Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
17-18 December 2020
2 Stratford Place, Montfichet Road, London, E20 1EJ

21-23 December 2020
Virtual Hearing

Name of registrant:	John Thomas Kelly
NMC PIN:	70J0015N
Part(s) of the register:	Registered Nurse 5 October 1972
Area of registered address:	Armagh
Type of case:	Misconduct
Panel members:	Florence Mitchell (Chair, Registrant member) Alex Forsyth (Lay member) John McGrath (Registrant member)
Legal Assessor:	Nigel Mitchell
Panel Secretary:	Roshani Wanigasinghe
Nursing and Midwifery Council:	Represented by Leeann Mohamed, Case Presenter
Mr Kelly:	Not present and not represented
No case to answer:	Charge 2a
Facts proved:	Charge 1 in its entirety, 2b, 3, and 4 in respect of Charge 1a, 1c, and 2b
Facts not proved:	Charge 4 in respect of 2a only
Fitness to practise:	Impaired
Sanction:	Striking-off order
Interim order:	Interim suspension order (18 months)

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Kelly was not in attendance and that the Notice of Hearing letter had been sent to Mr Kelly's registered address by recorded delivery and by first class post on 3 November 2020.

The panel had regard to the Royal Mail 'Track and trace' printout which showed the Notice of Hearing was delivered to Mr Kelly's registered address on 4 November 2020. It was signed for against the printed name of 'KELLY'.

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

Ms Mohamed, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Mr Kelly has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Mr Kelly

The panel next considered whether it should proceed in the absence of Mr Kelly. It had regard to Rule 21 and heard the submissions of Ms Mohamed who invited the panel to continue in the absence of Mr Kelly. She submitted that Mr Kelly had voluntarily absented himself.

Ms Mohamed referred a letter dated 10 January 2020 in which Mr Kelly's then representative had written:

> *"We have consulted with our client at length regarding this matter, and given his age our client has decided that he no longer intends to participate in this process, and in fact intends to seek the voluntary removal of his name from the register."*

Ms Mohamed further submitted that the NMC had attempted to call Mr Kelly on a number of occasions, most recently on 9 and 10 December 2020 but had been unsuccessful. Ms Mohamed submitted, as a consequence of Mr Kelly's disengagement from these proceedings, there was no reason to believe that an adjournment would secure his attendance on some future occasion.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised *'with the utmost care and caution'*.

The panel has decided to proceed in the absence of Mr Kelly. In reaching this decision, the panel has considered the submissions of Ms Mohamed, the letter from Mr Kelly's then representative, and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v Jones* and *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mr Kelly;
- Mr Kelly has informed the NMC that he does not want to participate in this process;

- There is no reason to suppose that adjourning would secure his attendance at some future date;
- Two witnesses have been warned to give evidence via video link on the second day of this hearing;
- Not proceeding may inconvenience the witnesses, their employer(s) and, for those involved in clinical practice, the clients who need their professional services;
- The charges relate to events that occurred in 2017;
- Further delay may have an adverse effect on the ability of witnesses accurately to recall events; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mr Kelly in proceeding in his absence. Although the evidence upon which the NMC relies will have been sent to him at his registered address, he has made no response to the allegations. He will not be able to challenge the evidence relied upon by the NMC and will not be able to give evidence on his own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Mr Kelly's decisions to absent himself from the hearing, waive his rights to attend, and/or be represented, and to not provide evidence or make submissions on his own behalf.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Mr Kelly. The panel will draw no adverse inference from Mr Kelly's absence in its findings of fact.

