making its decision.

Ms Whawell identified the specific, relevant standards where your actions amounted to misconduct. She submitted that your conduct in the charges found proved fall short of what would have been expected of a registered nurse. She submitted that the areas of concern identified relate to basic nursing skills and practice. She stated that, by falling asleep on a waking one to one shift for a vulnerable child with complex needs and failing in the fundamentals of care for that child, your conduct falls short of the standards expected of a registered professional.

Ms Whawell submitted that falling asleep after being entrusted as the sole nurse on duty to care for a vulnerable child, put your conduct at the upper end of the seriousness scale. The risk of harm posed was significant because you, at that time, lacked the ability to respond either entirely or quickly and appropriately enough to any medical needs for Child A, or indeed, any medical emergency.

Ms Whawell submitted that falling asleep on that shift was exacerbated by your having failed to tell anyone about having fallen asleep, and by leaving behind what can only be

described as 'inaccurate records' for part of the shift, as found proved in the sub charges of Charge 4, thus failing in your duty to be open and honest.

Ms Whawell noted that, a few months after this NMC had process had begun, you called Child A's grandmother [PRIVATE] which was unacceptable and unprofessional. She submitted that this constitutes very serious misconduct.

Ms Whawell submitted that your acts and omissions were a significant departure from the fundamental principles of the code of prioritising people, preserving safety, practising effectively and promoting professionalism and trust in the profession. She submitted that the clinical failings, coupled with [PRIVATE], are a serious departure from the expected standards of a registered nurse. In particular, Ms Whawell noted that you had put Child A at significant risk of harm and Witness 1 at risk of emotional harm.

Ms Whawell submitted that your behaviour undermines public confidence in the profession and is a serious departure from the standards expected of a registered professional.

Ms Michaels submitted that you are '*well aware*' that your actions in the charges that have led to this fitness to practise hearing, and that your actions fell short of the standards expected of a registered nurse. She submitted that you are aware that you should have acted differently regardless of any pressure you had felt that you were under at the time of these charges. [PRIVATE]

Ms Michaels submitted that you admitted after your waking shift that you had fallen asleep, and you made admissions since which have been consistent; you have always expressed sincere remorse for your actions.

Ms Michaels submitted that she invites the panel to consider that this is an isolated incident, there has been no repetition, and that there have been no previous incidents. However, she submitted that you are aware that your conduct may amount to misconduct, and that she accepts this.

Submissions on impairment

Ms Whawell moved on to the issue of impairment and 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).

Ms Whawell submitted you have in the past acted or are liable in the future, to act so as to put patients in unwarranted risk of harm. She submitted that you put an extremely vulnerable child at unwarranted risk of serious harm by falling asleep on a waking one to one shift.

Ms Whawell submitted that you failed in your duty to properly observe a vulnerable child during the course of your shift, or to accurately make records; the accuracy of those records were paramount. She submitted that you have in the past committed a breach of one of the fundamental tenets of the nursing profession and are liable to do so in the future. She further submitted that you had put your own needs above Witness 1's, [PRIVATE].

Ms Whawell submitted that, although your having fallen asleep was an isolated incident, your subsequent action to then call Witness 1 [PRIVATE] adds to an extended period of misconduct.

Ms Whawell submitted that you have shown remorse but limited insight into the seriousness of your actions. She stated further that you have failed to practice safely and effectively, and therefore, failed to promote professionalism and trust. It is submitted that there is a significant risk of the misconduct being repeated, and that your fitness to practice is currently impaired.

Ms Michaels submitted that the panel heard evidence from you at the facts stage, whereby you expressed your remorse for the risk you could have placed Child A in, by falling asleep. [PRIVATE]

Ms Michaels submitted that you are very grateful that no harm came to Child A, and that you are aware that by falling asleep, even for a short period, there was a risk of failing to ensure Child A's safety during that period, which you deeply regret.

Ms Michaels noted that the panel heard in your evidence of your close relationship with Child A prior to the incident, and that you are very aware, have insight and appreciate the seriousness of your previous actions.

Ms Michaels submitted that you have been working for the NHS since 2015 and have never had any complaints or concerns against your practice.

