

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

**Substantive Meeting
Friday, 3 May 2024**

Nursing and Midwifery Council
2 Stratford Place, Montfichet Road, London, E20 1EJ

Name of Registrant: Mr David Andrew McCann

NMC PIN 05B0181S

Part(s) of the register: Nurses part of the register Sub part 1
RNA: Registered Nurse – Adult (11 February 2008)

Relevant Location: Guernsey

Type of case: Conviction

Panel members: Tracy Stephenson (Chair, lay member)
Vivienne Stimpson (Registrant member)
Tricia Breslin (Lay member)

Legal Assessor: Ian Ashford-Thom

Hearings Coordinator: Yewande Oluwalana

Facts proved: Charges 1a, 1b, 1c and 1d

Facts not proved: N/a

Fitness to practise: Impaired

Sanction: **Striking-off order**

Interim order: **Interim suspension order (18 months)**

Decision and reasons on service of Notice of Meeting

The panel was informed at the start of this meeting that that the Notice of Meeting had been sent to Mr McCann's registered email address by secure email on 22 March 2024.

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Meeting provided details of the allegations, the time, dates and venue of the meeting.

In the light of all of the information available, the panel was satisfied that Mr McCann has been served with notice of this meeting in accordance with the requirements of Rules 11A and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Details of charge

That you, a registered nurse:

1. Were convicted, at the Magistrates Court of Guernsey on 23 March 2023 of the following offences:
 - a) Between 18th July and 21st August 2022 at Blanchelande Park Residential Home, Le Rocher, St Martin stole an unknown quantity of Oramorph medication belonging to Resident A contrary to Section 1 of The Theft (Bailiwick of Guernsey) Law, 1983 as amended.
 - b) Between 18th July and 21st August 2022 at Blanchelande Park Residential Home, Le Rocher, St Martin on approximately 4 other occasions stole an unknown quantity of Oramorph medication belonging to Resident A contrary to Section 1 of The Theft (Bailiwick of Guernsey) Law, 1983 as amended.

- c) On 14th January 2023 stole a bottle of Vodka valued at £70.00 belonging to Premier Inn; contrary to Section 1 of The Theft (Bailiwick of Guernsey) Law, 1983 as amended.

- d) On 16th January 2023 stole a bottle of Vodka valued at £70.00 belonging to Premier Inn; contrary to Section 1 of The Theft (Bailiwick of Guernsey) Law, 1983 as amended.

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

Background

On 1 September 2022 the NMC received a referral from the Blanchelande Park Nursing Home (the Home) in relation to Mr McCann who had worked as a registered nurse with them for five weeks.

On 28 July 2022 the Colleague 1 raised concerns about Oramorph medication. Colleague 1 had gone to re-order a new bottle and was told that one had only been dispensed on 13 July 2022 by the pharmacist. A smaller bottle was dispensed, and it was agreed to monitor the usage. Colleague 1 and night nurse marked one of the bottles in red ink as it appeared to have gone down more than expected. It is alleged that two residents also complained about the Oramorph tasting like water.

On 9 August 2022 it was noted that the amount in the marked bottle had risen in volume when they would have expected it to decrease.

On 10 August 2022 the Home informed the police that the residents' Oramorph medication may have been stolen. The police interviewed all members of the nursing staff. A number indicated they were concerned with Mr McCann's behaviour due to how he would present himself, [PRIVATE] and would disappear a lot during his shifts.

Mr McCann was dismissed for an unrelated matter and subsequently when clearing out his room, [PRIVATE] .

On 14 January 2023, after returning to Guernsey to answer bail in respect of the allegation of Theft of Oramorph, Mr McCann was seen on CCTV at the Premier Inn, to walk behind the back of the bar and steal a bottle of vodka. An identical offence was committed on 16 January 2023.

Mr McCann was later charged and convicted of two offences of Theft of Oramorph from Blanchelande Park Nursing Home and two offences of Theft of Vodka from Premier Inn.

