

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

**Substantive Hearing  
Monday 21 September – Tuesday 6 October 2020**

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

**Name of registrant:** Helder Silva

**NMC PIN:** 12J0283C

**Part(s) of the register:** Registered Nurse – Sub part 1  
RN1: Adult Nursing – 31 October 2012

**Area of registered address:** Swindon

**Type of case:** Misconduct

**Panel members:** Caroline Healy (Chair, Registrant member)  
Susan Greenwood (Registrant member)  
Jan Bilton (Lay member)

**Legal Assessor:** Nigel Ingram

**Panel Secretary:** Catherine Acevedo

**Nursing and Midwifery Council:** Represented by Hannah Smith, Case Presenter

**Mr Silva:** Not present and unrepresented

**Facts proved:** Charges 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,  
14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24  
Schedule A, B, C, D-1, E, F, G

**Facts not proved:** Schedule D-2, D-3

**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 Silva was not in attendance and that the Notice of Hearing letter had been sent to Mr Silva's registered email address by recorded delivery and by first class post on 21 August 2020.

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 Silva's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

Ms Smith, 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 Silva 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 Silva**

The panel next considered whether it should proceed in the absence of Mr Silva. It had regard to Rule 21 and heard the submissions of Ms Smith who invited the panel to continue in the absence of Mr Silva.

Ms Smith referred the panel to the correspondence from Mr Silva dated 31 January 2020, which stated:

*“This is my last message. I will delete this email to not be bothered, I’m not opening any documents sent by you. I’m happy and working in Portugal for the last 18months and that is the best prove that I was fit to return to work. I request to my NMC account to be cancelled because I will never work in uk again (sic)”.*

The panel further noted the email correspondence between Mr Silva and the NMC dated 10 March 2020 which stated:

*“Replying your email,*

*1. Would you want to attend or participate in the hearing at a later date? This could be in person or by video-link.*

*No.*

*2. If so, would you like to request a postponement of the hearing in April?*

*No.*

*3. If you answered ‘no’ to questions 1 and 2, do you agree that the panel can proceed without you present at the hearing starting on 6 April 2020?*

*Yes.”*

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 Silva. In reaching this decision, the panel has considered the submissions of Ms Smith 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 Silva;

- There is no reason to suppose that adjourning would secure his attendance at some future date;
- One witness will attend today to give evidence, others are due to attend;
- 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 2016 – 2018;
- 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 Silva in proceeding in his absence. He will not be able to challenge the evidence relied upon by the NMC in person 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 Silva's decision 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 Silva. The panel will draw no adverse inference from Mr Silva's absence in its findings of fact.

### **Decision and reasons on application to amend the charge**

The panel heard an application made by Ms Smith, on behalf of the NMC, to amend the wording of charge 12.3 to correct a typographical error.

The proposed amendment was to change '13.1–13.2' to '12.1–12.2'. It was submitted by Ms Smith that the proposed amendment would provide clarity and more accurately reflect the evidence.

### **Original charge 12**

*'carried out the above acts at charges 13.1-13.2 with a recently deceased patient still present in the room'*

### **Proposed charge 12**

*'carried out the above acts at charges 12.1-12.2 with a recently deceased patient still present in the room'*

The panel accepted the advice of the legal assessor and had regard to Rule 28 of 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel was of the view that such an amendment, as applied for, was in the interest of justice. The panel was satisfied that there would be no prejudice to Mr Silva and no injustice would be caused to either party by the proposed amendment being allowed. It was therefore appropriate to allow the amendment, as applied for, to ensure clarity and accuracy in the numbering of this charge.

### **Decision and reasons on application to amend the charge**

The panel heard an application made by Ms Smith, on behalf of the NMC, to amend charge 11. The proposed amendment was to add a new charge.

### **Proposed new charge 11.4**

*"Sometime between approximately June and August 2017, you carried out a sexual act in front of Colleague D by:*

11.1 *Blocking her exit whilst she was in the linen cupboard;*

11.2 *Masturbating;*

11.3 *Ejaculating into a towel;*

11.4 ***Throwing the towel at Colleague D.***

The panel accepted the advice of the legal assessor and had regard to Rule 28 of 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel was of the view that such an amendment, as applied for was in the interests of justice, particularly as the allegation contained within charge 11 was amplified during the live evidence of Colleague D. Consequently, the panel was satisfied that there would be no prejudice to Mr Silva and no injustice would be caused to either party by the proposed amendment being allowed. It was therefore appropriate to allow the amendment, as applied for, to ensure clarity and accuracy.

#### **Details of charge (as amended)**

*That you, a registered nurse:*

##### **Colleague A**

1. *Between April and June 2017, you sent one or more inappropriate messages via text message and/or social messaging to Colleague A as set out in Schedule A.*
2. *Your conduct set out at charge 1 was sexually motivated in that it was carried out for sexual gratification;*

##### **Colleague B**

3. *On 18 May 2017, you sent one or more inappropriate messages via text message and/or social messaging to Colleague B as set out in Schedule B.*
4. *Your conduct set out at charge 3 was sexually motivated in that it was carried out for sexual gratification;*

##### **Colleague C**

5. *On or around May 2017, during a night shift, asked Colleague C to sit in a room while you masturbated, or words to that effect;*

6. *Between 2017 and February 2018, you sent one or more inappropriate messages via text message and/or social messaging to Colleague C as set out in Schedule C.*
7. *Your conduct set out at charges 5 and 6 were sexually motivated in that it was carried out for sexual gratification;*

### **Colleague D**

8. *Between Summer 2016 and Summer 2017, you sent one or more inappropriate messages via text message and/or social messaging to Colleague D as set out in Schedule D.*
9. *Between Summer 2016 and Summer 2017, you gave Colleague D inappropriate notes as set out in Schedule E.*
10. *Between Summer 2016 and Summer 2017, approximately every week or two for about 6 months, you sent Colleague D pictures of your penis and/or of you masturbating in the toilet at work via text message and/or social messaging;*
11. *Sometime between approximately June and August 2017, you carried out a sexual act in front of Colleague D by:*
  - 11.1. *Blocking her exit whilst she was in the linen cupboard;*
  - 11.2. *Masturbating;*
  - 11.3. *Ejaculating into a towel;*
  - 11.4. *Throwing the towel at Colleague D.*
12. *Sometime between approximately June and August 2017, you carried out a sexual act in front of Colleague D by:*
  - 12.1. *masturbating and/or played with your penis;*
  - 12.2. *asked Colleague D if she wanted to play and/or watch you, or words to that effect;*
  - 12.3. *carried out the above acts at charges 12.1-12.2 with a recently deceased patient still present in the room;*
13. *Your conduct set out at charges 8 -12 above were sexually motivated in that it was carried out for sexual gratification;*
14. *Following Colleague D asking you to stop, or words to that effect, and/or when she ignored you, you would:*
  - 14.1. *not handover information about patients;*
  - 14.2. *not provide assistance when requested by Colleague D;*

