Conduct and Competence Committee

Restoration Hearing

7 August 2015

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

Name of Registrant: Memory Muchaneta Musekiwa

NMC PIN: 06F1126E

Part(s) of the register: Registered Nurse – Sub Part 1
Adult Nursing – July 1982

Area of Registered Address: England

Type of Case: Application for restoration

Panel Members: Paul Powici (Chair – Lay Member)
Linda Summers (Lay Member)
Fiona Barrie (Registrant Member)

Legal Assessor: Michael Hosford-Tanner

Panel Secretary: Zainab Mohamed

Nursing and Midwifery Council: Represented by Max Hardy, Counsel,
instructed by the NMC Regulatory Legal Team.

Ms Musekiwa: Present and represented by Robert Whitney of Kundert Solicitors

Outcome: Application rejected
Determination of application for Restoration to the Register:

Ms Musekiwa,

This is a hearing of your first application for restoration to the Nursing and Midwifery Council (NMC) Register. A panel of the Conduct and Competence Committee directed on 24 June 2009 that your name be removed from the Register on the grounds of misconduct. This application is made by you in accordance with Article 33 of the Nursing and Midwifery Order 2001, as at least five years have now elapsed since the date of your strike-off.

At this hearing the panel may reject your application or it may grant your application unconditionally. It may grant your application subject to your satisfying the requirements of Article 19(3) and it may make a conditions of practice order.

The panel has considered your application for restoration to the Council’s Register.

Background

You were working as an agency nurse at the Worcestershire Acute Hospital Trust (“the Trust”). You were posted for the first time to the Day Case and Surgical Short Stay unit on 11 November 2007. A number of patients were on this ward and they included Patients A, B and C. You were working with another agency nurse that night. At around 3:30 – 4:00 am on 12 November 2007, you responded to the ringing of a buzzer which had been rung by the patient in the bed next to Patient A. You attended to find that Patient A was out of bed and had urinated on herself. You proceeded to change the night clothes of Patient A and to mop up the urine which had got onto the floor. The disputed facts which were found proved related to the manner in which you spoke to and dealt with Patient A. In addition, the panel considered an allegation that you had been cautioned for an offence of cruelty to a child, [PRIVATE].

The panel at the substantive hearing on 23 – 24 June 2009, considered the following charges:
That you, while working as a Registered Nurse at Worcester Royal Hospital, on or around 11\textsuperscript{th} and 12\textsuperscript{th} November 2007:

1. Shouted at Patient A, using words to the effect of:
   a. “I give you a buzzer to go to the toilet and you wet all over the floor, now I’ve got to clean this mess up”;
   b. “get down”;
   c. “stay down”;
   d. “sit there”,
   e. “get to bed”.

2. failed to promote Patient A’s privacy and dignity in that you:
   a. stripped Patient A naked, without closing the bed curtains around her;
   b. left Patient A naked without closing the bed curtains around her, whilst fetching cleaning materials;

3. pushed Patient A onto a commode;

4. handled Patient A with force;

5. refused to wash Patient A after being requested to do so by Patient A;

6. pushed a table alongside Patient A’s’ bed, thereby preventing her from being able to get out of bed;

7. failed to protect confidential information in that you left a document containing confidential information relating to patients on Patient B’s bed.

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

8. That you on 19 June 2008 were cautioned by West Midlands Police for doing and act of cruelty to a child or young person under 16 years

And in light of the above, your fitness to practise is impaired by reason of your caution.

That panel found Charges 1 (in its entirety), 2, 3, 4, 5 and 8 proved. You admitted to Charge 2a. Charges 6 and 7 were not found proved.

In relation to misconduct that panel observed that your conduct fell below the acceptable level attributable to a registered nurse in that you;
• Failed to exercise reasonable judgment when assessing the needs of Patient A.
• Failed to appreciate the risk of harm to Patient A when she left her naked without a curtain near to a pool of urine on the floor, in order to fetch a bucket and mop.
• Failed to use appropriate language and appropriate actions when speaking to and dressing an elderly vulnerable patient.
• Failed to observe the laws of the UK when she committed an act of cruelty to a young person under 16 years ([PRIVATE]), hitting her with a belt.
• Failed to show compassion to Patient A or to preserve her dignity.

