### Facts proved:
All, by way of admission

### Fitness to practise:
Impaired

### Sanction:
**Striking-off order**

### Interim order:
**Interim suspension order (18 months)**
Decision on service of Notice of Meeting:
Mr Mtawali was not in attendance and written notice of this meeting had been sent to his registered address by recorded delivery and by first class post on 15 November 2018. The panel had regard to a printout of the Royal Mail Track and Trace service which showed that the letter was delivered to Mr Mtawali’s address on 16 November 2018 and signed for.

The panel took into account that the Notice of Meeting letter provided details of the allegation and confirmed that a panel of the Fitness to Practise Committee would consider Mr Mtawali’s case on or after 9 January 2019. It stated that the meeting would take place in private and that Mr Mtawali would not be able to attend as the panel would make its decision based on documentary evidence alone.

The panel accepted the advice of the legal assessor.

In light of all of the information available, the panel was satisfied that Mr Mtawali has been served with notice of this meeting in accordance with the requirements of Rules 11A and 34 of the ‘Nursing and Midwifery Council (Fitness to Practise) Rules 2004’, as amended (“the Rules”).

Details of charge:
“That you, a registered nurse:

1. On 23 February 2018 were barred from doing regulated work with children and adults under section 92 of the Protection of Vulnerable Groups (Scotland) Act 2007.

2. Between 6 March 2018 and 20 April 2018, failed to inform MSI Group that you were subject to the barring decision at charge 1 above.
3. Your conduct at charge 2 above was dishonest in that you deliberately did not tell your employer about the barring decision because you were afraid to lose your job.

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

**Decision on the findings on facts and reasons:**
In the Case Management Form (CMF) completed by Mr Mtawali, he indicated that he admitted Charges 1, 2 and 3 in their entirety.

The panel identified that Mr Mtawali had not signed or dated the CMF and therefore requested Mr Mtawali be contacted in order to confirm that he has received the charges, understands the basis of the allegations, and to confirm his earlier admissions. Mr Mtawali confirmed, by way of email on 9 January 2019, the following:

“I confirm all the charges and also want to emphasise i did not work as a staff nurse after receiving a letter from being barred to do regulated work…” [sic]

After a full and thorough consideration of the evidence before it, the panel accepted Mr Mtawali’s admissions.

Accordingly, the panel finds the charges proved by way of Mr Mtawali’s admission.

**Background**
A letter was sent to Mr Mtawali at his home address by special delivery on 1 March 2018 by Disclosure Scotland. The letter confirmed that Scottish Ministers have decided that he is unsuitable to work with children and adults and his name was included on the Children’s
and Adults’ List on 23 February 2018. It confirmed that the meaning of this was that, under Section 92 of the Protection of Vulnerable Groups (Scotland) Act 2007, he was barred from doing regulated work with children and adults indefinitely.

Mr Mtawali completed and provided a Personal Contact and Employment Details Form dated 17 April 2018 to the NMC. The form indicated that he was working for Oncall Care Service Ltd and MSI Group Ltd.

The NMC contacted both employers. In relation to Oncall Care Service Ltd, in an email dated 20 April 2018, they confirmed that Mr Mtawali was removed from their payroll in September 2017 and had not done any shifts since 9 July 2017. In relation to MSI Group Ltd, in an email dated 20 April 2018, the Clinical Governance Manager confirmed that Mr Mtawali was currently registered with them but had not worked any shifts since 5 March 2018. They also confirmed that Mr Mtawali had not disclosed any details of restrictions/conditions to his practice or any ongoing investigations and the first they knew of Mr Mtawali being barred was when the NMC contacted them on 20 April 2018.

Mr Mtawali has engaged with the NMC to date and completed a Regulatory Concerns Response Form on 29 June 2018. Within the form he accepts that he failed to inform the MSI Group that he had been placed on the barred list by Disclosure Scotland. He stated:

“When I received the letter on the 6th of March 2018 around 1145hrs, I did not take any further shifts, I stopped working. My last shift was the 5th of March 2018. I did not think it was necessary to inform them, I was intending to notify them in future, I was concentrating on my appeal, I was afraid to lose my job. My plan was to let them know once I appealed with Disclosure Scotland and also for confidential reasons”. [sic]

Within the form he also confirmed that he was not currently working as a nurse.
On 24 July 2018 Mr Mtawali sent an email to the NMC confirming that he had decided to withdraw his appeal against the decision of Disclosure Scotland.

Mr Mtawali completed a further Regulatory Concerns Response Form on 11 September 2018 where he continued to accept the concerns and confirmed that he was still not working as a staff nurse. He again confirmed that he did not take any shifts for MSI Group after receiving the barring decision.

