

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

Substantive Order Review Hearing

3 August 2020

Nursing and Midwifery Council, Virtual Hearing

Name of registrant:	Mrs Bernadette R Gargar
NMC PIN:	03Y0063O
Part(s) of the register:	Registered Nurse – sub part 1 Adult Nursing (19 June 2003)
Area of Registered Address:	Surrey
Type of Case:	Lack of Competence
Panel Members:	Andrew Galliford-Yates (Chair, Registrant member) John McGrath (Registrant member) Alexandra Ingram (Lay member)
Legal Assessor:	Ian Ashford-Thom
Panel Secretary:	Anjeli Shah
Mrs Gargar:	Not present and not represented
Nursing and Midwifery Council:	Represented by Assad Badruddin, Case Presenter
Order being reviewed:	Suspension Order for 3 months
Fitness to Practise:	Impaired
Outcome:	Striking-off order to come into effect at the end of 9 September 2020 in accordance with Article 30(1)

Decision and reasons on marking the determination and transcript of this hearing as private

At the outset of the hearing, Mr Badruddin, on behalf of the Nursing and Midwifery Council (“NMC”), invited the panel to consider whether to mark parts of the transcript of this hearing as private. This was on the basis that there were references to Mrs Gargar’s health within the documentation before the panel. Mr Badruddin submitted that although he would not be referring to those parts of the documentation in detail, if any questions regarding Mrs Gargar’s health arose, it would be appropriate to mark the transcript as private for such references, to protect Mrs Gargar’s privacy.

Rule 19 of the Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004 (as amended) (“the Rules”) and the NMC guidance has been amended to allow for virtual hearings during the COVID-19 crisis period. Rule 19 (5) states that Rule 19 does not apply to virtual hearings. However, paragraphs 27-33 of the NMC guidance during the COVID-19 emergency period sets out that transcripts may be marked as wholly or partially private and confidential where appropriate.

Having heard that there may be references to Mrs Gargar’s health, the panel determined to mark any such references as private within any transcript and determination produced as a result of this hearing, in order to protect Mrs Gargar’s right to privacy and confidentiality.

Service of Notice of Hearing

The panel was informed at the start of this hearing that Mrs Gargar was not in attendance, and she was not represented in her absence.

The panel was informed that the notice of this hearing was sent to Mrs Gargar on 3 July 2020 to her email address on the register. The panel further noted that on 29 July 2020 Mrs Gargar confirmed by email that she had received notification of the hearing.

The panel accepted the advice of the legal assessor.

The panel noted that under the recent amendments made to the Rules during the COVID-19 emergency period, notice of hearing can be sent to an email address held for the registrant on the register, or an email address the registrant has notified the NMC of for the purposes of communication.

In the light of the information available, the panel was satisfied that the notice period was reasonable in all the circumstances of this case. It was satisfied that notice had been served in compliance and in accordance with Rules 11 and 34 of the Rules.

Proceeding in absence

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

The panel considered all of the information before it, together with the submissions made by Mr Badruddin, on behalf of the Nursing and Midwifery Council (“NMC”). The panel accepted the advice of the legal assessor, who referred to the cases of *R v Jones* [2002] UKHL 5 and *Adeogba v GMC* [2016] EWCA Civ 162.

Mr Badruddin submitted, on behalf of the NMC that the panel must proceed with the “utmost care and caution” when determining whether to proceed in the absence of a registrant. He submitted that fairness to a registrant must be balanced with the wider public interest. Mr Badruddin submitted that reasonable efforts had been made by the NMC to serve Mrs Gargar with notice of today’s hearing. He referred the panel to the cases of *Jones* and *Adeogba* and the principles contained within those cases.

