

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

**12 June 2019**

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

<b>Name of registrant:</b>	Ms Dominique Ruth O'Brien
<b>NMC PIN:</b>	95C0288E
<b>Part of the register:</b>	Registered Nurse – Adult (2004)
<b>Area of Registered Address:</b>	England
<b>Type of Case:</b>	Misconduct
<b>Panel Members:</b>	John Hamilton (Chair, lay member) Julie Clennell (Registrant member) Ian Dawes (Lay member)
<b>Legal Assessor:</b>	Monica Daley
<b>Panel Secretary:</b>	Leigham Malcolm
<b>Ms O'Brien:</b>	Not present and not represented in absence
<b>Nursing and Midwifery Council:</b>	Represented by Mr Richard Webb, NMC Case Presenter.
<b>Order being reviewed:</b>	Suspension Order – 6 months
<b>Fitness to Practise:</b>	Impaired
<b>Outcome:</b>	Striking-off Order to come into effect at the end of 25 July 2019 in accordance with Article 30 (1)

## **Service of notice of hearing**

The panel was informed at the start of this hearing that Ms O'Brien was not in attendance, nor was she represented in her absence.

The panel was informed that the notice of this hearing was sent to Ms O'Brien on 10 May 2019 by recorded delivery and first class post to her registered address.

The panel accepted the advice of the legal assessor.

In the light of the information available the panel was satisfied that notice had been served in accordance with Rules 11 and 34 of The Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004 (as amended February 2012) (the Rules).

## **Proceeding in absence**

The panel then considered proceeding in the absence of Ms O'Brien. The panel was mindful that the discretion to proceed in absence is one which must be exercised with the utmost care and caution.

Mr Webb referred the panel to evidence of recent and unsuccessful attempts by the NMC to contact Ms O'Brien by telephone and email. He informed the panel that there has been no engagement from Ms O'Brien and that she had disengaged with these regulatory proceedings.

The panel considered all of the information before it, together with the submissions made by Mr Webb, on behalf of the Nursing and Midwifery Council (NMC). The panel accepted the advice of the legal assessor. It noted that there had been no response from Ms O'Brien in relation to the notice of hearing (although the recorded delivery letter had been signed for) nor had there been any request by her for an adjournment.

The panel was satisfied that Ms O'Brien had been sent notice of today's hearing and that she should be aware of it. The panel formed the view that she had chosen voluntarily to absent herself. The panel had no reason to believe that an adjournment would result in Ms O'Brien's attendance. Having weighed the interests of Ms O'Brien with those of the NMC and the public interest in an expeditious disposal of this hearing the panel determined to proceed in Ms O'Brien's absence.

## **Decision and reasons on review of the current order**

The panel decided to impose a striking-off order. This order will come into effect at the end of 25 July 2019 in accordance with Article 30 (1) of the Nursing and Midwifery Order 2001 (as amended) (the Order).

This is the first review of a suspension order imposed by a Fitness to Practise panel on 21 December 2018 for a period of 6 months. The current order is due to expire at the end of 5 July 2019.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved which resulted in the imposition of the substantive order were as follows:

That you, a Registered Nurse on 26 January 2017:

1. Disposed of/commenced the disposal of Oramorph without the presence/signature of a second witness;
2. Inaccurately recorded in the controlled drug book that the Oramorph referred to in Charge 1 above had been correctly destroyed;
3. Did not correct your entry in the controlled drug book to reflect that the pharmacy had been contacted to collect the Oramorph referred to in Charge 1 above;
4. Administered a Matrifen patch 12 mg to Resident A without first checking the resident's MAR Chart and/or care plan;

5. Retrospectively signed Resident A's MAR Chart for the administration of a Matrifen patch 12 mg, without making it clear that such an entry was retrospective;

And that you, a Registered Nurse on 07 April 2017:

6. Incorrectly administered medication, namely a Clonazepam 500mcg tablet and/or Lactulose 15 mls to Resident B, when it was meant for Resident C;

And as a result of the above, your fitness to practise is impaired by reason of your misconduct.

The original panel determined the following with regard to impairment:

The panel next went on to decide if as a result of this misconduct Ms O'Brien's fitness to practise is currently impaired.

