Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
Monday 4 April 2022 – Thursday 7 April 2022

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

Name of registrant:	**Andrew Emerson**
NMC PIN:	84D1925E
Part(s) of the register:	Registered Nurse – Sub Part 1 Mental Health Nursing – (July 1987)
Area of registered address:	West Sussex
Type of case:	Misconduct
Panel members:	John Penhale (Chair, lay member) Terry Shipperley (Registrant member) Caroline Friendship (Lay member)
Legal Assessor:	Nigel Mitchell
Hearings Coordinator:	Charis Benefo
Nursing and Midwifery Council:	Represented by Sapandeep Maini-Thompson, Case Presenter
Dr Emerson:	Present and unrepresented
Facts proved by admission:	Charges 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22
Facts not proved:	Charges 15
Fitness to practise:	Impaired
Sanction:	**Suspension order (3 months)**
Interim order:	**Interim suspension order (18 months)**

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

At the outset of the hearing, Mr Maini-Thompson, on behalf of the Nursing and Midwifery Council (NMC) made a request that parts of this case be held in private when matters of your health arise during the course of the hearing. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

You indicated that you did not support the NMC's request for the hearing to be held partly in private. You made a request for the entirety of this hearing to be held in private on the basis that your health is involved in every aspect of the case. You submitted that it would not be possible to discuss many aspects of the case without making reference to your health.

Mr Maini-Thompson submitted that the questions he intended to put to the NMC witnesses would only concern the specific facts of the allegations with no reference to your health.

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

The panel determined to go into private session in connection with your health as and when such issues are raised in order to protect your privacy. The panel concluded that if necessary, it would review this position during the course of the hearing, in the event that references to your health become inextricably linked to the case.

Decision and reasons on application for the proceedings to be stayed

The panel considered your application for these proceedings to be stayed or, as you put it, struck out on the basis that there has been an abuse of process. You invited the panel to consider the following three grounds:

1. The NMC has failed to properly address and accord proper weight to the medical evidence you previously submitted. You told the panel that this evidence includes reports from two different consultant psychiatrists and a report from your GP. You submitted that as a result of this, the NMC has treated this case as one of misconduct where it ought to be treated as a health matter from an early stage of the investigation.

2. There has been unreasonable and excessive delay in the case reaching a hearing. You submitted that it has been 42 months since you were told that the case would be referred from the investigation stage. You argued that your rights under Article 6 of the Human Rights Act 1998 are likely to have been infringed by excessive delay, such that you are unlikely to receive a fair hearing due to the delay. You submitted that a delay of this length is likely to affect the memory of witnesses and there is a danger that evidence may have been contaminated due to the delay. You told the panel that this has had a negative effect on your mental health.

   You acknowledged that there have been exceptional circumstances as a result of the COVID-19 pandemic but submitted that the NMC ought to have arranged for the resources to cope with the effects of the pandemic. You submitted that a registrant ought not to pay the price for organisational shortcomings.

3. The preponderance of the evidence is hearsay. You submitted that combined with the excessive delay, there is a danger that undue reliance will be placed on effectively weak NMC evidence.

Mr Maini-Thompson referred the panel to his written response to your abuse of process argument:

'1. This document sets out the NMC's position in relation to the Registrant's application to have these fitness proceedings stayed and/or struck out as an abuse of process.

2. The Registrant has made three submissions in relation to abuse of process:

a. First, that the NMC has failed to engage with the medical evidence in the case and accordingly has mis-classified these proceedings as pertaining to misconduct rather than a health concern;

b. Second, that there has been an unreasonable delay in this case reaching a hearing and that this delay amounts to a breach of the Registrant's right to a fair hearing under ECHR Article 6;

c. Third, that the preponderance of evidence in this case is hearsay.

Abuse of Process

3. In the criminal jurisdiction, abuse of process has been defined as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respect a regular proceeding" (Hui Chi-Ming v R [1992] 1 A.C. 34).

4. A case might form an abuse of process where:

a. the defendant would not receive a fair trial; and/or
b. it would be unfair for the defendant to be tried.