Mr Badruddin submitted that there was a public interest in the expeditious disposal of this hearing, given that this was the fifth statutory review of a substantive order, due to expire at the end of 9 September 2020. He submitted that the panel should consider the level of Mrs Gargar’s engagement and any reasons for her non-attendance at the hearing. Mr Badruddin submitted that having regard to the narrative of Mrs Gargar’s case, the panel would be familiar with her level of engagement. He referred the panel to an email from Mrs Gargar dated 29 July 2020, in which she stated:

“...I received the message that there would be hearing on August 3, 2002. I could not attend the hearing. Kindly, I would like to be informed what would be the result of the hearing. (sic)”

Mr Badruddin submitted that this email was limited in scope in terms of Mrs Gargar providing a reason for not attending the hearing. He submitted that Mrs Gargar remained on the register, with an expectation to engage with these proceedings and to

cooperate with her regulator. On the basis of her email, Mr Badruddin submitted that it was clear that Mrs Gargar is aware of the hearing and that she was not attending of her own volition. He submitted that Mrs Gargar had wilfully decided not to attend and she had voluntarily absented herself.

Mr Badruddin submitted that unfairness to a registrant must be considered, and that there would always be unfairness when a registrant does not attend a hearing, as they would be unable to make submissions or raise questions or issues with the evidence put forward by the NMC. However, he submitted that Mrs Gargar had made an active choice not to attend the hearing, which would diminish the level of unfairness to her. Mr Badruddin also submitted that fairness to the NMC needed to be considered. He submitted that Mrs Gargar had been given a fair opportunity to engage with this hearing, and she had made her position clear. Therefore, Mr Badruddin submitted that proceeding in Mrs Gargar's absence would not render any unfairness.

Mr Badruddin submitted that Mrs Gargar had not requested an adjournment, and within her email, she stated that she would like to be informed of the outcome of the hearing. He therefore submitted that Mrs Gargar had presumed that the panel will proceed in her absence today. Mr Badruddin submitted that if the panel did decide to grant an adjournment, there was no evidence that it would secure Mrs Gargar's attendance at a hearing on a future date, taking into account the nature of her email, and the narrative of her case, based on previous hearings. In these circumstances, Mr Badruddin submitted that it would be fair, appropriate and proportionate to proceed in the absence of Mrs Gargar.

The panel had regard to the information before it, including Mrs Gargar's email to the NMC dated 29 July 2020, in which she made it clear that she would not be attending the hearing. The panel noted that Mrs Gargar had not requested an adjournment. It did not consider that there was any information to suggest that an adjournment would secure Mrs Gargar's attendance at a hearing on a future date. The panel was of the view that Mrs Gargar had voluntarily absented herself from today's hearing. The panel also had regard to the public interest in the expeditious disposal of this hearing, and noted that the purpose of today's hearing was to undertake a mandatory review of a substantive

order, to which Mrs Gargar is subject, which is due to expire at the end of 9 September 2020. In these circumstances, the panel determined to proceed in the absence of Mrs Gargar.

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 9 September 2020 in accordance with Article 30(1) of the Nursing and Midwifery Order 2001 (as amended) (“the Order”).

This is the fifth review of a substantive order. On 6 April 2018, a panel of the Fitness to Practise Committee, imposed a conditions of practice order for a period of 12 months. That order was reviewed on 18 April 2019 and a conditions of practice order was imposed for two months. On 10 June 2019 a suspension order for two months was imposed. At the third review on 1 August 2019, the suspension order was extended for nine months, and this was further extended for three months at the fourth review on 29 April 2020. The current order is due to expire at the end of 9 September 2020.

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

The charges, found proved, by way of admission, at a consensual panel determination hearing, which resulted in the imposition of the substantive order were as follows:

That you between January 2015 and December 2016 failed to demonstrate the standards of knowledge, skill and judgement to practise without supervision as a Band 5 Staff nurse in that you:

- 1. Failed to meet one or more objectives that were set as part of the Steps towards Effective Performance (‘STEPS’) Programme between January 2015 and 6 September 2016;*
- 2. Whilst subject to the STEPS programme;*
 - a) On or around 21 January 2016 failed to respond appropriately during a patient’s cardiac arrest in that you were unable to locate the defibrillator;*
 - b) On 25 January 2016 failed to deal appropriately with one or more patients that were noted to be of concern in that you;*
 - (i) Did not check Patient GT’s temperature and/ or give Patient GT paracetamol;*

