

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

**Substantive Hearing  
Monday, 2 – Tuesday 10 September 2024**

Virtual Hearing

**Name of Registrant:** Alexander Davidson Birnie

**NMC PIN** 90B0442S

**Part(s) of the register:** Nurse Independent / Supplementary Prescriber (V300) – 31 October 2013

Registered nurse – Adult (RN1) – 7 November 1998

Registered nurse – General (level 2) (RN7) – 22 September 1991

**Relevant Location:** Aberdeenshire and Aberdeen City

**Type of case:** Misconduct

**Panel members:** Louise Guss (Chair, Lay member)  
Janet Williams (Registrant member)  
Kevin Connolly (Lay member)

**Legal Assessor:** Paul Housego

**Hearings Coordinator:** Sharmilla Nanan

**Nursing and Midwifery Council:** Represented by Alex Fletcher, Case Presenter

**Mr Birnie:** Not present and not represented at the hearing Monday 2 to the afternoon of Friday 6 September 2024

Present and not represented in the hearing from Friday 6 September 2024 afternoon onwards

**Facts proved:** Charges 1a, 1b, 2, 3a, 3b and 3c

**Facts not proved:**

Charges 4a, 4b, 5a and 6

**Fitness to practise:**

Impaired

**Sanction:**

**Suspension order (6 months)**

**Interim order:**

**Interim suspension order (18 months)**

## Decision and reasons on Mr Birnie's application to adjourn the hearing

At the outset of the hearing, the panel were informed that Mr Birnie was not present at the hearing but submitted an email request to adjourn or delay the start of the proceedings.

Mr Fletcher, on behalf of the Nursing and Midwifery Council (NMC), submitted that Mr Birnie sent an email on 28 August 2024 seeking an adjournment (which was not received until 30 August 2024) to the NMC stating that he was currently in the process of [PRIVATE] to support the content of his email. Mr Fletcher invited the panel to continue the hearing in the absence of [PRIVATE] but submitted that it is a matter for the panel as to whether the hearing will proceed today. He reminded the panel that the matters relating to this case were six years old and there are two witnesses who have been warned for today and it had been difficult to secure the attendance of one of them who had indicated that if she was not heard today she would cease to be willing to give evidence at all.

The panel had regard to the email sent by Mr Birnie to the NMC on 28 August 2024. It states:

*"Following our conversation on the telephone earlier today, I explained in detail the reasons for delaying my professional hearing which is planned to be taking place next week through virtual means.*

[PRIVATE]

[PRIVATE]

*[PRIVATE], I wholeheartedly own up to what I have done and explained my reasons for my other actions but what gives me grave concern as I explained to you earlier is if the nursing profession and the NMC supports bullying what hope is there for the future of the profession and I have discussed this with yourselves in the past and have been met with silent pauses. I am also*

*aware of the current issues within the press and the personal impact it has on registrants can indeed be dramatically life changing to them and their family.*

*I intend to keep in close contact with you [NMC case officer] [PRIVATE]"*

The panel accepted the advice of the legal assessor who referred the panel to the case of *General Medical Council v Hayat* [2018] EWCA Civ 2796 and to the NMC Guidance CMT-11.

The panel had regard to the NMC guidance 'When we postpone or adjourn hearings', CMT-11. [PRIVATE]

The panel reconvened the hearing at 13:00 and acknowledged that it was in receipt of a letter [PRIVATE].

Mr Fletcher submitted that the letter [PRIVATE] sets out some of the difficulties that he is facing, however it does not address all of the issues raised in the email Mr Birnie sent on 28 August 2024. Mr Fletcher submitted that he did not see anything within the letter which actively stops Mr Birnie from attending and participating in the hearing. He submitted that the [PRIVATE] evidence is not suitable to allow the matter to be postponed or adjourned. He noted that this matter has been adjourned on three prior occasions to accommodate Mr Birnie.

The legal assessor reminded the panel of his earlier advice.

[PRIVATE] The panel bore in mind the impact any further delays to these proceedings would have on the witnesses in this matter and their ability to recall the incidents. Further, the panel took into consideration that Mr Birnie has not indicated when he would be able to attend a hearing in the future and there is no information before it that adjourning the hearing today would secure Mr Birnie's attendance at a future date. The panel bore in

mind that it must consider fairness to both parties, the NMC and Mr Birnie, and it determined that it was in the public interest to proceed with the hearing. The panel therefore rejected Mr Birnie's application to adjourn the hearing.

### **Decision and reasons on service of Notice of Hearing**

The panel bore in mind that Mr Birnie was not in attendance and that the Notice of Hearing letter had been sent to Mr Birnie's registered email address by secure email on 24 July 2024.

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

The panel accepted the advice of the legal assessor.

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

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

### **Decision and reasons on proceeding in the absence of Mr Birnie**

The panel next considered whether it should proceed in the absence of Mr Birnie. It had regard to Rule 21 and heard the submissions of Mr Fletcher who invited the panel to continue in the absence of Mr Birnie.

