

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

**Substantive Hearing
Tuesday 2 - Wednesday 3 August 2022**

Virtual Hearing

Name of registrant: Joby Cherian

NMC PIN: 01E1056O

Part(s) of the register: RN1, Registered Nurse – Adult
May 2001

Relevant location: Cumbria and Merseyside

Type of case: Conviction

Panel members: Judith Webb (Chair, lay member)
Amanda Revill (Registrant member)
Robert Cawley (Lay member)

Legal Assessor: Marian Killen

Hearings Coordinator: Catherine Acevedo

Nursing and Midwifery Council: Represented by Anthony James, Case Presenter

Mr Cherian: Present and unrepresented

Facts proved: Charges 1a, 1b

Facts not proved: None

Fitness to practise: Impaired

Sanction: **Striking-off order**

Interim order: **Interim suspension order (18 months)**

Details of charge

That you, a registered nurse:

- 1) On 2 March 2020 at Barrow Magistrates' Court, were convicted of charges:
 - a) knowingly and without lawful authority or reasonable excuse, kept Child A, a child, away from the responsible person. Contrary to section 49(1) and (3) of the Children Act 1989;
 - b) knowingly and without lawful authority or reasonable excuse, kept Child B, a child, away from the responsible person. Contrary to section 49(1) and (3) of the Children Act 1989.

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

Background

The NMC received a referral on 8 March 2019 from Cumbria Police. You were arrested on 4 March 2019 and placed under investigation by them for serious criminal offences, namely, two counts of keeping a child away from a responsible person, and two counts of kidnapping.

According to the police referral, you were working at the Murrison Hospital, Swansea, at the time the offences were committed.

[PRIVATE]

You appeared at Barrow Magistrates' Court on 2 March 2020, where you were found guilty of both counts of keeping a child away from a responsible person and sentenced to 16 weeks' imprisonment. However, you appealed both the sentence and the conviction.

Your appeal was heard on 26 August 2021. Your appeal against the conviction was dismissed but your sentence was varied to 16 weeks' imprisonment suspended for 18 months.

The panel heard submissions from the NMC and was referred to the memorandum of conviction and to Rule 31(2) (a) and (b). The panel noted that you accepted that you are the person named in the memorandum of conviction.

The panel accepted the advice of the legal assessor.

Decision and reasons on facts

The charges concern your conviction and, having been provided with a copy of the memorandum of conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2)(a) and (b).

Fitness to practise

Having announced its findings on the facts, the panel then considered whether, on the basis of the facts found proved, your fitness to practise is currently impaired by reason of your conviction. 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.

Submissions on impairment

Mr James addressed the panel on the issue of impairment and reminded the panel to have regard to protecting the public and the wider public interest, the need to maintain proper standards and ensure public confidence in the profession and in the NMC as a regulatory body. He referred to the cases of *Council for Healthcare Regulatory Excellence*

v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin), *Achina v General Pharmaceutical Council* [2021] EWHC 415 (Admin) and *CHRE v GDC & Fleischmann* [2005] EWHC 87 (Admin).

Mr James outlined to the panel what the NMC considered to be fundamental breaches of 'The Code: Professional standards of practice and behaviour for nurses and midwives 2015' (the Code) in making its decision. He submitted that you have breached the following parts of the Code: 17.1, 17.3, 20 and in particular 20.4 and 20.8.

[PRIVATE]. [PRIVATE]. He also submitted that your account about a business scheme was not accepted at the original Magistrates' Court hearing nor at your Crown Court appeal. Mr James submitted that your behaviour, at the very least, seriously calls into question your judgement and ability to act appropriately and that lack of judgement is incompatible with being a nurse. Mr James submitted that there is risk of repetition as you continue to dispute the findings of two criminal courts and have not demonstrated any insight or remorse into your behaviour.

Mr James stated that your sentence, as varied by the Crown Court to one of 16 weeks' imprisonment suspended for 18 months, remains in force until February 2023.

Mr James submitted that damage had been caused to the reputation of the profession and that was not easily remedied. He submitted that public confidence in the profession would not be maintained and the public would be concerned if a finding of impairment was not made for a registered nurse who had behaved in this way.

Mr James therefore invited the panel to find your fitness to practice impaired on both public protection and public interest grounds.

The panel heard evidence from you under affirmation. [PRIVATE].

During cross-examination, you agreed that the Crown Court on appeal found that you knowingly kept Child A and Child B away from the responsible person. You told the panel that would that you do not accept the findings of the Magistrates' Court and the Crown Court.

You explained that you did your network marketing business alongside your role as a registered nurse. You said you worked 37.5 hours a week as a nurse through an agency and worked on your business on evening and weekends. You said you were not receiving much money for the network marketing and stated that you had not told either the hospital or the agency of your second income. You were adamant that you never involved patients in discussions about your marketing business.

[PRIVATE].

[PRIVATE]. You said that you feel very ashamed and disappointed about being convicted of these offences and that it had 'destroyed' you and said it is a shame that you now have two criminal convictions.

You told the panel that you are not currently working. You have stopped your network marketing business since you were arrested. You told the panel that you had not kept your nursing knowledge and skills up to date via any training or learning.

The panel accepted the advice of the legal assessor.

