

**Nursing and Midwifery Council
Fitness to Practise Committee
Substantive Hearing
17 – 21 February 2020
12 October 2020**

Nursing and Midwifery Council, 114-116 George Street, Edinburgh, EH2 4LH
Virtual Hearing (12 October 2020)

Name of registrant:	Dianne Stephenson
NMC PIN:	1111165S
Part(s) of the register:	Registered Nurse – Sub Part 1 Adult Nursing – 13 October 2014
Area of registered address:	Aberdeen
Type of case:	Lack of Competence
Panel members:	Dr Matthew Fiander (Chair, Lay member) Derek McFaul (Lay member) Anita Underwood (Registrant member)
Legal Assessor:	Graeme Henderson
Panel Secretary:	Oliver Stephens (17 – 21 February 2020) Xenia Menzl (12 October 2020)
Nursing and Midwifery Council:	Represented by Alastair Kennedy, NMC Case Presenter
Miss Stephenson:	Present via video-link, not represented
No Case to Answer:	Schedule A, items (a), (b), (c), (d), (e), (f), (g)
Facts proved:	1, 2, 3, 4, 5, 6, 8, Schedule A, items (i), (j), (l), (o), (p), (s)
Facts not proved:	7, Schedule A, items (h), (k), (m), (n), (q), (r)
Fitness to practise:	Impaired
Sanction:	Conditions of Practice Order, 3 Years

Interim order:

Conditions of Practice Order, 18 Months

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that you were not in attendance, were not in contact that day, and that the written notice of hearing letter had been sent to your registered address by recorded delivery and by first class post on 16 January 2020.

The panel had regard to the Royal Mail 'Track and Trace' printout which showed the notice of hearing was delivered to your registered address on 21 January 2020. It was signed for in the name of 'STEPHENSON'.

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

Mr Kennedy, 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 you had been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on application to participate in hearing and give evidence via video-link

Mr Kennedy made an application to proceed in your absence. Mr Kennedy referred the panel to various emails between you and the NMC Case Officer preceding the commencement of the hearing. However, the panel noted your email requests on 13 December 2019 and 14 December 2019 for the hearing to be conducted via video-link. The panel also had regard to a note of a telephone conversation between the NMC Case Officer and yourself, dated 14 February 2020, where you confirmed you would be available to attend the hearing via telephone.

Mr Kennedy informed the panel that the request for the hearing to be conducted via video-link had not been fully explored by the NMC. Mr Kennedy told the panel that you had instead been provided with documentation to make an application for financial assistance so that you could attend the hearing in person. Mr Kennedy informed the panel that this financial assistance was not provided because you were assessed as ineligible. Mr Kennedy also informed the panel that the Panel Secretary had attempted to contact you on three separate occasions on the morning of 17 February 2020, the first listed sitting day of this hearing, and that further attempts would be made so that you could make an application to attend the hearing via video-link. The application to proceed in absence was abandoned as contact had eventually been made with you.

Shortly thereafter, the panel heard your application by telephone under Rule 31 of the Rules to allow you to give your evidence and to participate in the hearing over GoToMeeting video-link. You told the panel that you had made requests previously to participate in the hearing via video-link and it was on this basis that you made the application. You explained to the panel that your personal circumstances prevented you from attending the hearing in person but that you wished to engage in the proceedings.

Mr Kennedy, on behalf of the NMC, did not oppose the application.

The panel heard and accepted the legal assessor's advice on the issues it should take into consideration in respect of this application. This included that Rule 31 provides that, so far as it is 'fair and relevant', a panel may accept evidence in a range of forms and circumstances, whether or not it is admissible in civil proceedings. The legal assessor also referred to the case of *Polanski v Condé Nast Publications Limited* [2005] UKHL 10 and noted that there are a range of methods in which an individual can engage in proceedings, including via telephone and video-link.

The panel concluded, that in all the circumstances, it was in the interests of justice to grant the application for you to firstly, attend the hearing via video-link and secondly, for you to provide evidence via video-link. The panel considered that your participation in the hearing would enable you to listen to the entirety of the evidence brought forward by the NMC in relation to the charges against you. The panel also considered that it would afford you an opportunity to ask questions of the NMC witnesses and present your case for consideration by the panel. The panel noted the judicial guidance on these issues and considered in circumstances such as these, that you should be facilitated to participate in the hearing via video-link if able to do so. Accordingly, the panel determined that the requirements for 'fairness and relevance' were satisfied in relation to you giving evidence via video-link, and that you should be allowed to participate in the hearing and give evidence via video-link.

The panel noted that there may be intermittent issues with the video-link and that a stable connection is not always guaranteed. In those circumstances, the panel noted that neither you nor Mr Kennedy objected to your participation over the telephone as an alternative. The panel determined that whenever the video link was interrupted you would participate by telephone.

Decision and reasons on amendment of the charge

The panel of its own volition determined that based upon the evidence it had before it, amendments to the wording of the stem preceding charges 1) – 8) and to charge 4) were required.

The proposed amendment was to delete the duplicate words ‘ / registered nurse’ and amend the word preforming, to performing, as follows:

“That you, a Registered Nurse, failed to demonstrate the standards of knowledge, skill, and judgement required to practise without supervision as a Scrub Nurse ~~/registered nurse~~ in that:

...

4) Competently ~~preforming~~ performing the role of Scrub Nurse without the support of a trained nurse acting as your circulating nurse;

...”

Neither Mr Kennedy, on behalf of the NMC, nor you opposed this proposed amendment.

The panel accepted the advice of the legal assessor that Rule 28 states:

‘28.— (1) *At any stage before making its findings of fact, in accordance with rule 24(5) or (11), the Investigating Committee (where the allegation relates to a fraudulent or incorrect entry in the register) or the Fitness to Practise Committee, may amend—*

(a) the charge set out in the notice of hearing; or

(b) the facts set out in the charge, on which the allegation is based, unless, having regard to the

merits of the case and the fairness of the proceedings, the required amendment cannot be made without injustice.

- (2) *Before making any amendment under paragraph (1), the Committee shall consider any representations from the parties on this issue.*

The panel was of the view that such an amendment, was in the interests of justice. It determined that the amendment was not material to the content of the charge, and was satisfied that there would be no prejudice to you. It was also satisfied that no injustice would be caused to either party by the proposed amendment being allowed. It was therefore appropriate to allow the amendment, to ensure clarity and accuracy.

The panel also determined at this stage how it should interpret the stem preceding charge 1) above. It considered that during the course of the evidence it was agreed between the parties and supported by the oral evidence of Colleague 1 and Colleague 3, that there were three core nursing roles for nurses employed in theatres under the general title 'theatre nurse'. The first of these was the role of 'Scrub Nurse' which the panel noted incorporated both scrub and circulating competencies. The panel considered that the remaining two types of theatre nurse were 'anaesthetic nurse' and 'recovery nurse'. Accordingly, the panel concluded that the title 'Scrub Nurse' as alleged should be read to include the roles and responsibilities of a 'Scrub Nurse' performing both scrub and circulating roles.

Details of charge

That you, a Registered Nurse, failed to demonstrate the standards of knowledge, skill, and judgement required to practise without supervision as a Scrub Nurse / ~~registered nurse~~ in that:

While subject to a Stage 1 Formal Capability Process at Aberdeen Royal Infirmary you failed to complete the following actions / competencies on your Performance Improvement Action Plan:

- 1) Complete all scrub competencies on completion of the action plan;*
- 2) Complete all circulating competencies on completion of the action plan;*
- 3) Demonstrating that you are aware of the appropriate time to complete a surgical count of instruments in accordance with the swab, needle instrument policy;*
- 4) Competently ~~performing~~ performing the role of Scrub Nurse without the support of a trained nurse acting as your circulating nurse;*
- 5) Communicating appropriately to floor staff;*
- 6) Demonstrate an understanding of different sutures and to give examples of when they could be utilised;*
- 7) Completing reflective accounts that show an understanding of the process and learning that has been gained;*
- 8) The concerns at any or all of areas referred to charges 1- 7 above is demonstrated by, but not limited to, those matters set out in 'Schedule A'*

AND in light of the above, your fitness to practise is impaired by reason of your lack of competence