Mr Fletcher submitted that Mr Birnie was notified of the hearing. He invited the panel to look at the seriousness of the allegations and public interest as to whether it is fit and just to continue in Mr Birnie's absence. He submitted that the allegations are serious and that it is in the public interest for the case to be heard. He submitted that these are allegations from six years ago and it would be unjust to the victims not to continue with the hearing. He submitted that Mr Birnie has chosen not to attend the hearing and that the NMC have tried to accommodate him as much as possible on each occasion that this case has been listed to be heard.

The panel accepted the advice of the legal assessor.

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

The panel has decided to proceed in the absence of Mr Birnie. In reaching this decision, the panel has considered the submissions of Mr Fletcher, and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v Jones* and *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- This case has been adjourned on three previous occasions at the request of Mr Birnie;
- The panel had refused Mr Birnie's present application to adjourn;
- There is no reason to suppose that a further adjournment would secure Mr Birnie's attendance at some future date;
- A number of witnesses are scheduled to attend the hearing to give live evidence, and one would not be heard at all if not on 2 September 2024;

- Not proceeding may inconvenience the witnesses, their employers and, for those involved in clinical practice, the clients who need their professional services;
- The charges relate to events that occurred in 2018 and 2019;
- Further delays may have an adverse effect on the ability of witnesses accurately to recall events; and
- There is a strong public interest in the expeditious disposal of the case.

The panel acknowledged there would be some disadvantage to Mr Birnie in proceeding in his absence. Although the evidence upon which the NMC relies will have been sent to him at his registered address, he will not be able to challenge the evidence relied upon by the NMC and will not be able to give evidence on his own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the panel noted that the limited disadvantage is the consequence of Mr Birnie's decisions to absent himself from the hearing, waive his rights to attend, and/or be represented, and not to provide evidence or make submissions on his own behalf.

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

### **Details of charge**

That you, a registered nurse:-

#### NHS Grampian

1. On 30 May 2018 in relation to Patient A:

- a. Grabbed the patient's head.
  - b. Said "turn your fucking head" to the patient or words to that effect.
2. On an unknown date in 2018 said "fuck off" to Colleague A or words to that effect.
3. On 1 June 2018 in relation to Patient B:
    - a. Said loudly "open your mouth" or words to that effect.
    - b. Held the patient's head.
    - c. Attempted to force feed medication to the patient using a spoon.

Rubislaw Park care Home

4. On 22 October 2018 following a resident falling failed to:
  - a. Perform a full physical assessment.
  - b. Take observations.
5. On 1 December 2018 said to Colleague B:
  - a. "You could fit a bus through that space but your bum can't fit" or words to that effect.
6. On 10 March 2019 did not ensure that all residents had received their breakfast.

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



## **Background**

Mr Birnie was employed at NHS Grampian (the Trust) during 2018. Whilst working on the dementia ward at the Trust, it is alleged that colleagues observed Mr Birnie forcing a patient to take their medication and speaking to them inappropriately and on a separate occasion dealing inappropriately with a vulnerable patient.

Subsequently, Mr Birnie was employed with Rubislaw Park Care Home (the Home) between September 2018 and March 2019. Whilst on his probationary period with the Home it is alleged that there were issues with his conduct in relation to patient care and inappropriate communication with staff.

## **Decision and reasons on application to admit hearsay evidence**

The panel heard an application made by Mr Fletcher under Rule 31 to allow the hearsay testimony of Witness 3, Witness 4, Witness 5 and Witness 6 into evidence. He addressed the evidence of each witness in turn.

### Witness 3

Mr Fletcher submitted that Witness 3 provides a descriptive and cogent account on the force Mr Birnie used whilst administering medication to Patient B. He submitted that Witness 3 is unable to attend the hearing today [PRIVATE]. He referred the panel to the efforts made to engage Witness 3 but noted that these have been unsuccessful. He noted that her evidence is aged but that it may perhaps remove the confusion of a live witness as there would be no degradation of their recollection. Mr Fletcher submitted that Witness 3's evidence could be balanced alongside Witness 2's evidence.

### Witness 4

Mr Fletcher submitted that Witness 4's evidence is related to the incidents outlined in charge 4. He submitted that Witness 4 has provided a balanced account and notes that she worked with Mr Birnie on a number of occasions. He submitted that Witness 4 saw

this incident and felt that it was necessary to report it. He submitted that Witness 4 has demonstrated a willingness to engage however she is currently on holiday and is not available to provide her evidence at this hearing.

#### Witness 5

Mr Fletcher submitted that Witness 5 was Mr Birnie's line manager at the Home and provides evidence in relation to charges 5 and 6. He submitted that Witness 5 was not willing to be present at today's hearing and put forward any further evidence however he is not retracting the evidence that he had put forward in the case so far. Mr Fletcher submitted that after six years it is not unexpected for a witness to become tired of the ongoing regulatory procedure.

