

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

30 April 2019

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

Name of registrant:	Paul Johnston
NMC PIN:	82A1910E
Part(s) of the register:	RN2: Adult Nurse - Level 2 (March 1981) Sub Part 2 RN1: Adult Nurse - Level 1 (September 1999) Sub Part 1
Area of Registered Address:	England
Type of Case:	Misconduct
Panel Members:	Adrian Smith (Chair, Lay member) Ken Arndt (Registrant member) Alexandra Ingram (Lay member)
Legal Assessor:	David Marshall
Panel Secretary:	Elaine Stewart
Mr Johnston:	Neither present nor represented
Nursing and Midwifery Council:	Represented by Bryony Dongray, Case Presenter
Consensual Panel Determination:	Accepted
Facts proved:	All
Fitness to practise:	Impaired
Sanction:	Caution Order – 5 Years
Interim Order:	N/A

Decision on Service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Johnston was not in attendance and that written notice of this hearing had been sent to Mr Johnston's registered address by recorded delivery and by first class post on 13 March 2019. Notice of this hearing was delivered to Mr Johnston's registered address on 14 March 2019. Further, the panel noted that notice of this hearing was also sent to Mr Johnston's representative at Unison on 13 May 2019.

The panel took into account that the notice letter provided details of the allegation, the time, date and venue of the hearing and, amongst other things, information about Mr Johnston's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

Ms Dongray submitted the NMC 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.

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

Decision on proceeding in the absence of the Registrant

The panel next considered whether it should proceed in the absence of Mr Johnston.

Ms Dongray referred the panel to the email dated 1 April 2019 from Mr Johnston's representative. In this email, his representative confirms that he will not be attending the

hearing. The email states that both Mr Johnston and his representative will be available by telephone and email should any clarification on any point be required.

Ms Dongray therefore invited the panel to continue in the absence of Mr Johnston on the basis that he had voluntarily absented himself. She submitted that Mr Johnston has been fully involved in the preparation of the CPD agreement to be considered and that he has an expectation that the hearing will take place today. Ms Dongray further submitted that Mr Johnston indicated that he would prefer his case considered at a meeting and therefore would not have attended. She submitted that this indicates that an adjournment would not secure his attendance at a future date.

Ms Dongray submitted that it was in the public interest to proceed in Mr Johnston's absence.

The panel accepted the advice of the legal assessor.

The panel had regard to Rule 21 (2) states:

- (2) Where the registrant fails to attend and is not represented at the hearing, the Committee—
 - (a) shall require the presenter to adduce evidence that all reasonable efforts have been made, in accordance with these Rules, to serve the notice of hearing on the registrant;
 - (b) may, where the Committee is satisfied that the notice of hearing has been duly served, direct that the allegation should be heard and determined notwithstanding the absence of the registrant; or
 - (c) may adjourn the hearing and issue directions.

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”. However, in this case, Mr Johnston has indicated that he wishes for the hearing to go ahead today, and has not requested an adjournment. The panel noted that he has signed the CPD agreement and his representative is available by telephone should the panel wish to clarify anything. The panel considered that it was in the public interest for the matter to proceed expeditiously and in light of the agreement from Mr Johnston there was no unfairness to him in proceeding in his absence.

Accordingly, the panel has decided to proceed in the absence of Mr Johnston.

Consensual panel determination

At the outset of this hearing, Ms Dongray, on behalf of the NMC, informed the panel that prior to this hearing a provisional agreement for a consensual panel determination had been reached with regard to this case between the NMC and Mr Johnston.

The agreement, which was put before the panel, sets out Mr Johnston's full admission to the facts alleged in the charges, that his actions amounted to misconduct, and that Mr Johnston's fitness to practise is currently impaired by reason of that misconduct. It is further stated in the agreement that an appropriate sanction in this case would be a caution order for a period of five years.

The panel has considered the provisional agreement reached by the parties.

That provisional agreement reads as follows:

The Nursing and Midwifery Council ('the NMC') and Mr Paul Johnston, PIN 82A1910E ('the Registrant') (collectively 'the parties') agree as follows:

1. The Registrant admits the following charges:

That you, a registered nurse:

1) on 16 December 2017:

- a) said to Patient A, 'Do you know how long a giraffe's neck is because if you hit me you'll have a neck like a giraffe by the time I will be done with you' or words to that effect.*
- b) said to colleagues, about Patient A:*
 - i) 'lucky he's in here and not on the outside or I would have knocked his head off' or words to that effect.*
 - ii) that he needed 'seven bells knocking out of him' or words to that effect.*
- c) slept whilst on duty.*

2) on 17 December 2017:

- a) conveyed Patient B from a wheelchair to an armchair using an inappropriate moving and handling technique.
- b) slept whilst on duty.

