

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

Substantive Order Review Hearing

3 January 2020

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

Name of registrant:	Mr Ian Birkinshaw
NMC PIN:	06E1093E
Part(s) of the register:	Registered Nurse – Sub Part 1 RNA: Adult – September 2006
Area of Registered Address:	England
Type of Case:	Misconduct
Panel Members:	Jacqueline Alexander (Chair, Lay member) Amy Noakes (Registrant member) Suzanna Jacoby (Lay member)
Legal Assessor:	William Hoskins
Panel Secretary:	Kelly O'Brien
Mr Birkinshaw:	Not present and not represented
Nursing and Midwifery Council:	Represented by James Edenborough, Case Presenter
Order being reviewed:	Suspension order (6 months)
Outcome:	Striking-off order to come into effect on the expiry of the existing order, namely, at the end of 29 January 2020 in accordance with Article 30 (1)

Service of notice of hearing

The panel was informed at the start of this hearing that notice had been sent to Mr Birkinshaw on 3 December 2019 by recorded delivery and first class post to his registered address on WISER.

The panel observed that notice of this hearing was delivered to Mr Birkinshaw's registered address on WISER on 4 December 2019. The panel noted that Mr Birkinshaw was also informed of the date of the hearing via email correspondence from an NMC case officer on 2 December 2019.

The panel accepted the advice of the legal assessor.

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

Proceeding in absence

The panel then considered proceeding in the absence of Mr Birkinshaw. 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 Edenborough, on behalf of the Nursing and Midwifery Council (NMC). The panel accepted the advice of the legal assessor.

Mr Edenborough invited the panel to proceed in Mr Birkinshaw's absence. He outlined the limited email correspondence between the NMC case officer and Mr Birkinshaw and submitted that it is evidence that he has chosen not to attend the hearing today and voluntarily absented himself.

The panel noted the contents of an email from an NMC case officer dated 2 December 2019, informing Mr Birkinshaw of the date of today's hearing, and stating that he will receive the notice of hearing in a few days.

Mr Birkinshaw replied to the correspondence from the NMC officer stating "*First I've heard of it! And, having not attended your kangaroo court first time round highly unlikely I shall attend this time either. And any correspondence sent will not have reached me as I have changed address.*" In further email correspondence to the NMC Mr Birkinshaw refused to provide his current registered address, and declined to attend the hearing via video link.

The notice of hearing was also sent to Mr Birkinshaw via email and egress on 9 December 2019.

The panel had regard to the email correspondence and found that it indicates that Mr Birkinshaw is aware of the hearing today. Whilst he had been sent notice of today's hearing he may not have received this notice by post due to his failure to update his address on WISER. The panel considered that a registrant cannot be permitted to frustrate the regulatory process by a refusal to supply his current address. In the circumstances the panel was satisfied that Mr Birkinshaw was aware of today's hearing and it is of the view that he has chosen voluntarily to absent himself. The panel had no reason to believe that an adjournment would result in Mr Birkinshaw's attendance. The panel noted that the order is due to expire in less than a month. Having weighed the interests of Mr Birkinshaw with those of the NMC and the public interest in an expeditious disposal of this hearing the panel determined to proceed in Mr Birkinshaw's absence.

Decision and reasons on review of the current order:

The panel decided to impose a striking-off order. This order will come into effect at the end of 29 December 2019 in accordance with Article 30 (1) of the Nursing and Midwifery Order 2001 (as amended) (the Order).

This is the first review of a suspension order, originally imposed by a Fitness to Practise panel on 28 June 2019 for 6 months. The current order is due to expire on 29 January 2020.

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

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

That you, a registered nurse:

1. *On 4 February 2018, used inappropriate handling techniques on Patient A in that you:*
 - 1.1. *Restrained him by his wrists; (PROVED)*
 - 1.2. *Lifted him up from the floor; (as amended, PROVED)*
 - 1.3. *Pulled him up his bed by his wrists. (as amended, NOT PROVED)*

2. *On 4 February 2018, spoke to Patient A in an unprofessional manner in that you said words to the effect of, "Don't try it mate, you ain't big enough". (PROVED)*

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

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

The panel finds that limbs a, b and c of the Grant test were engaged in Mr Birkinshaw's case.

Regarding insight, the panel considered that Mr Birkinshaw had sought to minimise his misconduct when he stated in correspondence with the NMC that: “it is impossible to provide evidence for a non-event”.

