

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

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

Virtual Hearing

Name of Registrant: Adrian Prostire

NMC PIN: 21D0345E

Part(s) of the register: Registered Nursing Associate – 21 April 2021

Relevant Location: West Sussex

Type of case: Misconduct

Panel members: Bernard Herdan (Chair, lay member)
Rosalyn Mloyi (Registrant member)
Georgina Foster (Lay member)

Legal Assessor: Guy Bowden

Hearings Coordinator: Samara Baboolal

Nursing and Midwifery Council: Represented by Sahara Fergus-Simms, Case Presenter

Mr Prostire: Not present and not represented at this hearing

Facts proved: Charge 1

Facts not proved: None

Fitness to practise: Impaired

Sanction: Suspension order (12 months)

Interim order: Interim suspension order (18 months)

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Prostire was not in attendance and that the Notice of Hearing letter had been sent to Mr Prostire's registered email address by secure email on 30 May 2024.

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

The panel accepted the advice of the legal assessor.

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

The panel took into account that this hearing was initially scheduled for a period of nine days, and Mr Prostire was informed of this. However, the hearing was then shortened to a period of five days. Mr Prostire's UNISON representative was made aware of this on 11 July 2024 via email and indicated that they were aware of the change. The panel took this into account and determined that the shortening of the hearing did not undermine proof being served within the requirements of the Rules as the hearing start date remained the same.

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

Decision and reasons on proceeding in the absence of Mr Prostire

The panel next considered whether it should proceed in the absence of Mr Prostire. It had regard to Rule 21 and heard the submissions of Ms Fergus-Simms who invited the panel to continue in the absence of Mr Prostire. She submitted that Mr Prostire had voluntarily absented himself.

Ms Fergus-Simms referred the panel to the documentation from Mr Prostire which included written submissions, witness statements, reflections, testimonials and training certificates, which was provided by his UNISON representative. She also referred the panel to an email from Mr Prostire's UNISON representative, dated 1 July 2024, which says:

'Mr Prostire is no longer able to attend the forthcoming hearing commencing on 15 July 2024. [...] No disrespect is intended by his non-attendance. It does mean that I will also not be present in his absence but a written statement, bundle and submissions will be provided in due course for the panel to consider along with the NMC's evidence.'

The panel accepted the advice of the legal assessor.

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

The panel has decided to proceed in the absence of Mr Prostire. In reaching this decision, the panel has considered the submissions of Ms Fergus-Simms, correspondence from Mr Prostire's representative, and the advice of the legal assessor. It also had regard to Mr Prostire's written witness statement, where he wrote:

'[PRIVATE].'

It had regard to the factors set out in the decision of *R v Jones and General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of fairness to all parties. It noted that:

- No application for an adjournment has been made by Mr Prostire;
- Mr Prostire's UNISON representative has informed the NMC that they have received the Notice of Hearing and confirmed that Mr Prostire is content for the hearing to proceed in his absence;
- There is no reason to suppose that adjourning would secure his attendance at some future date;
- Mr Prostire must attend all days of the scheduled hearing in order to be represented by his UNISON representative, and cannot do so;
- A witness has attended today to give live evidence, and two others are due to attend;
- Not proceeding may inconvenience the witnesses, their employers and, for those involved in clinical practice, the clients who need their professional services;
- The charges relate to events that occurred in 2023;
- Further delay may have an adverse effect on the ability of witnesses accurately to recall events; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mr Prostire in proceeding in his absence. Although the evidence upon which the NMC relies will have been sent to him at his registered address, he will not be able to challenge the evidence relied upon by the NMC in person and will not be able to give evidence on his own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any

inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Mr Prostire's decision to absent himself from the hearing, waive his rights to attend, and/or be represented.

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

Decision and reasons on application to amend the charge

The panel heard an application made by Ms Fergus-Simms on behalf of the NMC, to amend the wording of charge 1.

The proposed amendment was to replace the word "head" with "neck". It was submitted by Ms Fergus-Simms that the proposed amendment would more accurately reflect both the charge and the evidence. Ms Fergus-Simms submitted that the location of the contact between Mr Prostire hand and Resident A has never been materially in dispute. She submitted that the change would create completeness and avoidance of doubt.

"That you, a registered nursing associate

*1. On 02 February 2023, slapped Resident A on the back of their ~~head~~ **neck**.*

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

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

The panel was of the view that such an amendment, as applied for, was in the interest of justice. The panel was satisfied that there would be no prejudice to Mr Prostire and no

injustice would be caused to either party by the proposed amendment being allowed. The panel also took into account that Mr Prostire has not disputed the location of the alleged contact, nor that the contact took place, only the purpose of the contact. It was therefore appropriate to allow the amendment, as applied for, for completeness and to accurately reflect the charge and the evidence for the charge.

