

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

Substantive Order Review Meeting

1 November 2019

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

Name of registrant: Ms Wafzanai Mavhunga

NMC PIN: 02K0559O

Part(s) of the register: Registered Nurse – sub part 1
Adult Nursing (15 November 2002)

Area of Registered Address: England

Type of Case: Caution

Panel Members: Yvonne Brown (Chair, Lay member)
Evette Roberts (Registrant member)
Avril O’Meara (Lay member)

Legal Assessor: Justin Gau

Panel Secretary: Anjeli Shah

Order being reviewed: Suspension Order for 12 months

Fitness to Practise: Impaired

Outcome: Striking-off Order to come into effect at the end of 6 December 2019 in accordance with Article 30(1)

Decision on Service of Notice of Meeting:

Rules 11A and 34 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (as amended) (“the Rules”) state:

‘11A.(1) Where a meeting is to be held in accordance with rule 10(3), the Fitness to Practise Committee shall send notice of the meeting to the registrant no later than 28 days before the date the meeting is to be held.

*34.(3) Any other notice or document to be served on a person under these Rules may be sent by—
(a) ordinary post’*

The panel considered whether notice of this meeting has been served in accordance with the Rules.

Notice of this meeting was sent to Ms Mavhunga’s registered address on 11 September 2019 by recorded delivery and first class post. The panel is satisfied that the notice was sent at least 28 days in advance of this meeting. The panel also noted that notice of this meeting was delivered to Ms Mavhunga’s registered address and signed for in the name of ‘JORDAN’ on 10 October 2019.

The panel finds that notice has been served in accordance with the Rules.

The panel also noted that Ms Mavhunga has been in recent correspondence with the NMC and has provided information by email for this meeting.

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 6 December 2019 in accordance with Article 30(1) of the Nursing and Midwifery Order 2001 (as amended) (“the Order”).

This is the second review of a substantive order, originally imposed as a conditions of practice order by a panel of the Conduct and Competence Committee on 30 December 2016 for 24 months. That order was reviewed by a panel of the Fitness to Practise Committee on 7 December 2018 and it was replaced with a suspension order for 12 months. The current order is due to expire at the end of 6 December 2019.

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

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

That you, a registered nurse:

1. *On 5 August 2015 received a caution for failing to observe an Immigration Act restriction, which prevented you from working in the UK.*

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

The first reviewing panel determined the following with regard to impairment:

“The panel bore in mind the guidance in CRHE v (1) NMC (2) Grant [2011] EWHC 927 (Admin) as to what might lead to a finding of impairment and in particular: has the registrant in the past acted and/or is she liable in the future to act so as to put the patient or patients at unwarranted risk of harm; and/or has the registrant in the past brought and/or is she liable in the future to bring the profession into disrepute; and/or has the registrant in the past breached and/or is

liable in the future to breach one of the fundamental tenets of the medical profession; and/or has in the past acted dishonestly and/or is liable to act dishonestly in the future.

The panel also considered whether a finding of current impairment is required in the wider public interest in order to uphold proper standards of conduct and to protect the reputation of the profession (and the NMC as its regulator).

The panel did not accept your submission that you were unaware of the outcome of your substantive meeting. The panel was mindful that registered nurses have a duty to notify the NMC of their current address and you confirmed that you were living at the address to which the outcome of the meeting was posted. Further the panel noted you had legal representation at the time of the meeting. The panel considered that you were aware of the meeting and you were more likely than not to have taken an active interest in its outcome.

The panel noted that in your later submissions you appeared to contradict your assertion that you were unaware of the outcome. You later told the panel that you considered you could not tell the NMC where you were working, which indicates that you were aware that it would bring to light a breach of the conditions of practice order. The panel was of the view that it was more likely than not that you were aware of the outcome of the substantive meeting.

The panel observed that you fully accept you have continued to work as a registered nurse from time to time, including in September 2018 and that you knew you should not do so because your immigration status did not permit it. It had particular regard to your submission with respect to breach of condition (2) of the conditions of practice order, that:

“I could not write a reflective piece because I knew that what I was doing was wrong and I could not tell the NMC.”

The panel observed that this meant the serious conduct for which you were cautioned by the police had been repeated.

The panel also determined that you breached conditions (1), (2) and (3) of the Conditions of practice order in that you worked as a registered nurse without demonstrating to the NMC that you had a right to work in the UK, you failed to provide a reflective piece prior to this review hearing and you did not inform the NMC within 14 days of taking up nursing appointments and did not provide the NMC with details of your employer from time to time.

In your submissions to the panel you said that you did your best to work to the standards expected of you and had a long history of working without any difficulties. However you did not demonstrate any appreciation of the impact of your behaviour on the reputation of the profession in working as a registered nurse when you have no legal entitlement to do so and how an ordinary member of the public might be shocked or dismayed by your behaviour. The panel considered that your submissions focussed on your own interests and you failed to show any insight or appreciation of the wider public interest and your duty to uphold the reputation of the profession.