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

2. The facts are as follows:

- 2.1. The Registrant has practised as a nurse since 1984.
- 2.2. He was first admitted to the register of nurses and midwives maintained by the NMC on 01 April 2002.
- 2.3. The Registrant is registered as a Registered Nurse – Adult and Registered Nurse – Adult (Level 2).
- 2.4. Prior to the instant matter the Registrant has had no regulatory findings made against him.
- 2.5. On 07 December 2017, the Registrant took up employment with United Health (hereafter ‘United’). He was employed as a nurse at The Valleys Care Home (hereafter ‘the Home’), a nursing home operated by United.
- 2.6. On 16 December 2017, the Registrant was working as nurse in charge of the day shift (8am-8pm). This was the first time he had performed this role at the Home.
- 2.7. Patient A suffered from advanced dementia and, as a result of his condition, was prone to act aggressively.
- 2.8. Whilst Patient A was receiving personal care from two care assistants (Mr 1 and Ms 2), the Registrant attempted to administer Patient A’s medication. At this, Patient A became aggressive. He refused to take his medication and said to the Registrant ‘I’m going to thump you’ and ‘you can shove it’. He also called the Registrant a ‘four eyed fucker’.
- 2.9. The Registrant responded to this by saying words to the effect of ‘Do you know how long a giraffe’s neck is because if you hit me you’ll have a neck like a giraffe by the time I will be done with you’. Subsequently, Patient A asked the Registrant

'Are you threatening me?' to which the Registrant responded 'No, I'm telling you' before leaving the room.

- 2.10. *Later, the Registrant was in the staff kitchen and said to another care assistant (Ms 3) words to the effect of '[Patient A] is lucky he is in here and not on the outside or I would have knocked his head off' and that Patient A needed 'seven bells knocking out of him.*
- 2.11. *On 17 December 2017, the Registrant was also nurse in charge of the day shift.*
- 2.12. *Patient B was able to stand and sit independently but required carers to be on hand when mobilising.*
- 2.13. *In the course of that shift Patient B/a visitor to Patient B asked that he be moved from one chair into another which was thought to be more comfortable. Patient B was moved from the first chair into a wheelchair by two care assistants (Ms 4 and Ms 5). The Registrant offered to assist with this but was told his help was not required.*
- 2.14. *Patient B was then moved to the second chair and again the Registrant offered to help. On this occasion his help was accepted and Ms 4 stood out of the way. The Registrant then lifted Patient B by scooping him out of the wheelchair. One hand was placed on Patient B's back and the other behind Patient B's knees. This was not an appropriate moving and handling technique and potentially placed both Patient B and the Registrant at risk of injury*
- 2.15. *On both 16 and 17 December 2017 the Registrant fell asleep whilst writing care plans in the Home's lounge/dining room.*

3. *The Registrant admits that the facts amount to misconduct.*

3.1. *The parties have considered the Nursing and Midwifery Council's Code of Conduct and agree that the Registrant's actions were contrary to the following provisions:*

Prioritise people

1 Treat people as individuals and uphold their dignity

1.1 treat people with kindness, respect and compassion

2 Listen to people and respond to their preferences and concerns

- 2.1 work in partnership with people to make sure you deliver care effectively.*
- 2.6 recognize when people are anxious or in distress and respond compassionately and politely.*

Practise effectively

6 Always practise in line with the best available evidence.

Promote professionalism and trust

20 Uphold the reputation of your profession at all times

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

- 3.2. The Registrant accepts that his actions are demonstrative of a lack of care and compassion for Patient A, a failure to observe the principles of safe practice in respect of Patient B, and a general lack of professionalism.*
- 3.3. The NMC acknowledges that the Registrant's misconduct takes place in the context of a hitherto unblemished career. It is also acknowledged that the Registrant admitted the regulatory concerns in this case at the first opportunity.*
- 3.4. The NMC further acknowledges that it could not gainsay the Registrant's case as to why the instant misconduct occurred, namely that his aggressive outbursts were out of character and his falling asleep was a result of working long (14/15 hour days when travel time is included) days in a new environment whilst trying to digest unfamiliar forms i.e. the care plans he was completing when he fell asleep.*
- 3.5. The parties agree that, even when contextual factors are considered, the Registrant's conduct fell far below the standards to be expected of nurses and a finding of misconduct must necessarily follow to declare and uphold those standards.*

