

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

**Substantive Order Review Hearing
Friday, 8 November 2024**

Virtual Hearing

Name of Registrant: Elaina June Moynihan

NMC PIN 0211206S

Part(s) of the register: Registered Nurse – Adult (23 June 2006)

Relevant Location: Aberdeenshire

Type of case: Misconduct

Panel members: Adrian Smith (Chair, lay member)
Carole McCann (Registrant member)
Jayanti Durai (Lay member)

Legal Assessor: Graeme Henderson

Hearings Coordinator: Ifeoma Okere

Nursing and Midwifery Council: Represented by Fiona Williams, Case Presenter

Mrs Moynihan: Not Present and unrepresented

Order being reviewed: Suspension order (6 months)

Fitness to practise: Impaired

Outcome: **Suspension order (4 months) to come into effect on 17 December 2024 in accordance with Article 30 (1)**

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mrs Moynihan was not in attendance and that the Notice of Hearing had been sent to Mrs Moynihan's registered email address by secure email on 10 October 2024.

Further, the panel noted that the Notice of Hearing was also sent to Mrs Moynihan's representative on 10 October 2024.

Ms Williams, 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 substantive order being reviewed, the time, dates and that the hearing was to be held virtually, including instructions on how to join and, included information about Mrs Moynihan's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

In the light of all of the information available, the panel was satisfied that Mrs Moynihan has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Mrs Moynihan

The panel next considered whether it should proceed in the absence of Mrs Moynihan. The panel had regard to Rule 21 and heard the submissions of Ms Williams who invited the panel to continue in the absence of Mrs Moynihan. She submitted that Mrs Moynihan had voluntarily absented herself.

Ms Williams submitted that there had been no engagement at all by Mrs Moynihan with the NMC in relation to these proceedings and, as a consequence, there was no reason to

believe that an adjournment would secure her attendance on some future occasion. She noted Mrs Moynihan's previous non-attendance at the substantive hearing in May 2024 and highlighted the recent confirmation from her representative that her representative will not be in attendance today. Therefore, she urged the panel to proceed with the hearing in her absence, emphasising that it was in the public interest and would ensure an efficient resolution.

The panel accepted the advice of the legal assessor.

The panel has decided to proceed in the absence of Mrs Moynihan. In reaching this decision, the panel has considered the submissions of Ms Williams, the correspondence from Mrs Moynihan's representative, and the advice of the legal assessor. It has had particular regard to any relevant case law and to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mrs Moynihan;
- Mrs Moynihan has not engaged with the NMC and has not responded to any of the letters sent to her about this hearing;
- Mrs Moynihan's representative has confirmed to the NMC that she received the Notice of Hearing and is aware that the hearing will proceed today. Given this communication, it is clear that Mrs Moynihan is also fully aware of today's hearing.
- There is no reason to suppose that adjourning would secure her attendance at some future date; and
- There is a strong public interest in the expeditious review of the order which is due to expire on 17 December 2024.

In these circumstances, the panel has decided that it is fair to proceed in the absence of Mrs Moynihan.

Decision and reasons on review of the substantive order

The panel decided to impose a further suspension order for a period of 4 months

This order will come into effect at the end of 17 December 2024 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is the first review of a substantive suspension order originally imposed for a period of 6 months by a Fitness to Practise Committee panel on 15 May 2024.

The current order is due to expire at the end of 17 December 2024.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved which resulted in the imposition of the substantive order were as follows:

'That you, a registered nurse,

1) On 3 April 2022 in relation to Resident A, and before speaking to Colleague A:

a) Failed to inform the GP about Resident A's lower than normal oxygen

[PROVED]

saturation levels when it would have been clinically appropriate to do so.

b) Failed to record Resident A's observations on the observation sheet after

*14:00 hours. **[PROVED]***

*c) Failed to write in Resident A's care notes for the afternoon. **[PROVED]***

d) ...

e) ...

f) Failed to record Resident A's MAR chart that he had refused medication at

*14:00 hours. **[PROVED]***

*g) Left medication unattended in Resident A's room. **[PROVED]***

2) On 3 April 2022 in the presence of Resident A and/or his family members:

