

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

**Substantive Hearing
Wednesday 22 May 2024 – Friday 24 May 2024
Tuesday 30 May 2024 – Friday 31 May 2024
Monday 8 July 2024 – Thursday 11 July 2024**

Virtual Hearing

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|---------------------------------------|---|
| Name of registrant: | John Macmillan Rossi |
| NMC PIN: | 83B0614S |
| Part(s) of the register: | Registered Nurse – Sub Part 1 Mental Health Nurse (Level 1) – 2 July 1986 |
| Relevant Location: | Renfrewshire |
| Type of case: | Misconduct |
| Panel members: | Shaun Donnellan (Chair, Lay member) Mary Karasu (Registrant member) Oluremi Alabi (Lay member) |
| Legal Assessor: | Michael Hosford-Tanner (22 – 24 May 2024) Marian Killen (30 – 31 May 2024) Robin Hay (8 – 11 July 2024) |
| Hearings Coordinator: | Jumu Ahmed |
| Nursing and Midwifery Council: | Represented by Alastair Kennedy, Case Presenter |
| Mr Rossi: | Present and represented by Chris Weir, Anderson Strathern |
| Facts proved: | Charge 1 and 2 |
| Facts not proved: | N/A |
| Fitness to practise: | Impaired |
| Sanction: | Striking-off order |
| Interim order: | Interim suspension order (18 months) |

Details of charge

That you, a registered nurse:

1. On the night shift of 26 September 2022, engaged in sexual activity with Colleague A. **[PROVED]**
2. Your conduct a charge 1 was in the presence of Patient A. **[PROVED]**

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

At the outset of the hearing, you told the panel that you deny these charges.

Background

You were referred to the NMC on 6 January 2023 by Craigielea Care Home (The Home). It was alleged that you breached professional boundaries on the night shift of 26/27 September 2022, in that you were allegedly witnessed engaging in a sexual activity with Colleague A in a resident's bedroom whilst the resident was present, during working hours.

You had worked as a registered nurse at the Home for 6 years and 9 months.

Following an internal investigation at the Home, a formal disciplinary hearing was held on 23 December 2022. You have ceased working at the Home.

Before making any decision as to findings on the facts, the panel has considered procedural applications relating to the attendance of Colleague A, who has provided a signed formal witness statement, with a statement of truth, at the request of the NMC and has communicated with the NMC concerning the date on which she is available to give live evidence. 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 Weir.

Decision and reasons on procedural issue

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

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: Service Manager at Grandholm Care Home;
- Witness 2: Senior Carer at the Home at the time of the incident.

Short adjournment under Rule 22(5)

In his opening to the panel Mr Kennedy had told the panel that he proposed calling Colleague A to give live evidence on 23 May. However, he has now clarified that he had been unaware, until the morning of 23 May, of the communications between NMC and Colleague A since 7 May 2024.

The panel had earlier been informed in communications from the NMC, that NMC proposed calling Colleague A on 30 and/or 31 May, but in opening Mr Kennedy stated that he understood that had been changed, though he had not been able to provide detail of how or why.

Mr Kennedy midway on day 2 of the hearing informed the panel that he had instructions to close the NMC case and that NMC did not propose calling Colleague A to give evidence nor did he propose making a hearsay application for the panel to receive her NMC statement as her evidence.

The background is relevant to the panel's considerations and is as follows:

On 5 April 2023 Colleague A had signed a formal witness statement for the NMC, which contained a statement of truth.

The panel has been told that the Case Management Form indicated that the NMC had obtained that statement and that NMC would call Colleague A as a witness. The panel has noted that the situation is perhaps unusual, in that Colleague A's statement provides an apparently different account to that of the other NMC eye witness, Witness 2. However, the NMC had appropriately obtained the statement from Colleague A to allow the panel to consider all relevant evidence, and be able to give a full consideration of the allegations.

It is apparent from information received by the panel that Colleague A, a health care assistant, has co-operated with NMC throughout and is willing to give live evidence.

On 7 May 2024, an NMC Case Officer (CO) sent a notice to Colleague A's email address telling her that she would be required to give evidence.

On the same day, Colleague A responded:

'[...] I won't be able to attend virtual hearing on the 22nd may at 9.00am , I am on holiday abroad and I don't return till the 2nd June'

The CO responded back, again on the same day:

'many thanks for your prompt response to the notice of hearing and the details you provided.'