#### Witness 6

Mr Fletcher submitted that Witness 6 is clear in her account regarding the evidence she provides in relation to charge 6. He submitted that her account could be balanced with that of Witness 5. Mr Fletcher submitted that the NMC has received no response from Witness 6 and he can only hypothesise that she is fatigued by the duration of the proceedings.

In addition, Mr Fletcher addressed the panel with regard to Witness 7.

#### Witness 7

Mr Fletcher submitted that the NMC has secured an unsigned witness statement from Witness 7 in relation to charge 5. He submitted that this witness has not engaged with the NMC at all and that the panel should not take her evidence into account.

The panel heard and accepted the legal assessor's advice on the issues it should take into consideration in respect of this application. This included that Rule 31 provides that, so far as it is 'fair and relevant', a panel may accept evidence in a range of forms and circumstances, whether or not it is admissible in civil proceedings. He referred the panel to a number of cases, all set out in the case of *AB v XYZ* [2023] EWHC 1162 (KB), including *Nursing and Midwifery Council v Ogbonna* [2010] EWCA Civ 1216, *R (on the*

*application Bonhoeffer) v The General Medical Council [2011] EWHC 1585 (Admin), Thorneycroft v Nursing and Midwifery Council [2014] EWHC 1565 (Admin) and El Karout v Nursing and Midwifery Council [2020] EWHC 3079.*

The panel considered the application to admit the hearsay testimony of Witness 3, Witness 4, Witness 5 and Witness 6 into evidence carefully. It considered the evidence of each witness in turn.

### Witness 3

The panel took into consideration that Witness 3's evidence relates to charge 3. It noted that her NMC statement and local statement are aged however her local statement was contemporaneous as it was made on 21 June 2018. It took into account that her evidence was not sole nor decisive. The panel was of the view that Witness 3's statement appeared balanced and it also had no reason to believe that she was not a reliable witness or had any reason to fabricate her account. It bore in mind that Mr Birnie was not present at the hearing to cross examine her nor could the panel test her evidence.

[PRIVATE]. The panel took into account that she had received notice of the hearing and that recent attempts to contact her by the NMC had been unsuccessful. The panel determined that there was a good and cogent reason for Witness 3's non-attendance at the hearing.

The panel determined to admit Witness 3's evidence but that it would attach such weight, if any, to accord that evidence when considering whether facts were or were not found proved.

### Witness 4

The panel took into consideration that Witness 4's evidence relates to charge 4 and her evidence is the sole evidence to this charge. The panel was of the view that Witness 4 has no reason to fabricate her account.

The panel bore in mind that Witness 4 is currently unavailable to attend this hearing as she is on holiday. The panel determined that the NMC had not provided good reasons as to why Witness 4 could not attend the hearing as it had not made timely enquiries as to her capability to provide evidence since being on holiday.

The panel considered whether Witness 4's evidence was demonstrably reliable and if it was capable of being tested. It bore in mind that her evidence was the sole and decisive evidence in relation to charge 4 and was not capable of being tested. The panel determined that it was not fair to admit Witness 4's evidence and therefore rejected the NMC's application to admit Witness 4's evidence as hearsay.

#### Witness 5

The panel noted that much of Witness 5's evidence was hearsay, based on the evidence of others whose own witness statements the panel had declined to accept as hearsay. It was therefore unfair to admit it.

The panel bore in mind that Witness 5 was clear that he did not want to continue participating in these regulatory proceedings. The panel concluded that no good or cogent reason had been provided for Witness 5's non-attendance at the hearing. The panel therefore rejected the NMC's application to admit Witness 5's evidence as hearsay.

The panel determined to accept as documentary evidence the 'Notes of performance improvement meeting 20/12/18' which is not signed by Mr Birnie but was part of his human resources file and has never been contested. The panel also accepted as documentary evidence the 'Investigation meeting minutes 13/3/19' as this document had been reviewed and signed by Mr Birnie at the material time.

#### Witness 6

The panel took into consideration that Witness 6's evidence relates to charge 6. The panel had no reasons before it that Witness 6's evidence was not reliable or that she would fabricate her account. The panel concluded that her evidence was not the sole evidence

for charge 6 (because of Mr Birnie's account on 11 March 2019) but it accepted it could be decisive in relation to that charge. The panel considered that the NMC had not taken reasonable steps to secure Witness 6's attendance at the hearing. The panel concluded that it had no good or cogent reason before it as to why Witness 6 has not attended the hearing. The panel determined that it was not fair to admit Witness 6's evidence as it could not test her evidence to identify what weight to attach to it. The panel therefore rejected the NMC's application to admit Witness 6's evidence as hearsay.

### Witness 7

The panel disregarded the evidence of Witness 7 as her witness statement was not signed nor was she present at the hearing.

The panel concluded that in these circumstances, it would be fair and relevant to accept into evidence the hearsay testimony of Witness 3, and documentary evidence accepted by Mr Birnie or which was otherwise uncontroversial. It determined that it would attach what weight, if appropriate, to give that evidence once the panel had heard and evaluated all the evidence before it.

The panel concluded that it would not be fair to admit into evidence the hearsay testimony of Witness 4, Witness 5 and Witness 6 and rejected the NMC's application in regard to those witnesses.