Details of charge

That you, a registered nursing associate

1. On 02 February 2023, slapped Resident A on the back of their neck.

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

Background

Mr Prostire worked at St Magnus Hospital and St Magnus Nursing (the Trust) since 2015. St Magnus is a Mental Health Hospital for Older Men. He initially was a support worker. Later in his employment, he was sponsored by his employer to acquire a qualification as a Nursing Associate. Mr Prostire continued to work at the Trust in a new role to reflect his qualification.

On 20 February 2023 the NMC received a referral from the Trust about Mr Prostire.

On 2 February 2023, Mr Prostire allegedly slapped Resident A on the neck. This incident was witnessed by the registered manager, who said that the resident appeared settled

and was not displaying any challenging behaviour at the time. The resident has a diagnosis of mixed dementia and is significantly cognitively impaired.

The manager allegedly heard the slap from where she was standing, some distance away, and asked Mr Prostire what he was doing. He is said to have been visibly shocked to see the manager and responded that he didn't know why he did it. During a conversation following the incident, Mr Prostire allegedly admitted to the contact and apologised. He was then asked to leave the unit immediately and was suspended pending investigation.

A disciplinary meeting was held on 20 February 2023 and Mr Prostire was dismissed.

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

During the live evidence of Witness 2, the panel identified that Witness 2 may have to explore [PRIVATE], and that it may be more appropriate for the hearing to be heard partly in private. Ms Fergus-Simms was invited to make submissions on a Rule 19 application. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

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

The panel determined to go into private session in connection with [PRIVATE].

Decision and reasons on application to admit written statement as hearsay evidence

Having been supplied with a registrant defence bundle containing Mr Postire's written statement, the panel considered whether this statement and accompanying material

should be admitted as hearsay evidence in accordance with Rule 31. Ms Fergus-Simms did not object to the admission of this evidence and invited the panel to place what weight they deem appropriate in the circumstances on this written statement. Mr Prostire was not present at this hearing due to work commitments.

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.

The panel gave the application in regard to Mr Prostire's written statement serious consideration. The panel noted that Mr Prostire's statement had been prepared in anticipation of it being used in these proceedings and contained the paragraph, 'This statement ... is true to the best of my information, knowledge and belief' and signed by him.

The panel considered the question of admissibility of the registrant defence bundle in its entirety and recognised that it incorporates a witness statement, reflections, as well as submissions made by Mr Prostire's representative on his behalf. It noted that while the submissions are not evidence, they should be taken into account. The panel recognised that the weight placed on these documents must be appropriate and reflect that there has not been an opportunity for cross-examination of live evidence. The panel also recognised that there is other material within the registrant defence bundle that is not relevant at this stage in proceedings.

The panel concluded that Mr Prostire would not be disadvantaged by the admission of his written statement and defence bundle as hearsay evidence, as he prepared these documents in anticipation that they would be used in the course of these proceedings in his absence.

In these circumstances, the panel came to the view that it would be fair and relevant to accept into evidence the registrant defence bundle, including the written statement of Mr Prostire, but would give what it deemed appropriate weight once the panel had heard and evaluated all the evidence before it.

Decision and reasons on facts

In reaching its decisions on the facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Ms Fergus-Simms on behalf of the NMC.

The panel has drawn no adverse inference from the non-attendance of Mr Prostire.

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: A registered manager at the Trust.
- Witness 2: The registered manager at the Trust.
- Witness 3: A deputy registered manager at the Trust at the time of the incident.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the witness and documentary evidence provided by both the NMC and Mr Prostire's written submissions.

The panel then considered the disputed charge and made the following findings.

Charge 1

“That you, a registered nursing associate, on 02 February 2023, slapped Resident A on the back of their neck.”

This charge is found proved.

In reaching this decision, the panel took into account the live evidence of the three witnesses and Mr Prostire’s written statement.

In her live evidence during this hearing, Witness 2 stated that she was in the room where the incident occurred, and stated that the only people in that part of the room at the time was herself, Mr Prostire, and Resident A. She said that she heard and saw a slap, and when she confronted Mr Prostire asking him what he was doing, he replied that “he did not know why he had done it” and said he was moving Resident A. Witness 2 told Mr Prostire that there was no reason to move Resident A at that point as they were in a large room with ample space and Resident A was “not doing anything” that made moving him necessary. Witness 2 added that, even if Resident A did require moving, it would not involve slapping in the neck area.

