

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

**Substantive Hearing
Monday, 28 November – Thursday, 1 December 2022**

Virtual Hearing

Name of registrant: **Thandi Elizabeth Mthembu**

NMC PIN: 02Y03010

Part(s) of the register: Registered Nurse – Sub part 1
Adult Nursing (level 1) – July 2002

Relevant Location: West Sussex

Type of case: Misconduct and Caution

Panel members: Anthony Mole (Chair, Lay member)
Alexandra Hawkins-Drew (Registrant member)
Pauline Esson (Registrant member)

Legal Assessor: Andrew Granville-Stafford

Hearings Coordinator: Chantel Akintunde

Nursing and Midwifery Council: Represented by Ben Edwards, Case Presenter

Ms Mthembu: Not present and unrepresented at the hearing

Facts proved: Charges 1a, 1b, 2, 3 (Misconduct) and Charge 1 (caution)

Facts not proved: N/A

Fitness to practise: Impaired

Sanction: **Striking-off order**

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

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Ms Mthembu was not in attendance and that the Notice of Hearing letter had been sent to Ms Mthembu's registered email address on 27 October 2022. The panel had regard to the email evidence and the signed witness statement from an NMC case officer confirming this.

Mr Edwards, 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.

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

In the light of all of the information available, the panel was satisfied that Ms Mthembu has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Ms Mthembu

The panel next considered whether it should proceed in the absence of Ms Mthembu. It had regard to Rule 21 and heard the submissions of Mr Edwards who invited the panel to continue in the absence of Ms Mthembu.

Mr Edwards submitted that Ms Mthembu had voluntarily absented herself. He referred the panel to the email correspondence from Ms Mthembu to the NMC dated 5 October and 21 October 2022 where she stated the following:

“I resigned long ago from my nursing Profession [...] And I told him that I am going to S.A. I am outside the Country.”

“You can proceed without[sic] my absence.”

Mr Edwards submitted that a witness has also been scheduled to give live evidence during this hearing and to adjourn would cause inconvenience. Based on this, and Ms Mthembu’s email responses, Mr Edwards submitted that it would be in the public interest, and Ms Mthembu’s own interest, for these proceedings go ahead as planned.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised with the utmost care and caution.

The panel has decided to proceed in the absence of Ms Mthembu. In reaching this decision, the panel has considered the submissions of Mr Edwards, the emails from Ms Mthembu, and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Ms Mthembu;
- Ms Mthembu has informed the NMC that she has travelled abroad and is content for the hearing to proceed in her absence. The panel noted that Ms Mthembu had been offered the option of joining the hearing via video conference but still chose not to attend;
- There is no reason to suppose that adjourning would secure her attendance at some future date;
- A witness has been scheduled to attend and give live evidence at this hearing;

- Not proceeding may inconvenience the witnesses, their employer and the clients who need their professional services;
- Further delay may have an adverse effect on the ability of witness accurately to recall events;
- The charges against Ms Mthembu are of a serious nature; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Ms Mthembu in proceeding in her absence. Although the evidence upon which the NMC relies has been sent to Ms Mthembu at her registered address, she has made no response to the allegations. Ms Mthembu will not be able to challenge the evidence relied upon by the NMC in person/virtually and will not be able to give evidence on her own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Ms Mthembu's decisions to absent herself from the hearing, waive her rights to attend, and/or be represented, and to not provide evidence or make submissions on her own behalf.

In these circumstances, the panel has decided that it is fair, appropriate, and proportionate to proceed in the absence of Ms Mthembu. The panel will draw no adverse inference from Ms Mthembu's absence in its findings of fact.