### **Decision and reasons on facts**

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

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

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:

- Colleague A: At the material time Band 5 Nurse who worked on the same ward as Mr Birnie.
- Witness 2: At the material time, General staff nurse who worked with Mr Birnie.

The panel had regard to the hearsay evidence from the following witness:

- Witness 3: At the material time, Healthcare Support Worker who worked with Mr Birnie.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the witness and documentary evidence provided by the NMC.

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

### **Charge 1**

“That you, a registered nurse:-

NHS Grampian

1. On 30 May 2018 in relation to Patient A:

a. Grabbed the patient's head.

b. Said "turn your fucking head" to the patient or words to that effect."

**These charges are found proved.**

In reaching this decision, the panel considered these sub charges together. The panel took into account the evidence of Colleague A.

The panel considered Colleague A's NMC witness statement. She stated *'On 7 June 2018 I approached my Line Manager ... with concerns I had about the Registrant's professional conduct during a previous shift on 30 May 2018. On this shift, a patient ("Patient A") had just been discharged from the Scolty Ward... Whilst moving Patient A on to the stretcher, we noticed a small cut on her neck so the Registrant attempted to attend to this by applying a dressing to the cut. Patient A resisted the Registrant treating her cut and attempted to bite the Registrant. In response to this the Registrant grabbed Patient A's head and said "turn your fucking head."*

The panel considered the signed transcript of Colleague A's interview from the internal investigation which took place on 21 June 2018. During this interview Colleague A said *"It was 30<sup>th</sup> May and a patient was being transferred to a nursing home. The ambulance crew were having a cup of tea and sandwich before transferring her. We would normally hoist patients but she was a tiny lady so [the registrant] said that he would just "hoof her" across and [another person] helped him to do that and then he went back to the ward. There was a cut on the right side of her neck so [the registrant] went to get the dressing. She was feisty and wanting to bit [sic] [the registrant], which is normal for this patient, so he turned her head and said, "turn your fucking head"". With regard to how Mr Birnie turned Patient A's head, Colleague A said during this interview, "He put his hand on top of her head and twisted it away... he grabbed it and didn't do it gently. He grabbed her head and turned it*

away.” The panel bore in mind that this interview took place shortly after the incident and was contemporaneous to when the incident took place.

Colleague A said in her oral evidence that Mr Birnie grabbed the patient’s head and then said words to the effect of *“turn your fucking head”*. Colleague A physically demonstrated the motion of how Mr Birnie had moved the patient’s head. The panel noted that Colleague A was clear in her oral evidence about what she did and was clear about what she did not recall due to passage of time. She was clear that Mr Birnie was very irritated and was *‘threatening and aggressive in manner’*.

The panel was of the view that Colleague A was clear and balanced in her recollection of events. It considered Colleague A’s evidence was consistent in her local interview with the Trust, NMC witness statement and oral evidence during the hearing. The panel concluded that Colleague A’s evidence was compelling, reliable and credible and accepted it.

The panel considered the evidence before it and concluded that on 30 May 2018, Mr Birnie grabbed Patient A’s head and said *“turn your fucking head”* or words to that effect. The panel therefore found charges 1a and 1b proved.

## **Charge 2**

“2. On an unknown date in 2018 said “fuck off” to Colleague A or words to that effect.”

### **This charge is found proved.**

In reaching this decision, the panel took into account Colleague A’s evidence.

The panel took into consideration that Colleague A did not refer to this specific incident in her NMC witness statement.



The panel considered the signed transcript of Colleague A's interview from the internal investigation which took place on 21 June 2018. During this interview Colleague A said *"I've had mouthfuls of abuse before so wouldn't challenge him... I offered to help him one time with Kardexes and he told me to "fuck off". He has a sharp manner."*

During Colleague A's oral evidence, she said that Mr Birnie said *"fuck off"* to her, after she had offered her help to him with Kardexes. Colleague A said that Mr Birnie was not approachable as he could say inappropriate things and his manner was aggressive. She said that she tended to avoid him.

The panel was of the view that Colleague A was clear and consistent in all accounts of her evidence about this incident. The panel determined that Colleague A's evidence was credible and reliable.

The panel concluded that on an unknown date in 2018 said *"fuck off"* to Colleague A or words to that effect. The panel therefore found charge 2 proved.

### **Charge 3**

"3. On 1 June 2018 in relation to Patient B:

- a. Said loudly "open your mouth" or words to that effect.
- b. Held the patient's head.
- c. Attempted to force feed medication to the patient using a spoon."

**These charges are found proved.**

In reaching this decision, the panel considered the sub charges together. The panel took into account the evidence of Witness 2 and Witness 3.