15. *On an unknown date, you told Colleague D “you’re new, I have been here for ages – no one is going to believe you”, or words to that effect;*

### **Colleague E**

16. *Between 2016 and 2018, on one or more occasions whilst you were at work, you video called and/or sent a video message to Colleague E:*

16.1. *of your penis;*

16.2. *of you masturbating;*

17. *Between 2016 and 2018, on one or more occasions you sent one or more inappropriate messages via text message and/or social messaging to Colleague E as set out in Schedule F.*

18. *Between 2016 and 2018, on one or more occasions whilst you were at work, requested Colleague E to perform sexual acts on you as set out in Schedule G.*

19. *On an unknown date during a night shift, you called Colleague E via video messaging, whilst she was with Colleague C, and requested Colleague C and Colleague E:*

19.1. *Do sexual acts together whilst you watched, or words to that effect;*

19.2. *Tell you to do things to yourself whilst you were watching, or words to that effect;*

20. *Between 2016 and 2018, on one or more occasions when Colleague E was in the Store Cupboard, you would:*

20.1. *Come into the room and get your penis out of your pants;*

20.2. *Grab a hold of Colleague E’s hand;*

20.3. *Attempt to put Colleague E’s hand on your penis;*

21. *Between 2016 and 2018, on one or more occasions during your shift, you would ask Colleague E to drive you home and if she said yes, you would:*

21.1. *Pull her into a cupboard; and/or*

21.2. *Send her a text message stating “oh are you going to be able to drive if I am masturbating next to you?” or words to that effect; and/or*

21.3. *Send her a text message stating “what time have you got” or words to that effect; and/or*

21.4. *Send her a text message stating “what time do you have to pick your [child] up – I can quickly come to yours”, or words to that effect;*

22. *Your conduct set out at charges 16 - 21 above were sexually motivated in that it was carried out for sexual gratification;*

23. Following Colleague E asking you to stop, or words to that effect, and/or when she ignored you, you would:

23.1. not handover information about patients;

23.2. not provide assistance when requested by Colleague E;

23.3. not provide medication to patients when requested by Colleague E;

24. One or more of your actions at charges 1 - 23 above targeted less experienced and/or vulnerable staff;

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

### **Schedule A**

1. "I want you to be my mistress and I want you to tell me what you would do to me, I want to pee in a cup for you to tell me to throw it over me" or words to that effect;
2. "I want to phone you on video cam because I want you to watch me masturbate" or words to that effect;
3. "I'm going to be wearing a red thong tonight at work, I'll go in the toilet and take a photograph" or words to that effect;
4. "Ok. Just for you to keep ideas on your mind. I want dress a sexy thong and then you gonna tell me colour and which time of thong. Then I want fuck my ass in all positions we gonna tell me which ones. I want play with my cock as you want to. Other things... I don't know.. maybe out a cock".
5. On a date in June 2017, you stated "Will chart Thursday in more detail because I want to tell you all I feel about it and what I desire but my last question of the day, just curious, before I go to sleep, do you like order or do you like receive orders? If you know what I mean xx"
6. On 15 June 2017, stated "are u gonna order me to dress a female thong and slap myself?"
7. On 19 June 2017, stated "I never be a slave for anyone. I just showed my cock in webcam. That's the maximum I did. And now I want have a experience as a slave. Slave".

### **Schedule B**

1. You talked about your penis;
2. Stated "I wish you could watch my cock";
3. "Shame you don't want to watch another [cock] one"
4. "I can't wait for that. it's the same if I had a circumcision and you have a look my cock"

### **Schedule C**

1. Asked Colleague C if you would wear a pink thong to work, or words to that effect;
2. On an unknown date in 2017, stated "like taste the cum or stick a finger in my ass or that's too much for you? lol don't know if you have wishes to watch for fun.... im just asking" and "but asking that its be good because I like" and "so u didn't like to see me taste the cum? Just curious. If u don't is fine I just want to do all u wishes" and "lol so while u watching me you";
3. On an unknown date in 2017, stated "but for example if I have a oppurunity can I show u? like if we are alone on the Store room can I just show u for 1sec? Just show and put back in my pants lol." and "maybe another time you watch doing another thing" and "tonight the shift will be easy"
4. On an unknown dated between May and October 2017, stated "it's the game of slow and fast and the only thing you need to tell me is slow or fast. Ridiculous but efficient game lolol"
5. On 2 November 2017, stated "Hum its something that stays between us and that's it. you don't need to think in anything. Just enjoy to watch. Right?"
6. On 5 November 2017, stated "On your break, can I ask you slow or fast? Or is not wise? Lolol" and "it's easy and quick its that ok> but just when ure in break."

### **Schedule D**

1. Asked Colleague D if she wanted to watch you masturbate, or words to that effect;
2. Asked Colleague D what she would like to do to you, or words to that effect;
3. Asked "Do you want to see me naked?"

### **Schedule E**

1. "do you want to watch me?", or words to that effect;
2. "how fast should I go?", or words to that effect;

### **Schedule F**

1. "I want you to be my master and I want to be your slave" or words to that effect;
2. "I want you to tell me to do things to myself" or words to that effect;
3. "wee in a cup and pour it over yourself" or words to that effect;
4. "tell me to put my penis in a yoghurt and then eat the yoghurt of my penis" or words to that effect;
5. "talk dirty to me"; or words to that effect;

### **Schedule G**

1. *“tell me to do things to myself”, or words to that effect;*
2. *“tell me to get some tourniquet out and go and wrap it around my testicles and masturbate in the bathroom”, or words to that effect;*
3. *“get a syringe and go into the bathroom and put it up my bum”, or words to that effect;*
4. *“go into the bathroom with him”; or words to that effect;*  
*“stick a finger up my bum”, or words to that effect;*

### **Decision and reasons on facts**

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

The panel has drawn no adverse inference from the non-attendance of Mr Silva.

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:

- Colleague E: [PRIVATE]
- Colleague D: [PRIVATE]
- Colleague C: Healthcare Assistant.
- Colleague B: Registered Nurse
- Colleague A: Assistant Practitioner

- Ms 1: Training and Developmental Lead.
- Ms 2: Nurse Consultant – Gynaecology.