After concluding that your actions constituted misconduct, that panel then went on to consider impairment and found that “The admission and caution for committing an act of cruelty to a young person under 16 years ([PRIVATE]), whilst not amounting to a propensity for violence, indicates a propensity for inappropriate behaviour when dealing with vulnerable individuals such as a 15 year old and a vulnerable, 84 year old requiring medical attention. The panel accepts that this is the first time that the registrant has come before the Conduct and Competence Committee for misconduct. However this does not amount to mitigation against a finding that fitness to practise has been impaired because the nature of the misconduct now found against her was of such a serious nature.” That panel concluded that your fitness to practise was impaired.

In considering the matter of sanction, that panel were informed of a police caution you had received in 2004 for an offence of theft from your employer.

In relation to sanction that panel concluded that your misconduct was fundamentally incompatible with remaining on the nursing register and made a striking-off order. The panel’s reasons for making a striking-off order were:

“Protecting the dignity of a vulnerable patient is so fundamental to nursing care that the panel considers that no condition can adequately remedy such a breach of conduct. This breach represents a lack of basic nursing care and a lack of a humane attitude to vulnerable patients.

Suspension order- the panel asked itself the question—is the misconduct found such that it is incompatible with being on the register? We have answered that question in the affirmative. We consider that it is incompatible that such a person remains on the register, because taking the behaviour of the registrant as a whole (that is the 2004
dishonesty offences for theft from employer, the unacceptable behaviour to the vulnerable patient and [PRIVATE]) makes it incompatible for such a person to remain on the register.

Striking off- the panel considers that it is appropriate and proportionate to strike off the Registrant from the register. Our reasons are as follows;

It is necessary in the public interest to do so, as it is important to maintain public confidence in the behaviour of nurses who work within the profession.

Public confidence would be undermined if such a sanction were not imposed.”

Submissions and evidence

The panel had regard to the submissions of Mr Hardy, on behalf of the NMC, Mr Whitney, on your behalf and also your sworn evidence as well as the contents of the application which included three written references. You also provided a further reference and a number of performance review forms from hospitals where you have worked as an agency healthcare assistant.

Mr Hardy, on behalf of the NMC, outlined the background of the case and the facts that led to the striking-off. He referred this panel to the previous panel’s decision. He reminded the panel of the test set out in Article 33(5) of the Order. Mr Hardy submitted that it was a matter for the panel today to decide whether it was satisfied that you were capable of safe and effective practice and whether you are now a fit and proper person to practise as a registered nurse. He submitted that the panel must have regard to the public interest, and whether the public confidence in the profession would be undermined if you were restored on the Register.

Mr Hardy referred the panel to the references you have provided. However, he submitted that the panel may have been better assisted with references from one of your supervisors that referred particularly to the misconduct that was found proved and how you have improved your approach with patients.

Mr Hardy submitted that the matters found against you are a combination of dishonesty, [PRIVATE] and failure to provide adequate care to a vulnerable patient, which causes ongoing anxiety over your fitness to practise. Further, he submitted that maintenance of
a patient’s dignity is so fundamental to the practice of a nurse and such a basic and central tenet of nursing that where dignity has not been preserved, no amount of training is going to suffice until you have gained insight. He accepted that an underlying attitude might be capable of remediation although he submitted it would be difficult.

Mr Whitney, on your behalf, submitted that you accept the previous panel’s findings. He submitted that you are a fit and proper person to practise as a registered nurse and invited the panel to restore your name on the register. Mr Whitney submitted that public confidence in the profession would not be undermined by your restoration. He informed the panel that since your strike-off you have continued to work as a healthcare assistant and have made academic progress in your professional studies.

