

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

**Substantive Order Review Hearing
8 January 2021**

Virtual Hearing

Name of registrant:	Desiree Fernandez
NMC PIN:	04G0721O
Part(s) of the register:	Registered Nurse Adult Nursing – July 2004
Area of registered address:	Oxfordshire
Type of case:	Misconduct
Panel members:	Jane Kivlin (Chair, Registrant member) Rachel Jokhi (Registrant member) Alison Lyon (Lay member)
Legal Assessor:	Nigel Mitchell
Panel Secretary:	Holly Girven
Nursing and Midwifery Council:	Represented by Robert Levack, Case Presenter
Mrs Fernandez:	Not present and unrepresented
Order being reviewed:	Suspension order (3 months)
Fitness to practise:	Impaired
Outcome:	Striking-off order to come into effect at the end of 17 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 Mrs Fernandez was not in attendance and that the Notice of Hearing had been sent to Mrs Fernandez's registered email address on 9 December 2020.

Further, the panel noted that the Notice of Hearing was also sent to Mrs Fernandez's representative on 9 December 2020.

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

The panel noted that under the recent amendments made to the Rules during the COVID-19 emergency period, notice of a hearing can be sent to an email address held for the registrant on the register, or an email address the registrant has notified to the Nursing and Midwifery Council ("NMC") for the purposes of communication.

Mr Levack, 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 Mrs Fernandez has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Mrs Fernandez

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

Mr Levack submitted that there had been no engagement at all by Mrs Fernandez with the NMC in relation to this hearing 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 Mrs Fernandez. In reaching this decision, the panel has considered the submissions of Mr Levack and the advice of the legal assessor. It has had particular regard to 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 Mrs Fernandez;
- Mrs Fernandez has not engaged with the NMC since the previous hearing and has not responded to any of the emails or telephone calls to her about this hearing;
- There is no reason to suppose that adjourning would secure her attendance at some future date; and
- There is a strong public interest in the expeditious review of the case.

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

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 17 February 2021 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is the second review of a substantive suspension order originally imposed for a period of nine months by a Fitness to Practise Committee panel on 17 January 2020. This was reviewed on 16 October 2020, when the suspension order was extended for a period of three months.

The current order is due to expire at the end of 17 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 registered nurse, having agreed undertakings with the Nursing and Midwifery Council (NMC) in respect of the regulatory concerns in Schedule 1:

- 1. Breached your undertakings in that you,*
 - a. Did not provide the NMC with evidence of having completed training in recognition, escalation and care of the deteriorating patient.*
 - b. Did not provide the NMC with copies of reflective practice, every two months, detailing every case you have been involved in managing the care of a deteriorating patient, signed by your workplace manager, mentor or nominated supervisor.*
 - c. Did not send the NMC, every two months, reports from your workplace manager, mentor or nominated supervisor, setting out your progress towards achieving the aims of your personal development plan.*
 - d. Did not inform the NMC about your involvement in further clinical incidents on 1 March 2019 or about the investigation started against you.*

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

Schedule 1:

1. *Failure to provide adequate monitoring of a patient*
2. *Failure to record care adequately*
3. *Failure to correctly manage and escalate patient A's deteriorating condition'*

The first reviewing panel determined the following with regard to impairment:

'The panel considered whether Mrs Fernandez's fitness to practise remains impaired. The only engagement from Mrs Fernandez since the suspension order was imposed has been her recent emails regarding her attempts to obtain union representation. She has provided no evidence of insight, reflection or remediation, nor any information about her current employment situation or any efforts she has made to keep her nursing skills and knowledge up to date. The panel acknowledged that Mrs Fernandez appears to have had difficulties in obtaining union representation for this hearing, but considered that many of the recommendations made by the original panel could have been completed by Mrs Fernandez over the past nine months, with or without support from her union.'

In the absence of any evidence of insight or remediation, the panel concluded that the risk of repetition identified by the original panel remains. The panel therefore determined that a finding of current impairment on public protection grounds continued to be required.

The panel was also satisfied, there having been no material change of circumstances and no significant engagement from Mrs Fernandez that a finding of current impairment continued to be required on public interest grounds to uphold professional standards and maintain public confidence in the nursing profession and the NMC as a regulator.

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

The original panel considered the following to be aggravating and mitigating factors in relation to Ms Fernandez's conduct:

'The panel considered the aggravating factors in this case to be as follows:

- *Mrs Fernandez put patients at risk, through the original concerns in Schedule 1 and through her breach of the agreed undertakings designed to address those concerns;*
- *Mrs Fernandez has had an opportunity to remediate her practice, through the undertakings, and has not taken appropriate steps to fulfil that opportunity;*
- *Mrs Fernandez has demonstrated a lack of insight, and has disengaged from the regulatory process;*
- *There is information to suggest that Mrs Fernandez has an attitudinal issue in respect of this regulatory process;*
- *The seriousness of the matters set out in Schedule 1 were not dealt with by the agreed undertakings, and there is a possibility that those regulatory concerns appear to have been repeated, as per charge 1(d); and*
- *There has been a pattern of concerns as to Mrs Fernandez's clinical practice, dating back to 2010.*

The panel considered the mitigating factors in this case to be as follows:

- *Mrs Fernandez did initially accept the regulatory concerns (within Schedule 1), and appeared to make some early efforts to comply with the agreed undertakings, during a period of willingness; and*
- *There appears to have been a potential lack of support for Mrs Fernandez from relevant third parties, for her to comply with her undertakings in the workplace.'*

The first reviewing panel determined the following with regard to sanction:

'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 Mrs Fernandez's practice and would

therefore not protect the public from the identified risk of harm. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

The panel also decided that a caution order would be inappropriate for the same reasons.

