

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

**Substantive Order Review Hearing
8 January 2021**

Virtual Hearing

Name of registrant:	Mary Bernadette Costello
NMC PIN:	78I1014E
Part(s) of the register:	Registered Nurse Adult Nursing – March 1982
Area of registered address:	Middlesex
Type of case:	Misconduct
Panel members:	Anthony Kanutin (Chair, lay member) Jane Fraser (Registrant member) Claire Corrigan (Lay member)
Legal Assessor:	Paul Housego
Panel Secretary:	Tyrena Agyemang
Nursing and Midwifery Council:	Represented by Charles Drinnan, Case Presenter
Miss Costello:	Not present and unrepresented
Order being reviewed:	Suspension order (6 months)
Fitness to practise:	Impaired
Outcome:	Striking off order come into effect on at the end of 13 February 2021 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Miss Costello was not in attendance and that the Notice of Hearing had been sent to her registered address by recorded delivery and by first class post on 10 December 2020.

The panel had regard to the Royal Mail 'Track and trace' printout which showed the Notice of Hearing was delivered to Miss Costello's registered address on 11 December 2020.

The panel took into account that the Notice of Hearing provided details of the substantive order being reviewed, the time, dates, and venue of the hearing and, amongst other things, information about Miss Costello's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

Mr Drinnan, 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 Miss Costello has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

The panel noted that the Rules do not require delivery and that it is the responsibility of any registrant to maintain an effective and up-to-date registered address.

Decision and reasons on proceeding in the absence of Miss Costello

The panel next considered whether it should proceed in the absence of Miss Costello. The panel had regard to Rule 21 and heard the submissions of Mr Drinnan who invited the panel to continue in the absence of Miss Costello.

Mr Drinnan submitted that there had been no engagement by Miss Costello with the NMC since 2018 in relation to these proceedings and, as a consequence, there was no reason to believe that an adjournment would secure her attendance on some future occasion.

The panel accepted the advice of the legal assessor.

The panel has decided to proceed in the absence of Miss Costello. In reaching this decision, the panel has considered the submissions of Mr Drinnan and the advice of the legal assessor. It has had particular regard to any relevant case law and to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Miss Costello.
- Miss Costello has not engaged with the NMC at any time and has not responded to any of the letters sent to her about this hearing.
- Miss Costello has not provided the NMC with details of how she may be contacted other than her registered address.
- There is no reason to suppose that adjourning would secure her attendance at some future date; and
- The public interest requires an expeditious review of the case.
- This order is due to expire on 13 February 2021.

In these circumstances, the panel has decided that it is fair, appropriate, and proportionate to proceed in the absence of Miss Costello.

Decision and reasons on review of the substantive order

The panel decided to replace the current suspension order with a striking off order.

This order will come into effect at the end of 13 February 2021 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is a review of a substantive suspension order prior to its expiry. The order was imposed for a period of 6 months by a Fitness to Practise Committee panel on 15 July 2020.

The current order is due to expire at the end of 13 February 2021.

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

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

That you a Paediatric and Adult Nurse Advisor,

1. *On or around 26 January 2018, upon being notified by Colleague A that Nurse A was misusing and/or overdosing Patient A on chloral hydrate and buccal midazolam*

1.1. *Failed to document the allegations in the Coldharbour nursing records and/or CIAMS reporting system; **[Found proved]***

1.2 *Failed to escalate concerns to management and/or submit a safeguarding referral; **[Found proved]***

1.2. *Inappropriately advised Colleague A to investigate the matter further and failed to take action as a result of her concerns. **[Found proved]***

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

The original panel determined the following with regard to impairment:

The panel next went on to decide if, as a result of this misconduct, Miss Costello's fitness to practise is currently impaired. The panel accepted the advice of the legal assessor.

In this regard the panel considered the test adopted by Mrs Justice Cox in the case of Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin) at paragraph 76:

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

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

The panel found that limbs (a), (b) and (c) were engaged. It was of the view that Miss Costello's actions had, in the past, placed Patient A at unwarranted risk of harm, brought the nursing profession into disrepute and breached fundamental tenets of the profession. In these circumstances, the panel concluded that Miss Costello's fitness to practise had been impaired in the past by reason of her misconduct.