On 23 March 2023, Mr McCann received a total sentence of 12 months imprisonment. A total of 10 months custody was imposed for the two thefts of Oramorph. A further 2 months was imposed for each offence of Theft of Vodka, these were to run concurrent with each other but consecutive to the sentence of the Thefts of Oramorph. This 12 month sentence was backdated to commence when Mr McCann was taken into custody on 17 January 2023.

Decision and reasons on facts

The charges concern Mr McCann's conviction and, having been provided with a copy of the certificate of conviction by a competent officer of the Court, dated 23 March 2023. The panel also had sight of the transcript of the Judge's sentencing remarks dated 23 March 2023.

Having been provided with a copy of the certificate of conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3). This states:

- '31.—** (2) *Where a registrant has been convicted of a criminal offence—*
- (a) *a copy of the certificate of conviction, certified by a competent officer of a Court in the United Kingdom (or, in Scotland, an extract conviction) shall be conclusive proof of the conviction; and*
 - (b) *the findings of fact upon which the conviction is based shall be admissible as proof of those facts.*

(3) The only evidence which may be adduced by the registrant in rebuttal of a conviction certified or extracted in accordance with paragraph (2)(a) is evidence for the purpose of proving that she is not the person referred to in the certificate or extract.'

The panel also had sight of the General Report (Non GMG) dated 9 August 2022 and Guernsey occurrence summary report.

The panel also noted that Mr McCann submitted a completed Case Management Form (CMF) dated 28 November 2023 and has engaged with the NMC.

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, Mr McCann's fitness to practise is currently impaired by reason of his conviction. 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.

Representations on impairment

The NMC requires the panel to bear in mind its overarching objective to protect the public and the wider public interest. This includes the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. The panel was referred to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin) and *Cohen v General Medical Council* [2008] EWHC 581 (Admin).

Within the NMC's Statement of Case, it outlined its representations with regards to impairment:

*'20.Mr McCann's fitness to practise is impaired by reason of his conviction.
However current impairment is a matter for the panel's judgment.*

...

24. When determining whether the Registrant's fitness to practise is impaired, the questions outlined by Dame Janet Smith in the 5th Shipman Report (as endorsed in the case of Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin)) are instructive. Those questions were:

1. has [the Registrant] in the past acted and/or is liable in the future to act as so to put a patient or patients at unwarranted risk of harm; and/or
2. has [the Registrant] in the past brought and/or is liable in the future to bring the [nursing] profession into disrepute; and/or
3. has [the Registrant] in the past committed a breach of one of the fundamental tenets of the [nursing] profession and/or is liable to do so in the future and/or
4. has [the Registrant] in the past acted dishonestly and/or is liable to act dishonestly in the future.

25. It is the submission of the NMC that 1, 2, 3, and 4 can be answered in the affirmative in this case.

26. Mr McCann's actions in stealing Oramorph medication and watering down the remaining medication to cover his tracks, placed residents at unwarranted risk of harm and suffering. Residents did not receive their prescribed dosage of this medication to alleviate pain because it had been diluted.

27. Further, the public rightly expects nurses involved in the care of vulnerable people to practice in a way that protects and safeguards them and puts their needs first. At a basic level, this means this means [sic] that Mr McCann's actions placed other professionals at risk of unwittingly administering the wrong dosage of medication. This breached fundamental tenets of the profession and brought the profession into disrepute as does Mr McCann's conviction for 4 separate offences of theft. Mr McCann acted dishonestly on a number of separate occasions, both in stealing the medication, and the further thefts of alcohol.

Public Protection

28. *Impairment is a forward-thinking exercise which looks at the risk the registrant's practice poses in the future. NMC guidance adopts the approach of Silber J in the case of R (on application of Cohen) v General Medical Council [2008] EWHC 581 (Admin) by asking the questions whether the concern is easily remediable, whether it has in fact been remedied and whether it is highly unlikely to be repeated.*

29. *The first question to consider is whether the concerns can be addressed.*

30. *NMC guidance at reference FTP-3a deals with "Serious concerns which are more difficult to put right". These include breaching the professional duty of candour to be open and honest when things go wrong, and the examples of covering up and falsifying records are included.*

