

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

**Substantive Hearing
30 September – 1 October 2020**

Virtual hearing

Name of registrant:	Judith Alexandra Naughton
NMC PIN:	97J0083S
Part(s) of the register:	RNA: Registered Nurse – (sub part 1) Adult – Level 1 2 October 2000
Area of Registered Address:	Edinburgh
Type of Case:	Misconduct
Panel Members:	Robert Barnwell (Chair, Lay member) Carole Panteli (Registrant member) Christine Moody (Lay member)
Legal Assessor:	Graeme Dalagleish
Panel Secretary:	Aoife Kennedy
Ms Naughton:	Present and represented by Ms Catherine Stock of Kings View Chambers
Nursing and Midwifery Council:	Represented by Helen Guest, Case Presenter
Facts proved by admission:	All
Facts not proved:	None
Fitness to practise:	Impaired
Sanction:	Suspension order (4 months) with a review
Interim order:	No interim order imposed

Details of charge

That you, a registered nurse while working at the Royal Infirmary of Edinburgh, between 11 June 2018 and 4 December 2018:

- 1) Accessed the medical records of 28 patients via the Trakcare system, without clinical justification
- 2) Accessed your own medical records via the Trakcare system
- 3) Breached patient confidentiality by disclosing medical information to a third party

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

Facts

At the outset of the hearing, the panel heard from Ms Stock, who informed the panel that you had made admissions to all charges in their entirety.

The panel therefore finds all charges proved in their entirety by way of your admissions.

Background

On 28 March 2019 the NMC received a referral from the NHS Lothian Health Board, The Royal Infirmary of Edinburgh, in relation to your practice. The allegations concerned the inappropriate accessing of patient records and the breaching of patient confidentiality. There were no concerns about your clinical work or the care you provided to patients.

You joined the NMC register in November 2000 and in the same month took up a post at the Royal Infirmary of Edinburgh as a band 5 registered nurse, in gynaecology.

In January 2012 you commenced your duties as a band 6 Deputy Charge Nurse/Deputy Ward Manager.

On 21 February 2012 you received a letter concerning your accessing your own electronic records following a visit to the Accident and Emergency department, advising of the potential for disciplinary proceedings.

On 25 May 2015 you signed the "fair warning memorandum" in relation to the inappropriate use of clinical systems to access records. The memorandum was addressed To: All Staff Women's Services and states:

"Staff in Women's Services continue to be identified as accessing their records on TRAK. This is extremely concerning that despite all staff being provided with the fair warning letter dated April 2010, MAY 2011 AND February 2012 staff continue to access their own records electronically via TRAK, despite signing that they have read and understood this information. Please can I remind all staff that you must not access your own, a relative, neighbours(sic) or friends (sic) records unless you have responsibility for the management or provision of their care. This is a requirement under NHS Lothian Policies and NMC Professional Standards. All breaches of this policy are investigated as a matter of professional misconduct and breach of confidentiality. Please do not advise NHS employees who are pregnant to access their own records to obtain results or any other information pertaining to their pregnancy."

As part of its investigation the NMC took a witness statement from Ms 1, Clinical Midwifery Manager, whose responsibilities include being the manager for gynaecology within the Royal Infirmary of Edinburgh. She stated:

"To my knowledge, the behaviour of breaching the eHealth security policy is not a common practice and staff are well aware of that."

Between 12 June and 3 December 2018 you accessed the records of 28 patients, without clinical justification. Most of the records had been accessed on only one occasion but in respect of 5 patients, they had been accessed up to 6 times. A significant number of records accessed were those of male patients admitted into the Accident and Emergency or Toxicology departments including some who were potentially suicidal. This was in contravention of the Health Board's eHealth Security Policy.

On 12 December 2018 you accessed your own medical records.

Matters came to light as a result of an IT security audit in December 2018.

Initially you found it difficult to accept that the Health Board was acting upon the data breaches and suggested that it was common practice for nurses to do this.

