Factors to consider before deciding on sanctions

Reference: SAN-1 Last Updated: 02/12/2024

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Proportionality

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Being proportionate means finding a fair balance between the nurse, midwife or nursing associate's rights and our overarching objective of public protection.[1] We need to choose a sanction that doesn't go further than we need to meet this objective. This reflects the idea of right-touch regulation[2], where the right amount of 'regulatory force' is applied to deal with the target risk, but no more.

The Fitness to Practise Committee has to be proportionate when making decisions about sanctions. It's under a legal duty to make sure that any decisions to restrict a nurse, midwife or nursing associate's right to practise as a registered professional are justified.

To be proportionate, and not go further than it needs to, the Committee should think about what action it needs to take to protect the public and address the reasons why the nurse, midwife or nursing associate is not currently fit to practise.

They should consider whether the sanction with the least impact on the nurse, midwife or nursing associate's practice would be enough to achieve public protection, looking at the reasons why the nurse, midwife or nursing associate isn't currently fit to practise and any aggravating or mitigating features.

If this sanction isn't enough to achieve public protection, they should consider the next most serious sanction. When the Committee finds the sanction that is enough to achieve public protection, then it has gone far enough.

They need to explain why the following most serious sanction is not necessary as it would be going further than is needed to achieve public protection – simply saying that it would be disproportionate isn't enough.

Aggravating features

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Aggravating features are aspects of the case that make it more serious. They might mean that the Fitness to Practise Committee needs to order a sanction that has a greater impact on the nurse, midwife or nursing associate's practice.

Some possible aggravating features are:

- any previous regulatory or disciplinary findings
- abuse of a position of trust
- lack of insight into failings

- a pattern of misconduct over a period of time
- conduct which put people receiving care at risk of suffering harm.

Panels should weigh up carefully what evidence there is of a nurse, midwife or nursing associate's insight. Where there is *some* evidence of insight panels should consider whether this is so little that it might be an aggravating factor in the case, or whether this is evidence of developing insight which may count in the nurse, midwife or nursing associate's favour. It's unlikely that the level of insight can be both an aggravating and a mitigating factor.

If a nurse, midwife or nursing associate's actions put people at risk of being harmed, this risk makes their case more serious. However, keeping people receiving care safe also includes avoiding a culture of blame or cover up, so we do not want to punish nurses, midwives or nursing associates for making genuine clinical mistakes.

Generally, whether or not harm did happen is less important than whether the nurse, midwife or nursing associate's actions caused a risk of harm. We explain why this is in our guidance on investigating what caused the death or serious harm of a patient. It confirms that the fact that someone did suffer harm will only make a nurse, midwife or nursing associate's conduct or failings more serious if they deliberately chose to take an unreasonable risk with the safety of people in their care. The fact that a nurse, midwife or nursing associate has denied an allegation (and their defence has been rejected) might, in some cases, be regarded as an aggravating factor but panels must bear in mind the principle that nurses, midwives and nursing associates are fairly entitled to defend themselves. Panels should carefully consider the nature of the rejected defence before concluding that it can properly be regarded as an aggravating factor[3].

Mitigating features

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Mitigating features are aspects of the case that show it is less serious. Mitigating features may mean the future risk to the public is reduced and a sanction which has less impact on the nurse, midwife or nursing associate's practice is appropriate to manage that risk. The Fitness to Practise Committee will always look carefully at any evidence about mitigation, including references and testimonials, when they are deciding which sanction, if any, to impose.

Mitigation can be considered in three categories.

- Evidence of the nurse, midwife or nursing associate's insight and understanding of the problem, and their attempts to address it. This may include early admission of the facts, apologies to anyone affected, any efforts to prevent similar things happening again, or any efforts to put problems right.
- Evidence that the nurse, midwife or nursing associate has followed the principles of good practice. This may include them showing they have kept up to date with their area of practice.
- Personal mitigation, such as periods of stress or illness, personal and financial hardship, level of experience at the time in question, and the level of support in the workplace.

In regulatory proceedings, where the purpose of sanctions is to protect the public and not to punish nurses, midwives or nursing associates, personal mitigation is usually less relevant than it would be to punishing offenders in the criminal justice system. In some cases, sanctions might have an effect that could be described as being punitive, but this is not their purpose.

As we explained in the section about aggravating factors, we take patient harm extremely seriously. Putting patients at risk of harm makes a nurse, midwife or nursing associate's failings more serious. If the nurse, midwife or nursing associate's actions put patients or members of the public at a real risk of suffering harm, and the reason they did not suffer harm was down to chance, the fact that nobody suffered actual harm is generally not a good mitigating factor.