Details of charge

That you, a registered nurse:

1. On 27 October 2017:

a. Did not report that Colleague A punched Patient A; **[Charge found proved]**

b. Did not provide immediate first aid to Patient A; **[Charge found proved]**

c. Did not escalate the incident to a doctor and/or the night co-ordinator; **[Charge found proved]**

d. Did not complete a central nervous system check; **[Charge found proved]**

2. Following the incident on 27 October 2017:

a. Did not report that Colleague A told Patient A to fabricate that his nose had hit his knee; **[No case to answer]**

b. When interviewed about the incident on 2 February 2018 said that you believed Patient A's nose had hit Colleague A's knee when this was incorrect; **[Charge found proved]**

3. Your actions in charge 2(b) above were dishonest, in that you knew that Colleague A had punched Patient A. **[Charge found proved]**

4. Your actions in charge 1(a) and or 1(c) and/or 2(a) and/or 2(b) were in breach of your duty of candour in that you were not open and honest in relation to what happened. **[Charge found proved in respect of 1(a),1(c) and 2(b). Charge NOT proved in respect of 2(a)]**

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

Background

This case involves an incident that occurred on the nightshift of 26 October 2017 on the Rosebrook Ward at Craigavon Area Hospital. It is alleged that Mr Kelly witnessed an assault on Patient A by Colleague A, but did not take any action as set out in charges 1 and 2. At the time of the assault Mr Kelly was involved in attempting to restrain Patient A. The alleged assault was serious, as it comprised punches to Patient A's face.

Decision and reasons on application to admit hearsay evidence

The panel heard an application made by Ms Mohamed under Rule 31 to allow a section of paragraph 8 of Patient A's witness statement to be adduced into evidence. She submitted that this was the sole and decisive evidence in relation to charge 2a. She submitted that this evidence is important as it relates to Colleague A asking Patient A to fabricate a story in front of Mr Kelly. Ms Mohamed further submitted that there was no reason for Patient A to lie about this matter. She submitted that Patient A had put this information within his signed witness statement dated 13 July 2019. Ms Mohamed then told the panel that Patient A was not present at this hearing and, whilst the NMC had made sufficient efforts to ensure that this witness was present, he was unable to attend today due to good reason. She referred the panel to a telephone note dated 20 November 2019 in which Patient A's key worker had contacted the NMC. The telephone note read: "*She [the key worker] had talked to [Patient A] about attending the hearing and said that he does not want to… If he were to attend then it would set him back again. She said she talked to his doctor and they said he is capable of attending however, it should be his decision*." Ms Mohamed submitted that given the information was received from Patient A's key worker and given Patient A had certain vulnerabilities it was decided not to pursue him any further.

Ms Mohamed submitted that Mr Kelly was sent out the Case Management Form which included Patient A's witness statement within it and Mr Kelly was warned that this

statement could be read out. She submitted that Mr Kelly had not replied to this with any indication of an objection.

Ms Mohamed reiterated to the panel that this was the sole evidence in relation to charge 2a and invited the panel to adduce this evidence.

The panel accepted the legal assessor's advice on the issues it should take into consideration in respect of this application. This included that Rule 31 provides that, so far as it is 'fair and relevant', a panel may accept evidence in a range of forms and circumstances, whether or not it is admissible in civil proceedings.

The panel noted that paragraph 8 of Patient A's witness statement was the sole evidence in relation to charge 2a. The panel was of the view that it could not be certain whether or not Mr Kelly heard Colleague A as described at paragraph 8 of Patient A's witness statement. Furthermore, the panel noted that elsewhere in the documents provided to it that Patient A had provided a different account of the events. Within his Achieving Best Evidence (ABE) interview dated 10 November 2017, Patient A made no mention of this conversation. Further, he could not recall what time Mr Kelly was present.

The panel accepted that paragraph 8 of Patient A's witness statement was relevant in relation to charge 2a. However, due to the degree of speculation this evidence surrounds, the panel decided it was not fair to adduce this evidence.

In these circumstances the panel refused the application.

Decision and reasons on application of offering no evidence

The panel considered an application from Ms Mohamed to offer no evidence in respect of charge 2a.

This panel considered this application under Rule 24 (7) of the Rules. This rule states:

24 (7) Except where all the facts have been admitted and found proved under paragraph (5), at the close of the Council's case, and –

(i) either upon the application of the registrant, or …
(ii) of its own volition…

the Committee may hear submissions from the parties as to whether sufficient evidence has been presented to find the facts proved and shall make a determination as to whether the registrant has a case to answer.