## **Background**

The charges arose whilst Mr Silva was employed as a Band 5 registered nurse at Meldon Ward (the Ward), at Great Western Hospitals NHS Trust (the Trust).

It is alleged that Mr Silva failed to maintain professional boundaries by sexually harassing and behaving sexually towards other members of staff.

During the Trust's investigation, seven witnesses were interviewed as well as Mr Silva. Out of the seven witnesses, six said they had received either inappropriate messages via Facebook messenger both whilst Mr Silva was on and off duty and two had been asked to perform sexual acts or be witness to a physical act performed by Mr Silva whilst at work.

Mr Silva was interviewed by the Trust during an investigation meeting on 9 March 2018. Mr Silva claimed that he has a good working relationship with his colleagues and that all of the allegations have come as a shock to him. Mr Silva fully admitted to sending messages of a sexual nature to colleagues and to sending messages whilst at work, although he does not believe that any messages sent made the recipient feel uncomfortable. Mr Silva cites that these actions were wanted and reciprocated. Mr Silva refused to comment on a particular physical act which he explained was currently being investigated by the police.

Mr Silva has not engaged with the NMC's investigation.

Mr Silva was suspended by the Trust on 9 February 2018.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor particularly in relation to hearsay evidence and the weight that the panel

should attach to it. It considered the witness and documentary evidence provided by the NMC.

The panel considered the evidence of the witnesses and made the following conclusions:

Colleague A: The panel considered the evidence of Colleague A to be credible and reliable. Her answers in her evidence were consistent with her witness statement although she accepted when she did not have a clear recollection of events.

Colleague B: The panel considered the evidence of Colleague B to be credible. She was able to articulate and recall the chronology of events. The panel found her to be both a professional and committed nurse as demonstrated by her coming forward to express her concern about Mr Silva's behaviour after it was disclosed to her by other colleagues that his behaviour was escalating.

Colleague C: The panel considered Colleague C to be credible and she sought to assist it to the best of her recollection. She was clear and explained areas that she knew about well. Colleague C explained that she had a fear of reporting Mr Silva's behaviour to senior staff and felt scared by being involved in the incidents and had been concerned at the time that she may be blamed.

Colleague D: The panel considered the evidence of Colleague D to be credible and consistent. The panel found that she had a good recollection of the events and was honest and quick to acknowledge any shortcomings in her memory. The panel noted that she was committed to her role and was patient focussed. It also noted that when she was interviewed by the Trust, she was under enormous personal strain due to her home circumstances and she acknowledged that there were some differences in the account she gave at the time to the fuller account she has subsequently given to the NMC.

Colleague E: The panel considered the evidence of Colleague E to be initially incomplete and decided to recall her as a witness. It found her recollection was inconsistent about the

disclosures of the events. However, her recollection of the actual events was clear and consistent. The panel considered that she may have felt some embarrassment about her true level of engagement with Mr Silva.

Ms 1: The panel considered the evidence of Ms 1 to be credible and consistent. Ms 1's evidence assisted the panel in assessing Mr Silva's actions and the panel placed much reliance on her interviews with the witnesses.

Ms 2: The panel considered the evidence of Ms 2 to be credible and consistent. The panel was assisted by listening again to the recording of Ms 1's interview with Mr Silva. The panel found Ms 2 to be professional and fair in her evidence in so far as the investigative process she was able to assist the panel with her answers.

Mr Silva: The panel noted that Mr Silva had chosen to absent himself from the hearing. No inference was drawn from his absence. The panel also noted that Mr Silva had declined to give any responses to the charges to the NMC. The panel heard the account as understood by the NMC by reading Mr Silva's various interviews and his accounts were then explored with each of the witnesses.

In approaching its consideration of the facts of this case, the panel noted the police interview, the Trust's interview and the disciplinary interview which was provided as an audio recording and a transcript. Within the disciplinary interview, Mr Silva appeared to accept the allegations set out to him. Mr Silva explained that his position was that he was doing no more than simply 'flirting' with colleagues who he perceived to be insufficiently strong to say no to him. When asked why these colleagues were now making complaints, he went on to assert they had 'ganged up' and colluded against him.

Collusion: The panel considered Mr Silva's complaint about collusion. It noted that the witnesses only decided to share their own experiences of Mr Silva's behaviour in order to decide whether to escalate their concerns. The panel also noted that there had been three

separate and isolated incidents of reporting what had happened and the reporting had only taken place after Mr Silva's behaviour had continued for a number of years.

The panel took into account that each of the witnesses appeared to be reluctant to disclose the events, with some expressing a feeling of shame and violation for what they had been made a party to. All of the witnesses stated that Mr Silva was charming, he had a good network of relationships with Trust staff more senior than him and that he was a good nurse. For these reasons the panel could well understand how the witnesses may have felt less able to report what was happening.

The panel also took into account that Mr Silva does not deny the allegations in his various interviews so there would be no reason for the witnesses to collude and rejected the suggestion of a conspiracy between the witnesses.

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

The panel looked at each message alleged to have been sent by Mr Silva as set out in Schedule A individually to determine first if it were proved as a fact and, if so, whether this fact then proved that his conduct in charge 1 was sexually motivated and that it was carried out for sexual gratification as alleged in charge 2.

## **Colleague A**

### **Charge 1**

*Between April and June 2017, you sent one or more inappropriate messages via text message and/or social messaging to Colleague A as set out in Schedule A.*

### **Schedule A**

- 1. "I want you to be my mistress and I want you to tell me what you would do to me, I want to pee in a cup for you to tell me to throw it over me" or words to that effect;*
- 2. "I want to phone you on video cam because I want you to watch me masturbate" or words to that effect;*

3. *"I'm going to be wearing a red thong tonight at work, I'll go in the toilet and take a photograph" or words to that effect;*
4. *"Ok. Just for you to keep ideas on your mind. I want dress a sexy thong and then you gonna tell me colour and which time of thong. Then I want fuck my ass in all positions we gonna tell me which ones. I want play with my cock as you want to. Other things... I don't know.. maybe out a cock".*
5. *On a date in June 2017, you stated "Will chat Thursday in more detail because I want to tell you all I feel about it and what I desire but my last question of the day, just curious, before I go to sleep, do you like order or do you like receive orders? If you know what I mean xx"*
6. *On 15 June 2017, stated "are u gonna order me to dress a female thong and slap myself?"*
7. *On 19 June 2017, stated "I never be a slave for anyone. I just showed my cock in webcam. That's the maximum I did. And now I want have a experience as a slace. Slave".*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague A in her investigation meeting interview undertaken by Ms 1, her witness statement and her oral evidence. In her investigation interview, Colleague A describes messages 1-3 as set out in Schedule A. Colleague A also states in her witness statement that Mr Silva began to send her inappropriate messages in April 2017 and they continued for a few months. The panel found Colleague A's account to be supported by screen shots of messages 4 – 7 as set out in Schedule A. The panel also noted that Mr Silva admits sending these messages to Colleague A in his interview.