At the investigation interview on 29 January 2019 you admitted that you had accessed the records of a friend, a neighbour, a friend's mother and a friend of a friend, but had not known some of the 28 patients. You stated that you had accessed records out of curiosity and accepted breaching confidentiality on one occasion by informing your partner that his long-time friend and former brother-in-law, was in hospital.

At a disciplinary hearing on 2 April 2019 you, answered further questions in relation to accessing records without clinical justification. When asked directly you admitted that one of the patients concerned was in fact your boyfriend, as opposed to just a friend.

Following an investigation and disciplinary proceedings you were dismissed from your employment with the Health Board, on 5 April 2019.

You accepted the NMC's regulatory concerns prior to admitting the charges and provided the NMC with a Response to Regulatory Concerns and an undated

reflective piece. A certificate of achievement in respect of Information Governance etc, was also submitted.

Fitness to practise

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

Submissions on misconduct

Ms Guest, on behalf of the NMC, invited the panel to take the view that the facts found proved amount to misconduct. She referred the panel to parts of The Code: Professional standards of practice and behaviour for nurses and midwives (2015) (the Code) which she submitted had been breached.

Ms Guest submitted that your conduct in this case was unacceptable and exposed patients' private medical records. She reminded the panel that you were a senior and experienced nurse at the time of your actions, and that your actions were repeated even after you had been warned by your employer. Your actions have clearly breached the Code and the fundamental tenets that run through it, and breached patient confidentiality and data privacy rules.

Ms Guest further submitted that the nature of the conduct related to your professional practice, and raised fundamental questions and serious concerns about

your professionalism. She submitted that your actions in accessing a substantial number of patient's medical records without clinical justification, and disclosing some medical information to a third party fell seriously short of the standards that were expected of you and amounted to serious misconduct.

Ms Stock, on your behalf, accepted that your actions did amount to misconduct. She acknowledged that your actions were repeated even after you were formally warned by your employer. However, Ms Stock told the panel that there was a different culture and attitude to data protection in 2012 and 2013, and it did not have the prominence it has now. Ms Stock told the panel that there was a gap between 2012 when you accessed your own medical records until 2018 when you allowed yourself to be tempted in 2018 during a time of significant stress.

Submissions on impairment

Ms Guest moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. This included reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin) and *Cohen v GMC* [2007] EWHC 581 (Admin). Ms Guest submitted that limbs a, b and c in the test of Grant are engaged in this matter.

Ms Guest submitted that patient harm includes psychological and emotional harm, and breaching a patient's right to privacy amounts to patient harm. She further submitted that you have breached fundamental tenets of the profession and have brought the profession into disrepute. Your conduct clearly fell far below the standards expected of a registered nurse and has damaged the reputation of the profession.

She stated that patients would be outraged to find out that a nurse had looked up their medical records without any clinical reason. Repeatedly accessing patient records in this way, especially when you were a senior and experienced nurse,

raises serious concerns about your duty of candour and attitude, and undermines public confidence. Your actions involved deliberate and repeated conduct, and raise concerns about your attitude.

Ms Guest submitted that you have not shown full insight into your conduct and your reflection focuses on remorse that you lost your job, rather than insight into the impact of your misconduct on patients. Ms Guest invited the panel to make a finding of impairment on public protection grounds.

Given the nature and seriousness of your conduct, she also submitted that a finding of current impairment is required to declare and uphold proper professional standards and protect the reputation of the nursing profession.

Ms Stock told the panel that you are learning to keep your professional and personal life separate. She submitted that your reflective piece demonstrates that you have learned a valuable lesson and have apologised to family and colleagues. You now realise that you displayed utterly poor judgment and say that this will never be repeated again. You have been employed as a staff nurse at Spire Healthcare since 2019 and have been open and honest about these proceedings with your manager, who has provided a positive testimonial attesting to your competence and clinical skills. You have completed relevant training to address your misconduct. Ms Stock submitted that, in the light of your insight and remediation, your fitness to practise is not currently impaired.

The panel accepted the advice of the legal assessor who referred it to the NMC Guidance and to Roylance v GMC (No.2) [2000] 1 AC 311, and the Grant case.