Although you are away abroad as this is an important hearing you are still required to participate in the hearing.

As this hearing is being considered as a virtual one the panel will be using Microsoft teams. This can be accessed anywhere in the world.

You would probably only be required for an hour or so. I do understand the inconvenience of this, but witnesses are very important to an NMC case.

Please can you provide the best day that you can be available to participate and sort of the best time as well. The NMC will try and be as accommodating as possible in this instance to your circumstances.'

Colleague A, again responded on the same day:

'I don't take my phone abroad as it charges me

Sorry for the inconvenience'

The CO responded:

'You do not need a mobile phone – you just need access to a device that can link into Microsoft teams.

I have had many people being in contact whilst abroad and even some that had to come back to attend a hearing it was that necessary.

If you do not provide any dates for the NMC then I will have to ask for proof of your holiday abroad so that the panel can be satisfied of your situation, as we may need to apply for an adjournment to secure your attendance another time. Your evidence is crucial for a panel to consider the registrant's fitness to practise. [...]

Colleague A responded on 8 May 2024:

*'I am available 30th 31st May
As I return back to work on the 1st June
If it's going to be after these dates that's ok as I will get time
off work to attend anytime after my holiday'*

The CO then responded:

*'thank you for you prompt response and holiday info and
dates of availability.*

*The last day of the hearing is 31 May so | I will enquire if you
could be heard on 30th May.'*

Unfortunately, the NMC did not communicate further with Colleague A and it appears, from what panel was told about Colleague A being scheduled to attend 30 – 31 May, that this was apparently left as the expectation until the second day of this hearing.

The panel was informed that there have been communications with Colleague A on morning of 23 May, in which Colleague A clarified that her flight to UK is scheduled to land in early hours of 30 May and unlikely she be at home before 3am. Colleague A is willing to give live evidence from the morning of 30 May 2024.

Mr Kennedy told the panel that he was not aware of this conversation as it was not put on the NMC system and that nothing was done by the CO with Colleague A's response. He said that it was clear that this was the NMC's fault.

Mr Kennedy said that there a number of routes that could be taken. After taking instructions, Mr Kennedy submitted that the NMC is no longer relying on the statement provided by Colleague A and that it would close its case. He told the panel that the NMC is not playing games. He appreciated that the panel had already read Colleague A's statement and the supplementary exhibits and appreciated that it

would benefit you more than the NMC. However, it was the NMC's obligation to disclose information which supports and also contradicts its case, which was the case here.

Mr Kennedy submitted that he would not be making a hearsay application to admit Colleague A's evidence as hearsay as, as per the test in *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin), he could not make submissions that there was no reason for her to fabricate her evidence if the NMC does not accept her evidence. He referred the panel to the case of *The Professional Standards Authority for Health and Social Care v The Nursing and Midwifery Council, Ms Winifred Nompumelelo Jozi* [2015] EWHC 764 Admin and told the panel that if the panel was to make a decision that it would like to hear Colleague A's evidence, then his instruction is still that he would not call her as witness, but that it would be available for you to call her as your witness.

Mr Weir told the panel that this position was wholly unsatisfactory for you. He informed the panel that an interim suspension order was imposed on your NMC PIN for over a year and that you wanted these charges to be dealt with as soon as possible. He told the panel that you had taken annual leave from work in order to attend this hearing and as a result, you have limited availability to reconvene.

Mr Weir submitted that the issue was not of disclosure but of fairness as the NMC was initially seeking to rely on Colleague A's evidence but then invited the panel to disregard it. He further submitted that this was not fair for the NMC to then put the onus on you to present her as your witness. He submitted that the NMC is playing games and that it should either accept Colleague A's statement in its entirety as unchallenged or call her as a witness, particularly as there was an expectation that she would be called.

Mr Weir told the panel that it was for the NMC to prove its case and therefore submitted that the NMC should not be permitted to close its case, but rather adjourn to allow Colleague A to attend the hearing to give her evidence or to submit Colleague A's statement in its entirety.

The panel heard and accepted the advice of the legal assessor who referred the panel to Rule 22(5) of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules) and the cases of *Jozi, PSA v NMC and X* [2018] EWHC 70 and *Council for the Regulation of Health Care Professionals v General Medical Council, Nursing and Midwifery Council, Truscott and Ruscillo* [2004] EWCA Civ 1356. The legal assessor advised that the Court decisions indicate that the panel has an inquisitorial function and may need to take proactive steps to ensure a full and fair examination of the facts, and that the burden of proving the facts rests on the NMC.