4. *The Registrant admits that his fitness to practise is impaired by reason of his misconduct.*
- 4.1. *With reference to the factors outlined by Dame Janet Smith in the 5th Shipman Report he admits that he:*
 - 4.1.1. *has in the past acted so as to put a patient at unwarranted risk of harm;*
 - 4.1.2. *has in the past brought the nursing profession into disrepute;*
 - 4.1.3. *has in the past breached one of the fundamental tenets of the nursing profession.*
- 4.2. *The Registrant accepts that his actions placed Patients A and B at serious, unwarranted, risk of harm.*
- 4.3. *With regard to Patient A the Registrant had a responsibility to seek to de-escalate the situation.*

In responding to Patient A's aggression with aggression of his own he made the situation more dangerous for everyone, including the care assistants and himself.
- 4.4. *Similarly with Patient B, the Registrant's use of an inappropriate moving and handling technique was dangerous to Resident B and himself. Moreover, there was no need for the Registrant to have become involved as the situation was being appropriately managed by care assistants. Finally, with regard to Patient B, the Registrant's actions did not have due regard to Patient B's care needs, he was able to stand for himself with support and would not have needed the kind of intervention performed by the Registrant, even if it had been done correctly.*
- 4.5. *The Registrant's further accepts that his actions have brought the profession into disrepute. It is noteworthy in respect of the Registrant sleeping on duty that this was done in a public area. The evidence suggests a photograph of the Registrant sleeping was taken by a visitor to the Home.*
- 4.6. *The provisions of the Code invoked constitute fundamental tenets of the profession and the Registrant also accepts that his actions have clearly breached these in so far as they relate to compassion and professionalism.*
- 4.7. *The parties note that, the present issues notwithstanding, the Registrant has an unblemished career and further note that the Registrant has made full admissions from the earliest opportunity and demonstrated remorse.*

- 4.8. *The Registrant has kept in contact with the NMC throughout the life of his case and his reflection can be found at **Appendix 1**.*
- 4.9. *The NMC accepts that the Registrant has reflected on this issue and demonstrated well developed insight. The risk that he will commit similar misconduct in future is, the parties agree, low.*
- 4.10. *However, the parties also agree that the Registrant actions are so serious that a finding of current impairment is required in order to maintain public confidence in the professions and to uphold proper professional standards.*
5. *The appropriate sanction in this case is a 5 year caution order*
- 5.1. *The parties agree that in a case where patients and others were placed at risk of harm to take no action would not be appropriate.*
- 5.2. *In the absence of public protection concerns and in light of the Registrant's remorse, reflection and insight, the parties agree that this case is at the lower end of the spectrum of impaired fitness to practise. A caution order is therefore appropriate. A period of 5 years (the maximum period) reflects that the Registrant's actions were a very significant departure from proper standards.*
- 5.3. *A conditions of practice order be inappropriate in this public interest case. With regard to the SG, the following factors contraindicate the imposition of such an order:*
- 5.3.1. *there are no identifiable areas of the Registrant's practice in need of assessment or retraining;*
- 5.3.2. *there is no evidence of general incompetence and as such no indication that retraining would yield a positive response.*
- 5.4. *The parties agree that the public interest in this case is not sufficiently engaged to require either temporary or permanent removal from the register and that such a disposal would be disproportionate.*
- 5.5. *The parties also note that there is a public interest in an otherwise competent nurse returning to practise.*
- 5.6. *With regard to a suspension order, the parties note the following aspects of the SG:*

- 5.6.1. *there is no evidence of harmful deep-seated personality or attitudinal problems;*
- 5.6.2. *there is no evidence of repetition of behaviour since the incident;*
- 5.6.3. *the Registrant through his admissions and acceptance of this agreement has demonstrated insight and does not pose a significant risk of repeating behaviour.*
6. *The parties agree that absent public protection concerns there is no need for an interim order. The high threshold for an interim order otherwise in the public interest in not surmounted in this case.*

The parties understand that this provisional agreement cannot bind a panel, and that the final decision on findings of impairment and sanction is a matter for the panel. The parties understand that, in the event that a panel does not agree with this provisional agreement, the admissions to the charges set out at section 1 above, and the agreed statement of facts set out at section 2 above, may be placed before a differently constituted panel that is determining the allegation, provided that it would be relevant and fair to do so.

Here ends the provisional agreement between the NMC and Mr Johnston. The provisional agreement was signed by Mr Johnston on 27 March 2019 and by the NMC representative on 1 April 2019.

Decision and reasons on the consensual panel determination:

The panel decided to accept the CPD agreement.