The panel next considered a conditions of practice order. The original panel had decided that this sanction was inappropriate as Mrs Fernandez had not complied with previously agreed undertakings and had failed to engage appropriately with the regulatory process. This panel agreed with this reasoning. Mrs Fernandez's engagement with the NMC since the substantive order was imposed has been limited and this panel had no new information before it today to suggest that Mrs Fernandez would now be willing to comply with conditions of practice. The panel therefore concluded that a conditions of practice order would be insufficient to protect the public and the public interest.

The panel then moved on to consider a further period of suspension. It noted that another suspension order would protect the public for the time it was in force. However, it also noted that the original panel had raised concerns about Mrs Fernandez's attitude towards the regulatory process and made it clear that, if her engagement did not improve, then a future panel may decide that a striking-off was the only proportionate sanction which would satisfy the public interest.

Mrs Fernandez's engagement with the NMC over the past nine months has continued to be limited. She has provided no evidence for this reviewing panel, nor any information about her current employment situation and future intentions regarding nursing. Her only engagement with the NMC has been in relation to her difficulties in obtaining representation for this hearing, and even this communication has been initiated by the NMC rather than Mrs Fernandez herself. Given the lack of any significant engagement, the panel gave serious consideration to a striking-off order. However, it also bore in

mind that Mrs Fernandez had requested an adjournment of today's hearing which does suggest a commitment to retaining her professional registration. In light of this, the panel decided that it would be disproportionate to make a striking-off order at this time, and that the fairest and most proportionate outcome today would be to extend the suspension order.

The panel decided that a three month suspension order would be appropriate and proportionate as it would give Mrs Fernandez an opportunity to arrange representation and compile evidence for the next reviewing panel to demonstrate that she is committed to remediating her misconduct and returning to safe unrestricted practice. This order will take effect from 17 November 2020 in accordance with Article 30(1)(a) of the Nursing and Midwifery Order 2001.

This panel wishes to make it clear to Mrs Fernandez that two successive panels have now given serious consideration to striking her off the NMC register due to her lack of engagement. If Mrs Fernandez does not take this opportunity to fully engage with the NMC and provide evidence of further insight and remediation, then the next reviewing panel may decide that the public interest can only be served by striking Mrs Fernandez off the register.

At the next review, the panel would be assisted by:

- *Mrs Fernandez's attendance at the hearing (with or without a representative);*
- *Information about her current employment situation;*
- *A written reflection demonstrating her insight into her misconduct;*
- *Evidence of training / information about how she has kept her nursing skills and knowledge up to date;*
- *Any up to date testimonials or references from employers, whether in paid or unpaid employment.'*

Decision and reasons on current impairment

The panel has considered carefully whether Mrs Fernandez'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 Levack on behalf of the NMC.

Mr Levack reminded the panel of the background to the case and the decisions of the previous panels. He submitted that breaching undertakings made to a professional regulator are serious. He stated that the charges found proved relate to Mrs Fernandez not engaging with the NMC, and she has continued to disengage from these proceedings. Mr Levack submitted that Mrs Fernandez was warned by the original panel and the last reviewing panel that a striking-off order was a possibility if she continued to not engage with the NMC. Mr Levack stated that it is not clear why Mrs Fernandez had not attended this hearing, but that she has not responded to any of the efforts made by the NMC to contact her.

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 Mrs Fernandez's fitness to practise remains impaired.

The panel noted that the last reviewing panel found that Mrs Fernandez had insufficient insight. At this hearing the panel considered that there was nothing before it to indicate that Mrs Fernandez's level of insight had changed.

In its consideration of whether Mrs Fernandez has remedied her practice, the panel took into account that the NMC has received no further information from Mrs Fernandez and that she has not substantially engaged with the NMC since the original hearing, and not at all since the last review.

The last reviewing panel determined that Mrs Fernandez was liable to repeat matters of the kind found proved. Today's panel has received no new information. In light of this, this panel determined that Mrs Fernandez remains liable to repeat matters of the kind found proved.

The panel considered that the charges found proved against Mrs Fernandez include a failure to engage with the NMC. She has continued to fail to engage with the NMC, and therefore she has not demonstrated any insight or remediation. The panel also noted that the original concerns in relation to which Mrs Fernandez provided undertakings were serious and related to fundamental aspects of nursing practice. 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 Mrs Fernandez's fitness to practise remains impaired.

Decision and reasons on sanction

Having found Mrs Fernandez'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 Mrs Fernandez'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 Mrs Fernandez'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 on Mrs Fernandez'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 concluded that a conditions of practice order would not adequately protect the public or satisfy the public interest. The panel noted that these proceedings arise from Mrs Fernandez breaching the previous undertakings given to her by the NMC and as such considered that Mrs Fernandez was unlikely to comply with any conditions imposed. The panel was not able to formulate conditions of practice that would adequately address the concerns relating to Mrs Fernandez's misconduct.

The panel next considered imposing a further suspension order. The panel noted that Mrs Fernandez has not shown remorse for her misconduct. Further, Mrs Fernandez has not demonstrated any insight into her previous failings. The panel was of the view that considerable evidence would be required to show that Mrs Fernandez no longer posed a risk to the public. The panel noted that the original panel and the last reviewing panel had indicated to Mrs Fernandez that a striking-off order was a real possibility if she did not engage with the NMC and provide evidence of efforts to remediate her conduct. The panel considered that Mrs Fernandez's conduct and lack of engagement raises fundamental questions about her professionalism and her attitude to her practice and her regulator.

The panel determined that a further period of suspension would not serve any useful purpose in all of the circumstances. The panel determined that it was necessary to take action to prevent Mrs Fernandez 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 17 February 2021 in accordance with Article 30(1).

This decision will be confirmed to Mrs Fernandez in writing.

That concludes this determination.