Ms Michaels submitted that you have shown a developed level of insight, and that these isolated incidents were out of character. Ms Michaels noted your remorse and that you are not seeking to excuse what you have done, that you are not deflecting blame onto anyone [PRIVATE]. Ms Michaels submitted that you do not present any deep-seated attitudinal problems, but rather a momentary lapse of judgment [PRIVATE].

Ms Michaels submitted that your conduct is remediable; it has been over 3 years since this conduct, and you have set out to develop your nursing skills further over this period of time. You have stopped taking night shifts and have changed your working practice after learning through your experience with Child A. You do not want to put any child or adult at any level or risk.

Ms Michaels noted that you have been practicing unrestricted since 2021, with no issues, and you are viewed positively by both your colleagues and employers. Ms Michaels therefore submitted that you have remediated your failing, and that there has been no repetition. Consequently, she invited the panel to find that you pose no risk to the public,

and that your fitness to practice is not currently impaired on either public protection or public interest grounds.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Roylance v General Medical Council* (No 2) [2000] 1 A.C. 311, *Nandi v General Medical Council* [2004] EWHC 2317 (Admin), and *General Medical Council v Meadow* [2007] QB 462 (Admin).

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 was of the view that your actions did fall significantly short of the standards expected of a registered nurse, and that your actions amounted to a breach of the Code. Specifically:

1.2) make sure you deliver the fundamentals of care effectively

1.4) make sure that any treatment, assistance or care for which you are responsible is delivered without undue delay

10.1) complete records at the time or as soon as possible after an event, recording if the notes are written sometime after the event

10.2) identify any risks or problems that have arisen, and the steps taken to deal with them, so that colleagues who use the records have all the information they need

14.1) act immediately to put right the situation if someone has suffered actual harm for any reason or an incident has happened which had the potential for harm

14.2) explain fully and promptly what has happened, including the likely effects, and apologise to the person affected and, where appropriate, their advocate, family or carers

14.3) document all these events formally and take further action (escalate) if appropriate so they can be dealt with quickly

19.1) take measures to reduce as far as possible, the likelihood of mistakes, near misses, harm and the effect of harm if it takes place

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

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

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

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

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. However, the panel was of the view that Charge 3b, 4c, 4d 4e, 4f, 4g, 5a and 11, do amount to serious professional misconduct.

The panel decided to separate and contextually group the relevant charges together when considering whether or not your actions amounted to misconduct.

In relation to Charge 3d, the panel noted that Child A was a vulnerable child with complex care needs and required their observations to be conducted in a satisfactory manner. The panel noted that the shift in question in Charge 3 was a waking shift, which required one to one care between yourself and Child A; you were the sole nurse on duty and therefore Child A's care was reliant on you being awake and conducting the correct observations.

The panel considered therefore, that you had fallen asleep and put Child A at a risk of harm as the observations required were not conducted. The panel did note that Child A did not come to any real harm, but you did fail in your duty as a nurse of being awake, responsive, and responsible for the care of Child A, and to any needs which may have arisen.

Consequently, your conduct in Charge 3d falls far below the expectations of a registered nurse, and therefore, this charge amounts to serious professional misconduct.

In relation to Charged 4c, 4d, 4e, 4f, 4g, and 5a, the panel determined that as Child A had complex health needs, regular observations needed to be undertaken to ensure that there is no deterioration with this patient's health. Therefore, in not conducting these observations at the times required and directed, you could have caused serious consequences for Child A, if in any circumstance, he had deteriorated.

Further the panel noted that, you had not carried out the required observations for Child A between 12:00 AM and 3:00 AM, but you later took these observations, and falsely wrote that they were taken at 2:00 AM, when this was not the case. The panel determined that this incorrect entry made relating to your having undertaken observations at 2:00 AM, provides a false picture of the patient's health at that moment in time. Therefore, this could have led to serious consequences if Child A's health had deteriorated.

Consequently, your conduct in Charges 4c, 4d, 4e, 4f, 4g and 5a fall far below the expectations of a registered nurse in this specific clinical situation, and therefore, this charge amounts to serious professional misconduct.