5. *The burden of proof is on the Registrant to show that the proceedings should be stayed as an abuse of process. The standard of proof is the balance of probabilities.*

The NMC's Response to the Registrant's Submissions

Submission 1: the misclassification of proceedings

6. *The NMC submits the Registrant's first submission is mis-directed in law. The NMC retains the discretion as to whether a case should proceed to a substantive hearing. Accordingly, the burden of proof in this case rests exclusively on the NMC.*

7. *It is submitted that the assessment of medical evidence is a substantive matter which has no bearing on procedural fairness. It is for the panel to determine, having considered all the facts in this case, whether there is evidence of misconduct on the part of the Registrant.*

Submission 2: delay in bringing the proceedings

8. *Guidance on delay at common law is found in Attorney General's reference (no 1 of 1990) [1992] QB 630 CA (Lord Lane):*

"Stays imposed on the grounds of even unjustifiable delay should only be granted in exceptional circumstances. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or the prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant should never be the foundation for a stay. Where there has been no fault on the part of the prosecution there should be no stay unless the defendant shows on a balance of probabilities that owing to the delay he will suffer prejudice to the

extent that no fair trial can be held, in other words, that the continuance of the prosecution amounts to a misuse of the process of the Court. In assessing whether there is likely to be prejudice, and, if so, whether it can properly be described as serious the following matters shall be borne in mind: first, the power of the Judge to regulate the admissibility of evidence; second, the trial process itself, which will ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the Judge to give appropriate directions to the jury before they consider their verdict" (pp 643 - 644).

9. *Article 6(1) of the European Convention on Human Rights (ECHR) provides that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"*

10. *Article 6(1) is concerned only with procedural delay and not the passage of time between the conduct in question and the commencement of proceedings. Therefore, in civil cases, time begins to run from the initiation of proceedings (Guincho v Portugal (1994) EHRR 223) and continues throughout the entire proceedings.*

11. *Having determined the duration of the period, it is then necessary for the court to assess whether this period is itself unreasonable. The test is whether proceedings have been completed in a reasonable time, not whether they could have been completed sooner (Eckle v Germany (1983) 5 EHRR 1). The factors which the Strasbourg Court will consider are*

    a. *the complexity of the case;*
    b. *the conduct of the applicant and the authorities;*

c. the behaviour of any other parties to the case; and

d. what was at stake in the case for the applicant.

12. The leading authority on reasonableness of delay under Article 6 in this jurisdiction is Dyer v Watson [2004] 1 AC 379. At paragraph 52 Lord Bingham said this:

"In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive."

13. The NMC submits there is no evidence of an unreasonable delay in the period between the initiation of the proceedings against the Registrant and the date of the substantive hearing. A case management form containing the charges against the Registrant was sent to the Registrant on the 10 February 2021. Accordingly, there has been a 14-month gap between the commencement of the proceedings and the substantive hearing.

14. It is submitted that a 14-month delay is not prima facie unreasonable. Nevertheless, even if this period was considered to be lengthy, it remains reasonable on account of the complexity of the case, in particular the abundance of medical evidence, and the extensive correspondence between the Registrant and the NMC during the preparation of this case.

Submission 3: undue reliance upon hearsay

15. Rule 31 of the NMC's 2004 Fitness to Practice Rules permits a Committee, "subject only to the requirements of relevance and fairness… [to] admit oral, documentary or other evidence whether or not such evidence would be admissible in civil proceedings".

16. Notwithstanding the admissibility of hearsay evidence, a committee is entitled to take into account the fact that it can gave less weight to the evidence than if the maker of the statement was available to be cross-examined (Thorneycroft v Nursing and Midwifery Council [2014] EWHC 1565).

Conclusion

17. It is submitted that each of the Registrant's grounds of application should be rejected.

a. The first submission is procedurally misguided;
b. The second submission is flawed by the evidence;
c. The third submission pre-judges the determination of the committee.'

Mr Maini-Thompson submitted that it would be a matter for the panel to consider whether the medical evidence you provided will assist when determining the charges.

In relation to the time delay, Mr Maini-Thompson submitted that in the absence of any fault from the NMC, you have not provided evidence of having been caused prejudice as a result of the delay. He maintained that the time period in question is 14 months as opposed to the 42 months you suggested.

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

In relation to the first ground submitted by you, the panel noted that, in light of the medical evidence, it was a matter for the NMC to decide whether your case should be determined as a misconduct case or health case and what charges should be brought. The panel was satisfied that in reaching a decision in this case, the medical evidence you provided would have been taken into account by the NMC.

The panel noted the time period between the commencement of the proceedings and the date of the substantive hearing. It considered that the extensive correspondence between you and the NMC throughout this period had a significant effect on the timescale in bringing this case to a hearing.

The panel bore in mind that even where delay is unjustifiable, which is not the position here, a stay should be the exception rather than the rule. Further, the panel saw no evidence of the delay in this case being the fault of the NMC. The investigation process was lengthy and matters were not helped by the COVID-19 pandemic. Finally, you were unable to show that you had suffered or were likely to suffer serious prejudice as a result of the delay. The panel was quite satisfied that there has been no abuse of process such as to warrant a stay.