The panel therefore concluded that in respect of this allegation Mr Silva sent one or more inappropriate messages via text message and/or social messaging to Colleague A as set out in Schedule A.

**Charge 2**

*Your conduct set out at charge 1 was sexually motivated in that it was carried out for sexual gratification;*

## **This charge is found proved.**

In reaching this decision, the panel considered the question of sexual gratification in relation to each message set out in Schedule A. It considered whether each message, on the balance of probabilities, was sent for the purpose of Mr Silva's sexual gratification and whether the below factors apply:

- The message explicitly referred to a sexual act.
- The message referred to an intimate act.
- The message referred to Mr Silva's sexual organs (including his anus).
- The message described an act that Mr Silva would derive sexual pleasure from.
- The message referred to Mr Silva wearing women's underwear or clothing.

The panel was of the view that each of the messages set out in Schedule A is either explicitly or implicitly sexual. The panel noted that Mr Silva has not sought to explain that there is any interpretation applicable to the messages other than a sexual one. The panel was of the view that there is no interpretation of the messages as anything other than sexual.

The panel therefore concluded that in respect of this charge, Mr Silva's conduct set out at charge 1 was sexually motivated in that it was carried out for sexual gratification;

## **Colleague B**

### **Charge 3**

*On 18 May 2017, you sent one or more inappropriate messages via text message and/or social messaging to Colleague B as set out in Schedule B.*

### **Schedule B**

1. *You talked about your penis;*
2. *Stated "I wish you could watch my cock";*

3. *“Shame you don’t want to watch another [cock] one”*
4. *“I can’t wait for that. it’s the same if I had a circumcision and you have a look my cock”*

**This charge is found proved.**

In reaching this decision, the panel accepted the witness statement of Colleague B and her oral evidence.

The panel noted that Colleague B refers to messages 1 – 2 as set out in Schedule B in her investigation meeting with Ms 1. Colleague B says in her witness statement that Mr Silva began to send her inappropriate messages in May 2017 and that they had begun after she had [PRIVATE]. The panel found Colleague B’s account to be supported by screen shots of messages 2 – 4 as set out in Schedule B and also by her oral evidence. The panel also noted that Mr Silva admits sending explicit messages to colleagues in his Trust interview.

The panel therefore concluded that in respect of this allegation Mr Silva did send one or more inappropriate messages via text message and/or social messaging to Colleague A as set out in Schedule A.

**Charge 4**

*Your conduct set out at charge 3 was sexually motivated in that it was carried out for sexual gratification;*

**This charge is found proved.**

In reaching this decision, the panel considered the question of sexual gratification in relation to each message set out in Schedule B. It considered whether each message, on the balance of probabilities, was sent for the purpose of Mr Silva’s sexual gratification and whether the below factors apply:

- The message explicitly referred to a sexual act.

- The message referred to an intimate act.
- The message referred to Mr Silva's sexual organs (including his anus).
- The message described an act that Mr Silva would derive sexual pleasure from.
- The message referred to Mr Silva wearing women's underwear or clothing.

The panel was of the view that each of the messages set out in Schedule B is either explicitly or implicitly sexual and refers to Mr Silva's "cock". The panel noted that Mr Silva has not sought to explain that there is any interpretation applicable to the messages other than a sexual one. The panel was of the view that there is no interpretation of the messages as anything other than sexual.

The panel therefore concluded that in respect of this charge, Mr Silva's conduct set out at charge 3 was sexually motivated in that it was carried out for sexual gratification;

### **Colleague C**

#### **Charge 5**

*On or around May 2017, during a night shift, asked Colleague C to sit in a room while you masturbated, or words to that effect;*

**This charge is found proved.**

In reaching this decision, the panel accepted Colleague C's witness statement, her investigation meeting with Ms 1 and her oral evidence.

The panel noted that in the investigation meeting Colleague C stated that Mr Silva had asked her to '*sit in a room while he masturbated*'. Colleague C also refers to this in her witness statement where she states that this happened in May 2017 on a nightshift she worked with Mr Silva.

The panel therefore concluded that on the balance of probabilities, in respect of this charge, that on or around May 2017, during a night shift, Mr Silva did ask Colleague C to sit in a room while he masturbated, or words to that effect.

### **Charge 6**

*Between 2017 and February 2018, you sent one or more inappropriate messages via text message and/or social messaging to Colleague C as set out in Schedule C.*

#### **Schedule C**

1. *Asked Colleague C if you would wear a pink thong to work, or words to that effect;*
2. *On an unknown date in 2017, stated "like taste the cum or stick a finger in my ass or that's too much for you? lol don't know if you have wishes to watch for fun.... im just asking" and "but asking that its be good because I like" and "so u didn't like to see me taste the cum? Just curious. If u don't is fine I just want to do all u wishes" and "lol so while u watching me you";*
3. *On an unknown date in 2017, stated "but for example if I have a oppurunity can I show u? like if we are alone on the Store room can I just show u for 1sec? Just show and put back in my pants lol." and "maybe another time you watch doing another thing" and "tonight the shift will be easy"*
4. *On an unknown dated between May and October 2017, stated "it's the game of slow and fast and the only thing you need to tell me is slow or fast. Ridiculous but efficient game lolol"*
5. *On 2 November 2017, stated "Hum its something that stays between us and that's it. you don't need to think in anything. Just enjoy to watch. Right?"*
6. *On 5 November 2017, stated "On your break, can I ask you slow or fast? Or is not wise? Lolol" and "it's easy and quick its that ok> but just when ure in break."*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague C in her witness statement, her investigation meeting interview and her oral evidence.

The panel noted that Colleague C refers to messages sent by Mr Silva in her witness statement and also in her investigation meeting interview with Ms 1. She says in this

interview that Mr Silva was *'asking me if he would wear a pink thong to work'* as set out in Schedule C-1.

The panel found Colleague C's account that Mr Silva sent inappropriate messages to her to be supported by screen shots of messages 2 – 6 as set out in Schedule C and also by her oral evidence. The panel also noted that Mr Silva admits sending these messages in the Trust's investigation interview.

The panel therefore concluded that in respect of this allegation Mr Silva did send one or more inappropriate messages via text message and/or social messaging to Colleague C as set out in Schedule C.