In relation to this application, Ms Mohamed submitted that given the panel's ruling on the inadmissibility of paragraph 8 of Patient A's witness statement, the only other person to provide evidence in relation to this charge is Colleague A himself. Ms Mohamed referred the panel to the efforts the NMC had taken to secure Colleague A's attendance. She submitted that Colleague A was not willing to provide or participate in these proceedings. In these circumstances, Ms Mohamed submitted that there was no longer a realistic prospect of proving charge 2a.

The panel took account of the submissions made and accepted the advice of the legal assessor. He advised that at this stage, the panel needs to decide whether the evidence that the NMC has put before it at charge 2a is sufficient to satisfy the panel that there may be a case to answer and could justify proceeding further. He referred the panel to the case of PSA v NMC AND X [2018] EWHC 70 and to the test laid down by *Lord Lane CJ* in the case of ***R v Galbraith***. In relation to proceedings before this panel, that test is as follows:

1. If there is no evidence against the registrant to support a particular charge then the case must be stopped in respect of that particular charge.
2. The more difficult situation is when there is some evidence but it is of a tenuous nature, in that it is:
    i. inherently weak or vague, or
    ii. inconsistent with other evidence

> and the panel considers, taking the NMC's evidence at its highest, that it could not properly find the charge to be proved on the balance of probabilities, then the case must be stopped as far as that particular charge is concerned. However, where the NMC's evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the panel as judges of the facts, and where on one possible view of the facts, there is evidence on which the panel could properly come to the conclusion that a particular charge is proved, then the case should proceed.

In reaching its decision, the panel has made an initial assessment of all the evidence that had been presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it could find the facts at charge 2a proved and whether Mr Kelly had a case to answer.

The panel was of the view that, the only evidence at charge 2a was the evidence of Patient A as set out in paragraph 8 of his statement. The panel noted that it having ruled that evidence as inadmissible, the only other evidence as to whether or not Colleague A had told Patient A to fabricate the events was that of Colleague A himself. The panel took into account Ms Mohamed's submissions of the attempts the NMC had taken to contact Colleague A without success. On this basis, the panel of its own volition decided that there was not a realistic prospect that it would find the facts of charge 2a proved.

Accordingly, the panel determined that there is no case to answer in respect of charge 2a under the first limb of Galbraith.

Decision and reasons on facts

In reaching its decisions on the facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Ms Mohamed.

The panel was aware that the burden of proof rests on the NMC, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that a fact will be proved if a panel is satisfied that it is more likely than not that the incident occurred as alleged.

The panel heard live evidence from the following witnesses called on behalf of the NMC:

- Ms 1: Ward sister at the Trust when the incident took place;

- Mr 2: Patient Flow and Bed Management Coordinator at the Trust.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the witness and documentary evidence provided by the NMC.

The panel considered the evidence of the witnesses and made the following general findings in relation to credibility:

Ms1: The panel considered the evidence of Ms 1 to be open and honest. It was of the view that her evidence was credible and reliable. There was no apparent ill will towards Mr Kelly or motivation to be dishonest. She said that she had a good working relationship with him and that they had worked together for many years. Ms 1 was clear and consistent about what she could and could not remember and was fair to Mr Kelly in the answers she gave. She tried to assist the panel to the best of her abilities.

Mr 2: The panel considered the evidence of Mr 2 to be clear and concise. His evidence was credible and reliable. The panel was of the view that he had a good understanding of the Trust's policies and what was expected of the staff. The panel noted that Mr 2 had indicated that he had not worked with Mr Kelly before and therefore the panel received

fully independent evidence from him. The panel was of the view that Mr 2 provided well-articulated evidence and he tried to assist the panel to the best of his abilities.

The panel then considered each of the charges and made the following findings.

Charge 1

"1. On 27 October 2017:

a. Did not report that Colleague A punched Patient A;

b. Did not provide immediate first aid to Patient A;

c. Did not escalate the incident to a doctor and/or the night co-ordinator;

d. Did not complete a central nervous system check."

This charge is found proved in its entirety.