In relation to Charge 11, the panel determined that, the fact that you had contacted the patient's grandmother [PRIVATE] was highly unprofessional and brought the reputation of the profession into disrepute. [PRIVATE].

[PRIVATE]

Consequently, your conduct in Charge 11 falls far below the expectations of a registered nurse, and therefore, this charge amounts to serious professional misconduct.

The panel overall found that your actions did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

Decision and reasons on impairment

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

In coming to its decision, the panel had regard to the Fitness to Practise Library, updated on 27 March 2023, which states:

'The question that will help decide whether a professional's fitness to practise is impaired is:

"Can the nurse, midwife or nursing associate practise kindly, safely and professionally?"

If the answer to this question is yes, then the likelihood is that the professional's fitness to practise is not impaired.'

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust,

nurses must be honest and open and act with integrity. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

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

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

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

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

- a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
- b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
- c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession'*

The panel finds that a patient was put at a potential risk of physical harm as a result of your misconduct. Your misconduct had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute. It was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charges relating to dishonesty extremely serious.

The panel did note that the main incident of your misconduct, in relation to your having fallen asleep, was an isolated incident, but it noted that you had made an unprofessional and unacceptable phone call to the grandmother of Child A, some months after your NMC process had begun.

The panel noted that your reflection pieces which have been provided were extremely good and provided some level of insight, particularly in relation to how you would further manage your shifts and ensure that you do not fall asleep on shift again. The panel noted that you have made some practical changes to your work to ensure you do not fall asleep on shift again. The panel noted that there are some testimonials from 2021 that highlight your professionalism as a nurse, your helpfulness and the way in which you go *'above and beyond'*.

However, the panel felt that with regards to your documentation and the issues which have been highlighted in this case, it does not see full remediation or full insight yet. The panel noted that it has not had a testimonial before it, or any independent evidence to show that you have addressed any issues relating to the strengthening of your documentation skills.

[PRIVATE]. Therefore, it is unclear to the panel how you have changed your practice in regard to documentation, as there are inconsistencies in your oral and written evidence.

The panel noted that you were extremely apologetic for having phoned Child A's grandmother and stated that you were aware you should not have done this. However, the

panel felt that there was not sufficient insight into your behaviour of how this would have affected Child A's grandmother, and the nursing profession as a whole.

However, the panel is of the view that there is a risk of repetition due to a lack of full insight and therefore decided that a finding of impairment is necessary on the grounds of public protection.

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

The panel determined that a finding of impairment on public interest grounds is required because a well-informed member of the public would expect you, a registered nurse, facing such allegations, to have your fitness to practice found impaired. Consequently, the panel also finds your fitness to practise impaired on the grounds of public interest.

Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired.

Sanction

The panel has considered this case very carefully and has decided to make a conditions of practice order for a period of 6 months. The effect of this order is that your name on the NMC register will show that you are subject to a conditions of practice order and anyone who enquires about your registration will be informed of this order.

Submissions on sanction

Ms Whawell informed the panel that in the Notice of Hearing, 14 December 2023, the NMC had advised your that it would seek the imposition of strike-off order, if it found your fitness to practise currently impaired.

During the course of the hearing, the NMC revised its proposal and submits that a suspension order for a period of 12 months is more appropriate in light of the panel's findings.

Ms Whawell requested that the panel provide a clear and reasoned position as to why a strike off order is not proportionate in this case, if, the panel determine so.

Ms Whawell submitted that this case involves the neglect of vulnerable child and is a very finely balanced case. She noted that your record keeping and your wholly inappropriate phone call to Child A's grandmother, should be under the most focus.

Ms Whawell submitted that the panel should consider the following aggravating features in this case:

- 1) You have presented a lack of fully developed insight into your failings;
- 2) Your misconduct occurred over a period of time;
- 3) Your misconduct put patients at risk of harm due to the neglect of a vulnerable child;
- 4) Your actions could have had the effect of suppressing openness.

Ms Whawell submitted that the panel should consider the following mitigating features in this case:

- 1) You have presented some level of insight;

- 2) You provided admissions in relation to the concerns raised against you at a relatively early stage.