<u>SCHEDULE A</u>		
<i>a</i>	<i>16/11/2017</i>	<i>You having to check which procedure you were scrubbing for</i>
<i>b</i>	<i>16/11/2017</i>	<i>You not using appropriate scissors</i>
<i>c</i>	<i>16/11/2017</i>	<i>You needing the floor nurse to direct you / not working independently</i>
<i>d</i>	<i>16/11/2017</i>	<i>Your lack of knowledge of different types of sutures</i>
<i>e</i>	<i>16/11/2017</i>	<i>You not being able to identify debakey forceps</i>
<i>f</i>	<i>16/11/2019</i>	<i>Your lack of anticipation of the surgeons needs throughout surgery</i>
<i>g</i>	<i>21/12/2017</i>	<i>You not correctly completing surgical counts</i>
<i>h</i>	<i>05/04/2018</i>	<i>Your lack of understanding of stacking systems during an observation scenario relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
<i>i</i>	<i>05/04/2018</i>	<i>Your lack of understanding relating to an insufflator machine during an observation scenario relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
<i>j</i>	<i>05/04/2018</i>	<i>Your lack of understanding relating to blade sizes during an observation scenario relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
<i>k</i>	<i>05/04/2018</i>	<i>Your lack of understanding relating to the additional equipment a surgeon may require for a Laparoscopic procedure relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
<i>l</i>		<i>Your lack of understanding relating to sutures for a Laparoscopic procedure relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>

<i>m</i>	19/04/2018	<i>You not checking the settings on the diathermy and / or stacking system relating to a Laparoscopic Cholestectomy</i>
<i>n</i>	19/04/2018	<i>You not checking when handing over cables to be plugged in relating to a Laparoscopic Cholestectomy</i>
<i>o</i>	19/04/2018	<i>You not looking at the screen when the surgeon when putting the laproscopic ports relating to a Laparoscopic Cholestectomy</i>
<i>p</i>	19/04/2018	<i>You not anticipating the needs of the surgeon and /or potential hazards relating to a Laparoscopic Cholestectomy</i>
<i>q</i>	19/04/2018	<i>You not being able to identify a hernia whilst circulating for an open inguinal hernia repair</i>
<i>r</i>	19/04/2018	<i>Your lack of understanding relating to the procedure whilst circulating for an open inguinal hernia repair</i>
<i>s</i>	19/04/2018	<i>Your lack of knowledge in relation to sutures</i>

Background

A referral was made to the NMC by your employer, NHS Grampian Board ('the Board'), on 25 June 2018. You began work for the Board on 1 December 2014. You worked as a Staff Nurse at NHS Grampian Maternity Hospital ('the Hospital') between February 2016 and April 2017. You were primarily employed in a scrub nurse role at the Hospital. You then interviewed for a position as a theatre nurse and commenced work as an anaesthetic nurse at NHS Grampian Short Stay Theatres ('Theatres') at Aberdeen Royal Infirmary in April 2017. Shortly thereafter, within your role as a theatre nurse you were moved from an anaesthetic nurse role to a scrub nurse role. This followed concerns being raised by your colleagues about your clinical practice and communication skills in Theatres. Your line manager was subsequently informed by a previous manager at the Hospital of a number of similar concerns during the time you were employed at the Hospital, which were not communicated in the references.

On 2 June 2017 you were made subject to an informal capability process in order to complete your scrub competencies with a view upon successful completion to then completing your anaesthetic competencies. This process was suspended in mid July 2017 [PRIVATE]. The process resumed upon your return to work in September. On 2 February 2018 you attended a Stage 1 Formal Meeting and were placed on a Stage 1 Formal Capability Process. As part of this process, you were to complete a number of actions and competencies contained within your Performance Improvement Action Plan ('Action Plan'). The Action Plan was reviewed at regular monthly meetings in order to ascertain how you were progressing in relation to achieving the competencies set out in the Action Plan. It is alleged that you were unsuccessful in completing most of the actions / competencies contained within the Action Plan and you resigned on 26 April 2018 prior to this being escalated to the next stage.

Decision and reasons on application for hearing to be held in private

[PRIVATE]

[PRIVATE]

Rule 19 states:

- ‘19.—** (1) *Subject to paragraphs (2) and (3) below, hearings shall be conducted in public.*
- ...
- (3) *Hearings other than those referred to in paragraph (2) above may be held, wholly or partly, in private if the Committee is satisfied—*
- (a) *having given the parties, and any third party from whom the Committee considers it appropriate to hear, an opportunity to make representations; and*
 - (b) *having obtained the advice of the legal assessor, that this is justified (and outweighs any prejudice) by the interests of any party or of any third party (including a complainant, witness or patient) or by the public interest.*
- (4) *In this rule, “in private” means conducted in the presence of every party and any person representing a party, but otherwise excluding the public.’*

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may

hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

[PRIVATE] the panel determined to hold such parts of the hearing in private. The panel determined to rule on whether or not to go into private session [PRIVATE] when such issues are raised.

Decision on no case to answer

The panel of its own volition, having heard the NMC case, invited submissions from Mr Kennedy and from yourself in relation to a no case to answer in respect of Schedule A, item a), b), c), d), e), f), g). The panel noted that in relation to no case to answer, Rule 24(7), states:

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

(i) either upon the application of the registrant, or

(ii) of its own volition,

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

In relation to this application, the legal assessor reminded the panel that the burden of proof rests with the NMC in respect of the charges against you. The legal assessor informed the panel that Schedule A, items a) – g) inclusive, refer to dates where you were not subject to the Stage 1 Formal Capability Process and it is thereby open for the panel to find a no case to answer in relation to those items of Schedule A.

Mr Kennedy submitted that the stem of the charge does refer to a period when you were subject to a Stage 1 Formal Capability Process which commenced in February 2018. Mr Kennedy conceded that the dates as listed in Schedule A, items a) – g) inclusive, pre-date February 2018 and should therefore be 'taken out' of the charge. He accepted that charge 4 included a typographical error.

You did not oppose the panel considering whether there was no case to answer in relation to Schedule A, items a) – g) inclusive.

The panel took account of the submissions made and heard and accepted the advice of the legal assessor.

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

The panel was of the view, taking account of the stem of the charge, namely that whilst you were '*subject to a Stage 1 Formal Capability Process*', which it accepted commenced in February 2018, that there was therefore no basis for the inclusion of Schedule A, items a), b), c), d), e), f) and g).

The panel concluded therefore that there is no case to answer in respect of Schedule A, items a), b), c), d), e), f) and g).

Decision and reason on application pursuant to Rule 31

The panel heard from Mr Kennedy in relation to the 'written statement' of Colleague 4. This witness was not present at the hearing. Mr Kennedy conceded, that ordinarily an application would be made pursuant to Rule 31 of the Rules to allow the 'written statement' of Colleague 4 into evidence. However, Mr Kennedy conceded that the 'written statement' was neither signed, nor dated. Therefore, Mr Kennedy submitted that it is not open for the panel to consider this hearsay evidence under Rule 31.

The panel heard and accepted the advice from the legal assessor. The legal assessor reminded the panel that any written statement which is relied upon must adduce some form of proof that it is the evidence in its final form. The legal assessor advised the panel that in the absence of a signature and corresponding date from the purported author of the written statement, that the panel should disregard the statement.

Having heard the submissions from Mr Kennedy and advice of the legal assessor, the panel considered that in all the circumstances it would disregard the 'written statement' of Colleague 4. The panel concluded therefore that the 'written statement' of Colleague 4 would not form part of the documentary evidence.

Decision on the findings on facts and reasons

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 Mr Kennedy on behalf of the NMC and by you. Once the panel retired to make its decision you indicated that you wished to provide the panel with another document. The panel reconvened the hearing. You invited the panel to take into account 'questions for the NMC'. Your application was not opposed. The panel accordingly took this document into account along with all other material.

The panel accepted the advice of the legal assessor.

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.

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

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

- Colleague 1: Team Leader in Short Stay
Theatres at Aberdeen Royal
Infirmary, part of NHS Grampian
- Colleague 2: Senior Charge Nurse at Aberdeen
Maternity Hospital, part of NHS
Grampian

- Colleague 3: Senior Charge Nurse in Short Stay Theatres at Aberdeen Royal Infirmary, part of NHS Grampian

The panel also heard evidence from you under affirmation.