In reaching this decision, the panel took into account the CCTV footage and the oral and written evidence of Ms 1 and Mr 2.

The panel had sight of the CCTV footage and it was satisfied that Colleague A punched Patient A twice. The panel was further satisfied that Mr Kelly was in very close proximity that he would have seen Colleague A punch Patient A.

In relation to charge 1a, the panel noted that both Ms 1 and Mr 2 said that Mr Kelly did not at any point report the incident. It further took account that Mr 2 in his witness statement dated 12 March 2019 said:

"I interviewed John Kelly and noted his statement… he stated he helped in cleaning up the blood on the floor and that he believed Colleague A was taking responsibility for reporting the incident…"

The panel determined that given Mr Kelly was an experienced senior nurse, he witnessed an assault by a colleague on a patient and did not report the incident.

In these circumstances, the panel was satisfied that charge 1a is found proved.

In respect of charge 1b, the panel noted that in Mr Kelly's local witness statement dated 2 February 2018, he said:

> *"… I saw no reason to provide the patient with any emergency care immediately following the restraint as they were responding and did not seem distressed."*

The panel also had regard to the oral evidence of Mr 2 where he said that regardless of the patient responding, the blow was still to the patient's head and thus some first aid should have been provided. The panel also noted that within Mr 2's witness statement dated 12 March 2019, he said:

> "*In summary, if John Kelly had witnessed the assault on the patient, I would have expected him, in his position as a Registered Nurse, to take the following action. He should have ensured the Night Coordinator was called and informed of the incident and he should have ensured that the patient was seen by a doctor immediately. He should have provided aftercare to the patient following the incident and should not have left him alone with Colleague A. He should also have informed a Senior Nurse or Manager the following morning and completed an APP1 referral form, which was not done.*"

In light of the above evidence, the panel was satisfied that Mr Kelly did not provide first aid to Patient A and therefore found charge 1b proved.

In relation to charge 1c, the panel noted that within Mr Kelly's witness statement he said:

"when I came back from my break Colleague A told me that he had called the Night Coordinator and the doctor had been arranged to come and assess Patient A at 9.00am the following morning… I was not involved in the Handover at the end of the shift, normally that is the responsibility of the Nurse in charge of the shift, who had been Colleague A."

The panel further reminded itself of Mr 2's evidence in which he said that as a registered nurse who had witnessed an assault on a patient by a colleague the expectation would have been for Mr Kelly to have ensured that the Night Coordinator was called and informed of the incident and that the patient was seen by a doctor. The panel accepted this evidence.

In light of the above evidence, the panel found charge 1c proved.

In respect of charge 1d, the panel had regard to Mr 2's supplementary witness statement dated 18 July 2019 in which he stated:

"I would have also expected, given that it was a head injury, for a doctor to have been called out. There should also have been a CNS (Central Nervous System) check carried out but there was no evidence of this having been done. Even if Nurse Kelly had been told that a doctor was coming in the morning, he should still have queried this due to the fact that a head injury was involved. He should also definitely have been aware that a more immediate medical examination was required because of the nature of the injury. This is highlighted on the NEWS observations chart…"

The panel also noted that Mr Kelly in his witness statement accepts that he did not complete a CNS check.

In these circumstances, the panel found charge 1d proved.

In light of the clear evidence above, the panel found charge 1 in respect of all the sub charges, on the balance of probabilities, proved.

Charge 2b

> "2.Following the incident on 27 October 2017:
>
> > b. When interviewed about the incident on 2 February 2018 said that you believed Patient A's nose had hit Colleague A's knee when this was incorrect."

This charge is found proved.

In reaching this decision, the panel took into account the CCTV footage and Mr Kelly's witness statement dated 2 February 2018.

The panel noted that within his witness statement Mr Kelly said that:

> *"Patient A was brought to the ground by myself and Colleague A. Colleague A said to me that Patient A's nose had hit his knee as he was being brought to the ground. I accepted what he told me as I had no reason not to believe it."*

The panel further noted that Mr Kelly maintains this position as he repeats it multiple times within his statement at interview.