The panel considered the evidence of Witness 2. In her NMC witness statement she stated *'The Registrant's actions on 1 June 2018 were not an acceptable form of practice and were done without thought or asking a colleague for assistance. From my experience with Patient B, they had never been a previous [sic] concern to me which made me all the more so shocked with the Registrant's actions. In my several decades of nursing practise, I have never witnessed anything more unacceptable that the Registrants actions with Patient B on 1 June 2018...'*

The panel had regard to the Record of Interview with Witness 2, dated 14 June 2018. During this interview, Witness 2 said *"I saw [the registrant] standing over the patient. The patient was sitting and there were spaces all around him. [The registrant] was speaking loudly telling the patient to open his mouth. I should have said [the registrant] was doing the medication round and the drug trolley was in the concern of the day room. [The registrant] was standing over him and loudly saying "open your mouth" but the patient wasn't. My attention was taken so I was watching, [the registrant] tried several times to give him medication on a spoon, quite a forceful action. It wasn't a usual medicine spoon as it wasn't plastic or in a cup"*.

During Witness 2's oral evidence, she was careful about what she could and could not recall. She did not elaborate on what she had originally said in her NMC statement or local interview with the Home. She said that what she saw at the time upset her and she felt that she needed to be an advocate for the patient. She described how Mr Birnie held the patients head and explained that she had a clear and unobstructed view of the incident. She said that this was an incident that stood out to her in her nursing career. The panel determined that her accounts were consistent. The panel was of the view that Witness 2 was a reliable and credible witness.

The panel considered the evidence of Witness 3. In her NMC witness statement she said *'...the Registrant's conduct towards Patient B on 1 June 2018, was unprofessional and not in keeping with the duty of care he owed to his patients.'*

The panel had regard to the Record of Interview with Witness 2, dated 21 June 2018. During this interview, Witness 2 said *“The patient doesn’t get on with [the registrant] and I could see that because he wasn’t taking the tablet [the registrant] just shoved it down his throat. He got the tablet down his throat then went back to the drug trolley. The patient just spat it out so I went and picked the tablet up and asked him to take it which he did.”* She clarified that Mr Birnie used a *“dessert spoon not a medicine spoon, and because the patient wasn’t taking it [the registrant] forced it...I can’t remember if he used a finger or if he just shoved the spoon further down his mouth.”* The panel was of the view that elements of Witness 2’s account were corroborated by Witness 3’s account.

The panel considered the evidence before it. The panel concluded that on 1 June 2018, Mr Birnie said loudly to Patient B *“open your mouth”* or words to that effect, held Patient B’s head and attempted to force feed medication to the patient using a spoon. The panel therefore found charges 3a, 3b and 3c proved.

#### **Charge 4**

“That you, a registered nurse:-

Rubislaw Park Care Home

4. On 22 October 2018 following a resident falling failed to:

- a. Perform a full physical assessment.
- b. Take observations.”

**These charges are found NOT proved.**

In reaching this decision, the panel was not satisfied that the NMC had provided sufficient, or indeed any, evidence to discharge the burden of proof that on 22 October 2018

following a resident falling, Mr Birnie failed to perform a full physical assessment and take observations of the resident. The panel therefore found charges 4a and 4b not proved.

### **Charge 5a**

“5. On 1 December 2018 said to Colleague B:

“a. You could fit a bus through that space but your bum can’t fit” or words to that effect.”

### **This charge is found NOT proved.**

In reaching this decision, the panel took into account the document titled ‘Meeting with Sandy Birnie, Registered Nurse 15.45 Thursday 20 December regarding PIP’. It states, *‘[The registrant] does not recall immediately any situation where he would have made such a comment (statement received) but does acknowledge that there are regular attempts at banter, back and forth with staff and it does not always “hit the mark”’.*

The panel considered the evidence before it. The panel was of the view that Mr Birnie’s comments recorded in the meeting on 20 December were general and not specific to this charge. The panel concluded that the NMC had not provided sufficient, or any, evidence to discharge the burden of proof that on 1 December 2018, Mr Birnie said to Colleague B *“You could fit a bus through that space but your bum can’t fit”* or words to that effect. The panel therefore found charge 5a not proved.

### **Charge 6**

“6. On 10 March 2019 did not ensure that all residents had received their breakfast.”

### **This charge is found NOT proved.**

In reaching this decision, the panel took into account the signed Investigation meeting minutes dated 11 March 2019. During the meeting Mr Birnie was asked why the breakfast service was not completed for all residents on Sunday 10 March. Mr Birnie replied *“I was doing the drugs and the carers had said breakfast were well on there way to be finished.”* He added, when asked why all residents’ breakfast needs were not met before authorising the hot trolley to be removed, that *“I was going on the information being fed back from carers and I based my decision on that”*. The panel took into consideration that Mr Birnie’s account was not contradicted nor was it challenged during the interview.

The panel considered the evidence before it and it concluded that Mr Birnie’s account provided in the local interview with the care home did not amount to an admission of the charge. The panel was not satisfied that the NMC had provided sufficient evidence to discharge the burden of proof that Mr Birnie on 10 March 2019 did not ensure that all residents had received their breakfast. The panel therefore found charge 6 not proved.

### **Fitness to practise**

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether Mr Birnie’s fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant’s ability to practise kindly, safely and professionally.