**Decision and reasons on fitness to practise:**

Having announced its finding on all the facts, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether Mr Mtawali’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 suitability to remain on the register unrestricted.

The NMC invited the panel to find that Mr Mtawali’s actions amount to a breach of ‘The Code: Standards of conduct, performance and ethics for nurses and midwives 2015’ (“the Code”). The NMC identified the specific, relevant paragraphs where Mr Mtawali’s actions amounted to misconduct. The NMC addressed 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. This included reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin).*

The panel has accepted the advice of the legal assessor, which included reference to the case of *Roylance v GMC (No. 2) [2000] 1 AC 311* which defines misconduct as a “word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.”
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 Mtawali’s fitness to practise is currently impaired as a result of that misconduct.

**Decision on misconduct:**
When determining whether the facts found proved amount to misconduct the panel had regard to the terms of the Code.

The panel, in reaching its decision, had regard to the public interest and accepted that there was no burden or standard of proof at this stage and exercised its own professional judgement.

The panel was of the view that Mr Mtawali’s conduct did fall significantly short of the standards expected of a registered nurse, and that this amounted to a breach of the Code. Specifically:

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
   20.2 act with honesty and integrity at all times

23 Cooperate with all investigations and audits. This includes investigations or audits either against you or relating to others, whether individuals or organisations. It also includes cooperating with requests to act as a witness in any hearing that forms part of an investigation, even after you have left the register. To achieve this, you must:
23.3 tell any employers you work for if you have had your practice restricted or had any other conditions imposed on you by us or any other relevant body.

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. The seriousness of the departures from these standards prevented Mr Mtawali from working with children and adults and was compounded by his deliberate decision to withhold the information from MSI Group. The panel accepted that he did not undertake any further shifts, following the barring decision. However, the fact that he was barred and his conduct, particularly the dishonesty, had the potential to seriously damage the reputation of the profession and lead to a risk of harm to patients. This in turn could damage patients’ trust and confidence in the profession. Nurses should display a personal commitment to the standards of practice and behaviour set out in the Code at all times and Mr Mtawali failed to do so.

The panel found that Mr Mtawali’s conduct would be seen as deplorable by fellow practitioners and would damage the trust that the public places in the profession. Accordingly, the panel concluded that Mr Mtawali’s conduct amounted to misconduct.

Decision on impairment:
The panel next went on to decide if as a result of this misconduct, Mr Mtawali’s fitness to practise is currently 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. To justify that trust, nurses must be honest and open and act with integrity. 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.”

Mrs Justice Cox went on to say in Paragraph 76:

“I would also add the following observations in this case having heard submissions, principally from Ms McDonald, as to the helpful and comprehensive approach to determining this issue formulated by Dame Janet Smith in her Fifth Report from Shipman, referred to above. At paragraph 25.67 she identified the following as an appropriate test for panels considering impairment of a doctor’s fitness to practise, but in my view the test would be equally applicable to other practitioners governed by different regulatory schemes.

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. has in the past acted dishonestly and/or is liable to act dishonestly in the future."

The panel finds that the NMC’s allegations do not directly relate to Mr Mtawali’s clinical practice. However, being subject to a barring decision, Mr Mtawali’s failure to disclose this information to his employer has the potential to pose a risk of unwarranted harm to patients. By being subject to a barring decision and putting his own needs above those of his patients and colleagues by dishonestly withholding that information from his employers, Mr Mtawali breached fundamental tenets of the profession. The panel was in no doubt that this would bring the reputation of the profession into disrepute.

Regarding insight, the panel considered that although Mr Mtawali has made admissions to the charges, there is very little in his written submissions to demonstrate an understanding of how his actions could place patients at a risk of harm. He has not demonstrated an understanding of why his conduct was wrong or how this impacts negatively on the reputation of the nursing profession. The panel took into account that dishonesty in particular is difficult to remediate. None of the written submissions from Mr Mtawali address any concern for his patients or the reputation of his profession and he has not demonstrated an understanding of the impact of his actions. Without this information, the panel could not be satisfied that Mr Mtawali has remediated his conduct and therefore diminished the risk of repetition in the future.

The panel was satisfied that a member of the public would be shocked to find that not only has a nurse been barred from working with children and adults, but that they had deliberately withheld that information from an employer. In order to maintain the health safety and well-being of the public and patients, and to protect the wider public interest, which includes promoting and maintaining public confidence in the nursing professions, the panel finds Mr Mtawali’s fitness to practise is currently impaired.
**Determination on sanction:**

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Mr Mtawali off the register. The effect of this order is that the NMC register will show that Mr Mtawali has been struck-off the register.