As to your suggestion that the preponderance of the NMC evidence is hearsay, the panel determined that it could properly consider any applications to adduce hearsay evidence under Rule 31 as and when they are raised.

In all the circumstances, there was no material before the panel to support exceptional reasons for these proceedings to be stayed on the basis of abuse of process.

Background

The NMC received a referral in respect of you on 4 October 2018. You first entered onto the NMC's register, as a mental health nurse, on 21 July 1987.

The allegations in this case arose whilst you were employed as a staff nurse at Deep Court, Littlehampton (the Home), which is run by Deepdene Care Ltd. The Home has two units and caters for patients with long term mental health needs, and those undergoing psychological rehabilitation. The patients are working towards independence. You began working at the Home in November 2015.

It was your responsibility to administer medication, and look after the mental and physical wellbeing of the patients. You would run the shift and act in a supervisory role over the healthcare assistants and support workers. You also completed supervisions, care plans and other paperwork.

The allegations are that between May and September 2018, you failed to dispense medication to patients because they had not come to the clinic room, and then you incorrectly recorded that the medication had been refused when it had not.

On 23 September 2018, the Regional Support General Manager at Deepdene Care Ltd at the time spoke to you about withholding medication. You were suspended on full pay during the investigation of the allegations. On 25 September 2018, you left your position at the Home.

Details of charge (as amended)

That you, a Registered Nurse:

1) On one or more of the following dates failed to administer Carbocisteine to Patient A:

    a) 17 July 2018
    b) 20 July 2018
    c) 20 September 2018

2) On one or more of the following dates failed to administer Venlafaxine to Patient A:

    a) 17 July 2018
    b) 20 July 2018
    c) 20 September 2018

3) On one or more of the following dates failed to administer Fluticasone with Salmeterol to Patient A:

    a) 17 July 2018
    b) 20 July 2018
    c) 20 September 2018

4) On one or more of the following dates failed to administer Olanzapine to Patient A:

    a) 17 July 2018
    b) 20 July 2018
    c) 20 September 2018

5) On one or more of the following dates incorrectly recorded that medication had been refused by Patient A:

   a) 17 July 2018
   b) 20 July 2018
   c) 20 September 2018

6) On one or more of the following dates failed to administer Sodium Valproate to Patient B:

   a) 3 May 2018
   b) 17 May 2018
   c) 9 June 2018
   d) 10 June 2018
   e) 14 June 2018
   f) 28 June 2018
   g) 7 July 2018

7) On one or more of the following dates failed to administer Isphagula Husk to Patient B:

   a) 3 May 2018
   b) 17 May 2018
   c) 9 June 2018
   d) 10 June 2018
   e) 14 June 2018
   f) 28 June 2018
   g) 7 July 2018

8) On one or more of the following dates failed to administer Ferrous Fumarate to Patient B:

a) 3 May 2018
b) 17 May 2018
c) 9 June 2018
d) 10 June 2018
e) 14 June 2018
f) 28 June 2018
g) 7 July 2018

9) On one or more of the following dates failed to administer Senna to Patient B:

a) 3 May 2018
b) 17 May 2018
c) 9 June 2018
d) 10 June 2018
e) 14 June 2018
f) 28 June 2018

10) On one or more of the following dates incorrectly recorded that medication had been refused by Patient B:

a) 3 May 2018
b) 17 May 2018
c) 9 June 2018
d) 10 June 2018
e) 14 June 2018
f) 28 June 2018
g) 7 July 2018

11) On one or more of the following dates failed to administer Amisulpride to Patient C:

a) 7 September 2018
b) 15 September 2018
c) 21 September 2018

12) On one or more occasions between 19 June 2018 and 28 September 2018 failed to administer pain relief to Patient C.

13) On one or more of the following dates incorrectly recorded that medication had been refused by Patient C:

a) 7 September 2018
b) 15 September 2018
c) 21 September 2018

14) On one or more of the following dates failed to administer Zolpidem to Patient D:

a) 1 September 2018
b) 2 September 2018

15) On one or more of the following dates failed to administer Clozapine to Patient D:

a) 1 September 2018

16) On one or more of the following dates failed to administer Diazepam to Patient D:

a) 1 September 2018
b) 2 September 2018

17) On one or more of the following dates failed to administer Amisulpride to Patient D:

a) 1 September 2018

b) 2 September 2018

18) On one or more of the following dates incorrectly recorded that medication had been refused by Patient D:

a) 1 September 2018
b) 2 September 2018

19) Your actions in charge 5 were dishonest in that you knew that Patient A had not refused the medication but you were seeking to represent that he had.

20) Your actions in charge 10 were dishonest in that you knew that Patient B had not refused the medication but you were seeking to represent that he had.