The panel considered the overall credibility and reliability of all witnesses who gave evidence before it, including you. The panel was of the opinion that all witnesses have tried to assist the hearing to the best of their knowledge and belief. The panel also accepted the judicial guidance in *Suddock v Nursing and Midwifery Council [2015] EWHC 3612 (Admin)*. The panel then made the following conclusions about each witness:

The panel considered Colleague 1 to be a clear and credible witness when giving her oral evidence. Colleague 1 was consistent in both her oral and written accounts. She acted as one of your mentors whilst you were employed in theatres and was clear about the concerns she had in relation to your practice. The panel accepted that you were closely supervised by Colleague 1 and that she required you to be supported by a registered nurse at all times despite usual practice to be supported by a healthcare assistant. The panel considered her to be very open and honest in relation to how she escalated her concerns about you, and what she did in light of the difficulties she encountered with you. The panel accepted that Colleague 1 had a clear understanding of your difficulties in completing competencies, requisite to continuation in the anaesthetic role and made the decision that you needed to be proficient in the scrub nurse role before progressing to anaesthetics. You were not happy with this decision. Colleague 1 explained to the panel that she first worked with you in April 2017 and understood that you had been employed following interview and that you had previously worked as a scrub nurse at the Hospital. Colleague 1 told the panel that you were difficult to teach because you did not acknowledge what she was saying and there was nothing to indicate you understood what she was telling you, and sometimes there was

no response at all. However, the panel considered that during cross examination by you, Colleague 1 did appear agitated and at times was not clear in her evidence. The panel considered that this aspect of her demeanour did not detract from her credibility as a witness.

In terms of reliability, the panel noted that Colleague 1 did her best to assist the panel and was able to indicate when she could not remember an event. However, the panel noted that during the course of her oral evidence, she introduced new evidence in relation to two alleged serious incidents which occurred one to two weeks apart, during the time when you were subject to the formal capability process. She told the panel that on the first of these occasions, she was present in theatre 1 when the surgeon completed the closure of the cavity before any of the three required counts were completed by you. Colleague 1 explained that this was when you were acting as a scrub nurse and she was present in a supervisory capacity. She told the panel that shortly thereafter she was made aware of a repeated and similar alleged incident but explained she was not present in the theatre when this occurred. She told the panel that both of these events warranted the submission of an incident report (DATIX) and she would have expected with *'ninety nine per cent'* certainty that they would have been raised, but could not say whether one had been on either occasion.

No other witnesses spoke to these alleged incidents, they were not referred to in her witness statement and there was no mention of them in the documents supplied. The panel requested DATIX reports but were advised no documents could be produced. Although this raised concerns with regard to the reliability of Colleague 1, the panel disregarded this aspect of her evidence. The panel did not consider that her reliability with regard to other passages of evidence was effected by this. All of the panels other assessments of her performance, were supported by observations of, a similar nature, made by other sources.

The panel found Colleague 2 to be a credible witness when giving her oral evidence. It found Colleague 2 to be clear, consistent and confident when answering questions. The

panel noted she was able to provide a useful background, and whilst she never directly supervised you, was closely involved in your revalidation process. The panel considered that although Colleague 2 was a credible and reliable witness, her evidence went mainly to background and was not directly relevant to the charges alleged, other than charge 7. However, she told the panel that there were no issues with your practice [PRIVATE]. Colleague 2 told the panel that anaesthetic nurses are required to complete formal competencies as part of a National Framework and that a scrub nurse does not require this. The panel accepted Colleague 2's evidence that she consulted both the NMC and the Royal College of Nursing (RCN) for advice regarding the appropriateness of signing off your reflective pieces for the purposes of revalidation, when there were ongoing concerns surrounding your practice. It accepted Colleague 2's evidence that she acted in accordance with their advice. The panel considered that this added to her reliability as a witness.

The panel found Colleague 3 to be a very clear, reliable and credible witness. The panel noted that she was an experienced practitioner, that she gave a fair and balanced account and was able to articulate herself very well. She was able to say when she could clearly recall what happened and helpfully provide the panel with additional context to the events. The panel noted that when Colleague 3 was unsure of an event, she was open about that and relied on her contemporaneous notes from the time, which the panel considered added to her credibility as a witness. The panel also noted that she was clear regarding the role of a theatre nurse and in what role you were originally employed. The panel accepted her explanation regarding you being moved from your original role as an anaesthetic nurse to a scrub nurse, following concerns being raised.

The panel also considered that under cross examination, when she was challenged by you in relation to entering an incorrect date in relation to 'Competency 5 Prepare and dress for the scrubbed role', that she gave a very clear explanation that it was a clerical error in the year of sign off. This explanation was corroborated by other contemporaneous documentation before the panel, and it therefore accepted her explanation that the incorrect date '19 February 2017' was a simple clerical error.

The panel considered that Colleague 3 was clear and concise regarding the documentation surrounding your Action Plan. The panel noted that this was supported by her oral evidence. The panel was therefore satisfied that the contemporaneous notes were an accurate record and decided to give appropriate weight to these documents in so far as they related to the charges. The panel concluded that Colleague 3 was an extremely helpful witness upon whom it could rely.

You gave oral evidence in which you told the panel that you entered the nursing profession in 2011 and explained the circumstances prior to the completion of your nursing qualification. You told the panel that you want to rebuild your life after these proceedings and are two years away from applying to commence a PhD combining your interests in nursing, chemistry and anaesthesia.

[PRIVATE] You told the panel that since your resignation from the Board, you have not obtained employment and that you are unable to work with males.

The panel had regard to your explanation in relation to the charges. In the course of your oral evidence you accepted that you did not complete the competencies subject of charges 1 and 2. You told the panel that when you interviewed for the role at Theatres, you made it clear that you wanted to work as an anaesthetic nurse. [PRIVATE]

You told the panel that you accepted you were moved from the role of an anaesthetic nurse to a scrub nurse after concerns were raised about your practice. You explained that you did not agree with the concerns that were raised. You also told the panel that you accepted that you were moved from an informal capability process to a formal capability process in February 2018. You explained to the panel that you did have input into the Action Plan but that you felt you were forced into the role of scrub nurse which, you communicated at the time, you did not want to do. You told the panel that you tried to engage in the capability process to the best of your abilities under the circumstances and accepted that you had a duty to complete it.

The panel took into account that it is common ground between you and the NMC that you moved from the Hospital to Theatres in circumstances where your previous employer did not communicate their concerns with your new employer in relation to your ability to perform a scrub role. The panel also took into account that you agree that you were initially employed as an anaesthetic theatre nurse, a role you had sought and were interested in. Shortly thereafter, concerns were raised and Colleague 3 directed that you perform scrub duties instead, which you accepted with considerable reluctance, stating that you had made it clear at the time that you were unhappy at the making of that decision.

You told the panel that in relation to the two test scenarios conducted on 5 April 2018 and 19 April 2018 where you were supervised by Colleague 3 she gave you verbal feedback immediately following the supervision. You told the panel that you disagreed with the documented accounts of these scenarios completed by Colleague 3 and explained that they differed from the verbal feedback provided to you by Colleague 3 at the time. You were unsure as to whether you received a written copy of these feedback reports.

The panel considered your overall evidence. The panel took into account that you were providing evidence in a stressful environment, unrepresented and giving evidence via video-link having made that application well in advance of the hearing, and your application only being granted on the first day. [PRIVATE] The panel concluded in evaluating your evidence, that at times you were visibly affected by recounting these events and you were at times upset and defensive. The panel considered that your recollection of events was negatively affected to a degree by this emotion. However, the panel noted that on a number of occasions, you stated that you emphatically disagreed with the assessments of Colleague 3. When given the opportunity to explain why you disagreed with Colleague 3, you were unable to offer any explanation or produce any evidence to the contrary in relation to most of the charges. The panel considered that for these reasons your evidence was at times unreliable.

The panel also considered your evidence to be at times inconsistent. The panel had regard to your initial explanation of Schedule A, item (j), where you accepted that you had a lack of understanding in relation to blade sizes when setting up for a Laparoscopic Cholecystectomy. However, under cross-examination, you later changed your position and said that you disagreed with this allegation, and that you did have an understanding. For these reasons, the panel considered that this impacted upon your credibility and reliability as a witness.