- (ii) Did not immediately administer an injection of S/C cyclizine to Patient BW when instructed to do so;*
- c) On 7 February 2016 inappropriately mobilised a patient who was deemed non-weight bearing;*
- d) On 9 February 2016 administered 25mg of Pregabalin at 09:25 instead of 14:00*

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

“Regarding Mrs Gargar’s insight, the panel noted that the last panel concluded that Mrs Gargar had not demonstrated continuing insight and that there was no evidence before it to demonstrate that Mrs Gargar had remediated the deficiencies identified in her practice. This panel has no new information before it to determine whether Mrs Gargar’s insight has developed in the last eight months or whether she has taken any steps to remedy her practice. The panel noted that the failings listed were serious; Mrs Gargar failed to commence resuscitation on a patient, and issues were identified with basic, fundamental nursing skills including medication management, record keeping and caring for deteriorating patients. There is no evidence that any of these failings have been addressed despite clear guidance from previous panels. The panel noted that there is an onus on Mrs Gargar to provide evidence of any remediation or insight.

The last panel determined that Mrs Gargar was liable to repeat matters of the kind found proved. This panel has received no information to determine that there is no longer a risk of repetition of these failings. In light of this the panel determined that Mrs Gargar remains liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne 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 has determined that, in this case, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that Mrs Gargar's fitness to practise remains impaired."

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

"The panel considered the imposition of a further period of suspension. It was of the view that a short suspension order would allow Mrs Gargar an opportunity to re-engage with these proceedings. The panel noted that Mrs Gargar had engaged with today's proceedings insofar as she has made clear her wish not to participate. The panel had regard to the documentation she provided to the previous reviewing panel in August 2019. Mrs Gargar made a clear statement in her letter to the previous panel, dated 30 July 2019, that she wished to continue with her nursing career. Further, the panel had sight of information from her employer which indicated Mrs Gargar had attended some training courses to remediate her practice. This panel was of the view that there had appeared to be some progress at this point but there was no evidence of any progress made over the last eight months. The panel was mindful that Mrs Gargar had previously expressed her intention to continue with her nursing practice however, the panel was disappointed that she had not provided any information as to her present employment status or current intention regarding her nursing career.

The panel noted the GP letter dated 16 April 2019 which also confirmed Mrs Gargar had made significant progress in her health conditions. The panel was mindful that it has no up to date information as to the state of Mrs Gargar's current health but recognised the potential impact a deterioration in her health may have had on her engagement.

The panel considered that, whilst Mrs Gargar's lack of engagement raises questions about her professionalism, it has not yet reached the stage where her

failings are fundamentally incompatible with remaining on the register, albeit currently temporarily removed from the register.

The panel was cognisant of the number of opportunities that have been afforded Mrs Gargar and the clear steer that previous panels have made in respect of what is required of her. The panel considered a striking-off order however, it concluded that it would be disproportionate at this stage. The panel noted that if Mrs Gargar's lack of engagement continues that a future panel may consider this an appropriate sanction in the circumstances. However, this panel concluded it would be fair and appropriate to allow Mrs Gargar a further opportunity to meaningfully engage with these proceedings. The panel further considered that, in the current climate of the Covid-19 pandemic, there was a public interest in allowing Mrs Gargar a further opportunity to demonstrate insight and remediation of the concerns identified in her practice.

The panel therefore concluded that a suspension order, for a period of three months, to be the most appropriate and proportionate sanction available. This would afford Mrs Gargar adequate time to re-engage with the NMC proceedings and demonstrate her progress. This suspension order will take effect upon the expiry of the current suspension order, namely at the end of 9 June 2020 in accordance with Article 30 (1) of the Nursing and Midwifery Order 2001.