Ms Whawell submitted that a caution order, or a conditions of practice order, would not be workable or proportionate in this case due to the risks identified. She submitted that neither of these orders would adequately protect the public or satisfy the public interest in this case.

Ms Whawell submitted that there is a risk of harm to the public and that the public interest is engaged in this case. Therefore, the NMC submit that the appropriate and proportionate order would be a suspension order for a period of 12 months.

Ms Michaels submitted that a sanction of suspension would be disproportionate in light of the panel's findings in this case.

Ms Michaels submitted that the panel should consider the following mitigating circumstances:

- 1) You made early admissions to the concerns raised against you;
- 2) You have demonstrated genuine remorse;
- 3) You have shown in accordance with the panel's findings, a developing insight;
- 4) The conduct that has been found proved can be easily remediated;
- 5) Your misconduct relates to an isolated incident;
- 6) There is no risk of repetition of the main incident of misconduct, of falling asleep;
- 7) There has been no repetition of your misconduct of having fallen asleep since it initially occurred;
- 8) [PRIVATE]
- 9) There have been multiple testimonials provided in relation to your character and practice.

[PRIVATE]

Ms Michaels submitted therefore, that a caution order would be sufficient to mark that your actions were unacceptable and must not occur again.

Ms Michaels submitted that if the panel are not to impose a caution order, then a conditions of practice order would be a sufficient and appropriate response to the misconduct that has been found. She submitted that you have presented no harmful deep seated or attitudinal problems, and you have identifiable areas of your nursing which are in need of assessment or retraining; consequently, your misconduct can be remediated.

Ms Michaels submitted that there is no evidence of general incompetence, or evidence that you are not willing to respond to training in a positive manner.

Consequently, Ms Michaels invited the panel to impose a caution order, but if this is rejected, then she invited the panel to impose a conditions of practice order. She submitted that patients would not be put in danger if conditions were imposed, and that these can be created, monitored, and addressed.

Ms Michaels submitted that, if a conditions of practice order is to be imposed, conditions such as the following may be appropriate:

- 1) You must provide a reflective practice profile to the NMC regarding your professional development in relation to record keeping documentation and professional boundaries.

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:

- You have not provided full insight, in particular surrounding the public interest issues in this case;
- A vulnerable child was involved in this case and was put at risk of harm;
- There were two incidents of misconduct.

The panel also took into account the following mitigating features:

- 1) You made early admissions to the concerns raised against you;
- 2) You have shown remorse for your actions;
- 3) You have shown developing insight;
- 4) You have already taken steps to strengthen some of your practice;
- 5) No repetition since these incidents;
- 6) [PRIVATE]

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection and 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 issues identified. 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 mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the SG, in particular:

- *No evidence of harmful deep-seated personality or attitudinal problems;*
- *Identifiable areas of the nurse or midwife's practice in need of assessment and/or retraining;*
- *No evidence of general incompetence;*
- *Potential and willingness to respond positively to retraining;*
- *Patients will not be put in danger either directly or indirectly as a result of the conditions;*
- *The conditions will protect patients during the period they are in force; and*
- *Conditions can be created that can be monitored and assessed.*

The panel determined that it would be possible to formulate appropriate and practical conditions which would address the failings highlighted in this case. The panel accepted that you would be willing to comply with conditions of practice.

The panel had regard to the fact that these incidents happened three years ago and that, other than these incidents, you have had an unblemished career of 15 years as a nurse. The panel acknowledged that your misconduct in relation to Child A occurred within a very short window of time and noted that you have shown clear insight in regard to falling asleep on duty. You have taken action to ensure that you do not repeat this misconduct. The panel did note that although there was a vulnerable child involved within the concerns raised against your practice, this concern cannot be categorised as a case of neglect; the

concerns were centred around an hour of observations not taken, as opposed to a full night shift of care not given. No direct or indirect harm was caused to the child.

The panel was of the view that it was in the public interest that, with appropriate safeguards, you should be able to practise as a nurse.

Balancing all of these factors, the panel determined that the appropriate and proportionate sanction is that of a conditions of practice order.