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

The panel adopted a two-stage process in its consideration. First, the panel must determine whether the facts found proved amount to misconduct. Secondly, only if the

facts found proved amount to misconduct, the panel must decide whether, in all the circumstances, Mr Birnie's fitness to practise is currently impaired as a result of that misconduct.

### **Submissions on misconduct**

Mr Fletcher invited the panel to take the view that the facts found proved amount to misconduct. He referred the panel to The Code: Professional standards of practice and behaviour for nurses and midwives (2015) (the Code) and identified the specific, relevant standards where Mr Birnie's actions amounted to misconduct. He submitted that Mr Birnie's conduct would be abhorrent to fellow professionals.

### **Submissions on impairment**

Mr Fletcher moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body.

Mr Fletcher submitted that there is no information in relation to Mr Birnie's past conduct in nursing. He submitted that Mr Birnie has not provided any information about his personal circumstances at the time of the incidents. He submitted that the panel does not have information before it that Mr Birnie has learnt from his mistakes, has insight into what he has done wrong, or any courses or learning undertaken to remediate his behaviour. He submitted that Mr Birnie has demonstrated a lack of remorse and a lack of insight. He submitted that there is evidence that Mr Birnie's behaviour was not a one-off incident and that Mr Birnie is likely to repeat his conduct. He submitted that the panel should consider the impact that Mr Birnie's actions had on patients, his colleagues and work environment.

Mr Fletcher invited the panel to make a finding of impairment in relation to Mr Birnie's fitness to practise.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments which included *Roylance v General Medical Council (No 2)* [2000] 1 A.C. 311 and *Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council (1) and Grant (2)* [2011] EWHC 927 (Admin).

## **Decision and reasons on misconduct**

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of the Code.

The panel was of the view that Mr Birnie's actions did fall significantly short of the standards expected of a registered nurse, and that Mr Birnie's actions amounted to a breach of the Code. Specifically:

### **'1 Treat people as individuals and uphold their dignity**

*To achieve this, you must:*

- 1.1 *treat people with kindness, respect and compassion*
- 1.2 *make sure you deliver the fundamentals of care effectively*
- 1.5 *respect and uphold people's human rights*

### **2 Listen to people and respond to their preferences and concerns**

*To achieve this, you must:*

- 2.1 *work in partnership with people to make sure you deliver care effectively*
- 2.3 *encourage and empower people to share in decisions about their treatment and care*
- 2.4 *respect the level to which people receiving care want to be involved in decisions about their own health, wellbeing and care*
- 2.5 *respect, support and document a person's right to accept or refuse care and treatment*

2.6 *recognise when people are anxious or in distress and respond compassionately and politely*

**4 Act in the best interests of people at all times**

*To achieve this, you must:*

4.1 *balance the need to act in the best interests of people at all times with the requirement to respect a person's right to accept or refuse treatment*

**8 Work co-operatively**

*To achieve this, you must:*

8.1 *respect the skills, expertise and contributions of your colleagues, referring matters to them when appropriate*

8.2 *maintain effective communication with colleagues*

**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'*

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel took into consideration that Mr Birnie's inappropriate patient care happened on two separate occasions, with two patients, between May 2018 and June 2018. It took into consideration that Mr Birnie's conduct risked physical and psychological harm to Patient A and Patient B. The panel took into account that Patient A and Patient B were vulnerable patients who were physically and cognitively impaired and therefore reliant on the care and support of others including Mr Birnie. The panel was of



the view that fellow members of the profession would find Mr Birnie's conduct with Patient A and Patient B deplorable.

The panel considered Mr Birnie's conduct with Colleague A. It noted that Mr Birnie, in a professional setting, had rebuffed Colleague A following an offer of assistance from her. The panel determined that Mr Birnie's choice of language and tone had been intended to cause offence to Colleague A and had done so. Colleague A told the panel that Mr Birnie's interactions with her were aggressive in nature as highlighted above. The panel considered this serious enough to amount to misconduct.

The panel found that Mr Birnie's actions, in each of charges 1a, 1b, 2, 3a, 3b and 3c, did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

### **Decision and reasons on impairment**

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

In coming to its decision, the panel had regard to the NMC's 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 found that limbs a, b and c of Dame Janet Smith's "test" were engaged.

The panel found that Patient A and Patient B were at risk of physical and psychological harm as a result of Mr Birnie's misconduct. It also determined that Mr Birnie's conduct to Colleague A caused her distress. Mr Birnie's misconduct breached the fundamental tenets of the nursing profession, to prioritise and care for patients with respect, kindness and compassion and work collaboratively with colleagues. The panel therefore determined that Mr Birnie's conduct brought the nursing reputation into disrepute.

Regarding insight, the panel determined that it had no evidence before it that Mr Birnie has shown insight. Mr Birnie has not demonstrated an understanding of how his actions put patients at a risk of harm nor has he demonstrated an understanding of why what he did was wrong and how this impacts negatively on the reputation of the nursing profession. The panel bore in mind that it has no information that Mr Birnie has apologised to the patients or his colleagues for his misconduct. Mr Birnie has not demonstrated how he would handle a similar situation differently in the future.

