

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

**Substantive Hearing
15 – 18 September 2020**

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

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| Name of registrant: | Malgorzata Paprocka |
| NMC PIN: | 16G0859C |
| Part(s) of the register: | Registered Nurse – Sub Part 1 Adult Nursing – 21 July 2016 |
| Area of registered address: | Poland |
| Type of case: | Misconduct/Lack of knowledge of English |
| Panel members: | David Crompton (Chair, Lay member) Emily Davies (Registrant member) Andrew Macnamara (Lay member) |
| Legal Assessor: | Justin Gau |
| Panel Secretary: | Edmund Wylde |
| Nursing and Midwifery Council: | Represented by Leeann Mohamed, Case Presenter |
| Malgorzata Paprocka: | Present and not represented |
| Facts proved by admission: | 3 |
| Facts proved: | 1, 2 |
| Fitness to practise: | Impaired |
| Sanction: | Suspension Order (12 months) |
| Interim order: | Interim Suspension Order (18 months) |

Details of charge

That you, a Registered Nurse,

1. Do not have the necessary knowledge of English to practise safely and effectively; [Proved]

2. On an occasion between 5 and 10 November 2018 failed to obtain consent prior to applying cream to Resident B. [Proved]

3. Having been directed by the Registrar to take an IELTS test by letter dated 21 June 2019, failed to do so by 07 August 2019. [Proved by Admission]

And, in light of the above, your fitness to practise is impaired by reason of your lack of knowledge of English in respect of charge 1 and your misconduct in respect of charges 2 and 3.

Admissions

At the outset of the hearing, you admitted charge 3. The panel therefore found charge 3 proved in its entirety, by way of your admission.

Background

At the time at which the allegations in this case arose, you were an agency nurse. You carried out shifts at Hyperion House between October 2018 and 3 January 2019, when you were dismissed. During your time at Hyperion House, you were the registered nurse on nights. Hyperion House is a care home for the elderly.

Concerns regarding your allegedly poor use of English language were raised by members of staff at the Home. Ms 1 (the Home Manager) sent an email to the agency regarding your poor use of English on 2 November 2018.

This prompted a meeting on 5 November 2018 between you and Ms 1. At this meeting an incident was discussed regarding the hand-over of Resident A. It is alleged that your notes regarding Resident A *'did not make a lot of sense'*.

This meeting was followed up by a letter, dated 5 November 2018. The purpose of the meeting, according to the letter, *'was to discuss concerns regarding clarity of handover/quality of spoken English.'* At this meeting, you were advised that you were required to improve your English.

On an occasion between 5 and 10 November 2018 it is alleged that you applied cream to Resident B without consent. Resident B's daughter raised a complaint regarding this.

Ms 1 met with you regarding this incident and a letter summarising the points that were discussed at that meeting was sent to you. The concerns with your English were again discussed. It was hoped by Ms 1 that your English would have improved by the time of the next review which was scheduled for January 2019. The letter states:

"I trust that when we review again in January 2019, your English will be vastly improved and certainly at a level good enough to hold a discussion freely."

A further incident regarding your allegedly poor use of English was recorded on 11 November 2018. Ms 1 notified the agency of her concerns. A further example of your allegedly poor English was again recorded on 2 December 2018.

A further example of your allegedly poor English is in relation to an incident on 1 January 2019 which concerned Resident C. Ms 2 is a Care Assistant and was on shift with you when the incident occurred. Ms 2 was so concerned about your poor use of English language that she raised it with Ms 1. In addition Ms 2 wrote a statement regarding the incident.

A further criticism of your use of written English was that you repeatedly used the letter “J” instead of the letter “I”. This is also apparent in Resident C’s daily notes, your appeal from dismissal, and your written correspondence.

You were subsequently referred to the NMC. The concern identified by the NMC was:

‘Failure to have the necessary knowledge of English in order to practise safely as a nurse’

Ms 3 completed the investigation into your practice. She was the case holder from April 2019 to November 2019.