Decision and reasons on impairment

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

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must

be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must act with integrity. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

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

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

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

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

- 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 limbs a – c are engaged in the *Grant* test. The panel found that although patients were not put at risk of harm, your conduct resulting in your conviction put Child A and Child B at risk of harm and also puts patients and members of the public at an unwarranted risk of harm. Your conduct had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute.

The panel's view was that you had demonstrated a complete lack of insight for your conduct leading to your conviction [PRIVATE]. The panel also took into account that the suspended sentence is still in force. You continue to dispute facts of the conviction. You only addressed in your oral evidence how your conviction had affected you. The panel determined that you have not demonstrated an understanding of how your actions put Child A and Child B at risk of harm. It is also of the view that you have not demonstrated an understanding of why what you did was wrong and how this impacted negatively on the reputation of the nursing profession. The panel determined that you had not demonstrated how you would handle a similar situation differently in the future.

The panel noted that you have not taken any steps to address your conduct in this case by way of relevant training or reflection. You have not provided any references or testimonials from current employment or other activities.

The panel was of the view that there is a risk of repetition based on the lack of insight into your conduct which led to your conviction and in the absence of any supporting evidence that you have addressed the conduct identified. The panel decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health, safety and wellbeing of the public and patients, and to uphold/protect the wider public interest, which includes promoting and maintaining public

confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

When considering the wider public interest, the panel considered that confidence in the nursing profession would be undermined should a well-informed member of the public learn that the fitness to practice of a nurse who had been convicted of serious offences, [PRIVATE], was not found impaired. The panel determined that a finding of impairment on public interest grounds was required.

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 striking-off order. It directs the registrar to strike you off the register. The effect of this order is that the NMC register will show that you have been struck-off the register.

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 James informed the panel that the NMC's sanction bid is a striking-off order but it is up to the panel to determine the appropriate sanction.

Mr James submitted that the behaviour which led to your conviction is fundamentally incompatible with being on the register and raised fundamental concerns about your professionalism. [PRIVATE].

Mr James submitted that public confidence in nurses could not be maintained because of the nature of your offences. He submitted that a member of the public would be shocked to hear that the most severe action was not taken in these circumstances.

Mr James submitted that you have shown no insight, remorse or understanding of how your actions impacted the victims and you have not taken any steps to address your behaviour and keep your nursing knowledge and skills up to date. Mr James informed the panel that an interim suspension order was imposed on your registration in 2019 and was extended by the High Court. He submitted that there has been a lack of progress in your understanding or insight during over 3 years of interim suspension. Mr James submitted that due to your severe attitudinal issues in this case no sanction other than that of a striking-off order would be appropriate.

The panel also bore in mind your submissions. You told the panel that you have been working with the Probation Service since last year. You said that you understood your actions had an impact on Child A and Child B.

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 took into account the following aggravating features:

- The seriousness of the offences for which you were convicted.
- Your actions leading to your conviction put Child A and Child B, [PRIVATE] at risk of harm.

- Your lack of insight into your actions.
- Your lack of good judgement in the circumstances.

The panel did not identify any mitigating features 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 not protect the public nor be 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 conviction was not at the lower end of the spectrum and that a caution order 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 impose a caution order.

The panel next considered whether placing conditions of practice on your registration would be a sufficient and appropriate response. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case. The issues identified in this case were not clinical, were outside of your nursing work, and were behavioural and attitudinal. In the panel's view these issues cannot be addressed via conditions of practice. Furthermore, the panel concluded that the placing of conditions on your registration would not adequately address the seriousness of this case, would not protect the public nor address the public interest concerns.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that a 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;*

The panel determined that the behaviour which led to your conviction concerned a single incident [PRIVATE]. However, the panel identified harmful attitudinal issues and was of the view that because of the absence of reflection or insight it was not satisfied that you do not pose a significant risk of repeating your behaviour. The panel determined that you deflected blame on to others instead of accepting responsibility for your actions and you minimised the impact your actions had on Child A, Child B or public confidence in the nursing profession, your focus was on the impact of your conviction on yourself. You demonstrated a lack of good judgement during your commission of the offences and continue to show no understanding of the inappropriateness of your behaviour. You said in your oral evidence that you still do not accept the findings of the two Courts even though you do accept you are the individual named in the memorandum of conviction.

The conduct, as highlighted by the facts found proved and the panel's reasons given on impairment, was a significant departure from the standards expected of a registered nurse. The panel noted that the serious breach of the fundamental tenets of the profession evidenced by your actions are incompatible with you remaining on the register.

In this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, in looking at a striking-off order, the panel took note of the following paragraphs of the SG:

- *Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?*
- *Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?*
- *Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?*

Your actions were significant departures from the standards expected of a registered nurse and are fundamentally incompatible with you remaining on the register. The panel was of the view that its findings demonstrate that your actions were serious and to allow you to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors and after taking into account all the evidence before it, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the effect of your actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct themselves, the panel has concluded that nothing short of a striking-off order would be sufficient.

The panel considered that this 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.

This decision will be confirmed to you in writing.

Interim order

As the striking-off 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 interests until the striking-off 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 James. He submitted that an interim suspension order for 18 months is necessary on the grounds of public protection and is in the wider public interest to cover the period for an appeal.

You made no comment on the application.

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 cover the appeal period.

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

That concludes this determination.