*a) Raised your voice. **[PROVED]***

b) Said “I am fucking sick of this family” or words to that effect. **[PROVED]**

3) On 3 April 2022 having been instructed by Colleague A you failed to:

a) Call the GP about Resident A’s lower than normal oxygen saturation levels. **[PROVED]**

b) Record Resident A’s observation on the observation sheet. **[PROVED]**

c) Make a record in Resident A’s care notes. **[PROVED]**

4) On 3 April 2022, having found Resident B on the floor following a fall:

a) failed to check Resident B for any injuries. **[PROVED]**

b) Instructed others to move Resident B without first checking for injuries. **[PROVED]**

The original reviewing panel determined the following with regard to impairment:

‘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. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. They must make sure that their conduct at all times justifies both their patients’ and the public’s trust in the profession.

In this regard the panel considered the judgment of 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*
- d) ...'*

The panel finds that Resident A and Resident B were put at risk of harm as a result of Mrs Moynihan's misconduct. Mrs Moynihan's misconduct breached fundamental tenets of the nursing profession and therefore brought its reputation into disrepute.

Regarding insight, the panel considered that Mrs Moynihan's was limited. The panel took into account Mrs Moynihan's reflective statement dated May 2022. The panel took into consideration that Mrs Moynihan made no clear acceptance of what she did wrong, nor did she demonstrate an understanding of how her actions put the residents at risk of harm. The panel also considered that Mrs Moynihan has not demonstrated how her actions have impacted negatively on the reputation of the nursing profession. The panel noted that Mrs Moynihan said in her reflective statement that she apologised to Resident A's family when she realised that they had heard her comments and that she 'thought about writing an apology' however, the panel had no evidence that she had done so. The panel took into account that it had no information about how Mrs Moynihan would handle a similar situation differently in the future and what strategies she would employ to navigate a stressful situation.

The panel was satisfied that the misconduct in this case is capable of being addressed. Therefore, the panel carefully considered the evidence before it in determining whether or not Mrs Moynihan has taken steps to strengthen her practice. It noted that it did not have any evidence of training since these incidents, nor did it have any written testimonials from Mrs Moynihan's colleagues regarding her nursing practice.

The panel considered if there is a risk of repetition. It took into account that it had no information as to whether Mrs Moynihan was currently working in a nursing role or other healthcare role. It took into consideration that it had no evidence of training from Mrs Moynihan since these incidents nor did it have a recent reflective statement which addresses what she would do differently in a similar situation, how her actions have impacted negatively on the nursing profession or how her actions put residents at risk of harm. The panel concluded that there is a risk of repetition.

In light of the information before it, the panel considered whether Mrs Moynihan can practise kindly, safely and professionally. It determined that it had no current information that Mrs Moynihan has addressed the

misconduct found in this case. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind 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 considered whether a finding of impairment on public interest grounds is required. It took into consideration that an informed member of the public would be concerned to learn that a registered nurse was allowed to practise with no restrictions on their registration in light of the charges found proved in this case. 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 Mrs Moynihan's fitness to practise impaired on the grounds of public interest.

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

The original reviewing panel determined the following with regard to sanction:

'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 Mrs Moynihan'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 Mrs Moynihan’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 Mrs Moynihan’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 is of the view that there are no practical or workable conditions that could be formulated, given that Mrs Moynihan has not demonstrated to this panel that she is willing to comply with a conditions of practice order. Further, it took into consideration her limited insight and that she has not provided any recent evidence of strengthened practice.

Furthermore, the panel concluded that the placing of conditions on Mrs Moynihan’s registration would not adequately address the seriousness of this case.

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

- 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.*

Whilst the panel accepted that this was not a single instance of misconduct, it took into account that the misconduct took place during the course of a single shift.

The panel also took into consideration that the attitudinal concerns highlighted by the NMC took place over a single shift and that this snapshot of Mrs Moynihan's nursing practice did not portray a complete picture. On this basis, the panel concluded that Mrs Moynihan did not display any deep-seated personality or attitudinal problems.