In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case. The panel accepted the advice of the legal assessor. 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 Sanctions Guidance (SG) published by the NMC.

At an earlier stage, the NMC had advised Mr Mtawali in an ‘NMC Statement of Case’ (undated) that it would ask the panel to make a six month suspension order if it found his fitness to practise currently impaired. In the Notice of Meeting letter, dated 15 November 2018, Mr Mtawali was provided with a list of all potential sanctions the panel may impose when considering his case at a meeting. Although the panel had regard to the NMC’s recommendation, it recognised that the decision on sanction is solely 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.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public interest issues identified, an order that does not restrict Mr Mtawali’s practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where “the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.” The panel considered that Mr Mtawali’s
misconduct was not at the lower end of the spectrum and that a caution order 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 impose a caution order.

The panel next considered whether placing conditions of practice on Mr Mtawali’s
registration would be a sufficient and appropriate response. The panel is of the view that
there are no practical or workable conditions that could be formulated, given the nature of
the seriousness of the charges in this case and the fact that he is barred from working with
adults and children indefinitely.

The panel then went on to consider whether a suspension order would be an appropriate
sanction. The SG states that a 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; and
- The Committee is satisfied that the nurse or midwife has insight and
does not pose a significant risk of repeating behaviour.

Whilst the panel was satisfied that there is no evidence before it of Mr Mtawali having
repeated the misconduct or exhibiting deep-seated attitudinal issues, it considered the
barring and dishonesty to be so serious that a lesser sanction would not be sufficient to
satisfy public interest. Mr Mtawali has not demonstrated any insight, nor has he
demonstrated an understanding of how his actions could place patients at a risk of harm.
He has not demonstrated an understanding of why his conduct was wrong or how this
impacts negatively on the reputation of the nursing profession. Mr Mtawali’s conduct,
including being subject to a barring decision and his dishonesty, was a significant
departure from the standards expected of a registered nurse. The public would expect a
registered nurse to be honest and professional at all times, whether in nursing practice or
in their personal lives. They should act as a role model for other nurses and maintain their professionalism and integrity at all times.

The panel considered the aggravating factors in this case to be:

- Abuse of position of trust;
- Lack of insight;
- Potential risk of harm to patients; and
- A deliberate, premeditated decision to not inform his employer.

The panel considered the mitigating factors in this case to be:

- The charges do not relate to any clinical concerns; and
- Mr Mtawali’s early admissions to the allegations.

The panel has taken into account the mitigation put forth by Mr Mtawali in his written responses in his CMF, RCRFs and the email to his Case Officer dated 9 January 2019. He states in the RCRF, dated 29 June 2018, that upon receipt of the barring letter from Disclosure Scotland on 6 March 2018, he “did not take any further shifts [with MSI Group and]...stopped working.” However, the panel did not consider this to be a mitigating factor. The panel acknowledged that whilst this may have been a deliberate decision by Mr Mtawali, he was in fact barred from working with adults and children in any event. To have worked in his capacity as a registered nurse following the receipt of that letter, would have been committing a criminal offence.

The panel carefully considered whether a suspension order, imposed for a maximum period of one year, would be sufficient to mark the seriousness of the facts in this case. Although it accepted that by the imposition of such an order the public would be protected by restricting Mr Mtawali from working as a registered nurse, the public interest was such that Mr Mtawali’s misconduct is fundamentally incompatible with him remaining on the
register. In this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, in looking at a striking-off order, the panel took note of the following paragraphs of the SG:

- Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?
- Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?
- Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?

The panel was of the view that the findings in this particular case demonstrate that Mr Mtawali’s misconduct was so serious that to allow him to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that the only appropriate and proportionate sanction is that of a striking-off order. Having regard to the matters it identified, in particular the effect of Mr Mtawali’s actions in bringing the profession into disrepute by adversely affecting the public’s view of how a registered nurse should conduct himself, the panel has concluded that nothing short of this would be sufficient in this case.

The panel considered that this order was necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

**Determination on interim order:**
Following its decision on sanction, the panel considered whether or not an interim order should be made. It noted that an interim order should only be made on the grounds that it is necessary for the protection of the public and/or is in the registrant’s interest and/or otherwise in the public interest.

The panel accepted the advice of the legal assessor.

The panel was satisfied that an interim suspension 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. To do otherwise would be incompatible with its earlier findings.

The period of this order is for 18 months to allow for the possibility of an appeal to be made and determined.

If no appeal is made, then the interim order will be replaced by the striking-off order 28 days after Mr Mtawali is sent the decision of this hearing in writing.

That concludes this determination.