21) Your actions in charge 13 were dishonest in that you knew that Patient C had not refused the medication but you were seeking to represent that he had.

22) Your actions in charge 18 were dishonest in that you knew that Patient D had not refused the medication but you were seeking to represent that he had.

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

Decision and reasons on facts

At the outset of the hearing, you informed the panel that you made admissions to charges numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21 and 22 in their entirety.

You submitted that charge 15 is factually correct and accepted that you did not administer Clozapine to Patient D. However, you felt you were justified as you had a clinical reason for not administering the medication. You submitted that you did not admit to charge 15.

The panel therefore finds charges numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21 and 22 proved in their entirety, by way of your admissions.

Decision and reasons on application to amend the charge

The panel heard an application made by Mr Maini-Thompson to amend charge 15.

Mr Maini-Thompson informed the panel that the NMC had received new evidence from Witness 1, who was a Regional Support General Manager at Deepdene Care Ltd at the time of the incident. He submitted that in light of this new evidence and on further examination of the written evidence in the case, the substance of the initial allegation as contained in charge 15 falls away.

Mr Maini-Thompson submitted that the nature of the alleged failure related to record keeping rather than a substantive failure to administer medication. He told the panel that the NMC was seeking to amend charge 15 as follows:

> "That you, a registered nurse:
>
> 15) On one or more of the following dates failed **to provide adequate information explaining why clozapine had not been administered to patient D on** ~~to administer Cloazapine to Patient D~~:
>
> a) 1 September 2018"

You submitted that the suggested change would not amount to an amendment, but the replacement of a charge with an effectively new charge. You submitted that it is too late to

suggest such a change and invited the panel to consider this a significant reason to reject the NMC's application.

You identified a typographical error in the spelling of Clozapine in charge 15 and indicated that you are content for this charge to be amended to correct this error and accurately reflect the name of the medication from '*Cloazapine'*.

The panel accepted the advice of the legal assessor who referred it to Rule 28.

The panel noted the NMC's application to amend charge 15 by substitution of a wholly different charge on the basis of new evidence received by the NMC, following your denial of the facts.

The panel considered that you have had notice of the charges since February 2021 and have provided explanations in relation to some or all of the charges. It also noted your admission to all the charges with the exception of charge 15. The panel considered the merits of the case and the interests of fairness and justice. It determined that at this late stage it would not be fair to permit a significant amendment to charge 15. The panel refused the application to amend charge 15.

In relation to the typographical error identified in charge 15, the panel was of the view that such an amendment, as applied for, was in the interest of justice. The panel was satisfied that there would be no prejudice to you and no injustice would be caused to either party by the proposed amendment being allowed. It was therefore appropriate to allow the amendment, as applied for, to ensure clarity and accuracy.

Charge 15 now reads as follows:

"That you, a registered nurse:

15) On one or more of the following dates failed to administer Clozapine to Patient D:

a) 1 September 2018".

In light of the panel's decision to refuse the amendment of charge 15, Mr Maini-Thompson submitted that, following his opening of the case, he would be offering no evidence in relation to this charge.

Mr Maini-Thompson provided the background to the case and reminded the panel that you admitted all the charges with the exception of charge 15. He informed the panel that pursuant to additional information from you, further information was provided to the NMC by Witness 1. Witness 1 has said that there was a high probability that Patient D was drunk and therefore would not have been in a safe clinical position to receive Clozapine, because an intoxicated individual could have respiratory problems if they receive this medication. Mr Maini-Thompson told the panel that it was your responsibility to make a clinical judgement on whether the medication should have been administered and you made the correct judgement not to do so. He submitted that the substance of charge 15 is flawed and there is no longer a realistic prospect of the allegation being found proved.

You indicated that you had no objection to the NMC's decision to offer no evidence on this charge.

The panel accepted the advice of the legal assessor and had regard to Rule 24(7).

The panel took into account that in reaching its decision, it had to consider whether there was sufficient evidence to find this charge proved. The panel determined that the NMC had no evidence to support the charge and therefore there was not a realistic prospect that it would find the facts of charge 15 proved. Therefore the panel found this charge not proved.

Fitness to practise

Having announced the admitted charges found proved, the panel moved on to consider whether the facts contained therein 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. Second, 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

In coming to its decision, the panel had regard to the case of *Roylance v General Medical Council (No. 2)* [2000] 1 AC 311 which defines misconduct as a *'word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.'*

Mr Maini-Thompson referred the panel to his written submissions on misconduct and impairment:

> *'Introduction*
>
> 1. *The NMC submits that by reason of his misconduct, the Registrant's fitness to practice is impaired. The Registrant's conduct was dishonest and placed*

vulnerable patients at risk of harm. It would place others at risk of harm if repeated.