You submitted that you need to continue to work to earn money until at least May 2019 when you anticipate your immigration and working status may be resolved. The panel was therefore of the view there is a high risk that you will continue to work in spite of the restrictions upon you to the contrary.

The panel considered that your actions were in serious breach of the following numbered provisions of “The Code: Professional standards of practice and behaviour for nurses and midwives (2015” (The Code)

“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

20.4 keep to the laws of the country in which you are practising”

The panel determined that that there is a high risk of repetition of your behaviour. The panel bore in mind there was no evidence before it of any harm or risk of harm to patients. Nonetheless, you have behaved in such a way as has brought or is liable in the future to bring the profession into disrepute; and you have breached fundamental tenets of the profession in not keeping within the law, and are liable to do so in the future. The panel bore in mind that its primary function was to protect patients and the wider public interest, which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and behaviour. The panel determined that, in this case, a finding of current impairment was required in the public interest, to maintain the reputation of the profession and uphold standards.

For these reasons, the panel concluded that your fitness to practise is currently impaired.”

The first reviewing panel went on to determine the following with regard to sanction:

“The panel next considered the making of a suspension order. It concluded that a suspension order would protect the public interest in that your practice would be restricted and that the restriction would be evident to those who might consider employing you. It would be open to you to apply for an early review in the event that you are able to achieve the legal status that permits you to be lawfully employed. It therefore considered that a suspension order would be an appropriate and proportionate order to uphold proper standards of conduct and behaviour, maintain public confidence in the profession and its regulator and thereby satisfy the wider public interest.

The panel gave serious consideration to imposing a striking-off order. However, the panel noted that there was no evidence before it of clinical incompetence nor any evidence of harm to patients. While the panel considered you showed a persistent lack of insight in relation to your behaviour it also bore in mind your declared commitment to your profession, the value you place on your career, and the prejudice that a striking-off order would bring to your personal and financial

interests. The panel also noted that this is the first review of the substantive order. It concluded that the protection of the public interest could be achieved by restricting your practice through a period of suspension whilst allowing you further time to develop insight into your conduct and resolve your immigration status.

The panel therefore determined that a suspension order would be a sufficient and proportionate response in this matter. Having heard submissions from Ms Jean and from you the panel determined that this was an exceptional case where it was appropriate to replace the existing order with a suspension order that takes immediate effect and to extend that suspension order for a period of 12 months. The panel's reasons were that, in light of your stated intention to continue to practise as a registered nurse, the public interest could not be adequately protected unless your practice was fully and immediately restricted.

Accordingly, the panel decided to replace the existing order with a suspension order in accordance with Article 30 (4) (d) of the Nursing and Midwifery Order 2001 (as amended) (the Order) and extend the suspension order for a period of 12 months in accordance with Article 30 (1) (a). The further period of suspension will be sufficient to cover the time you have suggested is required to resolve your immigration position. The panel considered there should be a review of the order prior to its expiry."

Decision on current fitness to practise

This panel has considered carefully whether Ms Mavhunga'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.

The panel had regard to all of the documentation before it, including recent emails and documents from Ms Mavhunga to the NMC.

The panel 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 Mavhunga's fitness to practise remains impaired.

The panel considered what information had been provided since the previous review hearing, noting that the previous panel imposed a suspension order to give Ms Mavhunga further time to develop insight into her conduct and to resolve her immigration status.

The panel noted that Ms Mavhunga told the previous panel that a Leave to Remain application had been denied in May 2018, and that, at the time (December 2018), the Home Office were processing her most recent application of 7 November 2018, and she was awaiting the decision. The panel had a number of responses before it from Ms Mavhunga for this review meeting. Within those responses there was no information regarding any outcome of the Leave to Remain application submitted in November 2018. In an email to the NMC dated 30 October 2019 Ms Mavhunga stated that her solicitor required £2000 in fees for the Home Office in order to present her application.

There was no information in any of the documentation before the panel to suggest that Ms Mavhunga's immigration status had been resolved and that she now had a legal right to work in the UK.

The panel noted that Ms Mavhunga was originally referred to the NMC for working whilst she did not have a legal entitlement to do so, for which she became subject to a police caution. Ms Mavhunga was made subject to a conditions of practice order in 2016. The previous reviewing panel found that Ms Mavhunga worked in breach of that conditions of practice order as she returned to working as a registered nurse. At the previous hearing Ms Mavhunga claimed that she was unaware of the conditions of practice order. That panel did not accept Ms Mavhunga's explanation. That panel found it was more likely than not that she was aware of the conditions. This panel noted that in Ms Mavhunga's responses to the NMC, whilst she did apologise and made reference to her personal and financial circumstances, she did not appear to demonstrate insight, in recognising the seriousness of working whilst not legally permitted to do so and working in breach of a conditions of practice order.

The panel recognised that this case did not raise concerns with Ms Mavhunga's clinical practice, and therefore it did not consider it necessary to make a finding of impairment on public protection grounds.