The panel was mindful that in Mr Birkinshaw’s written account, he had sought to justify his misconduct and blame others. It determined that Mr Birkinshaw had shown no remorse for his actions and that there was no evidence of his reflection in relation to the incident.

The panel found that Mr Birkinshaw had failed to demonstrate an understanding of how his actions put the patient at risk of harm, why what he did was wrong, and how this impacted negatively on the reputation of the nursing profession.

In its consideration of whether he has remedied his practice, the panel took into account that Mr Birkinshaw had retired from the nursing profession and therefore had not demonstrated any efforts to remediate his practice.

The panel was of the view that there is a risk of repetition if Mr Birkinshaw was to return to practice, based on a lack of insight and remorse into his misconduct, alongside any acknowledgement that his handling of the matter was incorrect. 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 are to protect, promote and maintain the health, safety and well-being of the public and patients, and to uphold the wider public interest, which includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

The panel determined that, in Mr Birkinshaw’s case, a finding of current impairment on public interest grounds was also required to uphold the standards and confidence in the profession. This was based on the fact that a member of

the public who was fully aware of the facts of Mr Birkinshaw's case would find it deplorable that a nursing professional had conducted themselves in this manner and had subsequently been found not to be currently impaired.

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

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

The panel determined that the following factors were aggravating features:

- *The incident involved a vulnerable patient*
- *There had been a risk of harm to the patient involved*

The panel determined that the following factors were mitigating:

- *Mr Birkinshaw's previous good character*
- *Positive testimonials from Mr Birkinshaw's colleagues*
- *Mr Birkinshaw had never had any clinical or professional concerns raised about his nursing practice.*
- *There was no actual harm suffered by the patient involved*

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.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the SG, which states that a caution order may be appropriate where '...the case is at the lower end of the spectrum of impaired fitness to practise, however the Fitness to Practise committee wants to mark that the behaviour was unacceptable and must not happen again.' The panel considered that Mr Birkinshaw's misconduct was not at the lower end of

the spectrum and that a caution order would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Mr Birkinshaw's registration would be a sufficient and appropriate response. The panel was mindful that any conditions imposed must be proportionate, measurable and workable.

The panel concluded that, as Mr Birkinshaw had made it plain he no longer wished to be involved in nursing and had allowed his PIN to lapse, he would not be willing to comply with any conditions of practice that the panel could impose. The panel was therefore of the view that there were no practical or workable conditions that could be formulated, given the nature of the charges in this case.

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

- a single instance of misconduct but where a lesser sanction is not sufficient*
- no evidence of harmful deep-seated personality or attitudinal problems*
- no evidence of repetition of behaviour since the incident*

The panel found that the seriousness of the misconduct required a temporary removal from the register and a period of suspension.

The panel determined that, although there had been a clear breach of a fundamental tenets of the profession, there are in Mr Birkinshaw's case mitigating circumstances. As such, the panel considered that, in light of its finding of facts in Mr Birkinshaw's case, the misconduct was not fundamentally incompatible with remaining on the register.

The panel noted that Mr Birkinshaw lacked insight into his misconduct, but was of the view that a period of suspension was sufficient in order to protect the public and mark the seriousness of the misconduct, whilst allowing him the opportunity to reflect and demonstrate insight.

The panel further considered whether a striking-off order would be proportionate in Mr Birkinshaw's case. Taking account of all the information before it, including the findings of fact and the mitigating features, the panel concluded that it would be wholly disproportionate. Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in Mr Birkinshaw's case to impose a striking off order.

The panel found that there was no evidence of any harmful deep-seated personality or attitudinal problem, and balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction.

The panel noted the hardship such an order will inevitably cause Mr Birkinshaw. However this is outweighed by the public interest in this case.

The panel considered that this order is 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.

The panel determined that a suspension order for a period of six months was appropriate in this case to mark the seriousness of the misconduct and to allow Mr Birkinshaw time to reflect.

At the end of the period of suspension, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order.

Any future panel may be assisted by:

- *Mr Birkinshaw's attendance at any future hearings*
- *A reflective piece demonstrating insight into Mr Birkinshaw's failings and the impact they had on a vulnerable patient*
- *Any testimonials from current employers*

Decision on current fitness to practise

The panel has considered carefully whether Mr Birkinshaw'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 has had regard to all of the documentation before it.

The panel heard and accepted the advice of the legal assessor.