The panel was of the view that to impose a suspension order or a striking-off order would be wholly disproportionate and would not be a reasonable response in the circumstances of your case because the panel have not found evidence of incompetence, or deep-seated attitudinal concerns relating to your practice.

Having regard to the matters it has identified, the panel has concluded that a conditions of practice order will mark the importance of maintaining public confidence in the profession and will send to the public and the profession a clear message about the standards of practice required of a registered nurse. The panel determined that conditions could address the failings and satisfy the necessity for public protection whilst also allowing you the ability to strengthen your practice.

In making this decision, the panel carefully considered the submissions of Ms Whawell in relation to the sanction that the NMC was seeking in this case. However, the panel considered that a conditions of practice order would be more appropriate and proportionate given the panel's findings, as opposed to a suspension order, which the panel found to be disproportionate as the concerns related to two incidents, not multiple or extended.

The panel determined that the following conditions are appropriate and proportionate in this case:

For the purposes of these conditions, 'employment' and 'work' mean any paid or unpaid post in a nursing, midwifery or nursing associate role. Also, 'course of study' and 'course' mean any course of educational study connected to nursing, midwifery or nursing associates.

1. You must meet with your line manager, supervisor or mentor on a monthly basis to have a developmental meeting in order to review and discuss your reflection and insight in maintaining professional boundaries and evidence of your accurate documentation. You must provide a detailed summary of these meetings signed off by your line manager, supervisor or mentor, to your NMC case officer prior to the next review hearing.
2. You must, prior to the review of your order, provide the NMC with a reflective portfolio of your practice relating to:
 - a) Your documentation skills;
 - b) Maintaining professional boundaries, and;
 - c) Your understanding of the wider implications of a and b above on the reputation of the nursing profession.
3. You must keep us informed about anywhere you are working by:
 - a) Telling your case officer within seven days of accepting or leaving any employment.
 - b) Giving your case officer your employer's contact details.
4. You must keep us informed about anywhere you are studying by:
 - a) Telling your case officer within seven days of accepting any course of study.

- b) Giving your case officer the name and contact details of the organisation offering that course of study.
5. You must immediately give a copy of these conditions to:
- a) Any organisation or person you work for.
 - b) Any agency you apply to or are registered with for work.
 - c) Any employers you apply to for work (at the time of application).
 - d) Any establishment you apply to (at the time of application), or with which you are already enrolled, for a course of study.
 - e) Any current or prospective patients or clients you intend to see or care for on a private basis when you are working in a self-employed capacity
6. You must tell your case officer, within seven days of your becoming aware of:
- a) Any clinical incident you are involved in.
 - b) Any investigation started against you.
 - c) Any disciplinary proceedings taken against you.
7. You must allow your case officer to share, as necessary, details about your performance, your compliance with and / or progress under these conditions with:
- a) Any current or future employer.
 - b) Any educational establishment.
 - c) Any other person(s) involved in your retraining and/or supervision required by these conditions

The period of this order is for 6 months as you have already shown that you are developing your clinical practice, and the panel acknowledge that the concerns raised in this case can be addressed within this time period as they are focused on documentation and self-reflection.

Before the order expires, a panel will hold a review hearing to see how well you have complied with the order. At the review hearing the panel may revoke the order or any condition of it, it may confirm the order or vary any condition of it, or it may replace the order for another order.

This will be confirmed to you in writing.

Submission on interim order

Ms Whawell submitted that the NMC are inviting the panel to make an 18-month conditions of practice order, as this is necessary and proportionate to adequately protect the public. She submitted that the conditions included within this proposed interim conditions of practice order, would replicate those decided by the panel within this determination.

Ms Michaels invited the panel to bear in mind that you have been working for three years in an unrestricted manner with no concerns.

Decision and reasons on interim order

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

The panel concluded that the only suitable interim order would be that of a conditions of practice order, as to do otherwise would be incompatible with its earlier findings. The conditions for the interim order will be the same as those detailed in the substantive order for a period of 18-months months to ensure sufficient time for any appeal.

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

That concludes this determination.