### **Charge 7**

*Your conduct set out at charges 5 and 6 were sexually motivated in that it was carried out for sexual gratification;*

**This charge is found proved.**

In reaching this decision, the panel considered the question of sexual gratification in relation to each message set out in Schedule C. It considered whether each message, on the balance of probabilities, was for the purpose of Mr Silva's sexual gratification and whether the below factors apply:

- The message explicitly referred to a sexual act.
- The message referred to an intimate act.
- The message referred to Mr Silva's sexual organs (including his anus).
- The message described an act that Mr Silva would derive sexual pleasure from.
- The message referred to Mr Silva wearing women's underwear or clothing.

The panel was of the view that each of the messages set out in Schedule B is either explicitly or implicitly sexual. The panel noted that Mr Silva has not sought to explain that there is any interpretation applicable to the messages other than a sexual one. The panel

was of the view that there is no interpretation of the messages as anything other than sexual.

The panel therefore concluded that in respect of this allegation, Mr Silva's conduct set out at charge 3 was sexually motivated in that it was carried out for sexual gratification;

## **Colleague D**

### **Charge 8**

*Between Summer 2016 and Summer 2017, you sent one or more inappropriate messages via text message and/or social messaging to Colleague D as set out in Schedule D.*

### **Schedule D**

1. *Asked Colleague D if she wanted to watch you masturbate, or words to that effect;*
2. *Asked Colleague D what she would like to do to you, or words to that effect;*
3. *Asked "Do you want to see me naked?"*

### **This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague D in her witness statement, her investigation meeting interview with Ms 1 and her oral evidence.

The panel noted that Colleague D says in her witness statement that Mr Silva started sending her messages a few months after starting [PRIVATE]. Colleague D also says in the investigation meeting interview with Ms 1 that Mr Silva added her on Facebook and began to "*send messages while he was on night shifts – whether I was at home or at work and he would ask whether I want to watch him masturbate*", as set out Schedule D - 1. The panel also noted that Mr Silva admits sending explicit messages in the Trust's investigation interview.

In relation to Schedule D-2, the panel noted that the evidence is that Mr Silva asked Colleague D what she would like him to do to himself and Schedule D-2 is worded as Mr Silva asking what Colleague D would like to do to him so can therefore not be proved.

In relation to D-3, the panel noted that the only reference to “*Do you want to see me naked?*” is in Mr Silva’s police interview and is not mentioned in Colleague D’s oral evidence or witness statement. The panel was of the view that there was not enough evidence to find Schedule D-3 proved.

The panel therefore concluded that in respect of this allegation *Mr Silva sent one or more inappropriate messages via text message and/or social messaging to Colleague D is proved as set out in Schedule D-1 but not in relation to D-2 and D-3.*

### **Charge 9**

*Between Summer 2016 and Summer 2017, you gave Colleague D inappropriate notes as set out in Schedule E.*

### **Schedule E**

1. “*do you want to watch me?*”, or words to that effect;
2. “*how fast should I go?*”, or words to that effect;

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague D in her witness statement, her investigation meeting interview with Ms 1 and her oral evidence.

The panel took into account the investigation meeting with Ms 1. Colleague D says that Mr Silva would write her notes which would say things such as “*do you want to watch me?*” and “*how fast should I go?*” as set out in Schedule E 1 and 2.

The panel therefore concluded in respect of this allegation that on the balance of probabilities, between Summer 2016 and Summer 2017, Mr Silva did give Colleague D inappropriate notes as set out in Schedule E.

### **Charge 10**

*Between Summer 2016 and Summer 2017, approximately every week or two for about 6 months, you sent Colleague D pictures of your penis and/or of you masturbating in the toilet at work via text message and/or social messaging;*

### **This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague D in her witness statement, investigation meeting and also her oral evidence.

In Colleague D's witness statement she goes into some detail about the messages and images that Mr Silva sent her and how regularly this occurred. Colleague D states, *"He also sent me pictures of himself masturbating in the toilet at work... the picture messaging went on for about six months, probably about one message every week or two"*. The panel also took into account the investigation meeting and noted that in her oral evidence, Colleague D explained that there was an error in the notes of the investigation meeting. She said that where it says that Mr Silva "never sent any pictures", she meant to say that he did send pictures but that she did not have them because the police had retained her phone at that time.

The panel therefore concluded that on the balance of probabilities, between Summer 2016 and Summer 2017, approximately every week or two for about 6 months, Mr Silva sent Colleague D pictures of his penis and/or of him masturbating in the toilet at work via text message and/or social messaging;

### **Charge 11**

*Sometime between approximately June and August 2017, you carried out a sexual act in front of Colleague D by:*

- 11.1 Blocking her exit whilst she was in the linen cupboard;*
- 11.2 Masturbating;*
- 11.3 Ejaculating into a towel;*
- 11.4 Throwing the towel at Colleague D.*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague D from her witness statement and her oral evidence.

The panel noted that in the investigation meeting Colleague D described an incident in Summer 2017 where that Mr Silva asked her to put the linen away and he “*stood in the one bit where I couldn’t come out and he stood and masturbated and finished himself off into a towel, chucked the towel and walked out*”. The panel took into account that in her oral evidence Colleague D described in more detail where Mr Silver had thrown the towel stating that once Mr Silver had finished, he threw the towel toward her chest/head area, and was aimed at her as if to say “you clean up”.

The panel therefore found charge 11 proved in its entirety.

## **Charge 12**

*Sometime between approximately June and August 2017, you carried out a sexual act in front of Colleague D by:*

- 12.1 masturbating and/or played with your penis;*
- 12.2 asked Colleague D if she wanted to play and/or watch you, or words to that effect;*
- 12.3 carried out the above acts at charges 12.1-12.2 with a recently deceased patient still present in the room;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague D from her witness statement and her oral evidence.

The panel noted the investigation meeting notes where Colleague D explained that [PRIVATE] a patient had just passed away. Colleague D says *“he asked me to make a bed with him. I went and made the bed and he shut the room and drew the curtain and then he got his penis out and started trying to play with himself and asked if I want to play or watch him”*.

The panel noted that Colleague D’s witness statement and investigation meeting notes vary with regard to whether or not the deceased patient was in the room. Colleague D explained in her oral evidence that she was frightened of what the consequences would be for her being present during such an act taking place and not reporting it at the time. The panel accepted this explanation and took into account the context of Colleague D’s personal circumstances at the time and her concern about the potential consequences to her if she had reported that the deceased was in the room. This event clearly distressed Colleague D.

The panel therefore found charge 12 proved in its entirety.