You have engaged with the NMC in that you responded to the NMC on 22 January 2019 via email, 28 January 2019, 11 March 2019, 14 May 2019, and 3 June 2019. You deny this regulatory concern.

On 21 June 2019, you were sent a notice of a direction to take a language assessment. This letter provided information regarding the test and also provided a completion date of 7 August 2019. The letter went on to explain the consequences of failing or refusing to take the test as requested.

You responded via email on 2 July 2019, advising that you were considering the letter.

You subsequently sent a letter to the NMC dated 11 July 2018, with regard to your decision in relation to the direction to be tested. You stated:

“I will not stress my next test with these decision because I don’t have any contact with English for 6 months in speech”.

You also advised that:

“I will not try to renew my PIN number so please from 31.07.2018 delete my data from the system.”

You again emailed the NMC on 23 July 2019, in which you stated:

“Hello, I sent you a question in a letter whether you did not receive it. In a few days my registration with the NMC will end. Due to what happened to me and a few other reasons, I do not intend to prolong the registration which ends on 31 July 2019. I have sent you 23 evidence of knowledge of my English language. When registering my PIN I was not required to know the language at level C. I don’t intend to work as a nurse in the UK, I have already gained a new job and I’m learning a new language so Im not going to stress IELTTS test.”

The last correspondence dated 19 July 2020 from you states:

“My case in NMC has been going on for 1.5years and my English has almost been forgotten.”

To date, you have not complied with the NMC’s direction to take a language test as per the letter dated 21 June 2019.

Facts

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

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

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

- Ms 1: Home Manager at the Home.
- Ms 2: Care Assistant and Team Leader at the Home.

The panel also considered the agreed statement of Ms 3, which was read.

The panel also heard evidence from you under affirmation; you spoke to the panel through an interpreter.

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

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

The panel considered the evidence of Ms 1 to be consistent, credible and reliable – with no significant differences between her oral evidence and that contained within her written statement.

The panel considered the evidence of Ms 2 to be credible and consistent between her local statement, her witness statement, and her oral evidence. She provided assistance to the panel as much as she was able and was assisted by her contemporaneously-made local statement. However, her recollection of events was not, at times, particularly detailed.

The panel considered the evidence which you gave. You were focused in your evidence and assisted the panel as much as you were able. There was some inconsistency in your account of events with regards to Resident B, but otherwise your evidence was credible; you clearly believed what you said and were consistent in your position in respect of the allegations. The panel considered that hearing your version of events and rationale assisted it in its assessment of the charges.

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

Charge 1

1. Do not have the necessary knowledge of English to practise safely and effectively;

This charge is found proved.

The panel bore in mind the evidence of Ms 1 and Ms 2, in respect of the repeated concerns raised during your time at the Home with regards to your communication skills and knowledge of the English language; it considered Ms 1's evidence that she did not understand parts of your oral hand-over and that your written documentation did not make sense. It took into account that this evidence relates to late 2018 and early 2019. It was your evidence that you have not maintained your knowledge of English since that time, as you have moved away from England and that speaking English reminds you of the unpleasant experience of being dismissed from the Home.

The panel bore in mind the documentation before it written by you (in particular case notes, patient notes, text messages, and correspondence with the Home and the NMC) which, in the panel's professional judgement, is not of a sufficient standard of comprehensibility and quality to demonstrate the necessary knowledge of English to practise safely and effectively.

The panel considered the fact that you have never undertaken an IELTS test (or OET equivalent) to demonstrate that you have the necessary knowledge of English. It bore in mind the evidence of Ms 1 that she did not think that you would pass an IELTS test, back in 2018, and your evidence that, at the moment, you believe you would need to undertake a three-month course before taking the IELTS test – so that you would be ready to pass. It considered the documentation and certificates which you have provided, which date from 2018 into 2019; these are evidence of some knowledge of English and genuine attempts by you to improve your English, but they are not up-to-date and do not meet the required standard (of either IELTS or OET test) in respect of the NMC's language assessment.

The panel accepted the legal advice that the wording of the charge relates to your current knowledge of English.