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

It did go on to consider whether a striking-off order would be proportionate but, taking account of all the information before it, the panel concluded that it would be disproportionate in the circumstances. Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in Mrs Moynihan'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 Mrs Moynihan. 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 nurse.

The panel determined that a suspension order for a period of six months was appropriate in this case to mark the seriousness of the misconduct. The panel was also of the view that this would provide Mrs Moynihan enough time to reflect on her misconduct and take appropriate steps to address it.

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:

- Mrs Moynihan's engagement with the NMC and attendance at any future hearing.*
- A full reflective statement about the incidents which took place on 3 April 2022 which addresses:
 - How Mrs Moynihan's actions put the residents at risk of harm.*
 - How her actions have impacted negatively on the reputation of the nursing profession.*
 - How Mrs Moynihan would handle a similar situation differently in the future.*
 - What strategies Mrs Moynihan would employ to navigate stressful situations.**
- Evidence of any relevant training courses and professional development undertaken to address the underlying misconduct found in relation to the charges.*
- Any testimonials about paid or unpaid work from line manager and colleagues.'*

Decision and reasons on current impairment

The panel has considered carefully whether Mrs Moynihan's fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's ability to practise kindly, safely, and professionally. In considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. Whilst it has noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel has had regard to the NMC bundle and the email from Mrs Moynihan's solicitor on 7 November 2024. It has taken account of the submissions made by Ms Williams on

behalf of the NMC. Ms Williams submitted that Mrs Moynihan's fitness to practice remains impaired due to her lack of engagement with the NMC and failure to demonstrate any improvement since the last hearing. There is no evidence of remediation, insight, or any steps taken to address the concerns raised. Mrs Moynihan has not shown that she would handle similar situations differently, and the risk of repetition remains. Her ongoing disengagement suggests a lack of commitment to professional standards, which continues to undermine public confidence.

Ms Williams also highlighted that, given Mrs Moynihan's continued non-compliance, a conditions of practice order would be unfeasible. It is within the panel's discretion to decide whether to allow the current order to lapse, continue it, or impose a striking-off order, ensuring that public protection is maintained.

Ms Williams concluded that, in the public interest, the panel must take action to uphold professional standards and protect public safety, as Mrs Moynihan has not demonstrated any change in circumstances.

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

In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether Mrs Moynihan's fitness to practise remains impaired.

The panel noted the original panel found that Mrs Moynihan had limited insight. At this hearing, the panel carefully considered the brief email response from Mrs Moynihan's solicitor, which included an understanding on the part of the writer that Mrs Moynihan intends to make an application to be removed from the register. However, no formal written application for removal had been received by the time of today's hearing.

In its consideration of whether Mrs Moynihan has taken steps to strengthen her practice, the panel was not presented with any evidence of engagement or any remedial actions on her part. Mrs Moynihan has not undertaken any relevant training, provided a reflective

statement, or demonstrated any progress in addressing the concerns raised by the previous panel. There were also no testimonials regarding her paid or unpaid work, nor any indication that she has made efforts to remediate her practice.

Given her continued lack of engagement, failure to provide any evidence of remediation, and absence of meaningful insight, the panel determined that Mrs Moynihan remains liable to repeat misconduct of the kind found proved.

In light of these factors, the panel determined that Mrs Moynihan's fitness to practice remains impaired on the grounds of public protection.

The panel considered whether a finding of impairment on public interest grounds is required. It took into consideration that an informed member of the public would be concerned to learn that a registered nurse was allowed to practise with no restrictions on their registration in light of the charges found proved in this case. 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 Mrs Moynihan's fitness to practise impaired on the grounds of public interest.

For these reasons, the panel finds that Mrs Moynihan's fitness to practise remains impaired.

Decision and reasons on sanction

Having found Mrs Moynihan's fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Article 30 of the Order. The panel has also taken into account the 'NMC's Sanctions Guidance' (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

The panel first considered whether to take no action but concluded that this would be inappropriate. The panel paid careful regard to the guidance issued by the NMC (3h) on

the issue of whether it should allow the order to lapse without imposing a further order.