The panel took into account the following statement from Mr Prostire’s witness statement:

‘[Resident A] one of the residents, was walking around the dining room which was not unusual for him. He frequently gets in the way of staff and other residents and he is known for pacing around the room. As I approached him, I intended to redirect him away from my path. I wanted to put my hand on the small of his back to gently steer him, but unfortunately in my hurried action, I accidentally caught my right hand to the base of his neck. This was what caused the slapping noise that was heard by [Witness 2] but which also caused me to be very shocked as I had not

intended this to happen. Almost immediately, I heard [Witness 2], the Manager ask me what I was doing. In that moment I froze because I was so shocked by what had happened and initially was lost for words. As the reality of what had happened set in, I said that I was sorry and that I did not know why I done it that way, and I kept saying that I was sorry.

The reason that I was shocked and surprised was because I had intended to gently divert [Resident A] by placing my hand gently at his waist level in the small of his back and not to his neck as happened. [Witness 2] records that I was shocked which I was because I did not intend to make contact with [Resident A] in that way.'

Mr Prostire also wrote in his statement that, at the meeting with Witness 2 and 3:

'They both said they were really disappointed with me. I kept apologising for what had happened as I will [sic] still shocked by what had occurred. I tried to explain that I was trying to steer [Resident A] away from the direction I was going, but my English was clumsy in my own shock and confusion, I kept saying I was manually handling him which was clearly not the correct description of what happened. My description of manual handling [Resident A] was because I was attempting to guide or redirect [Resident A] in a different direction.'

The panel further took into account that Witness 2 spoke to two other colleagues [Witnesses 1 and 3] after the incident occurred. These two people gave live evidence during this hearing, and corroborated Witness 2's statement. The panel concluded that her live evidence is consistent and reliable, and that she has no reason to fabricate evidence.

Witness 1, Witness 2 and Witness 3 spoke about the Non-Abusive Physical and Psychological Intervention (NAPPI) training, which includes physical interventions to deescalate and aspects of manual handling training, specifically for patients with cognitive

impairments. The witnesses stated that it is emphasised that the neck is not touched. Witness 1 said that it is advised that staff never use that technique of touching the neck in the way that Mr Prostire did during the incident with Resident A.

Further, the panel took into account that Mr Prostire had a very clear understanding of English language and would have had a good understanding of manual handling, according to the witnesses. It also considered that he was a manual handling trainer and therefore would most likely be aware of the standard and correct procedure for manual handling of a vulnerable resident such as Resident A.

Mr Prostire also gave the explanation that the height difference between himself and Resident A led to the impact between his hand and Resident A's neck, as Resident A was about 10 inches shorter than Mr Prostire. However, the panel found that it seems implausible given that the height difference between Mr Prostire and Resident A was not so drastically different to result in Mr Prostire's hand making contact with Resident A's neck when he was allegedly aiming for his lower back. The panel concluded that the height difference was not a satisfactory explanation.

The panel was told that there was no harm caused to Resident A, the slap had not caused redness to the neck, and that Resident A did not call out or indicate distress.

[PRIVATE].

The panel concluded that on the balance of probabilities, Mr Prostire slapped Resident A with his hand on the back of Resident A's neck, for which the panel was not given a satisfactory explanation.

In light of all of the evidence before it, the panel determined that, on the balance of probabilities, this charge is found proved.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether Mr Prostire's fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's 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, Mr Prostire's 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 Fergus-Simms invited the panel to take the view that the facts found proved amount to misconduct. The panel had regard to the terms of 'The NMC code of professional conduct: standards for conduct, performance and ethics (2004)' (the Code) in making its decision.

Ms Fergus-Simms identified the specific, relevant standards where Mr Prostire's actions amounted to misconduct.

Ms Fergus-Simms submitted that Mr Prostire, in his written reflections, continues to deny and cover up the misconduct. She submitted that Witness 2 says that Mr Prostire has been known to cut corners and not always behave the way expected of a nursing professional. She submitted that protecting people from harm, abuse and neglect is an integral aspect of the profession. She further submitted that a key principle embedded through the Code emphasises that nurses, midwives and nursing associates take all reasonable steps to make sure that peoples' physical, social and psychological needs are assessed and responded to, which includes acting as advocates for the vulnerable and challenging poor practice and behaviour related to someone's care. Ms Fergus-Simms submitted that Mr Prostire acted contrary to this.

Ms Fergus-Simms further submitted that Mr Prostire has breached fundamental tenets of the profession through his action and misconduct. She submitted that he continues to deny and seek to conceal his behaviour.