The panel reminded itself that there is no burden or standard of proof at this stage of the proceedings and impairment is a matter for the judgment of the panel. It also reminded itself that not every finding of serious misconduct will result in a finding of current impairment.

It had regard to the advice of the legal advisor, which it accepted and incorporated into its decision.

The panel considered the factors set out in the case of *Ronald Jack Cohen v General Medical Council* [2008] EWHC 581 (Admin) and determined that the misconduct found proved can be remediated. However, in the absence of any engagement by Ms O'Brien, there is no evidence before the panel that she has taken steps to remediate.

The panel noted that there is no definition of impairment in statute or the Fitness to Practise Rules. Therefore, in deciding whether Ms O'Brien's fitness to practise is impaired, it considered the questions set out in the judgement of Mrs Justice Cox in the case of Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin) 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 found that limbs a and b were engaged.

The panel finds that whilst Ms O'Brien's errors did not cause any actual harm to patients, they did put patients at unwarranted risk of harm by her failure to undertake appropriate checks to avoid the incorrect administration of medication.

The panel also found that her record keeping and medication errors, involving vulnerable patients, were liable to bring the nursing profession into disrepute.

Regarding insight, the panel considered that in January 2017 Ms O'Brien displayed a significant lack of insight. The panel has noted above Ms O'Brien's comment, "Oh for God's sake it is only a signature" and the impression she made on Ms 1 that she had no insight into the importance of her errors.

Following the medication error in April 2017, proved in charge 6, the panel found that Ms O'Brien displayed improved insight by reporting her error at once, reflecting upon it and recording her reflections in writing.

Nevertheless, in the absence of any engagement by Ms O'Brien, there is no evidence before the panel that her insight has developed to a point where she is safe to practise.

The panel has already recorded above that there is no evidence before it of any remediation undertaken by Ms O'Brien.

The panel is of the view that there is no evidence to reassure it that Ms O'Brien will not repeat her errors and put patients at risk in the future. Accordingly, it can only conclude that the risk remains until Ms O'Brien has developed further insight and taken steps to remediate.

The panel also bore in mind that the overarching objectives of the NMC are 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, which 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, in this case, a finding of impairment on public interest grounds was required. Public confidence in the profession would be undermined if medication errors involving vulnerable patients did not result in a finding of impairment. It is also necessary to make a finding of impairment to send a message to the profession that controlled drugs in particular must be managed and prescribed with care and in accordance with the rules.

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

The original panel determined the following with regard to sanction:

The panel has considered this case very carefully and has decided to make a suspension order for a period of 6 months. The effect of this order is that the NMC register will show that your registration has been suspended.

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. It recognised that the 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. Nor would it address the need for public protection, already identified by the panel. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the SG, 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 considered that Ms O’Brien’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 has already recorded that it can have no confidence that Ms O’Brien’s misconduct will not be repeated. Accordingly, the panel decided that it would be neither proportionate nor in the public interest to impose a caution order. Nor would such an order address the need to protect the public from the risk of harm.

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 SG, in particular:

“Conditions may be appropriate where there is... potential and willingness to respond positively to retraining”

The panel is of the view that there are no practical or workable conditions that could be formulated, because Ms O’Brien has not demonstrated any willingness to engage with her regulator in a way that would give the panel confidence that conditions would be workable. Nor does the panel have any evidence of Ms O’Brien’s current employment situation.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The panel noted that a suspension order may be appropriate where:

“the seriousness of the misconduct requires temporary removal from the register.”

This was serious misconduct, which put patients at risk of harm. The panel determined that the errors were capable of remediation but, in the absence of any evidence of insight or remediation, concluded that a temporary removal from the register would be the most appropriate sanction.

This is because, a period away from practice in which Ms O’Brien could reflect, remediate and engage with her regulator would protect the public without depriving them of a potentially competent nurse. Such an order would also uphold the wider public interest by marking the seriousness of the misconduct.

The panel further considered whether a striking-off order would be proportionate in Ms O’Brien’s case. Taking account of all the information before it, the panel

concluded that it would be disproportionate because it would not reflect the panel's finding that Ms O'Brien's misconduct took place over a relatively short period and fell short of breaching a fundamental tenet of the profession. Nor would it reflect the fact that the misconduct is capable of remediation. Balancing all of these factors the panel has concluded that it would be unduly punitive in this case to impose a striking off order at this time. A suspension order for 6 months would be the appropriate and proportionate sanction.