The Fitness to Practise Committee will use our guidance on insight and strengthened practice, and in particular whether the concern has been addressed, when weighing up whether the level of insight demonstrated by a nurse, midwife or nursing associate is either aggravating or mitigating.

Previous interim orders and their effect on sanctions

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Interim orders have a separate and different purpose from final sanctions.

The purpose of interim orders is to tackle risks while a case is being investigated and prepared, and before the

Committee decides whether the nurse, midwife or nursing associate is fit to practise.

When making their decision on sanction, the Fitness to Practise Committee may be told that the nurse, midwife or nursing associate was under an interim order before they started deciding the case. The panel should consider the effect this might have.

Effects on which sanction to impose

If a nurse, midwife or nursing associate has been under an interim order they may have only had a limited chance to address the risks in their practice by working as a nurse, midwife or nursing associate.

If the nurse, midwife or nursing associate has followed the terms of the interim order, and made good progress under it, this can be relevant to questions about how much insight the nurse, midwife or nursing associate has shown, and how much of a risk they may present to the public in the future.

Equally, any evidence that the nurse, midwife or nursing associate did not fully comply with an interim order may be relevant to questions about insight, their attitude towards professionalism, and whether they are likely to comply with any order the Fitness to Practise Committee might make.

Effects on length of sanction

The fact that a nurse, midwife or nursing associate was previously under an interim order, and for how long, are relevant background factors in deciding on what a proportionate length of sanction might be.

This however doesn't mean that the length of time for which the nurse, midwife or nursing associate was previously restricted or suspended under an interim order must be deducted from a sanction. An interim order is separate from a substantive order[4]. When thinking about making a substantive order, the panel should take into account the individual circumstances of each case, and this may include the length of time that a nurse, midwife or nursing associate is under an interim order[5]. This is however never likely to be appropriate where a panel has identified that there is a current risk to public protection.

Previous fitness to practise history

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The nurse, midwife or nursing associate's fitness to practise history with us can be relevant to a decision on sanction. It's most likely to be useful in cases about similar kinds of concerns. If problems seem to be repeating themselves, this may mean that previous orders were not effective to help the nurse, midwife or nursing associate address them. If the panel is considering making a similar order to those made by previous panels, it may need to take this factor into account and reconsider if necessary.

The fact that a nurse, midwife or nursing associate doesn't have a past fitness to practise history in general may have some relevance when considering the decision on sanction, depending on the types of charges that have been found proved. For example, suppose the allegations relate to clinical failings and are shown to be one-off failings during a long career. In this case, this could be a relevant consideration for a panel when considering sanction alongside any evidence of insight, reflection and strengthened practice.

If the allegations relate to deep-seated attitudinal concerns, such as displaying discriminatory views and behaviours that the nurse, midwife or nursing associate hasn't fully addressed, the absence of a fitness to practise history is unlikely to be relevant to a panel when considering sanction.

Unlike a criminal court, the panel is not punishing the nurse, midwife or nursing associate. Its role is to decide which sanction is needed to achieve public protection. This includes protecting people receiving care, maintaining public trust and confidence and upholding the standards we expect of nurses, midwives and nursing associates.

Sometimes, the nurse, midwife or nursing associate's conduct may be so serious that it is fundamentally incompatible with continuing to be a registered professional. If this is the case, the fact that the nurse, midwife or nursing associate does not have any fitness to practise history cannot change the fact that what they have done cannot sit with them remaining on our register.

For these reasons, panels should bear in mind there will usually be only limited circumstances where the concept of a 'previously unblemished career'[6] will be a relevant consideration when they are deciding which sanction is needed, or in giving their reasons.

DBS and Disclosure Scotland decisions

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The existence of a DBS barring or Disclosure Scotland listing decision will be a legitimate consideration when approaching sanction – for example, when addressing the workability of conditions of practice. Where a fitness to practise panel is satisfied of the facts but decides that a nurse, midwife or nursing associate subject to such a decision shouldn't be struck off or suspended, it will need to explain carefully how it has reached that decision, with reference to public protection, public confidence and maintaining proper professional standards in the profession.

1 See the balance between the individual's rights and the public interest in Huang v Secretary of State for the Home Department [2007] UKHL 11

2 See Right-touch regulation, published by the Professional Standards Authority in 2015.

3 Sawati v GMC [2022] EHWC 283 (Admin)

4 Article 31(1)-(2) of the Order

5 Aga v GDC [2023] EWHC 3208 (Admin)

6 For an example of a case where a panel's decision to rely on a 'previously unblemished career' and not impose a striking-off order was overturned on appeal, see Judge v Nursing and Midwifery Council [2017] EWHC 817 (Admin)