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

This panel noted that at the substantive hearing, that panel determined that Mr Birkinshaw had sought to minimise his misconduct and that he had sought to justify his misconduct and blame others. That panel took into account that Mr Birkinshaw had retired from the profession and therefore had not demonstrated any efforts to remediate his practice.

This panel noted that Mr Birkinshaw has not engaged with the NMC in any real way since the date of the last review. The panel considered Mr Birkinshaw's correspondence to the NMC dated 2 December 2019 which stated "*having not attended your kangaroo court first time round highly unlikely I shall attend this time either*" indicated that he had

no intention of engaging, and displayed a disregard for the regulatory process. Accordingly, the position in relation to impairment and remediation since the date of the substantive hearing is largely unchanged. The panel considered that Mr Birkinshaw has not made any attempt to comply with the recommendations of the substantive hearing panel.

This panel considered that Mr Birkinshaw had previously indicated that he is retired and does not intend to return to nursing, and this panel have nothing to suggest that his position has changed. He has not provided any evidence of insight, remediation, or remorse. In these circumstances, the panel considered that the previous panel's concerns had not been addressed and accordingly, the risk of repetition of the misconduct remains. The panel considered that Mr Birkinshaw's misconduct was serious, and that patients would be put at an unwarranted risk of harm if Mr Birkinshaw was permitted to practise without restriction. The panel therefore finds that Mr Birkinshaw's fitness to practise remains impaired on public protection grounds.

The panel also considered that the recent email correspondence from Mr Birkinshaw demonstrated a worrying disregard for the concerns of his regulator.

The panel went on to ask itself whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment of fitness to practise were not made in the current circumstances. The panel concluded that it would in light of the serious errors made. It therefore concluded that a finding of impairment on public interest grounds is required.

The panel therefore finds that Mr Birkinshaw's fitness to practise remains impaired on both public protection and public interest grounds.

Determination on sanction

Having found Mr Birkinshaw'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 29 of the Order. The panel has also taken into account the

NMC's Sanctions Guidance (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the risk of repetition identified and seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

The panel then considered whether to impose a caution order but concluded that this would be inappropriate in view of the risk of repetition identified and 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 the imposition of a conditions of practice order. However, in light of Mr Birkinshaw's lack of engagement with the NMC, the panel considered that a conditions of practice order would serve no useful purpose. The panel noted that a conditions of practice order requires the willingness of the registrant concerned to engage in order to ensure that he reaches a stage where he is fit to practise safely. Since Mr Birkinshaw has not complied with the recommendations of previous panel, or demonstrated any willingness to remediate the original concerns it is not possible to devise conditions of practice that would be workable.

The panel next considered imposing a further suspension order. The panel noted that Mr Birkinshaw has not demonstrated any insight into his previous failings. The panel considered the fact that the previous panel did not find attitudinal concerns at that stage. However, since the date of the substantive hearing, Mr Birkinshaw has been in contact with the NMC via email correspondence dated 2 December. The panel considered that this correspondence in which he refers to the NMC as a "fraternity" and a "kangaroo court", refuses to provide his current address, and states that "with nothing having changed I can see no reason to attend personally or by video link. I prefer to save my time ...". The panel consider that this correspondence taken together with the previous panel's findings of his justification of his misconduct and a tendency to blame others is indicative of a deep-seated attitudinal problem. The panel noted that Mr Birkinshaw in an email of 2 December 2019 continued to justify his actions by stating "As they

appeared to take scant interest in my original submissions, relying on, ultimately, the deposition of one witness only, I am disinclined to make any further submissions.”

This panel noted that the previous substantive panel imposed a suspension order for a period of 6 months to allow Mr Birkinshaw the opportunity to engage and provide evidence of insight, remediation and remorse and express a willingness to return to nursing. This panel considered that Mr Birkinshaw has not provided any evidence of these matters.

The panel determined that a further period of suspension would not serve any useful purpose in all of the circumstances. The panel considered that an order should not be permitted to continue indefinitely without evidence of engagement or remediation, and in the context of disregard for the NMC as the professions’ regulator. The panel determined that it was necessary to take action to prevent Mr Birkinshaw from practising in the future, should he choose to do so, and concluded that the only sanction that would adequately protect the public and serve the public interest was a striking-off order. The panel considered that the attitudinal concerns also demonstrate that at this stage a striking-off order is necessary to maintain professional standards, and is in the public interest.

This decision will be confirmed to Mr Birkinshaw in writing.

That concludes this determination.