The panel was satisfied that the misconduct in this case is capable of being addressed. However, the panel bore in mind that it had no evidence before it that Mr Birnie has taken steps to strengthen his practice. The panel took into account that it had no evidence of any relevant training that Mr Birnie has undertaken to strengthen his practice, nor did it have a reflective piece written by Mr Birnie addressing the concerns identified.

The panel is of the view that there is a risk of repetition based on Mr Birnie's lack of insight and lack of evidence of strengthened practice. The panel took into account that Mr Birnie's conduct behind the charges found proved has not been remediated. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

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

The panel determined that a finding of impairment on public interest grounds is required because an informed member of the public would be concerned to learn that a registered nurse with the concerns identified in this case is allowed to practise with no restrictions on their NMC registration.

In addition, the panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds Mr Birnie's fitness to practise impaired on the grounds of public interest.

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

### **Direction arising from attendance by Mr Birnie on afternoon of Friday 6 September 2024**

On the afternoon of 6 September 2024, you attended the hearing. At the point of which you joined the hearing, the panel then handed down its decision on misconduct and impairment.

The panel invited submissions from both Mr Fletcher, on behalf of the NMC, and yourself on sanction. You submitted that since this matter had been referred to the NMC, you had provided the NMC with reflective statements and character references.

Whilst you continued to provide your submissions, Mr Fletcher made enquiries of the NMC in relation to this documentation. Mr Fletcher received a number of emails and asked for

some time to consider the emails. He noted that he had received a number of emails which included a reflective statement and testimonials.

Mr Fletcher submitted that the documents he had been sent by email would need to be redacted and put into a comprehensive bundle.

The panel is concerned to ensure that all relevant documentation is provided to it. The panel therefore directs that a professional lawyer of the NMC reviews the file, and provides any and all references or reflective pieces, or other documents relevant to the case, to the Case Presenter, the Hearings Coordinator and to the Legal Assessor, by 14:00 Monday 9 September 2024.

### **Decision and reasons to admit additional documents provided**

Following the panel's direction, Mr Fletcher submitted that three bundles had been prepared by the NMC which included documentation that you had sent to the NMC during the course of the regulatory process. Mr Fletcher submitted that some of the information provided by you and included in the bundle was not appropriate to be considered by the panel. He submitted that the competency assessment tool, 'version of events' document, 'statement', [PRIVATE] and employment tribunal COT3 should not be included in the documents sent to the panel. He submitted that these documents had no relevance to the hearing, potentially contradicted evidence provided by NMC witnesses at the Facts stage and any consideration by the panel may be a waste of panel time. Further, he submitted that the panel may not be able to distinguish whether a document had any particular relevance to the sanction stage.

You initially made no submissions in relation to this submission.

The panel accepted the advice of the legal assessor.

The panel decided that it was fair and relevant for all documents, aside from any which related to employment tribunal proceedings which were settled without a hearing, should be sent to it for consideration. The panel determined that it would consider what information from these bundles are relevant for its decision on sanction.

You asked for the legal assessor to explain it, which he did, and you were satisfied.

### **Decision and reasons on the panel's earlier finding of impairment in light of additional documents provided**

The panel had regard to the documents that had been submitted by you which contained a reflective statement and references. The panel also had regard to the documents provided by the NMC following its direction.

The panel considered your reflective statement. The panel took into account that you did not consider how your actions put vulnerable patients at a risk of harm or the effect upon them, nor did you demonstrate an understanding of why your actions were wrong and how they impacted negatively on your patients, colleagues and on the reputation of the nursing profession. It had limited information as to how you would handle a similar situation differently in the future. The panel determined that you have very limited insight.

The panel considered the five references that you provided to the panel which date from 2018 until the present. It noted that two of these references were personal character references whilst the remaining three references were provided by your work colleagues. The panel took into consideration that your work colleagues provided positive reflections on your work. However, it was unclear to the panel if the authors of these references knew the full circumstances of your NMC referral.

The panel bore in mind the training that you have undertaken has been relevant to your role as an advanced nurse practitioner and it was unclear when this training ended. The

panel took into account that the training did not relate to concerns identified in the charges.

The panel concluded that whilst this additional information changed its assessment of your level of insight from 'no insight' to 'very limited insight', there was no reason to change its finding that your fitness to practise is currently impaired.

## **Sanction**

The panel has considered this case carefully and decided to make a suspension order for a period of six months. The effect of this order is that the NMC register will show that your registration has been suspended for that period.

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 and other guidance provided by the NMC, available on its website.

## **Submissions on sanction**

Mr Fletcher submitted that the panel must impose a sanction which is proportionate and appropriate in relation to the circumstances of this case. He submitted that the NMC consider that the charges found proved and the panel's finding of current impairment are 'on the cusp' of warranting removal from the register and invited the panel to impose a 12-month period of suspension. He submitted that the panel should look at the situation going forward and mark its concern about the charges found proved, your lack of insight and remorse. He referred the panel to the NMC's sanction guidance.