The panel then moved on to consider whether Miss Costello is likely to repeat such misconduct in the future. The panel noted that, when she was interviewed as part of the local investigation, Miss Costello recognised that she had made mistakes and, when questioned, was able to demonstrate knowledge of the correct safeguarding procedures and the steps she should have taken in response to Colleague A's concerns. The panel therefore considered that Miss Costello's misconduct was not the result of a lack of knowledge or training. The panel considered that this could potentially be remediable, if Miss Costello could reflect upon and analyse her decision-making at the time and draw conclusions as to why she failed to act appropriately and take the steps which she knew she should.

However, despite showing some initial signs of insight during the local investigation, Miss Costello subsequently disengaged with the disciplinary process and has not engaged with these NMC proceedings. The panel therefore has no explanation or insight from Miss Costello as to why, despite being aware of the action she should have taken, she did not do so on these occasions. The panel also has no evidence of any further training Miss Costello has undertaken, nor any information about whether Miss Costello is currently practising as a registered nurse.

The panel considered that in the absence of any reflection, insight or remediation from Miss Costello over the past two years, there remains a real risk that she may repeat similar misconduct in the future and place patients at unwarranted risk of harm, bring the profession into disrepute and breach fundamental tenets of the profession. The panel therefore determined that a finding of current impairment was required on the grounds of public protection.

The panel also bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health, safety and well-being of the public and patients, and to uphold 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 considered that public confidence in the nursing profession would be seriously undermined if a finding of current impairment was not made in a case where a nurse of Miss Costello's experience and seniority, with specific responsibility for safeguarding, had failed to act appropriately when safeguarding concerns were raised about a vulnerable child. The panel therefore determined that a finding of current impairment was also required on public interest grounds to maintain public confidence in the nursing profession and the NMC.

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

The original panel determined the following with regard to sanction:

The panel decided to make a 6 month suspension order.

In reaching this decision, the panel had regard to all the evidence that it had read in this case, as well as the Sanctions Guidance published by the NMC. The panel accepted the advice of the legal assessor and bore 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 also had regard to the NMC's statement of case, which outlined a number of aggravating and mitigating factors and proposed that a 9 month conditions of practice order was the appropriate and proportionate outcome. However, the panel reminded itself that the decision on sanction was a matter for the panel, exercising its own independent judgement.

The panel considered that the aggravating factors in this case were:

- Miss Costello's actions placed a vulnerable child with complex healthcare needs at risk of harm;*
- Although Miss Costello showed some limited insight during the local investigation, she subsequently disengaged meaning that her early insight has not been maintained or built upon;*
- The panel has no evidence of any remediation.*

The panel considered that the mitigating factors in this case were:

- This appears to have been an isolated incident in a lengthy nursing career;*
- The panel has no evidence of any previous regulatory findings against Miss Costello;*
- There has been no repetition of the misconduct or other concerns about Miss Costello's practice since this incident (although the panel has no information to indicate that Miss Costello has practised as a nurse since).*

The panel considered each potential sanction in ascending order of restrictiveness.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the risk of repetition identified. Taking no further action would not restrict Miss Costello's practice and would therefore not protect the public. The panel also decided that it would be neither proportionate nor in the public interest to take no further action, given the seriousness of the misconduct.

The panel decided that a caution order, which does not restrict a registrant's practice, would also be inappropriate for the same reasons.

The panel next considered whether placing conditions of practice on Miss Costello's registration would be a sufficient and appropriate response. It noted that this was the sanction proposed by the NMC, on the basis that Miss Costello had demonstrated some insight, there are discreet identifiable areas of her practice in need of retraining, and no evidence of general incompetence or wide-ranging clinical concerns.