The panel heard and accepted the legal assessor's advice. He referred the panel to the NMC Sanctions Guidance (SG) and to the NMC's guidance on Consensual Panel Determinations. He reminded the panel that they could accept, amend or outright reject the provisional agreement reached between the NMC and Mr Johnston. Further, the panel should consider whether the provisional agreement would be in the public interest. This means that the outcome must ensure an appropriate level of public protection, maintain public confidence in the professions and the regulatory body, and declare and uphold proper standards of conduct and behaviour.

The panel noted that Mr Johnston admitted the facts of the charges. Accordingly the panel was satisfied that the charges are found proved by way of Mr Johnston's admissions as set out in the signed provisional agreement before the panel.

The panel then went on to consider whether Mr Johnston's fitness to practise is currently impaired. Whilst acknowledging the agreement between the NMC and Mr Johnston, the panel has exercised its own independent judgement in reaching its decision on impairment.

In respect of misconduct the panel determined that Mr Johnston's attitude and behaviour towards vulnerable residents fell far below the standard expected of a registered nurse. The panel was of the view that falling asleep on duty was also unacceptable behaviour. The panel considered Mr Johnston's failings to be breaches of the Code and sufficiently serious as to amount to professional misconduct. In this respect the panel endorsed paragraphs 3 to 3.5 of the provisional agreement in respect of misconduct.

The panel then considered whether Mr Johnston's fitness to practise is currently impaired by reasons of his misconduct. The panel determined that Mr Johnston's misconduct placed vulnerable patients at an unwarranted risk of harm. However it noted that these actions relate to two isolated incidents in an otherwise unblemished career. The panel considered that Mr Johnston, in sleeping on duty and being photographed doing so by a member of the public, brought the reputation of the profession into disrepute. The panel accepted Mr Johnston's explanations regarding the circumstances of these incidents. The panel found that, in sleeping on duty and failing to treat residents appropriately, Mr Johnston has breached fundamental tenets of the profession.

The panel considered that Mr Johnston has engaged with the NMC throughout this process and admitted the factual matters, misconduct and current impairment at the outset. The panel found that Mr Johnston has reflected on his actions and shown remorse for his failings. The panel considered that Mr Johnston has shown developing insight in his responses to the NMC and that his insight is now sufficiently well developed so as to satisfy the panel that the risk of repetition is currently low.

The panel considered that Mr Johnston's insight, remorse and efforts towards remediation were sufficient to find that his fitness to practice is not impaired on the grounds of public protection. However, the panel determined that Mr Johnston's misconduct is so serious as to require a finding of impairment on public interest grounds in order to maintain confidence in the profession and declare and uphold professional standards. In this respect the panel endorsed paragraphs 4 to 4.10 of the provisional agreement.

Having found Mr Johnston's fitness to practise currently impaired the panel went on to consider what sanction, if any, it should impose in this case. The panel has borne in mind that any sanction imposed must be appropriate and proportionate. The purpose of any sanction is not to be punitive even though it may have a punitive effect.

The panel had careful regard to the SG and noted the proposal for sanction in the preliminary agreement. Decision on sanction is a matter for the panel exercising its own independent judgement.

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 having found Mr Johnston's fitness to practise impaired.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the Sanctions Guidance, which 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 noted that Mr Johnston has shown insight into his conduct. The panel noted that he made full admissions at the outset and has expressed remorse for his misconduct. Mr Johnston has engaged with the NMC since referral. The panel noted that there are no outstanding public protection concerns and that a caution order for the maximum period of time is an appropriate and proportionate sanction to address the public interest in this case.

The panel considered whether it would be proportionate to impose a more restrictive sanction and looked at conditions of practice. The panel noted the misconduct found proved is not easily remediated by conditions and is not that which requires additional training.

The panel concluded that no useful purpose would be served by a conditions of practice order. It is not necessary to protect the public and nor would it mark the public interest in a case of this nature. The panel further considered that a suspension order would be wholly disproportionate in Mr Johnston's case.

The panel has decided that a caution order would adequately protect the public. For the next five years, Mr Johnston's employer or any prospective employer will be on notice that his fitness to practise had been found to be impaired and that his practice is subject to a restriction. The panel has determined that to impose a caution order for a period of five years would be the appropriate and proportionate response. It would mark not only the importance of maintaining public confidence in the profession, but also send the public and the profession a clear message about the standards required of a registered nurse.

At the end of this period the note of the caution on Mr Johnston's entry in the register will be removed. However, the NMC will keep a record of the panel's finding that Mr Johnston's fitness to practise had been found impaired. If the NMC receives a further allegation that his fitness to practise is impaired, the record of this panel's finding and decision will be made available to any practice committee that considers the further allegation.

The panel therefore accepted the provisional agreement.

This decision will be confirmed in writing.

That concludes this determination.