You submitted that you have engaged with the NMC throughout this process and have provided reflection on a regular basis. You've noted where your practise has been weak and identified opportunities for learning. You told the panel about your last place of employment. You stated that you have submitted character references to the NMC. You

told the panel that you [PRIVATE] want to promote your knowledge and experience.  
[PRIVATE].

### **Legal assessor's advice**

The panel received detailed legal advice from the legal assessor, who summarised it for your benefit as you had not been able to open the attachment to the email as you were attending the hearing using your mobile phone. You had no comments upon it. Mr Fletcher had no comment on the content of the written legal advice.

### **Decision and reasons on sanction**

Having found your fitness to practise is 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:

- Your limited insight into your misconduct.
- Misconduct that put patients at risk of suffering harm.
- Patients in your care were particularly vulnerable.
- No evidence of strengthened practice in relation to the attitudinal concerns identified and your practise in relation to caring for vulnerable patients.

The panel also took into account the following mitigating features:

- [PRIVATE].
- [PRIVATE].



- Unblemished career of approximately 30 years prior to the incidents found proved.
- [PRIVATE].

When considering the aggravating and mitigating features of this case, the panel determined that the aggravating factors outweighed the mitigating features due to your behaviour as found proved in the charges. The panel was concerned at your very limited level of insight, which was focussed on the effect on you, and not on the patients, your colleagues or the reputation of the profession of your actions. The panel was concerned at your lack of awareness and insight in relation to those incidents.

The panel considered the NMC guidance SAN-2, 'Considering sanctions for serious cases', dated 27 February 2024. The panel determined that your misconduct was at the upper end of the spectrum of seriousness due to your treatment of the vulnerable people in your care.

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 your practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that your misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on your registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the factors outlined in the SG and bore in mind that these factors are not exhaustive. It noted that there is evidence of a harmful attitudinal problem. It had regard to your very limited insight and your lack of understanding of the impact that your actions had on the vulnerable patients in your care. The panel was of the view that it is difficult to create conditions that can monitor and assess the attitudinal concerns identified by the charges found proved. The panel was not satisfied that patients will not be put at risk of harm either directly or indirectly as a result of any conditions imposed and that any conditions imposed will adequately protect patients during the period they are in force. The panel concluded that there are no practical or workable conditions that could be formulated, given the nature of the proved charges in this case. You were likely to encounter patients with dementia or other vulnerabilities in every area of nursing, and so no workable conditions could be devised to protect the public. Further, the panel concluded that the placing of conditions on your 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 that suspension order may be appropriate where some of the following factors are apparent:

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

The panel bore in mind that this was not a single incident but related to a single period of incidents in a long career. The panel bore in mind its finding that this shows you have an attitudinal problem. However, it noted that you have not repeated your misconduct since the material time but have demonstrated some insight, albeit limited. The panel was satisfied that in this case, the misconduct was not fundamentally incompatible with you remaining on the register.

The panel went on to consider whether a striking-off order would be proportionate but, taking account of all the information before it, and of the mitigation provided, the panel concluded that it would be disproportionate. The panel was of the view that your misconduct was attitudinal in nature, but capable of remediation and did not amount to a course of conduct that was incompatible with remaining on the register. Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in your case to impose a striking-off order. This is because although the misconduct was serious, it was of limited duration and was out of character given your long career. The panel took account of the fact that you had no training in dementia nursing and that [PRIVATE]. [PRIVATE]. Without diminishing the seriousness of the matters found proved, in these circumstances the panel decided that striking you from the Register would be disproportionate.

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

The panel noted the hardship such an order will inevitably cause you. However, this is outweighed by the need to protect the public until such time as a reviewing panel is satisfied that you are fit to practice without restriction. The panel noted that you have been subject to an interim order of suspension for approximately nine months, which satisfies the public interest in this case.

The panel determined that a suspension order for a period of six months was necessary to enable you to spend time developing insight as to your conduct, and to strengthen your nursing practice.

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:

- Your continued engagement and attendance at any future hearing.
- A reflective statement, using, for example, the Gibbs reflective model (1988), that addresses:
  - An understanding of how your actions put patients at a risk of harm with reference to standards in the NMC Code of Conduct.
  - An understanding of why your actions, found proved in the charges, were wrong and how it impacted negatively on your patients, your colleagues and on the reputation of the nursing profession.
  - How you would handle similar situations differently in the future.
- Evidence of training in the following areas:
  - How to manage vulnerable and challenging patients.
  - Effective communication and teamworking.

This will be confirmed to you in writing.

### **Interim order**

As the suspension 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 interests until the suspension sanction takes effect.

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

### **Submissions on interim order**

The panel took account of the submissions made by Mr Fletcher. He submitted an interim suspension order for a period of 18 months was necessary to cover any potential period of appeal.

You made no submissions in respect of this application.

### **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 to cover any potential period of appeal.

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

That concludes this determination.