This decision will be reviewed before its expiry. A future panel would be assisted by:

- Mrs Gargar's attendance at the next review hearing;*
- A statement from Mrs Gargar stating her intentions regarding her future nursing career;*
- Copies of signed supervision records;*
- Evidence of how Mrs Gargar has kept her nursing knowledge up to date including any online e-learning;*
- If Mrs Gargar has remained in a health care setting; documentary evidence to demonstrate her competence in the following areas*

(this can include signed reports from her employer, a personal development plan and/or training records/certificates):

- Medicines management;*
- Record keeping;*
- Managing/caring for deteriorating patients;*
- Resuscitation;*
- A written reflective piece that addresses the impact of her failings and how she would do things differently in future;*
- References/testimonials from her employer and nursing colleagues.*

Decision on current fitness to practise

This panel has considered carefully whether Mrs Gargar'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. It took account of the submissions made by Mr Badruddin, on behalf of the NMC.

Mr Badruddin submitted, on behalf of the NMC, that this panel finds itself in a similar position to previous panels, in that there is no documentary evidence before it to demonstrate that Mrs Gargar's lack of competence has been remedied. He submitted that Mrs Gargar has failed to demonstrate a continuing level of insight. Mr Badruddin submitted that Mrs Gargar had not been able to show that she has addressed her clinical failings, despite being given many opportunities to engage with these proceedings. He submitted that the risk of Mrs Gargar's repeating clinical errors of the same type is very high, and that there would be a risk to the public and the reputation of the nursing profession if she were able to practise unrestricted. Mr Badruddin therefore invited the panel to find that Mrs Gargar's fitness to practise remains impaired on public protection and public interest grounds.

Mr Badruddin submitted that the issue of sanction is a matter of professional judgement for the panel. He submitted that Mrs Gargar had been subject to two conditions of practice orders and three suspension orders. Mr Badruddin submitted that the previous panel considered whether to impose a striking-off order, but decided to provide Mrs Gargar with another opportunity to engage with these proceedings. However, he submitted that Mrs Gargar had not taken that opportunity.

Mr Badruddin submitted that a conditions of practice order would not be workable, and that a further suspension order, after Mrs Gargar having been subject to this type of

sanction three times, was not appropriate. He submitted that it would not be in the public interest, nor would the public be protected, if Mrs Gargar were to be suspended again. Mr Badruddin submitted that this would result in a future reviewing panel finding themselves in the same position as this panel as well as previous panels. He invited the panel to consider Mrs Gargar's lack of engagement and the lack of evidence of remediation and whether this now made her incompatible with remaining on the register. Mr Badruddin submitted that Mrs Gargar's email to the NMC dated 29 July 2020 did not address what the previous panel had requested, and more was required in order for Mrs Gargar to address insight and her clinical failings. He submitted that to date, Mrs Gargar had not provided such evidence in order to assist panels.

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 Mrs Gargar's fitness to practise remains impaired.

The panel considered that there was no new information before it, and therefore there had been no real material change of circumstances since the previous review hearing. The panel noted that Mrs Gargar had emailed the NMC on 29 July 2020 to notify it that she would not be attending today's hearing, and that she would like to be informed of the outcome of this hearing. Apart from this email, there had been no further engagement from Mrs Gargar. The panel noted that the previous reviewing panel, in its determination on 29 April 2020, had provided Mrs Gargar with a further opportunity to engage with these proceedings, and it had been very clear as to what this panel would be assisted by, in order for Mrs Gargar to demonstrate evidence of insight and remediation. Despite being given such clear information by the previous reviewing panel, Mrs Gargar had not meaningfully engaged with these proceedings, and she had not taken up that opportunity. The panel considered that Mrs Gargar had not provided any of the evidence requested by the previous panel.

The panel therefore considered that there was no information before it to demonstrate that Mrs Gargar had addressed her clinical failings and that she had remediated her lack of competence. The panel also considered that there was no evidence to show the development of any insight on Mrs Gargar's part. The panel had nothing before it to provide reassurance that Mrs Gargar would not repeat her clinical failings in the future. The panel therefore considered that there is a high risk of repetition, and that patients would be placed at a real risk of harm if Mrs Gargar were able to practise without restriction. The panel determined that a finding of impairment remains necessary on the grounds of public protection.