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

“That you, a Registered Nurse, failed to demonstrate the standards of knowledge, skill, and judgement required to practise without supervision as a Scrub Nurse /~~registered nurse~~ in that:

While subject to a Stage 1 Formal Capability Process at Aberdeen Royal Infirmary you failed to complete the following actions / competencies on your Performance Improvement Plan:”

As this part of the stem of the charge involved the panel considering whether you failed to demonstrate certain standards, the panel could only consider this issue once it had been determined whether any of the facts in the charges had been found proved. It reminded itself that the standards demonstrated had to be unacceptably low and that the NMC had to provide a fair sample of your work to assess your performance.

The panel next considered the stem preceding the numbered allegations and noted that there were firstly two constituent elements which must be considered before moving to the numbered charges. Firstly, the panel was satisfied that you were subject to Stage 1 Formal Capability Process at Aberdeen Royal Infirmary and subject to a Performance Improvement Action Plan. The panel had regard to your evidence and your acceptance that you were subject to this process and Action Plan. The panel also accepted the oral

evidence of Colleague 1 and Colleague 3 which confirmed that you were subject to this Action Plan. This was supported by the documentary evidence. The panel accepted the letter from NHS Grampian to you, dated 5 February 2018, which indicated that following a Stage 1 Formal Capability Meeting held on 2 February 2018 an Action Plan was implemented on 19 February 2018. That plan listed a number of competencies which were to be completed by 27 April 2018 and was to be reviewed monthly to ascertain your progress in relation to achieving those competencies.

The second element of the stem the panel considered, was the meaning of the word 'failed'. The panel noted the ordinary meaning of 'failed' as imposing on an individual a duty or obligation to do something. The panel accepted the legal assessor's advice in relation to this. The panel had regard to your oral evidence in that you felt that you had no choice but to engage with the Action Plan, and having chosen to engage you accepted that you subsequently had a duty to complete the Action Plan. The panel considered that had you at any point felt you were unable to complete the competencies contained within the Action Plan, you were also duty bound to admit that to Colleague 3. The panel considered that although you felt you were forced into the Capability Process, you accepted that it was Colleague 3's role to implement it to ensure patient safety and to ensure you were able to complete the role of a scrub nurse competently.

The panel was of the view that it was entirely appropriate for Colleague 3 to implement the Capability Process with the assistance of HR, after she became aware of the concerns in your previous role as a scrub nurse alongside concerns raised in your position as an anaesthetic nurse in Theatres. The panel took into account that you told your supervisors that you did not want to work in the role of a scrub nurse. The panel concluded that you were aware that to continue in your role as a scrub nurse working in theatres, you were required to complete the competencies required of a scrub nurse. The panel determined that you were accordingly under a duty to complete the competencies contained within your Action Plan. The panel therefore interpreted the word 'failed' as imposing on you a duty or obligation to complete the actions / competencies in your Action Plan.

Charge 1

1) Complete all scrub competencies on completion of the action plan;

The charge is found proved.

The panel considered that you frankly admitted during your oral evidence that you had not completed the scrub competencies as part of your Action Plan. This is consistent with the documentary evidence and oral evidence of Colleague 1 and Colleague 3.

The panel therefore found charge 1 found proved.

Charge 2

2) Complete all circulating competencies on completion of the action plan;

The charge is found proved.

The panel considered that you frankly admitted during your oral evidence that you had not completed the circulating competencies as part of your Action Plan. This is consistent with the documentary evidence and oral evidence of Colleague 1 and Colleague 3.

Charge 3

3) Demonstrating that you are aware of the appropriate time to complete a surgical count of instruments in accordance with the swab, needle instrument policy;

This charge is found proved.

In reaching this decision, the panel took into account its previous findings in relation to you being subject to a Formal Stage 1 Capability Process and Action Plan implemented on 19 February 2018. The panel also had regard to the Action Plan 'Meeting Review Tracker' ('the Tracker'), dated 27 April 2018 which showed that you had not completed this competency. The panel accepted the summary recorded on the tracker which states:

“Unable to demonstrate this consistently, still requires prompting. Can explain the procedure but in practice is unable to demonstrate that she can do this competently independently.”

This was supported by the oral evidence of Colleague 1 and Colleague 3 where they both stated that it is policy that three counts are carried out by a scrub nurse as a surgeon proceeds to close a wound. Colleague 1 explained that at each of the three stages, namely cavity, muscle/fat and skin, a scrub nurse must confirm to the surgeon that a needles, swabs, and instruments count has been completed at each of the three stages before the surgeon proceeds with closure. Colleague 3 confirmed this in her oral evidence.

The panel also had regard to the observation of you carried out by Colleague 3 on 19 April 2018. The panel also considered the contemporaneous notes completed by Colleague 3, in relation to this observation, which state:

“Handed over the closing suture, then continued to tidy tray and hand of specimen and then began her count.”

The panel had regard to your denial of the charge and that you did not offer an explanation in relation to the denial. Although you could articulate when and how a count should be carried out there was no clear evidence that you could demonstrate this consistently within a clinical setting. The panel accepted the evidence of Colleague 1 and Colleague 3 that a count must be completed at each stage before a suture is

handed over to the surgeon. The panel also accepted that the Action Plan indicated that by 27 April 2018 you had not been signed off on this competency and that you had been observed on at least one occasion of not appropriately carrying out the surgical count. The panel therefore concluded that you were unable to demonstrate that you were aware of the appropriate time to complete a surgical count of instruments in accordance with the swab, needle instrument policy.

Accordingly, the panel found charge 3 proved.

Charge 4)

4) Competently performing the role of Scrub Nurse without the support of a trained nurse acting as your circulating nurse;

This charge is found proved.

In reaching this decision, the panel took into account its previous findings in relation to you being subject to a Formal Stage 1 Capability Process and Action Plan implemented on 19 February 2018. The panel also had regard to the Action Plan 'Meeting Review Tracker' ('the Tracker'), dated 27 April 2018 which showed that you had not completed this competency. The panel accepted the summary recorded on the tracker which states:

"Dianne still requires support from a trained member of staff on the floor."

The panel was of the view that this supports a finding that you still required a trained nurse acting as your circulating nurse when you were performing the role of scrub nurse. Your position was inconsistent with you accepting charges 1 and 2.

The panel had regard to your denial of the charge and that when asked under cross-examination that you deny that you were unsafe. The panel also noted your

disagreement with the accuracy of what was recorded in the observation notes dated 5 April 2019 and 19 April 2019. The panel rejected your evidence and preferred the contemporaneous documentary evidence and the supporting oral evidence of Colleague 1. Colleague 1 stated that in order to ensure patient safety it was always necessary to allocate a registered nurse to work alongside you in theatre as a circulating nurse. Colleague 1 explained that this was unique amongst scrub nurses and that ordinarily a healthcare assistant would be able to accompany a scrub nurse. The panel therefore concluded, on the balance of probabilities, you were unable to perform the role of scrub nurse without the support of a trained nurse acting as your circulating nurse.

The panel therefore found charge 4 proved.

Charge 5

5) Communicating appropriately to floor staff;

This charge is found proved.

In reaching this decision, the panel took into account its previous findings in relation to you being subject to a Formal Stage 1 Capability Process and Action Plan implemented on 19 February 2018. The panel also had regard to the Action Plan 'Meeting Review Tracker' ('the Tracker'), dated 27 April 2018 which showed that you had not completed this competency. The panel accepted the summary recorded on the tracker which states:

“Dianne states that the noise level in theatre has improved, however, her communication with floor staff is still poor. She does not clearly communicate with the staff when scrubbed to indicate when she required support. I observed this during my latest observation of practice, where the floor staff were reacting to the surgeon, not Dianne, as she was not clearly indicating what she needed.”

The panel considered that the oral evidence of Colleague 3 supported this observation. The panel also had regard to the contemporaneous notes following the observation carried out by Colleague 3 when you were working as a scrub nurse in a Laparoscopic Cholecystectomy, dated 19 April 2018, which states:

“Throughout the operation, Dianne did not clearly communicate with the floor staff.”

The panel considered your denial of the allegation and that you offered no explanation in relation to the denial. The panel preferred the contemporaneous observation notes and Action Plan, and concluded that there was evidence that you failed to communicate appropriately with floor staff.

The panel therefore found charge 5 proved.

Charge 6

6) Demonstrate an understanding of different sutures and to give examples of when they could be utilised;

This charge is found proved.