Submissions on impairment

Ms Fergus-Simms 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 Fergus-Simms submitted that Mr Prostire has breached fundamental tenets of the profession through his action and misconduct. She submitted that he continues to deny and seek to conceal his behaviour and that his ability to practise is impaired.

Ms Fergus-Simms referred the panel to the Dame Janet Smith test and submitted that there is a significant risk of harm and repetition in this case, and that Mr Prostire acted in a

way that his integrity can no longer be relied upon. She submitted that the charge found proved is a serious act of violence against a vulnerable and cognitively impaired elderly resident who would not have been in a position to report it himself. She submitted that Mr Prostire then tried to distance himself from the conduct by making excuses when he was confronted by Witness 2, a manager at the Trust, that he was trying to move the resident.

Ms Fergus-Simms submitted that Mr Prostire's action has brought the profession into disrepute and that a member of the public would not feel confident leaving their loved one in the care of a nurse who slapped a vulnerable resident. She submitted that in light of this, the public interest is met in this case.

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 Mr Prostire's actions did fall significantly short of the standards expected of a registered nursing associate, and that Mr Prostire's actions amounted to a breach of the Code. Specifically:

'1. Treat people as individuals and uphold their dignity

1.1 *Treat people with kindness, respect and compassion*

1.5 *Respect and uphold people's human rights*

20. Uphold the reputation of your profession at all times

20.1 *Keep to and uphold the standards and values set out in the Code*

- 20.2 *Act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment*
- 20.3 *Be aware at all times of how your behaviour can affect and influence the behaviour of other people*
- 20.6 *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'*

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 members of the public would be very concerned if they learned that a nursing associate who slapped a vulnerable resident were allowed to continue practising without a finding of misconduct. They took into account that other members of the profession would also be shocked and noted that the witnesses, who are nursing professionals, were very shocked about Mr Prostire's actions.

The panel found that Mr Prostire's actions did fall seriously short of the conduct and standards expected of a nursing associate and amounted to misconduct.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, Mr Prostire's 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.'

Nursing associates 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 nursing associates with their lives and the lives of their loved ones. To justify that trust, nursing associates must 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; and/or

The panel concluded that limbs a, b and c of the Dame Janet Smith test applied in this case.

The panel finds that a patient was put at an unwarranted risk of harm as a result of Mr Prostire's misconduct. Mr Prostire's misconduct has breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute.

Regarding insight, the panel acknowledged that Mr Prostire apologised following the incident and has offered the explanation that he was attempting to move Resident A out of the way, and while doing this accidentally slapped Resident A's neck. This account is contained in the reflection provided in the registrant defence bundle.

However, the panel concluded that this is not a credible explanation for what took place and Mr Prostire was unable to explain his actions, initially saying to Witness 2 that he "did not know why he did it". The panel further took into account Mr Prostire's written reflection which says, in relation to the incident: "*I did not know why I did it that way*". It noted that Mr Prostire has not taken responsibility for his actions. It noted that he attempted to excuse his action based upon the height difference between himself and Resident A as well as his poor English language skills. However, the panel noted that witnesses attested to his good understanding of English and that he was trained in manual handling and that Mr Prostire acted as a manual handling trainer. Moreover, the panel judged that the height difference between Mr Prostire and Resident A was not significant enough to make accidental slapping of the neck area plausible.

The panel acknowledged that Mr Prostire has provided some relevant documentation, including training certificates and positive testimonials which spoke highly of his character. However, it found that these did not speak to whether Mr Prostire would repeat the charges of the kind found proved in the future. The panel also noted that the training certificates were for mandatory training that Mr Prostire would have already received prior to the incident and did not assure it that they were evidence of a reduced risk of repetition.

The panel therefore decided that there is a risk of repetition, and 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 member of the public and of the nursing profession would be very concerned if Mr Prostire were allowed to practise without a finding of impairment. In addition, the panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds Mr Prostire's fitness to practise impaired on the grounds of public interest.

The panel concluded that, in asking the question as to whether Mr Prostire can practise safely, kindly and professionally, given his conduct and the nature of the charge found proved, Mr Prostire has not demonstrated this. He did not exhibit safe practice on this occasion, he was unkind to Resident A, and his behaviour was not professional. Since he has demonstrated limited insight and has been unable to give a credible explanation for what occurred, the panel concluded that there is a risk of repetition.

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

Sanction

The panel has considered this case very carefully and has decided to make a suspension order for a period of 12 months. The effect of this order is that the NMC register will show that Mr Prostire's registration has been suspended.