The panel did not accept Mr Kelly's account. The panel was of the view upon seeing the CCTV footage, that Mr Kelly was in very close proximity and would have seen Colleague A punch Patient A on two occasions. So it was of the view that to say otherwise would be incorrect.

On this basis, the panel found charge 2b on the balance of probabilities, proved.

Charge 3

> "3. You actions in charge 2(b) above were dishonest, in that you knew that Colleague A had punched Patient A"

This charge is found proved.

In reaching this decision, the panel took into account the CCTV footage and Mr Kelly's witness statement dated 2 February 2018. It also took into account its decision at charge 2b.

The panel was satisfied that Mr Kelly was in close proximity to have seen clearly the two punches thrown by Colleague A at Patient A. Therefore Mr Kelly stating that he believed Patient A's nose had hit Colleague A's knee would have been incorrect. On this basis the panel was satisfied that Mr Kelly's actions at charge 2b were dishonest.

In these circumstances, the panel found charge 3, on the balance of probabilities, proved.

Charge 4 in respect of 1(a), 1(c) and 2(b).

> "4. Your actions in charge 1(a) and or 1(c) and/or 2(a) and/or 2(b) were in breach of your duty of candour in that you were not open and honest in relation to what happened."

This charge is found proved in respect of 1(a), 1(c) and 2(b).

In considering this charge the panel had regard to all the evidence before it including the guidance for the General Medical Council (GMC) and NMC on "Openness and honesty when things go wrong: the professional duty of candour".

The panel had regard to the above guidance which states:

> "*Healthcare professionals must also be open and honest with their colleagues employers and relevant organisations…They must support and encourage each other to be open and honest, and not stop someone from raising concerns."*
>
> *…*
>
> *2. As a doctor, nurse or midwife, you must be open and honest with patients, colleagues and your employers.*
>
> *…*
>
> *You make sure that patients and public safety is protected. You work within the limits of your competence, exercising your professional 'duty of candour' and raising concerns immediately whenever you come across situations that put patients or public safety at risk. You take necessary action to deal with any concerns where appropriate.*
>
> *….*
>
> *16 Act without delay if you believe that there is a risk to patient safety or public protection*
>
> *…*
>
> *16.1 raise and, if necessary, escalate any concerns you may have about patient or public safety, or the level of care people are receiving in your workplace or any other healthcare setting and use the channels available to you in line with our guidance and your local working practices."*

The panel was of the view that duty of candour includes being open and honest. It determined that Mr Kelly, being a registered nurse, regardless of role or rank had a duty to be open and honest in relation to what happened. By not reporting the incident and not escalating the incident Mr Kelly breached his duty of candour.

The panel was further of the view that dishonesty is incompatible with candour. Therefore by reason of the finding in charge 3 above proved, charge 4 in respect of 2b is also

proved. However, in all the circumstances the panel has determined that charge 4 in respect of 2b and its finding adds nothing to the seriousness of the case.

In these circumstances, the panel found charge 4 in respect of 1(a), 1(c) and 2(b) proved.

Charge 4 in respect of 2(a)

> "4. Your actions in charge 1(a) and or 1(c) and/or 2(a) and/or 2(b) were in breach of your duty of candour in that you were not open and honest in relation to what happened."

This charge is found NOT proved in respect of 2(a).

In reaching this decision, the panel took into account its decision that there was no case to answer at charge 2a. On this basis the panel did not need to consider charge 4 in respect of 2a.

The panel therefore found charge 4 in respect of 2(a) not proved.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether Mr Kelly'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 panel, in reaching its decision, has recognised its statutory duty to protect the public and maintain public confidence in the profession. Further, it bore in mind that there is no burden or standard of proof at this stage and it has therefore exercised its own professional judgement.

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 Kelly's fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

In coming to its decision, the panel had regard to the case of *Roylance v General Medical Council (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.'*

Ms Mohamed invited the panel to take the view that the facts found proved amount to misconduct. The panel had regard to the terms of '*The Code: Professional standards of practice and behaviour for nurses and midwives* (2015' (the Code) in making its decision. She then directed the panel to specific paragraphs and identified where, in the NMC's view, Mr Kelly's acts and omissions amounted to misconduct.