In reaching this decision, the panel took into account its previous findings in relation to you being subject to a Formal Stage 1 Capability Process and Action Plan implemented on 19 February 2018. The panel also had regard to the Action Plan ‘Meeting Review Tracker’ (‘the Tracker’), dated 27 April 2018 which showed that you had not completed this competency. The panel accepted the summary recorded on the tracker which states:

“Dianne has been unable to demonstrate any understanding of the different sutures used within theatres. Even having completed a reflective account as part of the informal stage of the capability process, and also when asked to study this, she has required to be prompted on more than one occasion.”

The panel also had regard to the observation notes, dated 5 April 2018, in relation to the observation carried out by Colleague 3 of a scenario based Laparoscopic Cholecystectomy where you were acting as a scrub nurse. The panel noted that in that scenario there were at least two occasions when you were unable to identify the correct sutures. The panel noted the observation notes state:

“On further discussion around the different types of sutures and their usage Dianne appeared to have little or no knowledge about sutures.”

The panel noted that similar concerns were raised during an observation of a Laparoscopic Cholecystectomy where you were acting as scrub nurse, on 19 April 2018. The notes completed by Colleague 3 who observed you on that occasion, state:

“Did not have suture ready and mounted on the needleholder to hand over to the surgeon.”

On the same day, an additional observation was carried out where you were performing the role of a circulating nurse on an inguinal hernia repair operation. The panel had regard to the notes prepared by Colleague 3, which indicate that you were unsure of different types of sutures and when they should be used. The panel noted that this was supported by the oral evidence of Colleague 3.

The panel again noted your denial in relation to the charge and that you did not offer an explanation in relation to the charge, or produce any evidence to the contrary. The panel determined that in relation to this charge there were at least three documented instances where you were unable to demonstrate an understanding of different sutures

and give examples of when they could be utilised. The panel preferred the documentary evidence supported by the oral evidence of Colleague 3 over your oral evidence.

The panel therefore found charge 6 proved.

Charge 7

7) Completing reflective accounts that show an understanding of the process and learning that has been gained;

This charge is found not proved.

In reaching this decision in respect of this charge, the panel accepted the evidence of Colleague 2 and Colleague 3 that you had completed reflections. Colleague 2 confirmed in her oral evidence that she signed your reflections as part of your revalidation paperwork. The panel also had regard to your evidence that you deny the allegation and that you explained you were able to provide the reflections when they were requested. Colleague 3 confirmed in her oral evidence that she had asked you to keep a diary, but that you had kept your reflections online and she did not have sight of these. The panel accepted that some form of reflection had been completed by you and that there was documentary evidence that reflections were completed in relation to your revalidation. The panel had regard to the various reflective accounts completed by you, but noted that they related to various dates in 2017, which is outside the period you were subject to the Stage 1 Formal Capability Process.

The panel also had regard to the tracker, dated 27 April 2018 and although completion of reflective accounts was marked as not completed, the panel considered that the comment by Colleague 3 was that you had '*shown minimal learning and development from these*'. The panel considered that this is the only evidence in relation to the charge, and was not satisfied therefore that the reflections completed did not show an

understanding of the process and the learning, though be it minimal, which you had gained from the reflection.

The panel therefore found charge 7 not proved.

Charge 8

8) The concerns at any or all of areas referred to charges 1 – 7 above are demonstrated by, but not limited to, those matters set out in Schedule A;

The charge is found proved in relation to items (i), (j), (l), (o), (p) and (s) of Schedule A

In reaching its decision in relation to charge 8, the panel considered each of the separate items contained within Schedule A. The panel had regard to its earlier determination in relation to a no case to answer in respect of items (a)-(g) inclusive. The panel noted that items (h) – (l) inclusive relate to an observation carried out by Colleague 3 on 5 April 2018, in a scenario based setting whilst you were scrubbed as a scrub nurse for a Laparoscopic Cholecystectomy. The panel also noted that items (m) – (s) inclusive related to two observations carried out on 19 April 2018. The first of these was when you were working in a scrub nurse role during a Laparoscopic Cholecystectomy operation, and the second was when you were in a circulating nurse role during an open inguinal hernia repair operation.

<i>h</i>	<i>05/04/2018</i>	<i>Your lack of understanding of stacking systems during an observation scenario relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
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The panel found item (h) not proved.

The panel considered the oral evidence of Colleague 3 in relation to your understanding of stacking systems. The panel considered that the contemporaneous notes of the observation carried out on 5 April 2018 did not indicate that you had a clear lack of understanding of stacking systems. The panel noted that the stacking system contained the camera, carbon dioxide cylinder, lights and insufflator machine. The panel also had regard to your denial that you had an insufficient understanding of the stacking system. The panel was of the view that whilst there were concerns raised in relation to the insufflator machine component of the stacking system, there was not clear evidence in relation to a lack of understanding of the stacking systems.

Accordingly the panel finds item (h) not proved and further concluded therefore that it does not demonstrate the concerns in relation to charges 1 – 6.

<i>i</i>	05/04/2018	<i>Your lack of understanding relating to an insufflator machine during an observation scenario relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
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The panel found item (i) proved.

In reaching its determination in relation to item (i), the panel had regard to the oral evidence of Colleague 3. The panel accepted that during the observation when asked by Colleague 3, that you did not have an understanding of what an insufflator machine was or how it was used in theatre. This was supported by Colleague 3’s written statement. The panel had regard to your denial of item (i) and that you could not remember something that had occurred two years ago. The panel also had regard to the observation notes and these confirmed that you were unable to explain the appropriate pressures that the gas should be set at on the insufflator machine. The panel preferred the contemporaneous notes supported by the oral evidence of Colleague 3 and concluded that you did lack an understanding relating to an insufflator machine.

Accordingly, the panel finds items (i) found proved.

j	05/04/2018	<i>Your lack of understanding relating to blade sizes during an observation scenario relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
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The panel found item (j) proved.

In reaching its decision on item (j), the panel had regard to your oral evidence. You originally agreed that the contemporaneous notes dated 5 April 2018, prepared by Colleague 3 in relation to the observation of you, were an accurate account. You subsequently changed your position in relation to this and disagreed that the notes were an accurate reflection of the observation carried out by Colleague 3 and the feedback provided at the time. The panel preferred the oral evidence of Colleague 3 which was supported by her contemporaneous notes following the observation. The observation notes, dated 5 April 2018, stated:

“I asked Dianne which blade she would require for a lap choley. Dianne was unsure which blade she would require, she went through a list of different blades that she could potentially use.”

The panel concluded therefore that there was evidence that you lacked an understanding relating to blade sizes.

Accordingly, the panel found item (j) proved.

k	05/04/2018	<i>Your lack of understanding relating to the additional equipment a surgeon may require for a Laparoscopic procedure relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
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The panel found item (k) not proved.

In considering item (k), the panel had regard to the oral evidence of Colleague 3 in relation to the observation. Colleague 3 told the panel that you were permitted during the observation to go to a folder which confirmed which instruments were required for a particular operation, if you were unsure of what was required. This folder would confirm which exact instruments were required. Colleague 3 told the panel that a surgeon may also change their particular preference of instrument on the day. You also told the panel that you disagreed with item (k) but that you were able to explain to Colleague 3 at the time that particular surgeons might prefer different instruments. The panel was therefore of the view that it was reasonable in the circumstances to refer to the folder if you were unsure of what instruments were required and that reference to this folder may be required should a surgeon change their preference. Accordingly, the panel determined that on the balance of probabilities the NMC had not provided sufficient evidence that you did not have an understanding relating to the additional equipment a surgeon may require for a Laparoscopic procedure.

The panel therefore found item (k) not proved.

I	05/04/2018	<i>Your lack of understanding relating to sutures for a Laparoscopic procedure relating to scrubbed setting up for a Laparoscopic Cholecystectomy</i>
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The panel find item (I) proved.

In reaching its decision in respect of this limb, the panel had regard to its earlier findings in respect of charge 6. The panel considered that this was a planned observation and contemporaneous notes were prepared by Colleague 3 immediately following the observation. The panel noted your denial of item (I) and that you denied that the notes were an accurate reflection of the observation but you were unable to produce any evidence to the contrary. The panel preferred to rely on the contemporaneous notes and evidence of Colleague 3. The panel therefore determined that the notes were an

accurate and reliable account of the observation and demonstrated your lack of understanding relating to sutures.