The panel had regard to Rule 22, which states:

'Witnesses

22. –

(5) The Committee may of its own motion require a person to attend the hearing to give evidence, or to produce relevant documents.'

There is a strong material dispute as to the facts of the case and the panel noted that Colleague A was one of the two direct witnesses to the alleged incident. The panel heard from Witness 2 who presents opposing evidence to Colleague A. There is also a dispute as to the relevance of some text messages which have been exhibited passing between Witness 2 and Colleague A. It was of the view that the material of facts is further complicated as the texts between Witness 2 and Colleague A is an issue as Witness 2 had told the panel that there were some inaccuracies as to what was said because of 'predictive texts'.

The panel took into account that Colleague A was engaging with the NMC promptly and that she would not attend the hearing before 30 May 2024. The NMC had left Colleague A with a reasonable expectation that she could give her oral evidence after she returned from abroad on 30 May 2024.

The panel, of its own volition, and prior to the NMC closing its case, exercised its powers under Rule 22(5) to require Colleague A to give evidence and the panel expects the NMC to liaise with Colleague A to call her for oral evidence at a reasonable time on 30 May 2024. The panel considered the suggestion by the Case Presenter that it be left up to you, the registrant, to call Colleague A as your witness to be unfair. The panel came to this conclusion taking account of the background of this procedural application and the preparation of the case where the NMC had obtained a formal statement from Colleague A and provided that statement to you and to the panel. The panel considered that this suggested approach would not sit comfortably with your right to a fair hearing under Article 6 of the European Human Rights Convention.

Having regard to the case of Jozi (above), the panel determined that it had a duty to be proactive and to ensure as far as possible that evidence which was at the heart of the case should be heard and tested. It therefore determined that a short adjournment should take place starting from 24 May 2024 until 30 May 2023 to allow Colleague A to attend and to give her evidence.

The hearing resumed on 30 May 2024.

Decision and reasons on facts

The panel heard live evidence from Colleague A on behalf of the NMC:

- Colleague A: Carer at the Home at the time of the incidents.

The panel also heard evidence from you under affirmation.

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

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

Charge 1

1. On the night shift of 26 September 2022, engaged in sexual activity with Colleague A.

This charge is found proved.

In reaching this decision, the panel took into account Witness 2's live evidence, witness statement and handwritten note dated 7 October 2022 and Colleague A's live evidence and witness statement. The panel also took into account the text messages between Witness 2 and Colleague A. It also took into account your evidence.

The panel noted from Witness 2's witness statement:

'14. I went to Resident A's room and opened the door at roughly 01:20. The television light was the only one that was on and Resident A was sat in their big chair in front of the television. I could not tell if Resident A was asleep but normally if a resident is asleep their head falls forward or to the side. I think they were awake as their head was straight looking at the television but I cannot be sure as I did not go further into the room. All I could hear was lip smacking and heavy breathing. I turned to the right and I could see Mr Rossi and [Colleague A] having it off with one another (fondling about) against the wall behind Resident A's chair. I do not think that they were having sex but it did not seem far off, I do not know what would have happened if I had walked in five minutes later. Resident A would not have been able to see Mr Rossi and Ms Wilkinson as they were behind Resident A's chair. The room was quite dark and I could not see [Colleague A's] hands but Mr Rossi's hands were below [Colleague A's] waist. The only light in the room was from the television so I could not see much more than this. I could see that they were kissing. I knew what they were doing, they were fondling with one another.'

In Witness 2's handwritten note dated 7 October 2022, she stated:

'I then proceeded [sic] to go straight to Resident A's room ,[...] when entering [...], Resident A was sitting in his chair in front of TV. I could not tell if Resident A was awake or asleep I could only see the back of his head, the room was dark and all I could hear was heavy breathing and I looked over to the wall and seen John and [Colleague A] kissing and touching each other they never heard or seen me [...]

[...]

I was shaking, shocked and angry by what I had just witnessed. When [Colleague A] entered the Roberts Unit five minutes later she came in to the lounge and asked whats up, I then took her by the arm and into the corridor and said to her I seen you's, what are you playing at in a residents room that could be my mother sitting there in that chair or your mother. [Colleague A] responded I know I am sorry, I then replied sorry's not good enough [...]