Before the panel is evidence of repeated concerns raised in 2018 about your standard of English, evidence from you that you have not maintained your English language skills since that time, and no clear evidence to indicate that you are of a sufficient standard currently to practise safely and effectively – such as an IELTS test.

Taking all the above into account, the panel determined that it is more likely than not that you do not currently have the necessary knowledge of English to practise safely and effectively as a nurse, and found this charge to be proved.

Charge 2

2. On an occasion between 5 and 10 November 2018 failed to obtain consent prior to applying cream to Resident B.

This charge is found proved.

It is accepted evidence between you and Ms 1 that, on an occasion between 5 and 10 November 2018, you applied cream to Resident B, specifically their heel. The issue at hand is whether you failed to obtain Resident B's consent prior to doing so.

The panel considered that, as a nurse with the care of Patient B, you were under a duty to obtain consent prior to providing treatment; this is the standard expected of a competent practitioner, and also accords with the evidence of Ms 1, the Home Manager. Furthermore the panel bore in mind that you passed a Safe Administration of Medication course on 13 May 2018, which must have included reference to matters of consent and competence.

In your account, you said that you told Resident B that you were about to apply the cream and she "did not oppose" – and that therefore you had obtained Resident B's consent. You also said that, as the relevant cream was prescribed on Resident B's MAR chart, she had previously given consent to it being administered and as such you did not need to seek further consent. You added that it was the responsibility of the Home Manager initially to obtain residents' consent and that, when residents entered the Home, they signed a form indicating consent to all care to be administered to them.

The panel did not accept that your actions amounted to obtaining valid consent; the fact that Resident B "did not oppose" the administration of the cream, having been woken from sleep and therefore potentially being in a confused state, is not sufficient to amount to informed and valid consent. The panel considered that your evidence on this matter as a whole raised serious questions as to your understanding of consent as a concept and its ongoing, developing, and changeable nature.

The panel acknowledged that the care plan provided to the panel was from 2019 and therefore post-dated the event, and further acknowledged your arguments that there were some shortcomings in your induction. However, the matter of patient consent is such a fundamental concept to nursing that it should not be required to be outlined in a Home induction or a care plan. Consent is not a local policy, but a fundamental aspect of nursing practice.

Taking the above into account, the panel determined that you did not obtain the consent of Resident B prior to administering the relevant cream, and were therefore in breach of your duty to do so. The panel found this charge to be proved.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider whether the facts found proved in respect of charge 1 amount to a lack of knowledge of English and whether the facts found proved in respect of charges 2 and 3 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.

With regards to lack of knowledge of English, the panel adopted a two-stage process in its consideration. First, the panel must determine whether the facts found proved amount to a lack of knowledge of English. Secondly, only if the facts found proved amount to a lack of knowledge of English, the panel must decide whether, in all the circumstances, your fitness to practise is currently impaired as a result of that lack of knowledge of English.

With regards to misconduct, 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.

The panel had regard to the submissions made by Ms Mohamed and by you.

The panel accepted the advice of the legal assessor.

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: Professional standards of practice and behaviour for nurses and midwives (2015)' (the Code).

In respect of charge 2, the panel considered that your actions amounted to a breach of the Code, specifically:

'4 Act in the best interests of people at all times

To achieve this, you must:

4.2 make sure that you get properly informed consent and document it before carrying out any action.'

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. It acknowledged your submission that your understanding of consent was gained through your induction, but reminded itself of its previous finding that matters of consent are fundamental to nursing; it should not need to be outlined in an induction or care plan.

However, the panel considered that the charge is not related to your wider understanding of the concept of consent or your general competence as a nurse; it relates to a single act of not obtaining consent from a Resident before putting cream on their heel. The evidence before this panel indicates that such action was undertaken with the best of intentions – to alleviate pain – but without the required verbal consent. The panel noted that there is no evidence before it of more general issues in relation to your nursing practice or further examples of concerns relating to matters of consent.