Decision and reasons on misconduct

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

The panel was of the view that your actions did fall significantly short of the standards expected of a registered nurse, and that your actions amounted to a breach of the Code. Specifically:

1 Treat people as individuals and uphold their dignity

1.5 respect and uphold people's human rights

5 Respect people's right to privacy and confidentiality

20 Uphold the reputation of your profession at all times

20.1 keep to and uphold the standards and values set out in the Code

20.2 act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel was of the view that you were in a position of seniority with the responsibility of supporting and supervising registrants who provided care.

The panel was of the view that your misconduct in deliberately breaching patients' right to privacy was serious. It noted that your actions were repeated and related to 28 patients. Further, you passed on information about a patient to a third party. The panel determined that accessing your own medical records alone did not amount to a serious breach. However, it considered your misconduct cumulatively and determined that your actions as a whole fell seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

Decision and reasons on impairment

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

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must be honest and open and act with integrity. They

must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

In this regard the panel considered the judgment of Mrs Justice Cox in the case of *CHRE v NMC and Grant* in reaching its decision. In paragraph 74, she said:

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

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

'Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

- a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
- b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
- c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*

d) has in the past acted dishonestly and/or is liable to act dishonestly in the future.'

The panel considered the test set out in the case of *Grant* and made the following findings: You did act in a way which fell significantly short of the expected standard of a nurse. You placed patients at an unwarranted risk of psychological and emotional harm by violating their right to privacy. The panel was satisfied that your actions brought the nursing profession into disrepute.

The panel also found that you had breached fundamental tenets of the nursing profession by breaching patient privacy. Your actions demonstrated a disregard for your patients, exposing private information relating to their health and potentially putting them at risk of harm.

Regarding insight, the panel had regard to the fact that you made full and early admissions to the facts. The panel had regard to your reflective piece and considered that your insight was developing. It considered that your remorse was linked to losing your job and damaging your reputation, and that you did not demonstrate genuine remorse or insight into the impact of your actions on patients, colleagues and the wider nursing profession. The panel found that you provided no real explanation as to why you acted the way that you did, or what you have learnt from your actions and these proceedings.

In respect of remediation, the panel noted that you have completed relevant training courses and have been employed as a staff nurse without any concerns raised. It had regard to the testimonial provided by your current line manager. It recognised the quality of the testimonial, the fact that your colleagues hold you in high esteem, and that you are a person of otherwise good character. However, the panel was of the view that the training and testimonial did not detract from the seriousness of your misconduct, the potential harm to patients and colleagues, or the actual harm caused to the nursing profession.

In light of its finding that your insight is developing, the panel was of the view that

you had not fully recognised or remedied your misconduct. The panel accepted that these proceedings may have acted as a salutary lesson, however in light of the developing insight shown into your misconduct, and the fact that the misconduct is difficult to remediate, there remains a risk of repetition. The panel therefore determined that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind the overarching objectives of the NMC to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

The panel determined that a finding of impairment on public interest grounds is also required. Your misconduct was planned and deliberate, and carried out whilst in a position of seniority. The panel considered that you have provided no real explanation for your actions, and was not satisfied that you would not repeat them. You have called into question the reputation of the nursing profession and caused doubt as to whether nurses can be trusted. The panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds your fitness to practise impaired on the grounds of public interest.

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

Submissions on sanction

Ms Guest set out the NMC's position with regard to the aggravating and mitigating features in this case. She informed the panel the NMC was seeking the imposition of a 12 months suspension order with a review. She submitted that a suspension order would protect the public and mark the seriousness of your misconduct. It would also allow you to reflect and develop full and genuine insight and remorse into your actions.

Ms Stock conceded that no further action would not be appropriate in circumstances and accepted that there were aggravating factors in this case. However, she submitted that a caution order would be appropriate to adequately address the concerns identified by the panel. She submitted that a caution order would allow you time to develop further insight. Ms Stock submitted that, should the panel decide that a caution order would not be the appropriate and proportionate order, a conditions of practice order would be appropriate as you are willing to engage with and respond positively to any such conditions. Ms Stock submitted that a suspension order would not be appropriate in the circumstances as it would be wholly punitive.