[...]

I told [Colleague A] I am horrified and disgusted, angry at what I had seen, [Colleague A] replied it has only been going on about a week and a half and that was the first time they had done that in a residents room

The panel also had sight of the text messages between Witness 2 and Colleague A.

On 26 September 2022, at 01:32, Colleague A texted Witness 2:

'I'm so so sorry. I promise and swear down it only happened when I came back from holiday, he saw I was so down and I know that not an excuse plz don't fall out with me'

Witness 2 responded:

'Look I wont say a word none of my business at the end of the day if you want to go down that road that's up to you [Colleague A] but I feel awkward as fuck now!!!'

On Monday 26 September 2022 at 09:36, Colleague A texted Witness 2:

'[...] I'm so so sorry for putting you in this position again, but plz don't fall out with me, and plz don't leave the work cause of it xx'

On Monday 26 September 2022 at 21:16, Colleague A texted Witness 2:

'[...] I really don't want this coming between us it was a Stupid mistake and im gonna put a stop to it on Friday [...]

'[...]

Witness 2 responded:

'[Colleague A] you have been my bestie for 24 maybe years I don't want this coming between our friendship either I'm shocked disgusted and uncomfortable about the whole thing [...] but the thing is [Colleague A] you never learn ... everything I have told you about John and how he's changed and he's unapproachable and you telling me about you dread going in sometimes incase johns in a mood and then your having it off with him just can not believe it and yeah your saying it's a mistake but you keep doing it and again you never learn !!!!' [sic]

Colleague A responded:

*'I don't want it to come between us either.
I am ending it it was stupid and irresponsible of me I get that I really do. [...] and I'm sorry I've put this on you now, I know I did bad mouth him but when I came back from hols he was totally different even towards me, and I know*

that no excuse for what I've done I know it's not. Piz don't let this ruin a friendship plz'

The panel noted that Witness 2 had texted Colleague A on 26 September 2022 at 01:14:

'Are you in with Resident A'

Colleague A responded: *'Yeah x'*

The panel also noted from Witness 2's live evidence that when she opened Resident A's door, the light from the television afforded the view of the room and that she was able to hear heavy breathing and kissing.

The panel preferred the evidence of Witness 2 over Colleague A. Albeit her evidence had some inconsistencies, the panel was of the view that the inconsistencies were not material or significant enough to doubt the occurrence of the fact in question.

The panel acknowledged that within the text messages between Witness 2 and Colleague A, Witness 2 did not specifically describe what she had seen. However, the panel noted that Colleague A, in her oral evidence, told the panel that when Witness 2 had sent her a text message which stated: *everything I have told you about John [...] and then your having it off with him just can not believe it and yeah your saying it's a mistake but you keep doing it and again [...]*, she (Colleague A) knew that Witness 2 was talking about what she (Witness 2) said she had seen on 26 September 2022. However, Colleague A did not deny these allegations in her response to the text message.

In her oral evidence, Colleague A told the panel that her response was in respect of another previous personal matter in which she had sought help from you. Further, the panel also noted that in response to the panel's question as to what Colleague A thought Witness 2 was talking about, she said she could not remember.

The panel was of the view that Witness 2 had no reason to fabricate a story as she had nothing to gain as, on the evidence provided by Witness 2 and Colleague A, Witness 2 has lost a long term friendship. The panel preferred the evidence of Witness 2 as to the incident that took place.

The panel took into account the evidence you gave under affirmation in which you provided an explanation of what had occurred in Resident A's bedroom with Colleague A.

The panel noted that your evidence was consistent with Colleague A's, and on cross examination you maintained the same account and never wavered.

It also noted that in relation to the text messages, you accepted that you could not provide an interpretation on them.

However, the panel preferred the evidence of Witness 2 over your evidence as it found the content of the text messages which were sent in or around 26 September 2022 to be reliable and credible evidence upon which to base its decision as to what took place.

The panel considered whether or not Witness 2 may have been mistaken in her interpretation of what she said she had seen. However, the panel was of the view that the text messages supported her evidence.

The panel was therefore of the view, that on the balance of probabilities, it is more likely than not that on the night shift of 26 September 2022, you had engaged in sexual activity with Colleague A. The panel, therefore, finds this charge proved.

Charge 2

2. Your conduct a charge 1 was in the presence of Patient A.

This charge is found proved.