The panel gave careful consideration to a conditions of practice order but ultimately decided that this would not be an appropriate or proportionate sanction. While Miss Costello's failings do relate to the issues of documentation and escalation, she has already demonstrated during the local investigation that she knows what she should have done in response to Colleague A's allegations. The risk to patients therefore does not arise out of a lack of knowledge or clinical skill on the part of Miss Costello. Due to Miss Costello's lack of engagement with her employer's disciplinary process and with the NMC process the panel has received no explanation as to why, on these occasions, she did not do what she knew she should. The panel considered that her failings would be more properly remediated through the development of Miss Costello's insight into the reasons for her misconduct, rather than clinical retraining.

The panel also had regard to the NMC's Sanctions Guidance and noted that an important factor in assessing the appropriateness of conditions of practice was the

registrant's willingness to engage. The panel was of the view that, even if it could formulate conditions of practice to address the risk in this case, it had no evidence which reassured it that Miss Costello would engage and respond positively to conditions. Miss Costello disengaged with the local investigation in 2018 and has not engaged at all with the NMC process. Miss Costello has not updated her email or telephone numbers with the NMC and the panel has no information about what she has been doing since 2018. In these circumstances, the panel decided that it would not be possible to formulate workable and measurable conditions. It also decided that, in the absence of engagement and a willingness to remediate from Miss Costello, a conditions of practice order would be insufficient to satisfy the public interest.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The Sanctions Guidance asks two questions in respect of a suspension order:

- does the seriousness of the case require temporary removal from the register?*
- will a period of suspension be sufficient to protect patients and the public interest?*

The guidance also indicates that a suspension order may be appropriate where some of the following factors are apparent:

This sanction may be appropriate where the misconduct is not fundamentally incompatible with continuing to be a registered nurse or midwife in that the public interest can be satisfied by a less severe outcome than permanent removal from the register. This is more likely to be the case when some or all of the following factors are apparent (this list is not exhaustive):

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

- *the Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour*
- ...
- ...

The panel considered that, in light of the seriousness of Miss Costello's misconduct and her lack of remediation and developed insight, temporary removal from the register was the minimum required to protect the public and uphold the public interest. It noted that this appeared to be an isolated incident in a lengthy nursing career, and the first time that Miss Costello has appeared before her regulator. The panel had no evidence of any harmful or deep-seated personality or attitudinal problems and no evidence of repetition of similar behaviour since the incident (although the panel noted that it had no information to suggest that Miss Costello is currently working as a registered nurse). While the panel is lacking evidence of developed insight, Miss Costello did demonstrate some early insight during the local investigation which might be developed further should Miss Costello choose to engage.

The panel did consider whether a striking-off order was required in this case but ultimately decided that this would be disproportionate at this time. In reaching this decision, it took account of the fact that this was an isolated incident in a lengthy career which could be remediated should Miss Costello choose to re-engage and develop the early insight which she showed during the local investigation.

Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction. The panel noted the hardship such an order may cause Miss Costello but was of the view that this was outweighed by the public interest in this case. The panel considered that a suspension order was necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

The panel determined that a 6 month suspension order would appropriately mark the seriousness of the misconduct. It would also provide Miss Costello with an adequate opportunity to engage and demonstrate developed insight.

At the end of the period of suspension, another panel will review the order. At that review, the panel may revoke the suspension order, confirm the order, or replace the suspension order with any other order, up to and including a striking-off order. This panel wishes to make it clear to Miss Costello that, while it has decided that a striking off order is currently disproportionate, all registrants have a duty to engage with the NMC and remediate their practice when things go wrong. If Miss Costello does not take this opportunity to engage with the NMC and demonstrate her insight then it would be open to the reviewing panel to decide that her persistent non-engagement is incompatible with remaining on the NMC register, and decide to strike her off.

Any future panel reviewing this order may be assisted by:

- Miss Costello's engagement;*
- A written reflective piece exploring the decisions which Miss Costello took at the time, with reference to human factors, and what she would do differently in the future to ensure that it did not happen again;*
- References/testimonials from any paid or unpaid work Miss Costello undertakes during the period of suspension.*

Decision and reasons on current impairment

The panel has considered carefully whether Miss Costello's fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's suitability to remain on the register without restriction. In considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. Whilst it has noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel has had regard to all of the documentation before it, including the NMC bundle. It has taken account of the submissions made by Mr Drinnan on behalf of the NMC. He submitted that all reasonable efforts have been made to engage with Miss Costello during the investigation, but there has been no response from her regarding this matter.