The panel noted that the guidance permitted it to do so:

'Where the professional would no longer be on the register but for the order in place, a reviewing panel can allow the order to expire or, at an early review, revoke the order. Professionals in these circumstances will automatically be removed from the register, or lapse, upon expiry or revocation of the order. The panel will record that the professional remains impaired.'

The panel noted that Mrs Moynihan appeared to have not paid her subscription when it fell due as of 1 June 2024. However, the panel was concerned that it had limited information with which to deal with the issue involved. It had to determine the matter on the basis of one sentence supplied by Mrs Moynihan's Solicitors who stated in their email of 7 November 2024 that the writer understood that Mrs Moynihan would shortly be submitting an application for agreed removal.

The panel was concerned that it was not clear how this understanding arose, when the writer had last contacted Mrs Moynihan, and whether or not the fact that no application had been submitted, meant Mrs Moynihan had changed her mind. This was not a situation where the panel had been presented with clear direct information that Mrs Moynihan had no intention of ever practising again in the future.

The panel decided that it would be neither proportionate nor in the public interest to take no further action. It would be open for Mrs Moynihan to seek voluntary removal by submitting the appropriate form.

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 Mrs Moynihan'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 Mrs Moynihan'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 a conditions of practice on Mrs Moynihan'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 bore in mind the seriousness of the facts found proved at the original hearing and concluded that a conditions of practice order would not adequately protect the public or satisfy the public interest. The panel was not able to formulate conditions of practice that would adequately address the concerns relating to Mrs Moynihan's misconduct or protect the public interest.

The panel then considered whether to impose a suspension order. Given the nature and gravity of the case, the panel concluded that a suspension order was appropriate. However, in considering the duration of the suspension, the panel decided that a suspension of 4 months would allow Mrs Moynihan sufficient time to reflect on her actions and decide whether she wishes to return to practice. The panel was mindful that this period would also provide Mrs Moynihan with the opportunity to decide to engage with the NMC and begin to remediate her actions or alternatively, to apply for voluntary removal from the register. The panel concluded that this period would strike an appropriate balance between protecting the public and providing Mrs Moynihan with a clear opportunity to reflect on her future in nursing.

Finally, the panel considered whether to strike Mrs Moynihan off the register. After careful consideration of the evidence, including the opportunity for remediation and further reflection during the suspension period, the panel determined that striking off was not the most appropriate course of action at this stage. While Mrs Moynihan has not fully remediated the issues, the panel is of the view that there remains a possibility for her to address the concerns raised. A decision to strike her off would be disproportionate at this point, and the panel seeks to provide her with the necessary time to decide on her future.

The panel has therefore decided to impose a suspension order for a period of 4 months. During this period, Mrs Moynihan has the opportunity to reflect on her nursing practice, engage with the regulatory process, and decide whether she will take steps to remediate the issues identified, or submit an application for voluntary removal from the register. This decision is made in the public interest and is intended to allow for sufficient time and space for Mrs Moynihan to fully consider her position.

This suspension order will take effect upon the expiry of the current suspension order, namely the end of 17 December 2024 in accordance with Article 30(1)

Before 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:

- Mrs Moynihan's engagement with the NMC and attendance at any future hearing.
- Clarification on Mrs Moynihan's future intentions.
- A full reflective statement about the incidents which took place on 3 April 2022 which addresses:
 - How Mrs Moynihan's actions put the residents at risk of harm.
 - How her actions have impacted negatively on the reputation of the nursing profession.
 - How Mrs Moynihan would handle a similar situation differently in the future.
 - What strategies Mrs Moynihan would employ to navigate stressful situations.
- Evidence of any relevant training courses and professional development undertaken to address the underlying misconduct found in relation to the charges.
- Any testimonials about paid or unpaid work from line manager and colleagues.

This will be confirmed to Mrs Moynihan in writing.

That concludes this determination.