2. *The NMC submits that, as a registered nurse, the Registrant is currently a risk to the health, safety or wellbeing of the public. It is submitted that by reason of his misconduct, his continued practice would diminish public confidence and professional standards.*

3. *The NMC offered no evidence in respect of Charge 15.*

The NMC's Code of Conduct

Rule 1

1. *The NMC submits the Registrant has broken Rule 1 of the NMC's Code of Conduct in respect of Patients A, B, C and D – on account of the fact that he did not provide an individualised service to meet the health requirements of the patients in his care.*

Rule 1 - Treat people as individuals and uphold their dignity

To achieve this, you must:

1.1 treat people with kindness, respect and compassion

1.2 make sure you deliver the fundamentals of care effectively

1.3 avoid making assumptions and recognise diversity and individual choice

1.4 make sure that any treatment, assistance or care for which you are responsible is delivered without undue delay

2. *With the Registrant having admitted all charges, save Charge 15, it is submitted the Registrant failed to treat his patients as individuals in need of specific and individually tailored medicine routines.*

Rule 20

3. *The NMC submits the Registrant has broken Rule 20 of the Code of Conduct in respect of Patients A, B, C and D – on account of the fact that the Registrant sought to give the impression that he had discharged his professional duties when in fact he had not.*

Rule 20 - Uphold the reputation of your profession at all times

To achieve this, you must:
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.
20.9 maintain the level of health you need to carry out your professional role

4. *With the Registrant having admitted all charges, save Charge 15, it is submitted the Registrant failed to act with integrity and honesty at all times.*

5. *It is further submitted that by failing to take the necessary steps to address the impact of his mental health situation on his professional duties, the Registrant did not maintain the level of health he needed to carry out his professional role.*

Rule 10

6. *It is submitted that the Registrant has broken Rule 10 of the Code of Conduct in respect of Patients A, B, C and D – on account of the fact that the Registrant did not take accurate and contemporaneous records.*

Rule 10 - Keep clear and accurate records relevant to your practice

To achieve this, you must:
10.1 complete records at the time or as soon as possible after an event, recording if the notes are written some time after the event

10.2 identify any risks or problems that have arisen and the steps taken to deal with them, so that colleagues who use the records have all the information they need

10.3 complete records accurately and without any falsification, taking immediate and appropriate action if you become aware that someone has not kept to these requirements

7. *With the Registrant having admitted all charges, save Charge 15, it is submitted the Registrant failed to keep clear and accurate records at all times and he failed to complete records without any falsification.*

Aggravating Factors

8. *It is submitted that the Registrant's misconduct is aggravated by its frequency. The Registrant engaged in multiple acts of dishonest record keeping across a period of 3 months.*

Mitigation

9. *The Registrant has admitted to all the charges, save Charge 15, in respect of which the NMC offered no evidence.*

Additional Observations

10. *The Registrant has confirmed within an email dated 20th January 2020 that he has not been employed since leaving Deepdene Care in September 2018. Accordingly, the NMC lacks any evidence of current safe practice.' [sic]*

You submitted that you "*remain agnostic*" on the matter of your misconduct and invited the panel to make a decision in its own judgement on whether your behaviour amounted to misconduct.

You submitted in response to written submission 10 that you have been practising for the last 12 months and have provided evidence of current practice in the letter from your

agency dated 18 March 2022, which indicated that you have been employed since April 2021.

In light of this, Mr Maini-Thompson indicated that he withdrew submission 10.

Submissions on impairment

The panel heard evidence from you under oath.

You said that you deeply regret the incidents that occurred in 2018. You stated that you are conscious that you were practising well below the standards expected of a registered nurse. You told the panel that at the time, you lacked insight due to a mental health condition which you developed following a violent physical assault. You were attacked by one of the patients at the Home who had used violence in the past, including towards other staff. You said that this patient punched you on the chin, which caused you to fall over backwards and hit the back of your head on the concrete ground. The panel saw evidence that the patient concerned was charged by the police with assault by beating.

You told the panel that after the assault, you were off work for a week and your GP diagnosed you with post-concussion syndrome, anxiety and loss of confidence. You informed your manager of the diagnosis over the phone and it was agreed that you should take a few days off. You said that you were working two nights a week at the time, although you occasionally did extra shifts.

You said that when you returned to work, you did not feel you had properly recovered, but you wanted to get back to work as you would not be paid if you did not go to work. You said that your manager told you that the patient would be moved to another facility, however the patient remained at the Home and this increased your anxiety. You argued that the manager was at fault for not putting adequate support in place for you when you returned to work.