Both counsel in their submissions to the panel said that if charge 1 was found not proved then charge 2 automatically had to be found not proved as well. The documentary and oral evidence before the panel in respect of charge 2 confirms that you and Colleague A were in Resident A's room whilst Resident A was present on 26 September 2022. The panel, therefore, finds this charge proved.

Fitness to practise

The panel then considered 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 suitability to remain on the register unrestricted.

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

The panel adopted a two-stage process in its consideration. First, it must determine whether the facts found proved amount to misconduct. Second, 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.*'

Mr Kennedy's submission was that the facts found proved amount to misconduct. The panel had regard to the terms of 'The Code: Professional standards of practice and behaviour for nurses and midwives (2015)' (the Code) in making its decision.

Mr Kennedy identified the specific, relevant standards where your actions amounted to misconduct. He referred to standards where your actions amounted to misconduct namely paragraph's 1, 1.1, 17.1, 20.1, 20.3 and 20.6 of the Code. He submitted that your actions and the facts found proved fell below the standard that is expected of a registered nurse and amounted to misconduct. This was compounded by the fact that you were a nurse in charge of the shift and in a position of responsibility. He submitted that in breaching professional boundaries with a more junior colleague, you had neglected your duties as well as Patient A and caused the junior colleague to do the same. Furthermore, Mr Kennedy submitted that your behaviour was selfish and unprofessional and that this was not the first time you had behaved in this manner.

Mr Weir said that the NMC's submission which is that you had neglected Patient A and your duties, was not subject to a charge. Consequently, no findings about neglect actually occurring were made. Therefore, It would be improper and unfair for this panel to make any sort of determination or consider that as a factor at this stage.

Mr Weir further said that you had only practised as a registered nurse for a limited period of time as you are subject to an interim suspension order. He told the panel that there are two testimonials provided by you that speak to your character. He submitted that there has been no repetition of behaviour since the current incident occurred.

Mr Weir also said that, whilst you maintain your innocence, you accept the findings of the panel and that the behaviour, as proved, amounts to misconduct.

Submissions on impairment

In regard to impairment, Mr Kennedy referred to the need to have regard to the protection of the public and to the wider public interest. This included the need to declare and maintain proper standards of conduct and behaviour and maintain public confidence in the profession and in the NMC as a regulatory body. He referred also

to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin).

Mr Kennedy said that your behaviour is remediable and that you have only worked as a registered nurse for a limited period. He further said that you currently work in a different field. However, there is no information from your current employer to demonstrate that you have not crossed boundaries with another staff member, nor how you work with others during a night shift. Mr Kennedy also submitted that remediation may be more difficult for you as this was not the first time you were before a Fitness to Practice panel for a similar type of behaviour, and which resulted in a 5 year caution order which expired on 31 May 2022. Although you did not commit any further misconduct whilst that caution was in place, the current charges took place 26 September 2022, which was four months after the caution order had expired. He referred the panel to the previous panel's determination which stated that the panel was unimpressed by your understanding of your position as a role model. He, therefore, submitted that these criticisms were well founded but your understanding did not develop following the imposition of the caution order.

Mr Kennedy submitted that although the panel may not find that the risk to patients is not at the higher end of the scale, however Patient A was exposed to a risk of harm as the necessary observations were not being carried out. Additionally, there is a risk of repetition of this type of behaviour because of your limited insight and therefore there is a public protection issue.

Mr Kennedy's submission was that a finding of current impairment was also necessary to satisfy the public interest. An informed member of the public would be shocked to learn that a nurse who catered to the needs of vulnerable people behaved in the way that you did on 26 September 2022, particularly in light of the previous finding against you. The same informed member of the public would expect the NMC as regulator to take action to ensure that the nurse did not repeat that behaviour.

Mr Kennedy submitted that a finding of current impairment is necessary to uphold public confidence in the NMC as regulator, protect the reputation of the profession and maintain proper standards in the profession.

Mr Weir submitted that in answering the questions as to whether the misconduct is easily remediable, has the misconduct been remedied and is the misconduct highly unlikely to be repeated, the panel should take into account that you have not been able to practise as a nurse as you are subject to an interim suspension order. He said that you have been working in a call centre without any issue and that this is relevant because the allegations are not about your clinical practice but about appropriate interactions with colleagues in your workplace.