Mr Whitney submitted that he was unable to formulate any conditions which could be formulated to assist the panel should it find that it was necessary to impose conditions on your practice. He submitted that the panel can be satisfied that your attitude towards patients has changed and improved.

Mr Whitney stated that he hoped the panel may appreciate the difficulty you face in obtaining references and identifying individuals in a supervisory capacity as you are an agency worker, working with different colleagues on different days. He submitted that you have shown by your actions over the past five years that you are committed to improving yourself and to behaving better in the future and providing adequate care for your patients. Mr Whitney submitted that you have tried very hard to learn about the requirements of a registered nurse and that you have changed. He submitted that you have shown that you are a fit and proper person and the references you have provided reflect this, albeit some are informal references from your agency timesheets. He asked the panel to restore you on the register and allow you opportunity to return to nursing.

In your oral evidence, you said that you accept the previous panel’s findings of the events that occurred on the night of 11 – 12 November 2007. You told the panel you have reflected on what happened that night and stated that if you could you would change how you had dealt with the patient.

[PRIVATE]
You informed the panel that in the last five years you have continued to work in the health environment but as a healthcare assistant. You told the panel that you have undertaken training courses and in doing so, it has helped you change how you handle patients and you have learnt a lot about dignity, ethics and morals. You said that sometimes what you may think is right may be wrong. You also said that you have learnt the importance of good communication and that your communication has changed. You said you take your time to listen to your patients and listen to what they want you to do.

You told the panel that the incident was a mistake and that you have corrected it in the six years you have been working as a health care assistant. You said that the patients you care for now speak highly of you and often receive positive comments, such as “you are a good lady”. You said that some of the hospitals you work for through your agency request to have you back and that you have good reports. You told the panel that if you knew what you know now then you would have done things differently, you would have been more effective and treated the patient better. You said that you have changed and that you wish to return to nursing, that it is your passion and that you have always wanted to care for people.

You said that you have made an application for restoration so that you can have the opportunity to prove to society that you are a good nurse. You said that you made a very big mistake, you have changed and that you have used the five years to correct it. You stressed to the panel that it would not happen again. You informed the panel that you completed a top up degree BSc in Health Studies at the University of Northampton. You explained that you attended the university two days a week and worked part-time as an agency healthcare assistant.

You also told the panel that in addition to you working as a healthcare assistant, you participated in an E-learning course, with the Skills Network in Yorkshire, marking students’ papers and that you have undertaken two of six modules of the ‘Preparing to Teach Course’, although you did not complete that course as you live too far away from the university concerned to be able to take the necessary teaching placement.

The panel heard and accepted the advice of the legal assessor.
The legal assessor reminded the panel of the test, as provided in Article 33(5) of the Nursing and Midwifery Order, 2001. Firstly you must satisfy the panel that you satisfy the requirements of Article 9(2)(a) (approved qualification and prescribed education, training and experience) and Article 9(2)(b) (capable of safe practice). Secondly, you must satisfy the panel whether, having regard in particular to the circumstances which led to the making of the striking-off order in 2009, you are a “fit and proper person to practise as a registered nurse”. He advised the panel that is for you to satisfy the panel of these two matters and it is for the panel to use its own independent judgment as to whether it is so satisfied. The legal assessor also made reference to the principles derived from the case of Balamoody v NMC [2010] EWHC 2256 (Admin), namely whether the practitioner is safe to practise and whether the public’s trust and confidence in the professions may be undermined by restoration of the practitioner.

Decision on the application for restoration

The panel has considered your application for restoration to the NMC register very carefully. It has decided to reject the application for the following reasons:

The panel noted that the burden was upon you to satisfy the panel that you are a fit and proper person able to practise safely and effectively as a nurse.

The panel first considered whether you have satisfied the panel that you are able to practise safely.

The panel had regard to the findings made at the substantive hearing in June 2009.