Accordingly, the panel therefore found item (l) proved.

m	19/04/2018	<i>You not checking the settings on the diathermy and / or stacking system relating to a Laparoscopic Cholestectomy</i>
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The panel find item (m) not proved.

In reaching its decision in relation to item (m), the panel had regard to the oral evidence of Colleague 3. She told the panel that she did not see you checking the settings on the diathermy and / or the stacking system which she would have expected you to do. This was confirmed in her written statement and the observation notes which state:

“Dianne handed off the cable to floor staff, at no point did I observe her checking the settings on either the diathermy or stacking system and the cables were then attached to.”

The panel considered that whilst Colleague 3’s evidence was that she did not see you check the diathermy and / or the stacking system, it is possible that these checks were carried out whilst she was not observing you. In the absence of evidence that any checks were not carried out, the panel was unable to find that you did not check the settings on the diathermy and / or stacking system.

The panel therefore find item (m) not proved.

n	19/04/2018	<i>You not checking when handing over cables to be plugged in relating to a Laparoscopic Cholestectomy</i>
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The panel find item (n) not proved.

In reaching its decision in relation to item (n), the panel again had regard to the oral evidence of Colleague 3. She told the panel that she did not observe you checking anything when you were handing over cables to be plugged in. The panel considered that whilst there was some evidence in relation to checks not being carried out, the panel was not satisfied that there was sufficient evidence of what checks were required when handing over the cables. The written statement of Colleague 3 confirms that you did not check anything when handing over the cables, but it is ambiguous as to what checks were required at that time.

Accordingly, the panel found item (n) not proved.

o	19/04/2018	<i>You not looking at the screen when the surgeon when putting the laproscopic ports relating to a Laparoscopic Cholestectomy</i>
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The panel find item (o) proved.

In reaching its decision in relation to item (o), the panel considered that there was a clear contemporaneous note made immediately following the observation of you acting as a scrub nurse on 19 April 2018. The panel had regard to the notes which state:

“Dianne did not observe the screen as any of the ports were inserted.”

The panel determined that it was clear it was part of the role of a scrub nurse to observe the screen when the laparoscopic ports were being inserted in to the patient. The panel accepted Colleague 3’s evidence that this is a crucial point in the procedure when there is an increased risk to the patient. The panel also accepted that you did not carry out this observation and that you were aware you should have been monitoring the screen. The panel accepted Colleague 3 was in a position to observe this and did so. The panel noted your denial in relation to item (o) but preferred the evidence of Colleague 3 supported by her contemporaneous notes of the observation.

Accordingly, the panel found item (o) proved.

p	19/04/2018	<i>You not anticipating the needs of the surgeon and / or potential hazards relating to a Laparoscopic Cholestectomy</i>
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The panel find item (p) proved.

The panel first considered item (p) in relation to anticipating the needs of the surgeon.

The panel had regard to the observation notes, dated 19 April 2018 which state:

“Did not anticipate the need for the Bert bag when the specimen was fully dissected and surgeon asked for it.”

The panel was of the view that this demonstrated you did not anticipate the needs of the surgeon. This was supported by the oral evidence of Colleague 3. The panel preferred this evidence to your oral evidence where you stated that you need to look at the screen to anticipate the needs of the surgeon.

In relation to anticipating potential hazards, the panel again considered the observation notes, which state:

“During the procedure a mayo clamp was handed off, if I had not prompted her during her count, she was willing to assume it was in the operating field, when she did not see it when counting. Even when I prompted her to state that it was not in the operating field she did not appear clear about its whereabouts.”

The panel considered this observation along with the oral evidence of Colleague 3, that a scrub nurse should be able to anticipate a potential hazard such as this. The panel considered that this demonstrates that you did not anticipate the potential hazards during the operation.

Accordingly the panel found item (p) proved in relation to both anticipating the needs of the surgeon *and* potential hazards.

q	19/04/2018	<i>You not being able to identify a hernia whilst circulating for an open inguinal hernia repair</i>
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The panel find item (q) not proved.

In reaching its decision in relation to item (q), the panel firstly had regard to the observation notes, dated 19 April 2018. The note makes a criticism of you in not being able to identify a hernia, however the panel had regard to the notes which state:

“At the point where the bowel could be visualised through the hernia I asked Dianne to identify what we were looking at.

...

Dianne stated that she didn’t think it was bowel. I informed her that it was the bowel, and the purpose of the operation was to ensure that the bowel was not protruding through the muscle wall. I was surprised that Dianne was not aware of this, as she has previously explained this operation to me during her capability meetings.”

The panel considered that Colleague 3’s statement conflicted with her observation notes, and given the contemporaneous nature of the notes, the panel preferred this evidence.

Given that the notes refer to you not being able to identify a bowel, and indeed, the bowel was visible through the hernia, the panel was not satisfied that you were asked to identify a hernia rather than a bowel. The panel also considered your evidence in which you stated that when Colleague 3 asked you this, she was not pointing to a hernia.

In these circumstances, the panel found item (q) not proved.

r	19/04/2018	<i>Your lack of understanding relating to the procedure whilst circulating for an open inguinal hernia repair</i>
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The panel find item (r) not proved.

In reaching its decision in relation to item (r) the panel considered the observation notes, dated 19 April 2018. The panel was of the view that the evidence is ambiguous and unclear as to what your required understanding of the procedure was. The panel was not satisfied that the observation notes demonstrated clearly a lack of understanding in relation to the procedure by you.

Accordingly, the panel find item (r) not proved.

s	19/04/2018	<i>Your lack of knowledge in relation to sutures</i>
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The panel find item (s) proved.

In reaching its decision, the panel considered the observation notes, dated 19 April 2019, which indicated that you were unsure which sutures were required and the difference between non-absorbable and absorbable sutures. The panel was satisfied that the notes demonstrate that you lacked knowledge in relation to sutures. This was supported by the written statement of Colleague 3 which states:

“I also asked the registrant about what sutures were needed. The registrant didn’t know and I was concerned as I had asked her November 2017 to investigate the different sutures and try to learn what the commonly used sutures were that we used.”

The panel was therefore satisfied that you lacked knowledge in relation to sutures.

Accordingly, the panel found item (s) proved.

The panel then went on to consider in relation to Schedule A, whether they demonstrate any of the concerns proved in charges 1 – 6. The panel firstly determined that in relation to items (i), (j), (l), (o) and (p) that you were being observed in relation to your role as a scrub nurse. Accordingly, the panel found that those items demonstrate the concerns in charge 1 found proved. The panel next considered that item (s) found proved, related to an observation undertaken in your role as a circulating nurse. Accordingly, the panel found that item (s) demonstrate the concerns charge 2 found proved.

The panel therefore concluded that those matters found proved in Schedule A, namely items (i), (j), (l), (o), (p) and (s), demonstrate the concerns set out in charges 1 and 2.

The panel therefore found charge 8 found proved.

The panel next considered whether the first part of the stem preceding the numbered charges had been found proved. It noted that this charge also contains two constituent elements:

“That you, a Registered Nurse, failed to demonstrate the standards of knowledge, skill, and judgement required to practise without supervision as a Scrub Nurse ~~/registered nurse~~ in that:

Since the allegation is a failure, the panel had to be satisfied you were under a duty to demonstrate the requisite standards. You were employed as a registered nurse in the role as a theatre nurse and the panel found that you were required to practice without supervision as a scrub nurse. You joined Theatres in April 2017 and were expected to attain a level of competency. You failed to do so. After failing to achieve competency through an informal process you were placed on a Stage 1 Formal competency process. You undertook to complete this process by 27 April 2018. Although you

tendered your resignation on 26 April 2018 it was not with immediate effect. You remained in post for a further four weeks.

The panel had careful regard to the evidence which had been provided in respect of your performance in addition to the evidence of the live witnesses. Their account was supported by documentary evidence and their recollection of what they had been told regarding your assessments in the critical period. The panel was in little doubt that your performance levels were unacceptably low and that the NMC had provided a fair sample of your work in order that the panel could reach this decision.

Fitness to Practise

Having reached its determination on the facts of this case, the panel considered, whether the facts found proved amount to a lack of competence and, if so, whether your 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 had to determine whether the facts found proved amount to a lack of competence. Secondly, only if the facts found proved amount to a lack of competence, the panel had to decide whether, in all the circumstances, your fitness to practise is currently impaired as a result of that lack of competence.

The panel took into account all the evidence before it and the submissions made by you and by Mr Kennedy, on behalf of the NMC.