Ms Mohamed submitted that the charges found proved were so serious and that Mr Kelly's actions fell far short of the standards expected of a registered nurse and amounted to misconduct.

Submissions on impairment

Ms Mohamed moved on to the issue of impairment and addressed the panel on 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 case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin).

Ms Mohamed submitted that Mr Kelly has in the past put patients at an unwarranted risk of harm. She submitted that Mr Kelly has also breached fundamental tenets of the nursing profession, had brought the nursing profession into disrepute, whilst having acted dishonestly in the past.

Ms Mohamed invited the panel to consider whether Mr Kelly's conduct is capable of remediation, whether it has been remediated, and whether his actions are likely to be repeated in future.

Ms Mohamed submitted that Mr Kelly has put Patient A at risk of harm. She submitted that the blows Patient A received were to his head and caused bleeding and thus he should have been provided first aid. She submitted that Mr Kelly having failed to report or escalate matters has brought the profession into disrepute. She reminded the panel that Mr Kelly provided an incorrect statement of the incident when asked and that he maintained that account in interview. She submitted that Mr Kelly has provided no evidence of insight, remorse or remediation. In the absence of any evidence to the contrary, Ms Mohamed submitted that there is a real risk of repetition of similar events transpiring in the future.

Ms Mohamed therefore invited the panel to find that Mr Kelly's fitness to practise as a registered nurse is currently impaired on the grounds of public protection and public interest. She submitted that the panel should consider what a fully informed member of the public would think, should a finding of no current impairment be made in this case.

The panel accepted the advice of the legal assessor, which included references to a number of relevant judgments.

Decision and reasons on misconduct

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of the Code.

The panel was of the view that Mr Kelly's actions did fall significantly short of the standards expected of a registered nurse, and that Mr Kelly's actions amounted to breaches of the Code. Specifically:

1 Treat people as individuals and uphold their dignity

To achieve this, you must:

1.1 treat people with kindness, respect and compassion

1.2 make sure you deliver the fundamentals of care effectively

1.4 make sure that any treatment, assistance or care for which you are responsible is delivered without undue delay

1.5 respect and uphold people's human rights

3 Make sure that people's physical, social and psychological needs are assessed and responded to

To achieve this, you must:

3.4 act as an advocate for the vulnerable, challenging poor practice and discriminatory attitudes and behaviour relating to their care

8 Work co-operatively

To achieve this, you must:

8.2 maintain effective communication with colleagues

8.5 work with colleagues to preserve the safety of those receiving care

8.6 share information to identify and reduce risk

14 Be open and candid with all service users about all aspects of care and treatment, including when any mistakes or harm have taken place

To achieve this, you must:

14.1 act immediately to put right the situation if someone has suffered actual harm for any reason or an incident has happened which had the potential for harm.

14.2 explain fully and promptly what has happened, including the likely effects, and apologise to the person affected and, where appropriate, their advocate, family or carers

14.3 document all these events formally and take further action (escalate) if appropriate so they can be dealt with quickly

16 Act without delay if you believe that there is a risk to patient safety or public protection

To achieve this, you must:

16.1 raise and, if necessary, escalate any concerns you may have about patient or public safety, or the level of care people are receiving in your workplace or any other health and care setting and use the channels available to you in line with our guidance and your local working practices

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, treating people fairly and without discrimination, bullying or harassment

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, in these circumstances, the panel decided that Mr Kelly's acts and omission in each of the charges found proved fell significantly short of the standards expected so as to justify a finding of misconduct.

The panel was of the view that a nurse punching a patient is very serious. The panel was of the view that witnessing such an act and not reporting, escalating or taking any steps to provide first aid was also very serious. It was of the view that having witnessed such an event; Mr Kelly had a responsibility to take action.