You told the panel that your support worker colleague made things worse by telling you that if a patient were to attack you again, he would not be able to protect you. You said that you were informed by the support worker that if there was any fighting between you and a patient, the Home would rather "*get rid*" of you than the patient because of the money they make from the patient. You stated that as a result of this, you were in fear of further assault and of losing your job.

You said that prior to the assault you were responsible for taking medication to patients in their rooms alone. However, you lost confidence in yourself. You said that at the time you did not feel you were doing anything wrong as you had convinced yourself that these patients, who had a history of using violence, had made threats to you before, may harm you again.

You said that you had persuaded yourself that if the patients did not come down to the clinic room, then in effect they were refusing their medication. You accepted that your judgement had been clouded by the growing fear you were under for some months.

You referred the panel to your response to the allegations document which you prepared in autumn 2018 shortly after you left the Home. You asked the panel to have particular regard to your in depth reflection contained in this document.

You then referred the panel to the report of a consultant psychiatrist dated 14 May 2021, which concluded that it was more likely than not that you suffered from PTSD of moderate severity between February 2018 and September 2018.

You asked the panel to consider the final decision letter from the DBS dated 5 April 2019, in which they stated their finding that it was not appropriate to bar you from working with vulnerable adults and children. You indicated that in the letter, they noted your remorse and insight and the lack of support from your manager and colleagues at the Home following the assault.

You said that you were not able to secure employment for a long period after you resigned from the Home due to Deepdene Care Ltd's refusal to confirm your dates of employment to prospective employers and agencies. You referred the panel to the positive appraisal dated 27 July 2017, which you received after having worked at the Home for almost two years and before the assault took place. You asked the panel to consider your manager's observation at the time that you were always working to the best of your ability.

You said that your mental health remained poor towards the end of your employment at the Home and for some time afterwards. You said that you felt isolated and feared the future and the outcome of the Fitness to Practise process.

You stated that you eventually managed to gain some employment with an agency which only came about because one of your former colleagues reached out to you and offered to provide a reference.

You told the panel that obtaining work has significantly helped you and you have improved over the last 12 months. You said that your agency is happy and referred the panel to your training certificates.

You said that in mitigation, you admitted to most of the charges at an early stage in July 2019 and engaged with the NMC throughout the process. You asked the panel to consider the context in which the decline in your practice occurred, namely that the misconduct followed a violent physical attack by a service user who was later convicted for the assault. You referred the panel to your victim impact statement dated 4 March 2018, which you submitted to the court.

You stated that you would like to apologise to the patients you let down and to the NMC. You said that at times, you have felt that you have thrown away a 30-year career in nursing.

In response to questions from the panel, you acknowledged that you could have raised your safety concerns with management but that at the time, you did not regard this as a problem.

You stated that you have informed your current employer (the Agency) of the allegations and the NMC proceedings. You explained that you work on a part time basis and that the Agency provides you with work, although you can also approach the Agency for work. You said that you have worked in several different places through the Agency, which includes working with the same type of patients as your previous job.

You told the panel that you do not have any recent documentation about your health but explained that you see your GP every four weeks and you are not taking any prescribed medication. You said that you are managing your anxiety better now and hope that in presenting your own defence, you have demonstrated that you are capable of managing your anxiety. You said that you now make sure that you take medication to patients in their rooms if they have not come to the clinic room and if there are concerns about violence, you will ask a support worker to accompany you.

You said that you are more self-aware and have learnt a great deal from your experiences in the last four years. You said that you think you are in a better position now to judge whether you are fit to be working and if there is any doubt in your mind, you understand that "*my health is more important than money*".

You said that it is fortunate that the outcome of your inappropriate behaviours were not more serious, resulting in the deterioration of the patients' mental or physical health. You said that you are conscious of the possible consequences. You stated that you are very aware that the patients were more likely to be violent if they had not taken their medication and that you feel deep regret about this.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Roylance v General Medical Council*, *Council for*

Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant [2011] EWHC 927 (Admin), *Ronald Jack Cohen v General Medical Council* [2008] EWHC 581 (Admin) and *Professional Standards Authority for Health & Social Care v (1) General Medical Council & (2) Uppal* [2015] EWHC 1304 (Admin).

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).

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***

To achieve this, you must:

1.1 treat people with kindness, respect and compassion

1.2 make sure you deliver the fundamentals of care effectively

1.3 avoid making assumptions and recognise diversity and individual choice

1.4 make sure that any treatment, assistance or care for which you are responsible is delivered without undue delay

10 Keep clear and accurate records relevant to your practice

This applies to the records that are relevant to your scope of practice. It includes but is not limited to patient records.