The panel considered whether your action in charge 2 amounted to an elementary and grievous failure and concluded that the administration of cream to a Resident's heel on a single occasion could not be described as such. Although your actions fell short of what is expected of a registered nurse, they did not fall so far short as to amount to misconduct. The panel therefore concluded that your actions in charge 2 did not amount to misconduct.

In respect of charge 3, the panel considered that your actions amounted to a breach of the Code, specifically:

'22 Fulfil all registration requirements

To achieve this, you must:

22.3 keep your knowledge and skills up to date, taking part in appropriate and regular learning and professional development activities that aim to maintain and develop your competence and improve your performance.

23 Cooperate with all investigations and audits'

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct.

The panel noted that you have been living in Poland since you left the Home, and there is no evidence before this panel to suggest that, since that time, you have attempted to return to the UK to work as a nurse. Furthermore, in a letter received by the NMC on 22 July 2019, you indicated that you did not want to return to the UK to practice, that you wanted to resign your PIN and not renew your registration, and that you would not "stress" about the IELTS test. From the evidence before this panel, your failure to take the relevant test as referred to in charge 3 appears to be a deliberate act.

You have not provided a good reason why you were unable to comply with the direction of the Registrar to take the relevant IELTS test; at its highest, the reason you have provided goes to why you did not, rather than any matters of capability.

The panel considered that a nurse's cooperation with, and respect for, the NMC as regulator, and particularly in response to a direct instruction from the Registrar, is of significant importance to maintain proper standards and protect the public. While a nurse is on the NMC register, they have an unqualified duty to cooperate with their regulator, as determined by the Code.

The panel determined that your actions, in deliberately failing to respond appropriately to a direct instruction from the Registrar and thereby deliberately refusing to cooperate with the NMC, fell seriously short of the conduct and standards expected of a registered nurse. As such, the panel therefore concluded that your actions in respect of charge 3 amounted to misconduct.

Decision and reasons on lack of knowledge of English

With regard to its decision on lack of knowledge of English, the panel had regard to Rule 31 (6A) of the Rules. The panel bore in mind that adequate knowledge of the English language is an essential part of safe nursing practice and that the public expect registered nurses to be able to communicate safely and effectively.

The panel determined that you had breached standard 7 of the Code, in particular:

'7 Communicate clearly

To achieve this, you must:

7.5 be able to communicate clearly and effectively in English.'

The panel referred itself to its finding of fact in respect of charge 1. It was clear to this panel that, in its professional judgement, not currently having the necessary knowledge of English to practise safely and effectively as a registered nurse amounts to a lack of knowledge of English.

Accordingly, the panel was satisfied that its findings in relation to charge 1 amounts to a lack of knowledge of English.

Decision and reasons on impairment

The panel next went on to decide if, as a result of the misconduct and your lack of knowledge of English, 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. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. 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* [2011] EWHC 927 (Admin) in reaching its decision. In paragraph 74, she said:

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

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

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

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

The panel considered the first three limbs of the *Grant* “test” to be engaged in this case. Your lack of knowledge of English, and linked misconduct, placed patients at an unwarranted risk of harm; if a nurse cannot communicate in English to a sufficient standard to be understood in a clinical setting, there is a clear risk to patients. Furthermore, your lack of knowledge of English, and linked misconduct, have previously brought the nursing profession into disrepute, in that you have breached a fundamental tenet of the nursing profession – having sufficient knowledge of English such as to practise safely and effectively.

There is no evidence before this panel of any recent attempts at remediation of your lack of knowledge of English. In 2018 you were taking steps to improve your English language skills, but you have not maintained your skills or attempted to improve your English since early 2019, when you left the country – such that it has now deteriorated, by your own admission. You have demonstrated insight to a degree, in that you can now see that there has been a deterioration in your English language skills, but have otherwise demonstrated very limited insight into the impact of your lack of knowledge of English on patients and their safety, on colleagues, and on public confidence in the profession. Furthermore, you have demonstrated only very limited insight into the seriousness of your actions in deliberately ignoring the direction of the Registrar in respect of the IELTS test, and the

impact of that action on the reputation of the nursing profession and public confidence in the NMC as regulator.