Details of charge

'That you, a registered nurse

1. Between 10 and 11 April 2021:

- a) Incorrectly entered on Patient A's medicine chart that you had administered Donepezil and/or Trazodone to Patient A*
- b) Incorrectly stated to Colleague A that you had cared for Patient A all night and/or that you had seen her in her bed.*

2. *Your conduct in Charge 1(a), above was dishonest in that you intended to create the misleading impression that you had administered one or more of the medications to Patient A when you knew you had not.*

3. *Your conduct in Charge 1(b), above, was dishonest in that you intended to create the misleading impression that you had provided care to Patient A when you knew you had not.*

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

That you, a registered nurse:

1. *Received a police caution on 1 August 2021 for:*

Carer ill treat/wilfully neglect a person without capacity-

On 11 April 2021 at Worthing had the care of Patient A who lacked or whom you reasonably believed to lack mental capacity, ill treated or wilfully neglected her by: failing to conduct checks upon her and falsifying records indicating that you had carried out such checks contrary to Section 44 Mental Capacity Act 2005

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

Background

The charges arose whilst Ms Mthembu was employed as a registered nurse by Willet Lodge Care Home (the Home) in Worthing from 6 January 2021. Patient A was a resident at the Home with Alzheimer's who was known to have behavioural problems, which included absconding from her room.

It is alleged that during the night shift from 10 April 2021 into the morning on 11 April 2021, Ms Mthembu failed to administer medication to Patient A and complete regular routine checks on Patient A when required. Patient A during the night absconded from the Home and was found wondering the streets by a member of the public. Patient A was then admitted into hospital and was found with scratches and unkempt. Patient A's absence was not noticed until the morning of 11 April 2022 during the day shift by another member of staff.

During the same shift, it is alleged that Ms Mthembu recorded on Patient A's MAR chart that she had administered the medication when she knew she had not. It is also alleged that Ms Mthembu informed Colleague A at the time that she had cared for Patient A all night when she knew she had not.

The police and adult safeguarding were notified and conducted a joint investigation into the matter. The investigation concluded that there was a case to answer for the offence of 'carer ill-treat/wilfully neglect a person without capacity' under section 44 of the Mental Capacity Act 2005. Subsequently, Ms Mthembu was formally cautioned on 1 August 2021 for this offence.

Decision and reasons on facts in relation to the misconduct charges

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

The panel has drawn no adverse inference from the non-attendance of Ms Mthembu.

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

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

- Colleague A: Home Manager at Willet Lodge
Care Home

In his closing submissions, Mr Edwards summarised the evidence available before the panel to support each of the charges.

With regards to charge 1(a), Mr Edwards referred to Patient A's MAR chart where Ms Mthembu recorded that the medications prescribed to Patient A had been administered when required. However, Mr Edwards then referred to Colleague A's live evidence where he stated that the Home undertook a stock audit on the morning, they discovered Patient A was missing. The audit confirmed that there was one extra tablet for each medication prescribed for the evening of 10 April 2021 (which was the same for all other residents in the Home), meaning that no medication was administered to Patient A at the time.

In relation to charge 1(b), Mr Edwards referred to the observation notes for Patient A which shows that no routine checks were recorded by Ms Mthembu throughout the night shift prior to the handover for the day shift. Mr Edwards referred to Colleague A's live evidence where he stated that, during a telephone conversation with Ms Mthembu after he was advised of Patient A's abscondence, Ms Mthembu was 'surprised' and denied that Patient A had absconded during her shift. Mr Edwards submitted that, had Ms Mthembu performed her duty by regularly checking on Patient A, her absence would have been noticed earlier on during the shift.

In relation to charge 2, Mr Edwards submitted that Ms Mthembu was well aware that she did not administer any of the medications to Patient A during her shift, but nevertheless falsely indicated on Patient A's MAR chart that she did, which was dishonest of her.

In relation to charge 3, Mr Edwards submitted that on Patient A's observation sheet, under the handover section, Ms Mthembu wrote the following:

'Patient A had a good night no new concerns although she slept very late and was checked on a regular basis.'

Mr Edwards submitted that at the time of Ms Mthembu writing this comment, Patient A was not in bed as she had already absconded from the Home and had been admitted into hospital after being found by a member of the public wondering the streets. He submitted that, had Ms Mthembu actually made regular checks on Patient A, Patient A's absence would have been written down on the observation notes and she would have reported Patient A as missing.