31. *The NMC say that watering down medication can be seen as analogous to falsifying records as both are designed to paint an incorrect picture of the true position. In Mr McCann's case, the watering down of the medication was done to cover up even more serious misconduct of the theft of medication.*

32. *The NMC guidance entitled "**Can the concern be addressed?**" FTP-13a, gives examples of conduct which may not be possible to address, and where steps such as training courses or supervision at work are unlikely to address the concerns, include criminal convictions that led to custodial sentences and dishonesty linked to the nurse's practice.*

33. *Mr McCann's dishonesty in stealing the Oramorph was directly linked to his practice. He has a conviction for 2 offences of theft of this medication for which he received custodial sentences, in addition to the custodial sentence imposed for the other 2 offences of theft of alcohol which were committed on 2 separate dates approximately 6 months after the offences of theft of medication.*

34. *The second question to ask is whether the concern has been addressed?*

35. *On 28 November 2023 Mr McCann admitted the charge in his completed case management form although denied that his fitness to practice is currently impaired.*

36. In his reflective account dated 4 March 2023, Mr McCann displayed some insight into why he stole the Oramorph, [PRIVATE]. The panel do not have the assistance of any evidence provided by Mr McCann in support.

37. Whilst Mr McCann is no longer a serving prisoner and thus has been in a position [PRIVATE], he has not worked as a nurse since August 2022 and therefore not been tested in the pressurized environment of nursing practice.

38. Further the offences indicate that Mr McCann's dishonesty spanned 7 separate occasions as the second offence related to theft of Oramorph on 4 occasions.

39. In the circumstances, the NMC consider there is a continuing risk of unwarranted harm to the public as it cannot be said that Mr McCann's actions are highly unlikely to be repeated.

Public interest

...

44. Registered professionals occupy a position of privilege and trust in society and are expected at all times to be professional and to treat patients with care and compassion. Patients and families must be able to trust registered professionals. It is submitted that Mr McCann's convictions and his actions in watering down the remaining medication have brought the nursing profession into disrepute.

45. We consider there is a public interest in a finding of impairment being made to uphold proper standards of conduct and to maintain confidence in the profession and the NMC as regulator. If such a finding were not made this is likely to erode confidence in the profession and may deter the public from seeking necessary care.

46. For all the reasons detailed above, whatever the panel decide in respect of future risk, it is submitted that, Mr McCann's actions are so serious that a finding of current impairment is required in order to maintain public confidence in the profession and NMC and to uphold proper professional standards. The public

confidence in the profession and the NMC as its regulator would be undermined if that behaviour was allowed to pass effectively unremarked.

47. Accordingly, it is submitted that this is a matter in which a finding of impairment is required on public protection and public interest grounds.'

Decision and reasons on impairment

The panel next went on to decide if as a result of the conviction, Mr McCann'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.'

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/their fitness to practise is impaired in the sense that S/He/They:

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

The panel determined that limbs a, b, c and d are engaged in this case. The panel considered that residents were placed at unwarranted risk of harm as Mr McCann stole Oramorph from residents and then diluted the medication to cover up his misuse of the substance. Some residents did receive insufficient dosage of medication which was for pain relief. The panel noted that Mr McCann had only been working in the Home for five weeks when the theft of Oramorph had occurred.

Mr McCann's conduct and convictions 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 theft and dishonesty extremely serious.

The panel had regard to the case of *Cohen* and considered whether Mr McCann's behaviour and dishonesty were capable of remediation.

The panel concluded that Mr McCann's dishonest conduct would be difficult to remediate. The panel noted that the behaviour of repeated thefts of Oramorph at the Home and then a subsequent theft of alcohol from Premier Inn whilst on bail, was indicative of persistent dishonesty.

The panel considered that Mr McCann has limited insight into his behaviour and conviction, although it did take into account that he had made early admissions to the charges in his completed CMF.

[PRIVATE]

Further, the panel found that Mr McCann had not demonstrated that he fully understood the seriousness of his actions or the impact his behaviour may have had on residents, his colleagues or the nursing profession. The panel noted that Mr McCann primarily focused on his own personal circumstances and not what impact his actions caused at that time.