Mr Weir submitted that the conduct is remediable and that despite your denial of the charges, you respect and accept the panel's findings. Further, you apologised for any upset, hurt or pain caused by such behaviour. He also said that you accept that the behaviour as proved was disrespectful to Resident A, to your employers, your colleagues, and the wider nursing profession. He accepted that it was not an excuse that Resident A was asleep at the time but there was no evidence of harm caused to him. Further, any emotional harm caused to Witness 2 was not intentional. Moreover, the behaviour was not practice related nor was it directed at service users. He said also that during your long nursing career, there have been no concerns about your clinical abilities.

Mr Weir submitted that your conduct had been remedied in that you have fully engaged with this process and in your evidence have accepted that this behaviour is unacceptable. Further, you have demonstrated an understanding as to how this type of behaviour poses a risk to residents, colleagues and the wider nursing profession. This has been a significant wake up call for you and the behaviour is best categorised as a thoughtless, impulsive act which has been remedied.

Mr Weir submitted that the impact this has had on you should give reassurance to the panel that this behaviour is unlikely to be repeated. He further submitted that the current allegations took place after your caution order had expired and a long time after the previous incident occurred. Therefore there is no pattern of behaviour.

Mr Weir's submission was that there should be a finding of no current impairment. Further, reasonably informed members of the public, whilst acknowledging the seriousness of the behaviour, would take into account the passage of time since the incident took place. Also that it happened with a colleague who was a willing participant. It was thoughtless and not with malice or intent to cause harm to anyone including service users. This would give reassurance that there would be no repetition.

Decision and reasons on misconduct

The panel accepted the advice of the legal assessor.

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:

'20 Uphold the reputation of your profession at all times

To achieve this, you must:

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

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

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

25 Provide leadership to make sure people's wellbeing is protected and to improve their experiences of the health and care system

To achieve this, you must:

25.1 identify priorities, manage time, staff and resources effectively and deal with risk to make sure that the quality of care or service you deliver is maintained and improved, putting the needs of those receiving care or services first'

The panel was mindful that breaches of the Code do not automatically result in a finding of misconduct. However, the panel concluded that in the light of the seriousness of the concerns, which involved your engaging in sexual activity with Colleague A in the presence of Patient A, fell far short of the conduct and standards expected of a nurse and was so serious as to amount to misconduct.

Decision and reasons on impairment

The panel next considered whether as a result of the misconduct, your fitness to practise is currently impaired.

In reaching 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 of that judgement, Mrs Justice Cox referred to Dame Janet Smith's remarks in the Fifth Shipment Report which reads as follows:

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

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

The panel determined that limbs a, b and c of this 'test' were engaged.

Whilst there is no evidence to suggest that Patient A suffered actual harm, the panel heard that he was vulnerable requiring 1:1 care and concluded that your actions had put him at risk of harm. Furthermore, having breached multiple provisions of the Code, the panel determined that your misconduct had breached fundamental tenets of the nursing profession and therefore brought its reputation into disrepute. The panel was satisfied that confidence in the nursing profession and in the NMC as regulator would be undermined if your fitness to practise were not found to be impaired.

The panel found your level of insight to be limited with the opportunity for further development. Although you accept the panel's decision in finding the charges proved, the panel could not be satisfied that you had addressed the concerns and would not repeat behaviour of this nature. Further, the incident found proved occurred only some 4 months after the caution order had expired, which was as a result of similar behaviour being found proved. The panel, therefore determined that, in the absence of sufficient insight there remains a likelihood that you would repeat such conduct in the future.

The panel was satisfied that the misconduct is capable of being remedied and considered the evidence before it, in determining whether you have taken steps to do so. The panel has found that although you have some degree of insight, this requires further development. It therefore determined that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objective of the NMC is to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding proper professional standards for their members. It therefore finds your fitness to practise is also impaired on public interest grounds.

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

Sanction

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

In reaching this decision, the panel has had regard to all the evidence, together with the submissions of Mr Kennedy and Mr Weir, as well as the Sanctions Guidance (SG) published by the NMC.

Submissions on sanction

In the Notice of Hearing, dated 16 April 2024, the NMC had advised you that it would seek the imposition of a striking-off order if your fitness to practise were found to be currently impaired.

Mr Kennedy said that the mitigating factors include your being fully engaged in this process and demonstrating some insight. Further, the aggravating factors include your previous Fitness to Practice findings for a similar matter, as well as the fact that the misconduct took place in the presence of a vulnerable resident whilst you were in a leadership role at the time.