### **Charge 13**

*Your conduct set out at charges 8 -12 above were sexually motivated in that it was carried out for sexual gratification;*

**This charge is found proved.**

In reaching this decision, the panel considered the question of sexual gratification in relation to each message set out in charges 8-12. It considered whether each message, on the balance of probabilities, was for the purpose of Mr Silva’s sexual gratification and whether the below factors apply:

- The message explicitly referred to a sexual act.
- The message referred to an intimate act.
- The message referred to Mr Silva's sexual organs (including his anus).
- The message described an act that Mr Silva would derive sexual pleasure from.
- The message referred to Mr Silva wearing women's underwear or clothing.

The panel was of the view that the messages and notes set out in Schedule D-1, Schedule E and charge 10 described sexual and intimate acts and are explicitly and implicitly sexual. The panel was of the view that the actions in charges 11 and 12, were overtly sexual and involved Mr Silva masturbating/touching himself and are explicitly sexual.

The panel noted that Mr Silva has not sought to explain that there is any interpretation applicable to the messages other than a sexual one. The panel was of the view that there is no interpretation of the messages as anything other than sexual. The panel therefore concluded that in respect of this allegation, Mr Silva's messages and conduct set out at charge 8 – 12, excluding D-2 and D-3, was sexually motivated in that it was carried out for sexual gratification;

#### **Charge 14**

*Following Colleague D asking you to stop, or words to that effect, and/or when she ignored you, you would:*

- 1.1. not handover information about patients;*
- 1.2. not provide assistance when requested by Colleague D;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague D from her witness statement and her oral evidence.

[PRIVATE].

The panel therefore found charge 14 proved in its entirety.

### **Charge 15**

*On an unknown date, you told Colleague D “you’re new, I have been here for ages – no one is going to believe you”, or words to that effect;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague D.

The panel took into account the investigation meeting notes and her witness statement. Colleague D says that when she told Mr Silva that if he did not stop she would tell the Sister and he stated that *“you’re new, I have been here for ages – no one is going to believe you”*. Colleague D also confirmed this in her oral evidence to the panel.

The panel therefore concluded that on the balance of probabilities, Mr Silva did tell Colleague D *“you’re new, I have been here for ages – no one is going to believe you”*, or words to that effect;

### **Colleague E**

#### **Charge 16**

*Between 2016 and 2018, on one or more occasions whilst you were at work, you video called and/or sent a video message to Colleague E:*

*16.1 of your penis;*

*16.2 of you masturbating;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague E.

The panel took into account Colleague E's witness statement. She says that Mr Silva "started sending more explicit text messages and video calling me, some of these were when he was working on night shift and often he would be masturbating in the toilets at work". The panel also took into account the investigation meeting notes. Colleague E says that Mr Silva would call her on video messages when he was on the night shift at work and as soon as she would answer the camera would be on his penis and he would masturbating in the staff toilets. Colleague E also confirmed the events in her oral evidence to the panel.

The panel therefore found charge 16 proved in its entirety.

### **Charge 17**

*Between 2016 and 2018, on one or more occasions you sent one or more inappropriate messages via text message and/or social messaging to Colleague E as set out in Schedule F.*

### **Schedule F**

1. *"I want you to be my master and I want to be your slave" or words to that effect;*
2. *"I want you to tell me to do things to myself" or words to that effect;*
3. *"wee in a cup and pour it over yourself" or words to that effect;*
4. *"tell me to put my penis in a yoghurt and then eat the yoghurt of my penis" or words to that effect;*
5. *"talk dirty to me"; or words to that effect;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague E.

The panel noted that Colleague E says in her investigation meeting that Mr Silva would send messages asking her to engage in sexual acts, engage in sadomasochistic behaviour or refer to his penis and talking dirty. Colleague E describes the messages set out in Schedule F-1 to 5 in this meeting.

The panel therefore found charge 17 proved in its entirety.

### **Charge 18**

*Between 2016 and 2018, on one or more occasions whilst you were at work, requested Colleague E to perform sexual acts on you as set out in Schedule G.*

### **Schedule G**

1. *“tell me to do things to myself”, or words to that effect;*
2. *“tell me to get some tourniquet out and go and wrap it around my testicles and masturbate in the bathroom”, or words to that effect;*
3. *“get a syringe and go into the bathroom and put it up my bum”, or words to that effect;*
4. *“go into the bathroom with him”; or words to that effect;*
5. *“stick a finger up my bum”, or words to that effect;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague E.

The panel took into account what Colleague E says in her investigation meeting with Ms 1. Colleague E describes how Mr Silva would say sexual things to her whilst they worked together. She said that Mr Silva would ask her to tell him to perform acts on himself and to choose an object to insert into his anus, and to join him in the bathroom. Colleague E describes all the sexual acts as set out in Schedule G-1 to 5 in the investigation meeting.

The panel also took into account that in Mr Silva's disciplinary meeting with Ms 2, he did not deny the allegations.

The panel therefore found charge 18 proved in its entirety.

### **Charge 19**

*On an unknown date during a night shift, you called Colleague E via video messaging, whilst she was with Colleague C, and requested Colleague C and Colleague E:*

*19.1 Do sexual acts together whilst you watched, or words to that effect;*

*19.2 Tell you to do things to yourself whilst you were watching, or words to that effect;*

### **This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague E. The panel took into account what Colleague E says in her investigation meeting with Ms 1. She described spending an evening with Colleague C during which Mr Silva was repeatedly calling her from work. Colleague E said when she eventually answered the video call it was of Mr Silva masturbating. She says that Mr Silva "had video called us and was trying to get us to do things together so he could watch as well as us telling him to do things to himself while he was watching".

The panel therefore found charge 19 proved in its entirety.

### **Charge 20**

*Between 2016 and 2018, on one or more occasions when Colleague E was in the Store Cupboard, you would:*

*20.1 Come into the room and get your penis out of your pants;*

*20.2 Grab a hold of Colleague E's hand;*

*20.3 Attempt to put Colleague E's hand on your penis;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague E.

The panel took into account Colleague E's witness statement where she described that on a few occasions when she was in the store cupboard, Mr Silva would come in and get his penis out and grab her hand to try and get her to touch him. Colleague E also confirmed Mr Silva's conduct in her live evidence to the panel. The panel noted that her evidence varied in relation to the location of the acts but her evidence was consistent in that the locations were in a secluded position on the ward and in drawing its conclusion the panel concluded that the location of the acts was immaterial.

The panel therefore found charge 20 proved in its entirety.