Taking this lack of remediation and insight into account, the panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

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

The panel determined that a finding of impairment on public interest grounds is required; an informed and reasonable member of the public would significantly lose confidence in the nursing profession and the NMC as regulator were this panel to make no finding of impairment in the circumstances of the case.

Having regard to all of the above, the panel concluded that your fitness to practise is currently impaired, on grounds of both public protection and public interest.

Decision and reasons on sanction

The panel has considered this case carefully and has decided to make a suspension order for a period of 12 months. The effect of this order is that your name on the NMC register will show that you are subject to a suspension order and anyone who enquires about your registration will be informed of this order.

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. In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case and had careful regard to the Sanctions Guidance (SG) published by the NMC. It considered the submissions made by Ms Mohamed and those made by you. The panel bore in mind the NMC's Sanction Bid (12-month Suspension Order, with a review) but exercised its own independent professional judgement and was not bound by such a bid. The panel accepted the advice of the legal assessor.

The panel took into account the following aggravating features:

- Your limited insight into the impact of your lack of knowledge of English on patient safety and the reputation of the nursing profession; and
- Your limited insight into your lack of cooperation with the NMC's investigation.

The panel also took into account the following mitigating features:

- There is no evidence of any actual patient harm and no evidence of any other clinical issues in respect of your nursing practice; and
- Your previous good character.

The panel considered whether to take no action or impose a caution order but concluded that such courses of action would be inappropriate in view of the nature and seriousness

of the case, as well as the panel's finding of impairment on public protection grounds. In the light of the above, the panel considered that an order which does not restrict your practice would not be appropriate in the circumstances of the case.

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

The panel determined that it would not be possible to formulate appropriate and practical conditions which would address the failings highlighted in this case. The panel came to this view having considered its finding on your lack of knowledge of English and the linked misconduct. It bore in mind that you deliberately ignored a direction by the Registrar to take an IELTS test, and therefore did not have complete confidence that you would respond positively to re-training. However, the panel did note that you have indicated a possible change of mind and that you might use a period of suspension to develop your English by attempting to pass an IELTS test.

The panel considered that a conditions of practice order requiring you to complete the IELTS test (or OET equivalent) to the required standard before practising again would amount effectively to a suspension and would therefore not be workable. Such a conditions of practice order would also not fully address your misconduct in respect of not cooperating with your regulator.

The panel was of the view that to impose a suspension order would therefore be proportionate to the circumstances of the case. Such a sanction would adequately protect the public and address the public interest in this case.

The panel noted that a striking-off order is available only in respect of the misconduct in this case, flowing from charge 3. It considered that to strike your name from the register on the basis of your actions in respect of charge 3 alone would be wholly disproportionate and substantively unfair.

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 12 months. The panel considered that such a period of time would afford you ample opportunity to develop your knowledge of English and prepare for the IELTS test (or OET equivalent), such that you are able to appropriately pass it. A suspension order for 12 months would appropriately protect the public and adequately address the public interest in this case, while also providing you the opportunity to bring your clinical skills back up-to-date – as you have been away from nursing for a significant period of time.

Before the order expires, a panel will review it to see how well you have complied with the order. 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, such as you passing the IELTS test, it is open to you to request an early review of the order.

Any future panel reviewing this case would be assisted by:

- Your continued engagement with the NMC and attendance (virtually or in person) at any review hearing; and
- Evidence of professional development, including documentary evidence of completion of the above mentioned IELTS test (or OET equivalent), any workplace references and testimonials, and training certificates indicating that your nursing skills are up-to-date.

This will be confirmed to you in writing.

Decision and reasons on interim order

The panel heard submissions from Ms Mohamed and from you, in respect of the necessity of an interim order. It accepted the advice of the legal assessor.

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 reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. The panel therefore imposed an interim suspension order for a period of 18 months to cover the period of time for any appeal to be made and suitably disposed of.

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

That concludes this determination.