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

Submissions on sanction

Ms Fergus-Simms informed the panel that in the Notice of Hearing, the NMC had advised Mr Prostire that it would seek the imposition of a striking-off order if the panel found Mr Prostire's fitness to practise currently impaired. She submitted that there are continued denials throughout Mr Prostire's responses and limited insight on his part, raising a real risk of repetition of the conduct found proved. She submitted that this case involves an unwarranted incident of violence against a cognitively disabled, vulnerable resident in Mr Prostire's care.

Ms Fergus-Simms submitted that Mr Prostire's conduct can have a severe impact on public confidence on a professional's ability to uphold the standards and values set out in the Code if he were allowed to remain on the register.

Ms Fergus-Simms submitted that there are the following aggravating features in this case:

- Mr Prostire's limited insight
- Mr Prostire's attempt to conceal the misconduct

Ms Fergus-Simms submitted that a striking-off order is the appropriate order in these circumstances.

The panel accepted the advice of the legal assessor.

Decision and reasons on sanction

Having found Mr Prostire's 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:

- Abuse of position of trust relating to a vulnerable resident
- Limited insight into failings
- Conduct which put a resident at risk of suffering harm.

The panel also took into account the following mitigating features:

- Isolated incident
- [PRIVATE]
- Has been apologetic from the beginning and his apologies continue throughout his statements and reflection
- Has engaged with the NMC
- Demonstrated some insight

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

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Mr Prostire's practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Mr Prostire's misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel 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 Mr Prostire's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the SG, in particular:

- *No evidence of harmful deep-seated personality or attitudinal problems;*
- *Identifiable areas of the nurse or midwife's practice in need of assessment and/or retraining;*
- *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 is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charge in this case. In particular, the option of imposing a condition that Mr Prostire be supervised by a senior nurse whenever he is with a

patient/resident was found to not be workable. It concluded that while the misconduct identified can potentially be mitigated, Mr Prostire has been on an interim conditions of practice order and has not been able to secure employment in a nursing associate role. Therefore, he has been unable to demonstrate compliance with the current interim conditions of practice order and the risk of repetition and harm has not been mitigated. Further, it was of the view that the charge found proved was serious in nature as it related to the slapping of a vulnerable resident, and a conditions of practice order may not adequately reflect the seriousness of the charge. In particular, an informed member of the public or a nursing professional may conclude that this sanction is insufficient to maintain public trust in the profession.

The panel concluded that the placing of conditions on Mr Prostire's registration would not adequately address the seriousness of this case and would not protect the public or satisfy the public interest.

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

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

The panel was satisfied that in this case, the misconduct, although serious, was not fundamentally incompatible with remaining on the register.

In making this decision, the panel carefully considered the submissions of Ms Fergus-Simms in relation to the sanction that the NMC was seeking in this case. However, the

panel considered that a striking-off order was disproportionate considering the degree of seriousness in this matter. The panel acknowledged that the charge found proved in this case is serious, however, it took into account that this was a single, isolated incident with no evidence of repetition. Mr Prostire has not demonstrated deep-seated attitudinal issues and has remained apologetic since the incident. There was no evidence of actual harm caused to Resident A, and the panel was of the view that, although there is a risk of repetition, this can be addressed through further insight and reflection. The panel was therefore satisfied that a suspension order is appropriate, proportionate and sufficiently protects the public from the risk of harm and meets the public interest.

Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in Mr Prostire's case to impose a striking-off order.

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

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

The panel considered that this order is necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nursing associate.

The panel determined that a suspension order for a period of 12 months was appropriate in this case to mark the seriousness of the misconduct and to allow sufficient time for Mr Prostire to develop insight into his misconduct and develop strategies to ensure this is not repeated in the future. The length of the suspension order would also satisfy the public interest in this case.

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

Any future panel reviewing this case would be assisted by:

- Information on employment whether paid or voluntary
- Testimonials from employers and colleagues who are aware of these proceedings
- Further training and personal development
- Reflective statement including Mr Prostire's understanding of the seriousness and impact of his actions on public confidence in the nursing profession and on patients
- Evidence of developing reflection and insight
- Evidence of efforts made to keep his nursing knowledge up to date

This will be confirmed to Mr Prostire in writing.

Submissions on interim order

The panel took account of the submissions made by Ms Fergus-Simms. She submitted that an interim order is necessary to protect the public and meet the public interest as the sanction will not come into effect until 28 days from the service of the determination or if Mr Prostire appeals the decision. She submitted that an interim suspension order for a period of 18 months is appropriate to protect the public and meet the public interest until the sanction comes into effect.

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 fact

found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. The panel therefore imposed an interim suspension order for a period of 18 months due to the nature of the charge found proved and the risk of harm and repetition in this matter. The panel also concluded that an interim suspension order would meet the public interest.

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

That concludes this determination.