**Charge 21**

*Between 2016 and 2018, on one or more occasions during your shift, you would ask Colleague E to drive you home and if she said yes, you would:*

*21.1 Pull her into a cupboard; and/or*

*21.2 Send her a text message stating "oh are you going to be able to drive if I am masturbating next to you?" or words to that effect; and/or*

*21.3 Send her a text message stating "what time have you got" or words to that effect; and/or*

*21.4 Send her a text message stating "what time do you have to pick your [child] up – I can quickly come to yours", or words to that effect;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague E.

The panel took into account what Colleague E says in her investigation meeting with Ms 1. She described Mr Silva seemingly innocuously, asking for a lift home and if she agreed he would pull her into one of the cupboards, he would send her a message to ask if she would be able to drive if he was masturbating next to her and asked her how much time she had and whether he could go to her home.

The panel therefore found charge 21 proved in its entirety.

### **Charge 22**

*Your conduct set out at charges 16 - 21 above were sexually motivated in that it was carried out for sexual gratification;*

### **This charge is found proved.**

In reaching this decision, the panel considered the question of sexual gratification in relation to your conduct set out in charges 16 - 21. It considered whether Mr Silva's conduct, on the balance of probabilities, was for the purpose of his sexual gratification and whether the below factors apply:

- The message explicitly referred to a sexual act.
- The message referred to an intimate act.
- The message referred to Mr Silva's sexual organs (including his anus).
- The message described an act that Mr Silva would derive sexual pleasure from.
- The message referred to Mr Silva wearing women's underwear or clothing.

The panel was of the view that the conduct set out in charge 16 referred explicitly to sexual and intimate acts and referred to Mr Silva's sexual organs. The panel was of the view that the conduct set out in charge 16 was overtly sexual and involved Mr Silva masturbating and are explicitly and implicitly sexual.

The panel was of the view that the conduct set out in charge 17 referred explicitly to sexual acts and referred to Mr Silva's sexual organs and described an act that Mr Silva

would derive pleasure from. The panel was of the view that the actions in charges 17 were overtly and explicitly sexual.

In relation to charge 18, the panel determined that the conduct referred explicitly to sexual and intimate acts and referred Mr Silva's sexual organs. The panel was of the view that the conduct in charges 18 were overtly and explicitly sexual.

In relation to charge 19 and 20, the panel determined that the conduct referred explicitly to sexual acts. The panel was of the view that the conduct in charges 19 and 20 were overtly and explicitly sexual.

In relation to charge 21, the panel determined that the conduct referred to sexual acts and in context described acts that Mr Silva would derive sexual pleasure from. The panel was of the view that the actions in charge 21 were explicitly and implicitly sexual.

The panel noted that Mr Silva has not sought to explain that there is any interpretation applicable to the messages other than a sexual one. The panel was of the view that there is no interpretation of the messages as anything other than sexual. The panel therefore concluded that in respect of this allegation, Mr Silva's messages and conduct set out at charge 16 - 21 was sexually motivated in that it was carried out for sexual gratification;

### **Charge 23**

*Following Colleague E asking you to stop, or words to that effect, and/or when she ignored you, you would:*

23.1 *not handover information about patients;*

23.2 *not provide assistance when requested by Colleague E;*

23.3 *not provide medication to patients when requested by Colleague E;*

**This charge is found proved.**

In reaching this decision, the panel accepted the evidence of Colleague E.

The panel took into account what Colleague E says in her investigation meeting with Ms 1. Colleague E describes in this meeting how if she told Mr Silva to stop, or ignored him he would make her work extremely difficult. [PRIVATE]. This account was also confirmed by Colleague E in her witness statement and in her oral evidence. The panel found Colleague E's account to be supported by Colleague D [PRIVATE].

The panel therefore found charge 23 proved in its entirety.

#### **Charge 24**

*One or more of your actions at charges 1 - 23 above targeted less experienced and/or vulnerable staff;*

#### **This charge is found proved.**

In reaching this decision, the panel took into account that of the five complainants [PRIVATE] were care assistants one a student nurse and as such were junior to Mr Silva. Some of the witnesses mentioned being intimidated by Mr Silva and being aware of his friendships with senior staff. The panel also noted that Colleague B, who was the only complainant of similar banding to Mr Silva, was only sent sexually explicit messages by him after she had disclosed to him that [PRIVATE].

The panel also took into account the evidence of Ms 2. In her witness statement she says about Mr Silva that "*As a senior nurse he should have been acting as a role model and not abused his position, taking advantage of less experienced staff*". Ms 2 also explained in her oral evidence that *the witnesses did not feel that they would be believed if they came forward.*

The panel therefore concluded that, on the balance of probabilities, Mr Silva's actions at charges 1 - 23 did target less experienced and/or vulnerable staff.

## **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 Silva'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 Silva'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 Smith 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.

Ms Smith identified the specific, relevant standards where Mr Silva's actions amounted to misconduct.

### **Submissions on impairment**

Ms Smith 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 cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin).

Ms Smith submitted that the panel can conclude that Mr Silva has no insight into the consequences of his actions on colleagues and no insight into how his actions put patients at unwarranted risk of harm. She submitted that Mr Silva has made no attempt to explain why he continued to behave in the way that he did for such a long time and he shows no understanding of the seriousness of his behaviour. In the absence of any reassurance that Mr Silva understands the seriousness of his actions and his lack of remediation, Ms Smith invited the panel to find Mr Silva's fitness to practise impaired.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments, including *Nandi v General Medical Council* [2004] EWHC 2317 (Admin),

### **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 Silva's actions fell far short of the standards expected of a registered nurse, and that Mr Silva's actions amounted to a breach of the Code.