Submissions on lack of competence and impairment

Mr Kennedy reminded the panel that there is no burden of proof at this stage and the decision on lack of competence and fitness to practise is for the panel's independent judgment.

Mr Kennedy submitted that lack of competence needs to be assessed by having regard to the standards expected of a band 5 nurse. Further he said that the panel must

consider whether the events were an isolated incident and whether the panel was satisfied that the events complained about were a representative sample of your work.

Mr Kennedy reminded the panel that the events the charges relate to cover a twelve week period between February and April 2018 during which you were subject to a Stage 1 Formal Capability Process. He submitted that the Capability Process was put in place against a background of concerns which had resulted in an informal capability process. He submitted that the informal process involved a target of completing an Action Plan which ran from June 2017. The plan sought to address similar issues to those in the Formal Capability Process. He submitted that neither were completed.

He submitted that you were given a great deal of support during this time but you were not able to successfully complete the Capability Process. Mr Kennedy submitted there was nothing unusual or specialised in the knowledge and skills you were asked to demonstrate but that these were basic knowledge and nursing skills that would be expected of a band 5 registered nurse.

Mr Kennedy submitted that the facts found proved show that your competence at the time was below the standard expected of a band 5 registered nurse. Mr Kennedy therefore invited the panel to take the view that the facts found proved amount to a lack of competence.

Mr Kennedy then 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. Mr Kennedy submitted that your case engages both public protection and public interest considerations. Mr Kennedy referred to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin) and *R (Cohen) v General Medical Council* [2008] EWHC 581 (Admin).

Mr Kennedy also referred to various sections of 'The Code: Professional standards of practice and behaviour for nurses and midwives (2015)' ("the Code") and submitted that the charges found proved were in breach of the Code.

Mr Kennedy invited the panel to have regard to the issues of remediation, insight and remorse. He submitted that you have not shown insight into your failings or the possible effect your shortcomings could have had on patient safety, on the working of the theatre team, on the trust which colleagues in the theatre team needed to place in you, the trust which patients needing the procedures being carried out placed in you or on the reputation of the profession as a whole.

Mr Kennedy further submitted that you have not remediated your failings. He submitted that you have not been working as a nurse since you resigned in April 2018 and have not been able to demonstrate that you are competent in areas which are part of your role. Mr Kennedy submitted that the panel did not have evidence before it for it to be satisfied that there is a period of trouble free practice. Mr Kennedy also submitted that you have not demonstrated remorse and have sought to deflect blame onto others.

Finally, Mr Kennedy submitted that in these circumstances, there is a risk of repetition. He submitted that you pose a risk to patients and to the reputation of the nursing profession. Mr Kennedy therefore invited the panel to find that your fitness to practice is currently impaired.

You submitted that prior to the commencement of this hearing you had been subject to an interim conditions of practice order. You told the panel that you have been unable to comply with the conditions of practice order and are unsure how to. You explained that you have attempted to engage with the conditions and applied for a Return to Practice Course at Stirling University. You explained that you have been informed by staff at Stirling University that due to staffing issues the university is unable to offer the practical component of the course due to the supervision requirements of your interim order. You

indicated that most universities would not consider admitting you unless you were absent from the NMC register for a period of three years.

You submitted to the panel that since you resigned from the Board you have reflected and considered the areas of communication, safety, competence and overall how to improve. You told the panel that you have tried to engage with the NMC but feel stuck between a '*rock and a hard place*'. You told the panel that you want to address the issues identified but that you are limited by the current order.

The panel accepted the advice of the legal assessor who referred the panel to the cases of *Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council and Grant* [2011] EWHC 927 (Admin) and *R (Cohen) v General Medical Council* [2008] EWHC 581 (Admin), though in relation to lack of competence and not misconduct. There is a material difference between competence and misconduct. In *Calhaem v GMC* [2007] EWHC 2606 (Admin) it was said that "lack of competence [indicates] a standard of professional performance which is unacceptably low and which... has been demonstrated by reference to a fair sample of the doctor's work". The panel accepted this guidance.

Decision and reasons on lack of competence

When determining whether the facts found proved amount to a lack of competence, the panel had regard to the Stage 1 Formal Capability Process and concluded that this applied the appropriate standards required of a scrub and circulating nurse. The panel has had regard to all of the documentation before it and the submissions from you and Mr Kennedy, on behalf of the NMC.

The panel, in reaching its decision, has had regard to the public interest and accepts that there is no burden or standard of proof at this stage and exercised its own professional judgement.

The NMC has defined a lack of competence as:

‘A lack of knowledge, skill or judgment of such a nature that the registrant is unfit to practise safely and effectively in any field in which the registrant claims to be qualified or seeks to practice.’

The panel determined that there have been a number of failings involving a range of fundamental nursing skills including:

- Lack of knowledge of equipment;
- Lack of organisation;
- Lack of knowledge of the procedure being carried out;
- Lack of observation during the procedure; and
- Issues with your communication with colleagues.

The panel noted that your failures between February 2018 and April 2018 persisted despite significant support and you being subject to a Stage 1 Formal Capability Process. The panel noted that the failings occurred on more than one occasion and the panel had been provided with a fair and representative sample of your work.

The panel determined that the charges found proved demonstrate a lack of competence. The panel found that based on a fair sample of your work, the standard of your professional performance was of an unacceptably low level for a registered nurse.

The panel was of the view that your actions did fall short of the standards expected of a reasonably competent registered nurse, and that in failing to complete the Stage 1 Formal Capability Process you were unable to demonstrate the appropriate standards as outlined in the Code.

The panel bore in mind, when reaching its decision, that you should be judged by the standards of the reasonably competent band 5 registered nurse and not by any higher or more demanding standard.

Taking into account the reasons given by the panel for the findings of the facts, the panel has concluded that your practice was below the standard that one would expect of the average registered nurse acting in your role. In all the circumstances, the panel determined that your performance demonstrated a lack of competence.

Decision and reasons on impairment

The panel next went on to decide if as a result of the lack of competence, your fitness to practise is currently impaired.

The panel was mindful of the need to consider not only whether you continue to present a risk to members of the public, 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 of this case.

In this regard the panel considered the judgment of Mrs Justice Cox in the case of *CHRE v NMC and Grant* in reaching its decision. In paragraph 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

...'

In light of its findings of fact, the panel determined that your actions had engaged the first and third limbs of the guidance in *Grant*. The panel determined that you have in the past acted so as to put patients at unwarranted risk of harm. Furthermore, that your clinical failings related to basic and fundamental tenets of nursing practice.

The panel considered that the facts found proved demonstrated deficiencies in basic nursing competencies. The panel considered that these were basic fundamental tenets of the nursing profession and that although the competencies related to your role as a scrub and circulating nurse, certain elements such as communication with colleagues, would be required in all aspects of nursing.

The panel was mindful that the issue it had to determine was that of current impairment as of today. It therefore had to consider whether you are liable in future to act in such a way as to put patients at unwarranted risk of harm and/or breach fundamental tenets. The decision about the risk of repetition in this case would be informed by consideration of the level of insight you have demonstrated and by whether your lack of competence is capable of being remedied and, if so, whether it has been remedied.

Regarding insight, the panel considered that you have demonstrated some insight as you accepted that you lack competence in certain areas. The panel noted that you have attempted to engage in a RTP course and have not been able to secure a place.

However the panel considered that there are other opportunities and avenues that exist in which you are able to engage to demonstrate that you have remediated the concerns

in your level of competence. The panel also considered that throughout the proceedings you attempted to allocate blame to your colleagues, to the NMC and to other third parties without accepting responsibility for the concerns in relation to your practice. The panel therefore considered that, whilst you have demonstrated some insight, your insight is still, at this time, developing.

The panel considered whether the three questions in *Cohen*; whether it could be satisfied that your lack of competence as a band 5 nurse is capable of being remedied, whether it in fact had been remedied and whether it is highly unlikely that your previous lack of competence would be repeated.

The panel is of the view that your level of competence is potentially capable of being remedied, but that it has not been so far. The panel noted that you went through a significant period where you were heavily supported in your role but you failed to successfully complete a Stage 1 Formal Capability Process which was implemented to improve your practice. Further the panel has no evidence of any continued professional development you have undertaken in the form of online or distance learning courses, your attendance at conferences or any reflections on relevant articles. The panel therefore concluded that you have yet to remediate your lack of competence.