The panel accepted the advice of the legal assessor.

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 Sanctions 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 received a previous warning for similar conduct in 2012
- You were a senior and experienced nurse
- You accessed the records of 28 patients over an extended period of time

- You passed on a patient's private medical information to a third party
- Your remorse appears to be of a personal nature as opposed to demonstrating insight into the impact of your actions on patients and the nursing profession

The panel also took into account the following mitigating features:

- You made full and early admissions to all charges
- You have engaged fully with these proceedings
- You have been working as a nurse with no repetition of your misconduct
- You provided a positive testimonial from your current line manager

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case and the public protection issues identified. 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's 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 misconduct did present a risk to patients, and was not at the lower end of the spectrum. It therefore determined that a caution order would be inappropriate. 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 of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case. The misconduct identified in this case was not related to clinical practice and as such is not something that can be addressed through

retraining. The panel took into account the SG, which states that a conditions of practice order may be appropriate where:

- *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*
- *conditions can be created that can be monitored and assessed.*

The panel considered how it might deal by way of conditions with the risks it has identified. It identified a risk of repetition and what appears to be an attitudinal issue which involved a repeated pattern of behaviour that you have not been able to fully explain or, it seems, understand. The panel decided that it was not able to formulate conditions that would be realistic, workable, sufficient and proportionate to protect the public and maintain confidence in the profession and the regulator.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The panel took into account that you have demonstrated developing insight and have been working as a nurse since the incident without further concern. It noted that you have engaged with these proceedings and that you are a competent and able nurse. However, your misconduct was a significant departure from the standards expected of a registered nurse and was a serious breach of patient privacy. The panel considered that a short period of suspension would adequately protect the public and mark the public interest in this case. Further, it would allow you to fully reflect and demonstrate genuine remorse and insight into the impact of your actions on patients, colleagues and the wider nursing profession. The panel was of the view that to impose a suspension order would therefore be proportionate to the circumstances of the case.

The panel considered that a striking-off order would be disproportionate as your misconduct is not fundamentally incompatible with remaining on the register.

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

The period of this order is for four months. The panel considered that such a period of time would afford you ample opportunity to develop your insight and take steps to remediate your practice. A suspension order for four months would appropriately protect the public and adequately address the public interest in this case, while also providing you the opportunity to develop your insight.

Before the order expires, a panel will review it. At this review, the panel may revoke the order, it may confirm the order, or it may replace the order for another order. If, before the scheduled review of the order, there has been a material change of circumstances, it is open to you to request an early review of the order.

Any future panel reviewing this case may be assisted by:

- Your continued engagement with the NMC and attendance (virtually or in person) at any review hearing;
- Hearing evidence from you;
- A full and detailed reflective piece dealing with the impact of your misconduct on patients, colleagues and the wider nursing profession.

This will be confirmed to you in writing.

Decision and reasons on interim order

The panel heard submissions from Ms Guest and Ms Stock in respect of the necessity of an interim order.

Ms Guest applied for an interim order on the basis that there was a risk to patients and that it was in the public interest.

Ms Stock submitted that you have been working as a senior nurse for a period of two years since your misconduct with no concerns, and therefore you do not pose a risk to patient safety. She submitted that, as you are currently working on a busy ward as a senior nurse, it would cause risk to your patients and colleagues should you be suspended from practising immediately as it would leave the ward with no cover.

The panel accepted the advice of the legal assessor.

The panel noted that it was conducting a risk assessment in assessing the need for an interim order. It considered that there was a risk to your patients should you be allowed to practise during the interim period before your substantive order comes into effect. However, it determined that any such risk was surpassed by the risk to your patients and colleagues if you were to be suspended with immediate effect, thereby leaving the ward short-staffed. The panel had particular regard to additional pressures currently caused by COVID-19. It was not satisfied that an interim order is necessary for the protection of the public or was otherwise in the public interest.

The panel therefore concluded an interim order would not be appropriate or proportionate in this case.

Your substantive suspension order will come into effect 28 days after you are sent the decision of this hearing in writing.

That concludes this determination.