Specifically:

*“Our role is to set the standards in the Code, but these are not just our standards. They are the standards that patients and members of the public tell us they expect from health professionals. They are the standards shown every day by those on our register.*

**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*

**8 Work co-operatively**

*To achieve this, you must:*

**8.2** *maintain effective communication with colleagues*

**8.3** *keep colleagues informed when you are sharing the care of individuals with other health and care professionals and staff*

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

**8.6** *share information to identify and reduce risk*

**16.5** *not obstruct, intimidate, victimise or in any way hinder a colleague, member of staff, person you care for or member of the public who wants to raise a concern*

**16.6** *protect anyone you have management responsibility for from any harm, detriment, victimisation or unwarranted treatment after a concern is raised*

### **Promote professionalism and trust**

*You uphold the reputation of your profession at all times. You should display a personal commitment to the standards of practice and behaviour set out in the Code. You should be a model of integrity and leadership for others to aspire to. This should lead to trust and confidence in the profession from patients, people receiving care, other health and care professionals and the public*

### **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*

**20.3** *be aware at all times of how your behaviour can affect and influence the behaviour of other people*

**20.5** *treat people in a way that does not take advantage of their vulnerability or cause them upset or distress*

**20.8** *act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to*

**20.10** *use all forms of spoken, written and digital communication (including social media and networking sites) responsibly, respecting the right to privacy of others at all times*

*25 Provide leadership to make sure people's wellbeing is protected and to improve their experiences of the health and care system"*

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel was of the view that Mr Silva's behaviour was sexually motivated and was carried out for sexual gratification and was serious particularly as he was in a position of seniority, noting that Mr Silva directed this sexualised behaviour towards junior colleagues who were identified to be vulnerable and who would have looked up to him as a senior member of staff and someone they could trust. It also noted that Mr Silva's actions were repeated and sustained over a number of years and involved multiple colleagues. The panel was of the view that fellow professionals would have found Mr Silva's behaviour, exacerbated by having taken place over an extended period of time, to be deplorable.

The panel considered that although no patient harm was caused by Mr Silva's actions, by ignoring his colleagues at work and withholding information and assistance from them when they did not go along with his advances, he placed patients at unwarranted risk of harm, potentially delaying provision of care and medication.

The panel found that Mr Silva'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 Silva'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 and to maintain professional boundaries. 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 Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin) in reaching its decision. In paragraph 74, she said:

*'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'*

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) ...

The panel found that the first three limbs of the Grant test to be engaged in this case, both as to the past and the future.

The panel finds that patients were put at unwarranted risk or harm and colleagues were caused emotional harm as a result of Mr Silva's misconduct. Mr Silva'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 sexual misconduct extremely serious.

Regarding insight, the panel considered that Mr Silva has shown no insight or remorse into his misconduct. It took into account the recording of Mr Silva's disciplinary interview noting that he commented that his colleagues should have been strong enough to rebuff him if they did not like his behaviour and he seemingly saw nothing wrong in how he had behaved towards them stating that he was merely 'flirting'. The panel noted that Mr Silva would stop his behaviour and then start again, demonstrating that he had no respect for the wishes of his colleagues or insight into the impact that his behaviour was having and had on them and how this might have impacted upon patient safety generally.

Further, the panel is of the view that there is a serious risk of repetition based on his complete lack of insight, remorse or remediation. 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 required. The panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds Mr Silva's fitness to practise impaired on public protection and public interest grounds.

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

### **Hearsay**

Ms Smith invited the panel to expand on the detail of the hearsay advice that was given in the determination on facts.

It was the view of the legal assessor that the passage within the determination flagged the issues which were properly explored by the panel throughout the course of hearing. The legal assessor advised the panel that Mr Silva would have the opportunity not only to read a copy of the determination but also to read the transcript, where the issue was extensively discussed.

The panel accepted the advice of the legal assessor and declined this application.

[PRIVATE]

### **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 Silva off the register. The effect of this order is that the NMC register will show that Mr Silva 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 Smith informed the panel that in the Notice of Hearing, dated 21 August 2020, the NMC had advised Mr Silva that it would seek the imposition of a striking-off order if his fitness to practise was found to be currently impaired.

### **Decision and reasons on sanction**

Having found Mr Silva'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:

- Mr Silva abused his position of trust and seniority
- Mr Silva exploited colleagues who were junior to him or in their own way vulnerable
- Mr Silva exploited his position in relation to his junior colleagues.
- Mr Silva demonstrated a complete absence of insight into his conduct.
- Mr Silva demonstrated a pattern of misconduct over a significant period of time
- Mr Silva's conduct put patients at risk of harm.
- Mr Silva used the fact that he was otherwise a well-regarded nurse and good practitioner as a cover to manipulate staff and exploit his position of trust.

- Although Mr Silva made admissions at the local investigation, he showed no insight as to how his actions impacted on his colleagues and subsequently on patient safety.

The panel could find no mitigating features in this case.

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 issues identified, an order that does not restrict Mr Silva'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 Silva'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 Silva's registration would be a sufficient and appropriate response. The panel noted that no deficiencies in his competence were identified. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case. The misconduct identified in this case was not something that can be addressed through retraining. Furthermore, the panel concluded that the placing of conditions on Mr Silva's registration would not adequately address the seriousness of this case and would not protect the public.

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:

- *A single instance of misconduct but where a lesser sanction is not sufficient;*
- *No evidence of harmful deep-seated personality or attitudinal problems;*
- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour.*

The panel noted that Mr Silva's actions were not a single instance and took place over a significant period of time and involved multiple colleagues. The panel was of the view that Mr Silva has demonstrated by his behaviour and in his answers in interview, evidence of harmful deep-seated personality or attitudinal problems in his exploitation and manipulation of colleagues.

It also took the view that because of his complete lack of insight into the impact his actions had on colleagues and the potential risk to patients under his care, Mr Silva poses a continuing risk of repeating his behaviour.

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 the serious breach of the fundamental tenets of the profession evidenced by Mr Silva's actions is fundamentally incompatible with Mr Silva remaining on the register.

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?*

The panel was of the view that Mr Silva's actions raise fundamental questions about his professionalism. Mr Silva used his position of trust that staff had in him to target both 'weak' and vulnerable colleagues for his own sexual gratification, knowing that he was well-regarded and respected at the Trust. The panel was of the view that Mr Silva felt safe in the knowledge that his behaviour would not come to light because of his seniority. Mr Silva has demonstrated no respect for the views or feelings of his vulnerable female colleagues and placed blame on them for 'not being strong enough' to rebuff him. The panel was of the view that Mr Silva's continuing absence of insight demonstrates why he felt able to continue this behaviour over many years and there is nothing to suggest that he would stop his behaviour if he were given the opportunity to continue his career in nursing. It is the view of the panel that Mr Silva will continue to pose a serious risk to any future female colleagues.

Mr Silva's actions were significant departures from the standards expected of a registered nurse, and are fundamentally incompatible with him remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Mr Silva's actions were serious and to allow him to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

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 Silva'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.

In light of its findings and ongoing concerns and the information supplied by Mr Silva that he is continuing to work as a nurse in Portugal, the panel requests that the NMC actively contact the Portuguese authorities to inform them of its decision.

This decision will be confirmed to Mr Silva in writing.

### **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 Silva's own interests 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 Smith. She invited the panel to impose an interim suspension order for a period of 18 months for the same reasons identified by the panel for imposing a striking off order.

## **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. 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 striking-off order 28 days after Mr Silva is sent the decision of this hearing in writing.

That concludes this determination.