Mr Edwards invited the panel to find Colleague A and his live evidence creditable. He submitted that Colleague A was able to demonstrate a good recollection of events and was able to assist with the panel's questions to the best of his ability.

Based on the evidence available, Mr Edwards invited the panel to find all charges against Ms Mthembu proved in its entirety.

The panel accepted the advice of the legal assessor, who made reference to the judgment in the case of *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67.

Before making any findings on the facts, the panel considered the witness and documentary evidence provided by the NMC, along with the advice of the legal assessor. The panel then considered each of the disputed charges and made the following findings.

Charge 1(a)

'Between 10 and 11 April 2021:

Incorrectly entered on Patient A's medicine chart that you had administered Donepezil and/or Trazodone to Patient A.'

This charge is found proved.

The panel had regard to Patient A's MAR chart which shows that medication was administered to Patient A during the night shift of 10 April 2021 to 11 April 2021 whilst Ms Mthembu was on duty. Colleague A explained that the nurse in charge of a shift is responsible for carrying out the medication rounds to all patients within the Home. He confirmed that Ms Mthembu was the only registered nurse on duty that night, along with a carer.

The panel noted that the initials 'an' were used to make a record on Patient A's MAR chart that medication had been administered to Patient A. Colleague A told the panel that 'an' means 'agency nurse', and that Ms Mthembu would often lose her login password and use the agency nurse account to access the Home's electronic system where the MAR chart is located.

The panel also considered the interview notes between Ms Mthembu and the police, where the following was summarised:

'GWALA [Ms Mthembu] began the medication at around 20:25 and she started to distribute this. In relation to Patient A she gave her medication at around 20:45 and then walked her to her room. [...] At that time she was busy and put Patient A to bed but left the room to carry on with the medication. [...] Later she updated the system regarding medication given.'

However, Colleague A told the panel that a drug stock audit was carried out following the incident, which showed that there was one extra tablet for both medications prescribed to be administered to Patient A in the evening, which was the same case for all other residents at the Home. Colleague A said that the only explanation could be that the medication rounds for the night shift of 10 April 2021 to 11 April 2021 was not carried out.

Taking the above information into account, the panel was satisfied that Ms Mthembu was the nurse in charge during the night shift of 10 April 2021 to 11 April 2021 and was

therefore responsible for ensuring that all residents residing in the Home received their prescribed medication when required. The panel noted that Ms Mthembu stated in her police interview that she had administered the medications to Patient A during her shift, which is supported by the entry on the MAR chart located on the Home's electronic system. However, the panel considered the key fact that the Home's medication stock audit following the incident showed that not only was there one extra tablet for both of Patient A's medication, but that this was the same case for all other residents at the time. The panel therefore considered that, it was more likely the not, Ms Mthembu failed to perform her duty that night by administering Patient A's medications.

The panel determined that, on a balance of probabilities, Ms Mthembu had incorrectly entered on Patient A's MAR chart that she had administered Donepezil and Trazodone to Patient A, as set out in the charges. The panel therefore found this charge proved in its entirety.

Charge 1(b)

'Between 10 and 11 April 2021:

Incorrectly stated to Colleague A that you had cared for Patient A all night and/or that you had seen her in her bed.'

This charge is found proved.

The panel had regard to the observation notes for Patient A where Ms Mthembu typed the following in the '*Willett Lodge Nurses Daily Handover Notes*' section at 07:19 on 11 April 2021 at the end of her shift:

'Patient A had a good night no new concerns although she slept very late and was checked on a regular basis.'

Colleague A in his witness statement and live evidence stated that, during a telephone conversation with Ms Mthembu on the morning of 11 April 2021 (after he was notified

that Patient A had absconded from the Home), she told him that she had seen Patient A in her bed at the Home sleeping.