To achieve this, you must:

10.1 complete records at the time or as soon as possible after an event, recording if the notes are written some time after the event

10.2 identify any risks or problems that have arisen and the steps taken to deal with them, so that colleagues who use the records have all the information they need

10.3 complete records accurately and without any falsification, taking immediate and appropriate action if you become aware that someone has not kept to these requirements

20 Uphold the reputation of your profession at all times

To achieve this, you must:

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

20.9 maintain the level of health you need to carry out your professional role'

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

The panel considered that the charges relate to failing to administer medication to four vulnerable patients, and then incorrectly recording that medication had been refused by each of the patients. The panel was satisfied that in doing so, your actions were dishonest. It took into account your evidence that you knew that your actions were below the standards expected of a registered nurse.

The panel considered that you made a conscious decision to withhold medication from patients unless they came to the clinic room at the Home, and you then sought to hide your actions by recording that the patients refused to take their medication. The panel heard no evidence to suggest that you considered any other method of administering the medication to the patients. It was of the view that you had essentially disregarded the doctor's prescription for each of the patients.

The panel noted that Patient A was on a life licence which provided that he could be returned to prison if he did not comply with the conditions of the licence, one of which was to ensure that he was taking his medication. He was required to co-operate with any medical care or treatment recommended. The panel considered that you in not providing his medication, Patient A was at risk of being recalled to prison.

The panel also noted that Patient D was on a community treatment order, which required him to take his medication. Patient D's care plan indicated non-concordance with medication impacts on his mental health and contributes to relapse. The panel considered that you in not providing his medication, Patient D's behaviour could have been affected and his community treatment order could have been revoked resulting in readmission to hospital.

In relation to dishonesty, the panel took account of your health concerns at the time and the reason you provided for your actions. It was concerned by your choice to incorrectly record that the patients had refused medication, rather than to communicate and record the fear you had for your safety. The panel determined that failing to administer medication and dishonestly recording that it had been refused left vulnerable patients exposed to risk of relapse and disruption in their treatment. The consequence of not receiving medication could lead to recall to prison or a return to hospital.

Having considered the charges, the panel was satisfied that, taken individually and collectively, your actions fell seriously short of the conduct and standards expected of a registered 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. 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: the

> *'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 was satisfied that all four limbs are engaged. It found that patients were put at risk of physical harm as a result of your misconduct. Your misconduct breached the fundamental tenets of the nursing profession and brought its reputation into disrepute. It was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charges relating to dishonesty extremely serious.

Regarding insight, the panel noted your oral and documentary evidence. It took into account your admissions to the charges and the remorse you have shown. The panel was satisfied that you have some insight into the impact of your misconduct. It is clear you understand how you were personally affected, but the panel was of the view that this was less developed in terms of the impact on your patients and the nursing profession. The panel noted from your response to the allegations that you placed emphasis on the violent assault you experienced, the fear you felt, your mental health and the unsupportive and hostile attitude of The Home management and colleagues.

The panel noted your evidence under oath that you continue to see your GP on a monthly basis and your assertion that your health is better than it was. However, the panel had no evidence before it to substantiate that information. The panel did not have a clear indication of how you would handle a similar situation differently in the future.

The panel was satisfied that the misconduct in this case is capable of being addressed. It considered your unblemished nursing career of 30 years and the traumatic physical assault at work which affected your mental health and had a subsequent negative effect on your nursing practice. The panel carefully considered the evidence before it in determining whether or not you have taken steps to strengthen your practice. The panel

took account of your oral evidence and recent training certificates, however it was concerned that it had not received any evidence, by way of a reference or testimonial, about your current safe practice from your employer, line manager or other colleagues.

In all the circumstances, the panel concluded that there is a risk of repetition based on the lack of information about your current safe practice, how you are managing your anxiety around patients and how you intend to manage it in the future. The panel had little confidence that given the same set of circumstances, you would be able to recognise the need to place the patient's needs above your own. The panel had no current evidence that you would consult appropriately with management and colleagues. The panel therefore decided 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 required because a member of the public would be concerned to learn that a nurse not only failed to administer medication to vulnerable patients but then sought to cover up their failure by incorrectly recording that the patients refused the medication. The panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case.

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

Sanction

The panel has considered this case very carefully and has decided to make a suspension order for a period of three months. The effect of this order is that the NMC register will show that your registration has been suspended.

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. The panel accepted the advice of the legal assessor.

Submissions on sanction

Mr Maini-Thompson referred the panel to his written submissions on sanction:

'1. The NMC submits the most appropriate sanction is a 10-month suspension order.