The panel is of the view that there is a high risk of repetition based on your limited, albeit developing, insight and lack of remediation, especially given you have not practiced as a registered nurse since April 2018. 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 safety and well-being of the public and patients, and to uphold/protect 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 was of the view that the public would rightly expect a registered nurse to be competent in basic nursing

skills and knowledge. The panel determined that, in this case, a finding of impairment on public interest grounds was required.

Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired.

Sanction

The panel has considered this case very carefully and has decided to make a conditions of practice order for a period of three years. The effect of this order is that your name on the NMC register will show that you are subject to a conditions of practice order and anyone who enquires about your registration will be informed of this order.

Submissions on sanction

Mr Kennedy informed the panel that in the Notice of Hearing, the NMC had advised you that it would seek the imposition of a conditions of practice order for a period of 12 months if it found your fitness to practise currently impaired.

Mr Kennedy submitted the mitigating and aggravating factors in this case. He submitted that the mitigating factors were that you showed some insight into the facts found proved and engaged in the NMC process throughout, you also have expressed a determination to return to nursing and not to return as a scrub nurse. He submitted that your lack of full insight, lack of remediation, potential harm to patients should you be allowed to practise unrestricted as well as the lack of progress in your previous action plans are aggravating factors in this case.

Mr Kennedy submitted that taking no further action or a caution order would neither protect the public nor address the public interest issues identified. He therefore invited the panel to impose a conditions of practice order for a period of 12 months. Mr Kennedy submitted that your lack of competence is remediable and that a conditions of

practice order requiring further training and supervision would allow you to address the issues identified.

Mr Kennedy submitted that a suspension order would not be proportionate in this case and would not allow for an opportunity to address the underlying clinical issues.

In advance of the hearing you supplied a significant number of documents disclosing your recent activities. You are engaged in obtaining a BSc in natural science and hoped to obtain a PhD. You indicated that you are reluctant to return most nursing roles due to the Covid-19 crisis. You submitted that it would be some time until you returned to a nursing role. You were minded to enrol in a return to nursing course but were experiencing difficulties with the institutions that offered it.

You addressed the panel and stated that you supported a condition requiring a period of supervision. However, you explained that you needed a shorter time limit on this condition as it has caused you problems to acquire work in the past. You stated that a period of two weeks, equivalent to a short placement, would be sufficient to address the issues. You said that this would be workable.

You explained that you have no intention of returning to work in the role of a scrub nurse, but that you would in general be okay with returning to work in a theatre. However, you stated that you believe that working in a theatre setting as a nurse would ultimately include scrub nursing.

You stated that you have intentions to go to Glasgow or Stirling to work in a research nurse role. However, you explained that these plans are on hold at the moment due to the global Covid-19 pandemic.

Decision and reasons on sanction

Having found your 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 Sanction Guidance (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:

- You sought to blame others for your imposition and took no responsibility for your failings;
- Lack of full insight;
- Little remediation has taken place; and
- Should the matters found proved be repeated there is a potential risk of harm to patients.

The panel also took into account the following mitigating features:

- You have engaged throughout the NMC process;
and
- You have shown some insight into the matters found proved.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the wide ranging lack of competence in this 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 your practice would not be appropriate in the circumstances. The SG

states that a caution order may be appropriate where *'there is no risk to the public or to patients requiring the nurse or midwife's practice to be restricted, meaning the case is at the lower end of the spectrum of impaired fitness to practise'*. The panel considered that your lack of competence was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. 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 your registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the SG, in particular:

- *Identifiable areas of the nurse or midwife's practice in need of assessment and/or retraining;*
- *Patients will not be put in danger either directly or indirectly as a result of the conditions;*
- *The conditions will protect patients during the period they are in force;*
and
- *Conditions can be created that can be monitored and assessed.*

The panel considered that the lack of competency demonstrated was specific to the role of a scrub nurse, and noted that most of the charges found proved are focused in this specific area. The panel took into account that you never intend to work as a scrub nurse again. However, the panel was of the view that beneath this it could identify fundamental issues in your general nursing practice which includes working within a team, communication, learning and adapting and focusing on important matters.

The panel determined that it would be possible to formulate appropriate and practical conditions which would address the failings highlighted above. The panel accepted that you would be willing to comply with conditions of practice.

Balancing all of these factors, the panel determined that that the appropriate and proportionate sanction is that of a conditions of practice order.

The panel was of the view that to impose a suspension order today would be disproportionate, punitive and would not be a reasonable response in the circumstances of your case.

Having regard to the matters it has identified, the panel has concluded that a conditions of practice order will mark the importance of maintaining public confidence in the profession, and will uphold the standards of practice required of a registered nurse.

The panel determined that the following conditions are appropriate and proportionate in this case:

'For the purposes of these conditions, 'employment' and 'work' mean any paid or unpaid post in a nursing, midwifery or nursing associate role. Also, 'course of study' and 'course' mean any course of educational study connected to nursing, midwifery or nursing associates.'

1. *You must ensure that you are supervised by a band 6 nurse any time you are working. Your supervision must consist of:*
 - *Working at all times while being directly observed by a registered nurse of band 6 or above.*

2. *You must work with your mentor, line manager, supervisor or their nominated deputy to create a personal development plan (PDP). Your PDP must address the concerns about:*
 - *Team working*
 - *Communication skills*
 - *Clinical competencies relevant to the role you are working in*

You must:

- a) *Send your case officer a copy of your PDP within 6 weeks starting work as a registered nurse.*
 - b) *Meet with your mentor, line manager, supervisor or their nominated deputy at least every fortnight to discuss your progress towards achieving the aims set out in your PDP.*
 - c) *Send your case officer a report from your mentor, line manager, supervisor or their nominated deputy every 3 months. This report must show your progress towards achieving the aims set out in your PDP.*
3. *You must keep us informed about anywhere you are working by:*
- *Telling your case officer within seven days of accepting or leaving any employment.*
 - *Giving your case officer your employer's contact details.*
4. *You must keep us informed about anywhere you are studying by:*
- *Telling your case officer within seven days of accepting any course of study.*
 - *Giving your case officer the name and contact details of the organisation offering that course of study.*
5. *You must immediately give a copy of these conditions to:*
- *Any organisation or person you work for.*
 - *Any agency you apply to or are registered with for work.*
 - *Any employers you apply to for work (at the time of application).*
 - *Any establishment you apply to (at the time of application), or with which you are already enrolled, for a course of study.*
 - *Any current or prospective patients or clients you intend to see or care for on a private basis when you are working in a self-employed capacity.*

6. *You must tell your case officer, within seven days of your becoming aware of:*

- *Any clinical incident you are involved in.*
- *Any investigation started against you.*
- *Any disciplinary proceedings taken against you.*

7. *You must allow your case officer to share, as necessary, details about your performance, your compliance with and / or progress under these conditions with:*

- *Any current or future employer.*
- *Any educational establishment.*
- *Any other person(s) involved in your retraining and/or supervision required by these conditions.*

The period of this order is for three years. The panel noted your stated career intentions and concluded that a time frame of three years would allow you to gain employment, considering the Covid-19 pandemic and the delays this could cause, and would also allow for some time to implement and comply with the conditions imposed.

The panel noted that should there be positive developments earlier than the three years ordered by the panel, you can ask the NMC for an early review.

Before the order expires, a panel will hold a review hearing to see how well you have complied with the order. At the review hearing the panel may revoke the order or any condition of it, it may confirm the order or vary any condition of it, or it may replace the order with another order.

Submissions on interim order

The panel took account of the submissions made by Mr Kennedy. He reminded the panel that the order imposed today would not come into effect until 28 days after you have been sent the decision of this hearing in writing. He submitted that making no

interim order would be incompatible with the panel's earlier findings. He submitted that an interim order was necessary to protect the public and to address the public interest in this case. Mr Kennedy therefore invited the panel to impose the same conditions of practice order as directed earlier as an interim order.

You made no submissions.

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 the only suitable interim order would be that of a conditions of practice order, as to do otherwise would be incompatible with its earlier findings. The conditions for the interim order will be the same as those detailed in the substantive order for a period of 18 months.

If no appeal is made, then the interim conditions of practice order will be replaced by the substantive conditions of practice order 28 days after you are sent the decision of this hearing in writing.

That concludes this determination.