The panel bore in mind the evidence it had received that Mr Kelly and Colleague A had worked together for "many years". The panel therefore appreciated that it might have been difficult for Mr Kelly to escalate matters. Mr Kelly was an experienced nurse and should have known how to respond to the situation appropriately. The panel determined that

there was no excuse for Mr Kelly to have behaved as he did. The panel noted that whilst this was a single incident Patient A suffered serious injury to his nose, which required manipulation under general anaesthetic.

Taking all the information into account, the panel concluded that Mr Kelly's actions did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, Mr Kelly'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.'*

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's “test” which reads as follows:

> *‘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 considered all limbs a, b, c and d to be engaged in this case.

The panel finds that Patient A was put at risk and was caused physical harm as a result of Mr Kelly’s misconduct. Mr Kelly’s misconduct had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute. It was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charges relating to dishonesty extremely serious.

Regarding insight, the panel noted that it had not received any evidence of insight. It had no information as to Mr Kelly’s understanding of how his actions and/or inactions put

Patient A at a risk of harm, he has not demonstrated an understanding of why what he did was wrong and how this impacted negatively on the reputation of the nursing profession.

The panel noted that these are very serious matters and conduct of the kind identified in this case are very difficult to remediate. It had not received any evidence of remorse or remediation.

The panel considered the seriousness of the misconduct involving a vulnerable patient and was mindful of the need to uphold proper professional standards. It took into account that harm was caused to Patient A and Mr Kelly's subsequent dishonest actions after the incident.

The panel decided that given the serious nature of the misconduct and the absence of any evidence of insight, remorse or remediation there is a risk of repetition in this case. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC; 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. This 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 a finding of impairment on public interest grounds is also required in this case. A reasonable and fully informed member of the public would expect a finding of impairment to follow such serious misconduct. Any other outcome would undermine confidence in the profession and in its regulator.

Having regard to all of the above, the panel was satisfied that Mr Kelly's fitness to practise is currently impaired, by reason of his misconduct, on public protection and public interest grounds.

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 Kelly off the register. The effect of this order is that the NMC register will show that Mr Kelly 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 and had careful regard to the Sanctions Guidance (SG) published by the NMC.

The panel accepted the advice of the legal assessor.

Submissions on sanction

Ms Mohamed, whilst recognising that the decision and sanction was for the panel alone, submitted that the NMC considered a striking-off order to be the appropriate sanction.

Ms Mohamed took the panel through the aggravating factors which, in the NMC's view, were present in this case. She submitted that the NMC had been unable to identify any mitigating factors in this case.

Ms Mohamed reminded the panel that it had identified, at the impairment stage of this hearing, that Mr Kelly had not provided any evidence of insight, remediation or remorse and therefore there was a risk of repetition. She submitted that as there is a continuing risk to patient safety, no further action would be inappropriate, and so would a caution order. Ms Mohamed submitted that neither of these sanctions would reflect the severity of Mr Kelly's misconduct.

Furthermore, she submitted that a conditions of practice order would not be a sufficient sanction to reflect the severity of Mr Kelly's misconduct. She submitted this case is extremely serious and involves dishonesty and a breach of the duty of candour. She

further reminded the panel that there had been no response to the regulatory concerns sent to Mr Kelly and that there is no evidence before the panel to indicate that he would be willing to engage with this sanction. In any event, Ms Mohamed submitted that Mr Kelly has not provided this panel with evidence of insight, remorse, or remediation so as to justify the imposition of a conditions of practice order. She submitted that this sanction would not sufficiently protect the public, or mark the wider public interest elements of this case. Furthermore, Ms Mohamed submitted that there may be evidence of a potential attitudinal concern.

Ms Mohamed submitted that a suspension order was not appropriate or proportionate given the seriousness of the misconduct and the subsequent dishonesty. She invited the panel to consider whether Mr Kelly's behaviour is incompatible with him remaining on the NMC register. She reminded the panel that whilst this was a single incident, the actual misconduct occurred over a period of time from not reporting to "covering up" in interview. Ms Mohamed submitted that judging by the nature of Mr Kelly's misconduct and subsequent dishonesty, temporary removal from the NMC register may be insufficient, as his actions may be incompatible with him remaining on the NMC register.