2. The Panel has found that the Registrant engaged in serious misconduct and that his fitness to practice is impaired on the basis of both public protection and the public interest.

3. It is submitted that absent fuller medical evidence regarding the Registrant's current health status and absent testimonials confirming current safe practice in the setting of mental health nursing, there is a real risk of repetition.

4. The NMC submits that a suspension order is necessary to maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest.'

The panel also bore in mind your submissions. You invited the panel to consider a 10 month suspension order as too severe in the circumstances and having the practical effect of indirect permanent exclusion from the register. You said that you provided evidence of your current employment and that it was not the policy of your agency to provide anything more than a basic reference to confirm your dates of employment. You reminded the panel of your evidence under oath that your employer is happy with your practice and would like the employment relationship to continue.

You submitted that it would be against the public interest to remove a highly experienced mental health nurse from practice for such a lengthy period, particularly in a time where there is a national shortage of nurses.

You submitted that a 10 month suspension order would not assist you to obtain testimonial evidence of good and safe practice as you would be prevented from practising. You suggested that such an order would be self-defeating if the purpose of the order was to protect the public.

You submitted that there is no real risk of repetition and said that you have never experienced something that impacts on your health and practice before. You accepted that you lacked self-awareness and insight and stated that you have subsequently developed this greatly since the incident. You said that you are sorry if you were unable to adequately convey to the panel your awareness of the impact of your unwarranted omissions and recording failures on patients and colleagues. You submitted that you were aware of this impact, but felt it was more important to deal with the mitigating facts of your defence, namely the impact of the violent physical assault on your mental health.

You submitted that a shorter suspension order for a period of three months with no review would be in the public interest, and enable you to continue your relationship with your employer and make a valuable contribution to any nursing team. You told the panel that although you work ad-hoc shifts, the nursing teams are always glad to have you back.

You said that you are due to revalidate towards the end of the year and a long suspension order would make this extremely difficult, if not impossible. You asked the panel to consider whether it is in the public interest to suspend a nurse with 30 years of unblemished practice from the NHS for such a long period.

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 SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel considered the following to be aggravating features:

- You abused a position of trust
- Your conduct put patients at risk of suffering harm
- Your misconduct occurred over a period of several months that affected multiple patients

The panel considered the following to be mitigating features:

- Your personal circumstances of having suffered a violent physical assault by a patient which had an effect on your physical and mental wellbeing
- Your previous unblemished career of 30 years
- Your early admissions to all of the charges in this case

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 your 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 your 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 placing conditions of practice on your registration would be a sufficient and appropriate response. The panel concluded that the placing of conditions on your registration would not adequately address the seriousness of this case and the public interest.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that suspension order may be appropriate where some of the following factors are apparent:

- *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.*

Whilst this was not a single instance of misconduct, the panel took into account that it was a pattern of behaviour that took place over several months following the physical assault. The panel saw no evidence of any harmful deep-seated personality or attitudinal problems and no evidence of repetition of behaviour since the incident. The panel was satisfied that

you have some insight but found this needed to be developed further. However, the panel does not believe you pose a significant risk of repetition.

The panel did go on to consider whether a striking-off order would be appropriate. The panel was satisfied that in this case, the misconduct was not fundamentally incompatible with remaining on the register, therefore the panel concluded that a striking-off order would be disproportionate.

Balancing all of these factors the panel has concluded that a suspension order is the appropriate and proportionate sanction.

The panel noted the hardship such an order will inevitably cause you. However this is outweighed by the public interest in this case.

The panel considered that this order is 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 suspension order for a period of three months was appropriate in this case to mark the seriousness of the misconduct and provide you with sufficient time to address the concerns identified.

At the end of the period of suspension, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order.

Any future panel reviewing this case would be assisted by:

- Your continued engagement and attendance at a review hearing
- Testimonials from colleagues about your recent practice in the period prior to this hearing

- An up to date medical report
- A reflective account with particular emphasis on your future safe and effective practice

This will be confirmed to you in writing.

Interim order

As the suspension order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in your own interest until the suspension sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

The panel took account of the submissions made by Mr Maini-Thompson. He submitted that an interim order was required on public protection and public interest grounds for the same reasons given for the substantive suspension order. Mr Maini-Thompson invited the panel to make an interim suspension order for a period of 18 months to cover any appeal period until the substantive suspension order takes effect.

Decision and reasons on interim order

The panel was satisfied that an interim order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

The panel concluded that 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 ensure that you cannot practise without restriction before the substantive suspension order takes effect. This will cover the 28 days during which an appeal can be lodged and, if an appeal is lodged, the time necessary for that appeal to be determined.

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.