## **Decision on current fitness to practise**

The panel has considered carefully whether Ms O'Brien's fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's suitability to remain on the register without restriction. In considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. It has noted the decision of the last panel. However, it has exercised its own judgment as to current impairment.

Mr Webb outlined the background to Ms O'Brien's case. He told the panel that Ms O'Brien has not engaged with the NMC nor has she demonstrated that she has complied with the recommendations of the previous panel. He submitted that as there has been no new information made available to the NMC, Ms O'Brien has failed to demonstrate that she has sufficiently developed her insight and remediated the concerns in relation to her nursing practice. Mr Webb submitted, therefore, that an order preventing Ms O'Brien from practising as a registered nurse remains necessary on the grounds of public protection and the wider public interest.

Mr Webb stated that Ms O'Brien has been provided with opportunities to engage in these proceedings and attempts have been made to contact her. In view of Ms O'Brien's persistent lack of engagement and continuing lack of remediation, he submitted that the panel may decide that either a further period of suspension or a striking-off order is appropriate in this case.

The panel has had regard to all of the documentation before it and it took account of the submissions made by Mr Webb, on behalf of the NMC.

The panel heard and accepted the advice of the legal assessor. In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether Ms O'Brien's fitness to practise remains impaired.

The panel was of the view that the findings of the previous panel covered all of the concerns that needed to be addressed in relation to Ms O'Brien's nursing practice. The panel had no new information before it to suggest that Ms O'Brien had acted on the recommendations of the previous panel and developed her insight or remediated the shortcomings in her nursing practice. In the absence of any information to suggest otherwise, the panel considered Ms O'Brien's fitness to practise remains impaired.

The panel decided that a finding of continuing impairment is necessary on the grounds of public protection. It also determined that, in this case, a finding of continuing impairment on public interest grounds is required.

For these reasons, the panel finds that Ms O'Brien's fitness to practise remains impaired.

## **Determination on sanction**

Having found Ms O'Brien's fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Article 30 of the Order. The panel has also taken into account the NMC's Sanctions Guidance (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

The panel first considered whether to take no further action but concluded that this would be inappropriate in view of the risk of harm identified.

The panel then considered whether to impose a caution order. The panel concluded a caution order would also be inappropriate in view of the risk of harm identified as it would do nothing to protect the public.

The panel considered that Ms O'Brien's continued lack of engagement demonstrated a significant lack of insight. The panel noted that the misconduct occurred on two occasions and put patients at risk of harm, which it considered to be an aggravating feature. Further, the panel inferred from Ms O'Brien's lack of engagement that there may be an underlying attitudinal problem.

The panel took account of the fact that, at the time, when Ms O'Brien made the second medication error, she reported it and reflected on the event. However, the panel bore in mind that there has been no information that Ms O'Brien has since developed her insight nor remediated her nursing practice. In addition, the panel considered there to be no evidence of mitigation in this case.

The panel determined that it could not be satisfied that Ms O'Brien had sufficient insight into her failings and would not repeat the errors. The panel concluded that the issues in this case raised fundamental concerns about Ms O'Brien's professionalism.

The panel considered a conditions of practice order. However, mindful of Ms O'Brien's continued lack of engagement, it was not be satisfied that she would be willing or able to comply with any conditions imposed.

Finally, the panel considered imposing a further suspension order. The panel bore in mind Ms O'Brien's persistent lack of engagement and continued failure to demonstrate any remediation in regard to her failings. The panel was of the view that considerable evidence would now be required to show that Ms O'Brien no longer posed a risk to the public. The panel determined that a further period of suspension would not serve any useful purpose in all of the circumstances. Ms O'Brien has provided no evidence that she is willing or able to take the necessary steps to develop her insight and in so doing remediate her practice. The panel concluded that the only appropriate sanction that would protect the public and serve the public interest was a striking-off order.

This decision will be confirmed to Ms O'Brien in writing.

That concludes this determination.