Ms Mohamed therefore invited the panel to consider a striking-off order in this case due to the seriousness of the misconduct and the lack of any evidence of any insight, remorse or remediation. She submitted that this sanction is appropriate and proportionate in the particular circumstances of this case.

Decision and reasons on sanction

Having found Mr Kelly's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel took into account the following aggravating features:

- Patient A was vulnerable; and
- No evidence of any insight, remorse or remediation has been provided.

The panel also took into account the following mitigating features:

- Two testimonials dated November 2017 from Mr Kelly's colleagues have been provided which attest to the high standard of patient care he provided in the past. Ms 1 also spoke highly of Mr Kelly's previous good practise during her oral evidence.

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 protection and public interest issues identified, an order that does not restrict Mr Kelly'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 Kelly'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 a conditions of practice order on Mr Kelly's nursing registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable.

The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the caution and misconduct in this case. The panel noted that there were no identifiable areas of concern involving Mr Kelly's clinical nursing practice which needed to be addressed. It further noted that Mr Kelly had indicated that he no longer wishes to practise as a nurse, thus conditions would not be workable. The panel was of the view that Mr Kelly's actions were deplorable, and conditional registration would not adequately reflect the seriousness of this case, having regard to Mr Kelly's misconduct and dishonesty.

In any event, the panel determined that a conditions of practice order would not sufficiently protect the public, nor address the public interest considerations in this case.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that suspension order may be appropriate where some of the following factors are apparent:

- *No evidence of repetition of behaviour since the incident; and*
- *The Committee is satisfied that the nurse has insight and does not pose a significant risk of repeating behaviour.*

The panel considered Mr Kelly's misconduct to be extremely serious. The conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse.

The panel noted that a registered nurse who has been found to have acted dishonestly always runs a risk of being removed from the NMC register. However, this risk is reduced should a registrant demonstrate a high level of insight, remorse, or remediation into their misconduct. None of these have been demonstrated by Mr Kelly despite ample opportunity to do so. The panel noted that there were serious breaches of multiple standards of the Code, breaches of fundamental tenets of the nursing profession, and breaches of Mr Kelly's professional duty of candour in this case.

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?*

Taking account of the above, the panel determined that Mr Kelly's misconduct and dishonest actions were not merely serious departures from the standards expected of a registered nurse and serious breaches of the fundamental professional tenets of probity and trustworthiness, they were fundamentally incompatible with Mr Kelly remaining on the NMC register. In the panel's judgment, to allow someone who had behaved in this way by not taking the relevant actions after witnessing such an event and then being dishonest about the event, to maintain his NMC registration would undermine the public confidence in the nursing profession and in the NMC as a regulatory body.

In reaching its decision, the panel bore in mind that its decision would have an adverse effect on Mr Kelly both professionally and personally, although it noted that there was some suggestion he did not intend to return to nursing at some point in the future. However, the panel was satisfied that the need to protect the public and satisfy the public interest outweighs the impact on Mr Kelly in this regard.

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the effect of Mr Kelly'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.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in Mr Kelly's own interest until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

The panel took account of the submissions made by Ms Mohamed. She invited the panel to impose an interim suspension order for a period of 18 months. She submitted that this interim order is necessary on the grounds of public protection and it is also in the public interest.

Decision and reasons on interim order

The panel was satisfied that an interim 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.

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. Owing to the seriousness of the misconduct in this case and the risk of repetition identified, it determined that Mr Kelly's acts and omissions were sufficiently serious to justify the imposition of an interim suspension order until the substantive order of suspension takes effect. In the panel's judgment, public confidence in the regulatory process would be damaged if Mr Kelly would be permitted to practise as a registered nurse prior to the substantive order coming into effect.

The panel decided to impose an interim suspension order in the circumstances of this case. To conclude otherwise would be incompatible with its earlier findings.

The panel therefore imposed an interim suspension order for a period of 18 months.

If no appeal is made, then the interim suspension order will be replaced by the substantive suspension order, 28 days after Mr Kelly is sent the decision of this hearing in writing.

This will be confirmed to Mr Kelly in writing.

That concludes this determination.