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 had regard to Mrs Gargar's lack of meaningful engagement with these proceedings, despite being given further time by the previous panel to engage, and with clear directions as to how she could provide this panel with evidence to demonstrate remediation and insight. The panel considered that Mrs Gargar had a duty to engage with these proceedings and cooperate with the NMC as her regulator, and she had failed to do. The panel therefore determined that a finding of impairment also remains necessary on public interest grounds, in order to maintain confidence in the nursing profession and in the NMC as a regulator.

For these reasons, the panel finds that Mrs Gargar's fitness to practise remains impaired.

Determination on sanction

Having found Mrs Gargar'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 risk of repetition identified. Taking no action would not restrict Mrs Gargar's practice. The panel determined that taking no action would not protect the public and it 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 risk of repetition identified. Imposing a caution order would also not restrict Mrs Gargar's practice. The panel determined that imposing a caution order would not protect the public and it would not satisfy the public interest.

The panel next considered whether to impose a conditions of practice order. The panel noted that Mrs Gargar had previously been subject to conditions of practice orders but she had failed to comply with them. The panel noted Mrs Gargar's lack of meaningful engagement with these proceedings. It considered that there was no evidence to suggest that Mrs Gargar would be willing or able to comply with a conditions of practice order. The panel determined that it would not be possible to formulate workable or practicable conditions, which would suitably protect the public and satisfy the public interest.

The panel next considered whether to impose a further suspension order. The panel noted that Mrs Gargar had been the subject of three suspension orders, after having been subject to two conditions of practice orders. During that time, there was no evidence to suggest that Mrs Gargar had developed any further insight, that she had done anything to remediate her clinical failings, and that she was any closer to being able to return to safe and effective practice. To the contrary, the panel considered that during these periods of suspension, during which time Mrs Gargar's engagement had been limited, and limited evidence of further insight and remediation had been

produced, Mrs Gargar had in fact moved further away from being able to return to safe and effective practice. The panel considered that previous panels had clearly given Mrs Gargar information about what she would need to do in order to satisfy future panels that she was safe to return to practice. Indeed, Mrs Gargar had been given many opportunities to engage and provide such information. Despite those numerous opportunities, Mrs Gargar had not engaged and provided any evidence to demonstrate that she had mitigated any risks associated with her practice, and to demonstrate that she was capable of safe and effective practice. The panel considered that the risk of Mrs Gargar repeating her clinical failings was high, and that in the circumstances, a further suspension order would serve no useful purpose. It concluded that a suspension order would not be appropriate or proportionate in the circumstances of this case.

The panel determined that it would not be in the public interest for a further a suspension order to be imposed, in circumstances where there was no evidence to suggest that this would facilitate further engagement from Mrs Gargar, and facilitate her return to safe and effective practice. The panel noted that this was the fifth review of a substantive order, originally imposed on Mrs Gargar's registration in 2018. Despite the number of opportunities given to Mrs Gargar to demonstrate evidence of insight and remediation, she had failed to engage with these opportunities. The panel considered that this raised fundamental questions about Mrs Gargar's willingness and ability to remediate her clinical failings. The panel considered that in light of this and Mrs Gargar's lack of meaningful engagement with the NMC as a her regulator, Mrs Gargar's position was fundamentally incompatible with being a registered nurse. It considered that a striking-off order was now the only sanction which would be sufficient to protect patients and members of the public and to maintain proper professional standards. The panel determined that public confidence in the nursing profession and in the NMC as a regulator would be undermined if Mrs Gargar were not permanently removed from the register. The panel concluded that a striking-off order is the only appropriate and proportionate sanction in the circumstances of this case.

In accordance with Article 30(1) of the Order, this striking-off order will come into effect upon the expiry of the current suspension order, namely at the end of 9 September 2020.

This decision will be confirmed to Mrs Gargar in writing.

That concludes this determination.