However, the panel bore in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel considered that Ms Mavhunga's actions were serious, in working when she did not have the legal right to do so and working in breach of her conditions of practice order. Ms Mavhunga still does not have a legal right to work in the UK, and therefore it would not be appropriate for her to be permitted to practise as a nurse without restriction. The panel considered that confidence in the nursing profession and in the NMC as a regulator would be undermined if a finding of impairment were not made on public interest grounds, in light of the seriousness of Ms Mavhunga's actions, the fact that she has not demonstrated insight and the fact that she continues to not have the legal right to work in the UK. The

panel therefore determined that a finding of impairment remains necessary on public interest grounds.

For these reasons, the panel finds that Ms Mavhunga's fitness to practise is currently impaired, on public interest grounds alone.

Determination on sanction

Having found Ms Mavhunga'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 also took into account the NMC's Sanctions Guidance ("SG") and bore 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 action but concluded that this would be inappropriate in view of the seriousness of the case and the fact that Ms Mavhunga does not have the legal right to work in the UK. The panel determined that taking no action would not satisfy the public interest.

The panel then considered whether to impose a caution order but concluded that this would also be inappropriate in view of the seriousness of the case and the fact that Ms Mavhunga does not have the legal right to work in the UK. The panel determined that imposing a caution order would not satisfy the public interest.

The panel next considered whether to impose a conditions of practice order. The panel noted that Ms Mavhunga was previously made subject to a conditions of practice order, with a condition requiring her not to work as a registered nurse until she had demonstrated to the NMC that she had a right to work in the UK. Ms Mavhunga worked in breach of this condition, as she worked as a registered nurse despite the fact that she had not obtained Leave to Remain. In light of Ms Mavhunga working in breach of a previous conditions of practice order, the panel did not consider that there was evidence to suggest that Ms Mavhunga would comply with a conditions of practice order. Given that Ms Mavhunga's immigration status had not been resolved, the panel did not consider that conditions would be workable. Furthermore, having regard to the seriousness of this case and Ms Mavhunga's actions, the panel considered that a conditions of practice order would not satisfy the public interest considerations in this case.

The panel considered whether to impose a further suspension order. In doing so, the panel gave consideration as to what a further period of suspension may achieve. The panel noted that the previous reviewing panel imposed a suspension order for 12

months to give Ms Mavhunga time to reflect and demonstrate insight into her conduct as well as time for her immigration status to be resolved. Since that suspension order was imposed, the panel noted that the position remained the same regarding Ms Mavhunga's immigration status. Ms Mavhunga had now communicated to the NMC that she needed to pay £2000 in fees to her solicitor in order to continue her application process for obtaining Leave to Remain. The panel noted that Ms Mavhunga's previous applications for Leave to Remain had been refused. The panel did not consider that there was any information to suggest that, should it impose a further period of suspension, Ms Mavhunga's immigration status was likely to be resolved, allowing her the legal right to remain in and work in the UK. Furthermore, whilst Ms Mavhunga had provided a number of responses to the NMC, expressing her difficult financial, personal and legal circumstances, she had not demonstrated any insight into the seriousness of working when she did not have a legal right to do so and working in breach of the conditions of practice imposed in respect of this.

Whilst the panel expressed sympathy with the extremely difficult position Ms Mavhunga found herself in, it did not consider that imposing a further period of suspension would serve any useful purpose in the circumstances. The panel noted that Ms Mavhunga had been subject to the NMC's proceedings for a number of years. Within that time, whilst Ms Mavhunga had provided information regarding her seeking to resolve her immigration status, the panel did not consider that any of the information provided suggested she was likely to be successful if another period of temporary removal from the register were to be imposed. Furthermore, whilst noting Ms Mavhunga's engagement and the numerous responses provided, having regard to those responses, the panel did not consider that a further period of time would be likely to result in Ms Mavhunga demonstrating insight and recognition of the seriousness of her behaviour.

The panel then considered whether to impose a striking-off order. The panel recognised Ms Mavhunga's extremely difficult personal, financial and legal position, and it considered that she is to be commended for remaining engaged with these proceedings and has sought to provide information. However, the panel also recognised that it was not in the public interest for these proceedings to continue, particularly if they would serve no useful purpose in returning a nurse to unrestricted practice. The panel considered that in the circumstances of this case it was unlikely that Ms Mavhunga

would successfully resolve her immigration status. Furthermore, the panel considered that Ms Mavhunga's behaviour was serious, in working when she did not have the right to do so, and then continuing to work as a registered nurse when she did not have Leave to Remain in breach of her conditions of practice order. Ms Mavhunga had not demonstrated any insight into the seriousness of her behaviour and the panel considered that this was fundamentally incompatible with being a registered professional.

The panel considered that it was now necessary, appropriate and proportionate to take action to prevent Ms Mavhunga from practising in the future, and it concluded that the only sanction which would adequately satisfy the public interest would be that of a striking-off order. The panel considered that this would maintain confidence in the nursing profession and in the NMC as a regulator as well as sending to the profession a clear message about the standards of behaviour expected of a registered nurse.

In accordance with Article 30(1) of the Order, this striking-off order will come into effect upon the expiry of the current order, namely at the end of 6 December 2019.

This decision will be confirmed to Ms Mavhunga in writing.

That concludes this determination.