Mr Kennedy said that the charges are serious and anything less than a striking-off order would not be appropriate nor proportionate, particularly as this was not the first time you have behaved in this manner. He said that this demonstrates that you have an attitudinal problem as you allow your personal desires to take precedence over your professional duties. He submitted that, therefore, the public interest requires a removal of you from the register.

Mr Weir said that you are a nurse with significant experience, and that the previous caution order related to an incident that occurred nine years ago.

Mr Weir submitted that the current misconduct is remediable, particularly as you had accepted the panel's findings on the charges.

Mr Weir submitted that a sanction other than a striking-off order would allow you to continue to offer to the public your significant experience as a nurse. He said that the mitigating factors include your full engagement with the process and that your acceptance of the panel's findings of the charges, albeit denying it. He said that you have and continue to reflect on your behaviour and to further develop your insight. He said that a striking-off order would be disproportionate and would deprive the public of a long term dedicated nurse.

Mr Weir submitted that a conditions of practice order would be proportionate, workable and measurable, particularly if the conditions include particular training in specific areas such as maintaining professional boundaries with colleagues in the workplace. He further submitted that a suspension order would not be proportionate to the charges as it would not allow you an opportunity to demonstrate any developing insight and would not take into account your engagement with the process.

Decision and reasons on sanction

The panel accepted the advice of the legal assessor.

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:

- Previous NMC finding of a similar nature
- Repeat of behaviour which took place only four months after your caution order expired
- Abuse of a position of trust
- Limited insight into failings

- Putting a vulnerable patient who required 1:1 at all times at risk of harm
- Causing emotional distress to a member of staff

The panel was unable to identify any mitigating features.

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 repeated conduct of this nature requires a sanction. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

The panel considered the imposition of a caution order but determined that in the light of the repetition of behaviour of this nature and the public protection issues identified, an order that does not restrict your practice would not be appropriate. 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. You had received a maximum length caution order for a previous similar behaviour and therefore a further caution order would be inappropriate. The panel decided that it would be neither proportionate nor in the public interest to impose a further 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. It took into account the SG, however, it concluded that there are no practical or workable conditions that could currently be formulated, given the nature of the charges and your current limited level of insight.

Furthermore, the panel concluded that the placing of conditions on your registration would not adequately address the serious nature of your misconduct and would not protect the public or address the public interest.

The panel then considered whether a suspension order would be an appropriate sanction. The SG states that a suspension order may be appropriate in certain instances. The panel concluded that this was a single incident of misconduct and that there had been no evidence of repetition of similar behaviour since then. However, although there was no evidence of harmful deep-seated personality issues, it appeared that you had attitudinal issues as you had been subject to a five year caution order for similar misconduct and this event took place only four months after it expired. The panel therefore could not be satisfied that you have sufficient insight into your behaviour and was not confident that you no longer pose a significant risk of repeating similar behaviour. Therefore, it concluded that a suspension order is not sufficient to protect the public nor the public interest.

The panel therefore considered a striking-off order as the sanction. As the SG states relevant matters for consideration are:

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

Your misconduct raises fundamental questions about your professionalism. The panel concluded that public confidence in the profession, and the NMC as its regulator, could not be maintained unless you were removed from the register. It therefore determined that a striking-off order is the only sanction which will be proportionate, sufficient to protect the public and to maintain professional standards.

For all the reasons above, the panel imposed a striking-off order.

This will be confirmed to you in writing.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in your own interest until the striking-off sanction takes effect.

Submissions on interim order

The panel took account of the submissions made by Mr Kennedy who submitted that interim suspension order should be imposed for a period of 18 months to cover the 28 day appeal period and the subsequent period should an appeal be lodged. He further submitted that this is necessary for the same reasons as given by the panel regarding the substantive order and should be on both public protection and public interest grounds.

Mr Weir did not oppose the application.

Decision and reasons on interim order

The panel accepted the advice of the legal assessor.

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 an interim conditions of practice order would not be appropriate or proportionate, due to the reasons already identified in the panel's determination for imposing the substantive order. The panel therefore imposed an interim suspension order for a period of 18 months to allow sufficient time for any appeal to be heard.

If there is no appeal, the interim suspension order will be replaced by the substantive striking off order 28 days after this decision is sent to you in writing.

That concludes this determination.