Mr Drinnan took the panel through a brief background of the case and submitted that although it was made clear within the determination that her engagement was required, she has failed to engage with the NMC since that determination was sent to her.

Mr Drinnan told the panel that despite showing some insight during the local investigation, due to no further contact with Miss Costello, there has been no evidence of remediation that would report on her progress since the failings took place or to demonstrate that she is safe to practise and, on this basis, the risk of repetition remains.

Mr Drinnan outlined the aggravating factors in this case for the panel to consider, but submitted that with no contact with the registrant, the panel has no current information about Miss Costello. He submitted that there has also been no response in relation to the recommendations put forward by the previous panel and only two options remain, to further suspend or to strike from the register. Mr Drinnan submitted that the substantive orders are not meant to be ongoing with no progress being made. The choice was between giving Miss Costello a further opportunity to engage, perhaps to provide evidence that she no longer wished to be a nurse so that the order might be allowed to lapse, or to strike her from the register now.

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

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

The panel considered whether Miss Costello's fitness to practise remains impaired. The panel noted that the original panel found that Miss Costello had demonstrated some insight during the local investigation, but since that time there has been no engagement with her. At this hearing, the panel noted the original panel's decision and the

recommendation to Miss Costello for her to engage with the process. As well as the lack of engagement, the panel noted the absence of information to show that she has been keeping her practise up-to-date or any correspondence that would explain her position. There has also been no insight on how her misconduct would have impacted her colleagues.

In its consideration of whether Miss Costello has remedied her practice, the panel had no information to support efforts of remediation from her.

The original panel determined that Miss Costello was liable to repeat matters of the kind found proved. Today's panel has heard or received no new information to suggest otherwise. In light of this, this panel determined that Miss Costello is liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that Miss Costello's fitness to practise remains impaired.

Decision and reasons on sanction

Having found Miss Costello's fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Article 30 of the Order. The panel has also taken into account the 'NMC's Sanctions Guidance' (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

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

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Miss Costello's practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Miss Costello's misconduct 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 conditions of practice order on Miss Costello's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable, and workable. The panel bore in mind the seriousness of the facts found proved at the original hearing and Miss Costello's lack of engagement and concluded that a conditions of practice order would not adequately protect the public or satisfy the public interest. The panel was not able to formulate conditions of practice that would adequately address the concerns relating to Miss Costello's misconduct or that it was confident she would comply with them. The panel noted the concerns identified at the substantive hearing which were not primarily related to clinical concerns but attitudinal issues. It had no information which would demonstrate that these concerns had been addressed.

The panel has received no information from Miss Costello regarding her activities since 2018, and whether she wishes to practise as a nurse. The panel noted that it is a requirement of the nurse to engage with the regulator. In view of the absence of evidence about Miss Costello's remediation and her lack of engagement with the NMC for the entirety of the process, the panel considered that any conditions of practice order would not be workable and would serve no useful purpose.

The panel next considered imposing a further suspension order. The panel noted that Miss Costello has not shown remorse for her misconduct or insight on the impact her misconduct has had on her colleagues. Further, Miss Costello has not demonstrated any further insight in addition to those expressed during the local investigation into her failings. The panel was of the view that considerable evidence would be required to show that Miss

Costello no longer poses a risk to the public. The panel was of the view that the failings found proven were not clinical but were due to lack of judgement. In light of her ongoing disengagement, the panel determined that a further period of suspension would not serve any useful purpose in light of all of the circumstances.

The panel noted the sanction guidance in relation to the Striking Off order:

“Do the regulatory concerns about the nurse... raise fundamental questions about their professionalism”.

The panel determined that it was necessary to take action that would prevent Miss Costello from practising in the future and concluded that the only sanction that would adequately protect the public and serve the public interest was a striking-off order.

This striking-off order will take effect upon the expiry of the current suspension order, namely at the end of 13 February 2021 in accordance with Article 30(1).

This decision will be confirmed to Miss Costello in writing.

That concludes this determination.