The panel considered that the facts proved against you were very serious and related to inappropriate behaviour when dealing with a vulnerable patient. The panel also noted that, you were cautioned twice by the police, the first caution order was for stealing three cheques [PRIVATE] in 2004 and the second was for committing an act of cruelty to a young person under 16 years ([PRIVATE]).

In your evidence today you said you accepted that the decision of the previous panel, but when questioned by the panel on why your version of events differed to the corroborating version of events given by the two witnesses (which the original panel
preferred), you had no explanation. The panel found that although you said you accept
the facts found proved, you did not fully accept the findings of the previous panel and
were not fully candid in your evidence. The panel considered that this might have been
influenced by your reluctance to revisit your specific behaviour on the 11 – 12
November 2007. The panel found that this indicated an element of denial on your part
and your memory has reduced the incident to a single set of circumstances rather than
the wider ranging failings which it represents.

The panel, however, is of the view that you have reflected on the incidents at some
length and the panel noted that you have expressed genuine remorse. The panel also
noted your positive references and feedback forms, however there were no references
from your current employers. The panel considered your evidence carefully and
concluded that you have demonstrated some, although not full, insight. It found that
there were gaps in your reflection and that you have not fully accepted the way you
behaved or reflected upon why you behaved in such a way and the impact your actions
had on the vulnerable patient. Unkind treatment of a vulnerable patient is something
which requires careful reflection if you are to satisfy a panel that you have remedied
your practice and attitudes in order to show that you no longer pose a risk of harm to the
public.

With respect to remediation the panel considered that dishonesty is inherently difficult to
remediate, although this was not at the core of the reasons for the striking-off order.

The panel was encouraged to hear of your continuing work as a healthcare assistant
and all the academic courses and training you have undertaken, to refresh and keep
your nursing knowledge up to date. Although the panel had no documentary evidence of
this. You have, in the panel’s view, demonstrated a willingness to return to nursing and
have taken considerable steps to achieve this. However, this was not sufficient to satisfy
the panel that you are able to practise safely and that you do not pose an unacceptable
risk of harm to the public.

The panel had consideration as to whether the public could be adequately protected by
a conditions of practice order. However, the panel could not formulate conditions that
would adequately protect the public or address the concerns in this case, namely the
failures to provide basic and sensitive nursing care to a vulnerable patient and the continuing absence of full insight into the reasons for, and impact of, your behaviour.

The panel also considered the public interest which includes the maintaining of public confidence in the professions and concluded that, in light of its concerns regarding your misconduct, public confidence would be undermined if you were restored to the Register at this stage.

Having found that you are not at present capable of safe and effective practice, the panel rejects your application.

Any future application for restoration by you may be assisted by the following:

- A detailed reflective piece which reflects on the incident, the reasons for your behaviour and the impact your actions had on Patient A, and what you would do differently.

- References or testimonials from your current employers which comment specifically on these proceedings and your progress in light of this.

- A portfolio of evidence of your knowledge of the latest developments in the nursing profession since you were last in practice and reflection as to how you would go about returning to nursing if restored to the register.

- Documentary evidence of the courses you have already undertaken and of any future academic and practical training you undertake.

You have the right to appeal this panel's decision, pursuant to Article 33 (12) and (13):

(12) A person whose application … for restoration is refused or made subject to his satisfying requirements under paragraph (6) may appeal to the appropriate Court and article 38 shall apply to that appeal.

(13) The appeal must be brought before the end of the period of 28 days beginning with the date on which notice of the decision rejecting the application, is served on the applicant.
You are able to make a further application for restoration to the Register, after twelve months. In accordance with Article 33(2) (b) you must not make a further application “in any period of twelve months in which an application for restoration to the register has already been made by the person who has been struck off.”

You should bear in mind Article 33 (9) which provides that:

If, while a striking-off order is in force, a second or subsequent application for restoration to the register, made by the person who has been struck off, is unsuccessful, the Committee which determined that application may direct that that person’s right to make any further such applications shall be suspended indefinitely.

That concludes this determination.

This decision will be confirmed to you in writing.