In light of the above, the panel was of the view that there is a continuing risk of harm and a real risk of repetition. The panel therefore determined 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 are to protect, promote and maintain the health safety and well-being of the public and patients, and to uphold/protect the wider public interest, which 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 was of the view that a well-informed member of the public would be very concerned that a registered nurse was convicted of theft of a controlled substance and of

alcohol, and serious allegations of dishonesty were allowed to practice unrestricted. This would undermine public confidence in the nursing profession and the NMC as regulator if a finding of impairment on public interest grounds was not made. The panel determined that a finding of impairment on public interest grounds was also required.

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

Sanction

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

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

The panel accepted the advice of the legal assessor.

Representations on sanction

The panel noted that in the Notice of Meeting, dated 22 March 2024, the NMC had advised Mr McCann that it would seek the imposition of a striking-off order if it found Mr McCann's fitness to practise currently impaired.

'Sanction

48. The NMC consider the appropriate and proportionate sanction in this case to be a striking off order. With regard to the NMC's sanctions guidance the following aspects have led us to this conclusion and looking at each of the sanctions in turn:

49. The aggravating features in this case, are that the conviction for 2 offences is directly linked to Mr McCann's professional practice. There was a clear risk of

unwarranted harm to residents, both from the theft of the medication and the watering down of the remaining medication. [PRIVATE].

...

58. It is the submission of the NMC that Mr McCann's behaviour has raised fundamental questions about his professionalism. His conviction and the facts of the offences, in particular in respect of the theft of medication and seeking to cover that up, are so serious that public confidence cannot be maintained if he is not removed from the register. Further, it is submitted striking-off is the only sanction that will be sufficient to protect patients and maintain professional standards.

59. The NMC submit that the appropriate and proportionate sanction in all circumstances of this case is a Striking-off Order.'

Decision and reasons on sanction

Having found Mr McCann'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:

- Serious and repetitive dishonesty
- Abuse of a position of trust
- Lack of insight into failings
- Conduct which put patients at risk of suffering harm.
- Criminal offence committed whilst on bail
- Deliberate and premeditated
- On the adult and children barred lists by Disclosure Scotland

The panel also took into account the following mitigating features:

- [PRIVATE]
- Early admissions of the charges
- [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 issues identified, an order that does not restrict Mr McCann'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 McCann's dishonesty and conviction were not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Mr McCann's registration would be a sufficient and appropriate response. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case and Mr McCann's deep seated attitudinal concerns. The panel found that Mr McCann's dishonesty and convictions were not things that could be addressed through retraining. Furthermore, the panel concluded that as Mr McCann is currently on the barred list from working with vulnerable children and adults, conditions would not be workable as he would not be able to work as a nurse.

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;*

- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour;*
- *In cases where the only issue relates to the nurse or midwife's lack of competence, there is a risk to patient safety if they were allowed to continue to practise even with conditions.*

The conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel determined that this was not a single instance of theft, as he was arrested for a further offence of theft whilst on bail. There is only limited insight from Mr McCann and therefore the risk of harm and repetition is significantly high. The panel therefore concluded that a suspension order would not be sufficient to address the public protection and public interest considerations in this case.

The panel noted that the serious breach of the fundamental tenets of the profession evidenced by Mr McCann's actions is fundamentally incompatible with him remaining on the register.

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

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

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

Mr McCann's actions raised fundamental questions about his professionalism, and were a significant departure from the standards expected of a registered nurse. Therefore, the panel found that it was fundamentally incompatible with him remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Mr

McCann's actions were very serious and to allow him to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the matters it identified, in particular the effect of Mr McCann's actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct himself, the panel has concluded that nothing short of this would be sufficient in this case.

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

This will be confirmed to Mr McCann 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 Mr McCann's own interests until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Representations on interim order

The panel took account of the representations made by the NMC:

'Interim Order Consideration

60.If a finding is made that Mr McCann's fitness to practise is impaired on a public protection basis is made and a restrictive sanction imposed, we consider an interim order in the same terms as the substantive order should be imposed on the basis

that it is necessary for the protection of the public and otherwise in the public interest.'

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 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.

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

That concludes this determination.