However, the panel noted that the observation notes had one section titled '*Comfort Round – Evening*' and five sections titled '*Night Checks*' that were left blank, which had time slots from 20:30 on 10 April 2021 to 07:30 on 11 April 2021. The panel understood that these timings were the duration of the night shift, and that nurses are expected to complete these sections to indicate the type of observations that were carried out. The panel also noted that the Home has an electronic scan that staff could utilise to show that they had been in the room, this had been used the previous night by the staff on duty. The panel could see that this is demonstrated by the previous entries made by other nurses on Patient A's observation notes prior to Ms Mthembu's shift.

Colleague A told the panel that he was called around 9:00 hours on 11 April 2021 by a member of staff on the day shift and told that Patient A was missing. Colleague A also stated that he was later advised by the police that Patient A was admitted into hospital between 22:00 to 23:00 hours on 10 April 2021.

Taking the above information into account, it is clear to the panel that Patient A had absconded from the Home prior to the hours of 22:00 and 23:00 as it was around this time she was admitted into hospital. It therefore considered that, had Ms Mthembu made regular checks on Patient A during her shift, Patient A's absence would have been noticed sooner on the night of 10 April 2021, recorded on the observation notes and the alarm raised.

On a balance of probabilities, the panel determined that Ms Mthembu had incorrectly told Colleague A that she had cared for Patient A all night and that she had seen her in her bed, as set out in the charges. The panel therefore found this charge proved in its entirety.

Charge 2

'Your conduct in Charge 1(a), above was dishonest in that you intended to

create the misleading impression that you had administered one or more of the medications to Patient A when you knew you had not.'

This charge is found proved.

Colleague A told the panel that the Home uses a system where medications are scanned onto an electronic medication administration system. This is to indicate that medication has either just been administered or is just about to be administered to the relevant resident. Patient A's MAR chart shows that one dose of Donepezil and one dose of Trazodone was entered onto the system at 21:33 hours. The panel therefore considered that this entry would give someone the reasonable assumption that medication had been administered to Patient A around this time. The panel also considered that, if the medications was scanned onto the system in error, there would have been provisions in place to correct this.

As charge 1(a) has been proved in its entirety, and Ms Mthembu has not claimed this entry on the MAR chart to be an error, the panel considered that the only other reasonable explanation for this is that Ms Mthembu sought to mislead others into believing that she had administered the medications to Patient A during her shift.

The panel therefore determined that, on a balance of probabilities, Ms Mthembu's conduct in charge 1(a), was intended to create the misleading impression that she had administered one or more of the medications to Patient A when she knew she had not, as set out in the charge. The panel was satisfied that this conduct would be considered dishonest by the standards of ordinary and honest people. The panel therefore found this charge proved in its entirety.

Charge 3

'Your conduct in Charge 1(b), above, was dishonest in that you intended to create the misleading impression that you had provided care to Patient A when you knew you had not.'

This charge is found proved.

The panel considered the fact that Patient A had indeed absconded from the Home prior to the hours of 22:00 and 23:00 on 10 April 2021 and was admitted into hospital. This was at the time Ms Mthembu was on duty during the night shift of 10 April 2021 to 11 April 2021.

As charge 1(b) has been considered proved in its entirety, the panel considered that the only reasonable explanation for Ms Mthembu recording at 07:19 hours that she had checked Patient A, was to give the false impression that she had regularly checked on Patient A during the shift, and therefore unaware that Patient A had absconded.

The panel therefore determined that, on a balance of probabilities, Ms Mthembu's conduct in charge 1(b), was dishonest in that she intended to create the misleading impression that she had provided care to Patient A when she knew she had not. The panel was satisfied that this conduct would be considered dishonest by the standards of ordinary and honest people. The panel therefore found this charge proved in its entirety.

Decision and reasons on facts in relation to the caution charge

Following its decision and reason on facts in relation to the misconduct charges, Mr Edwards informed the panel that there is an additional charge that concerns Ms Mthembu's fitness to practise that needs to be considered at the hearing. This additional charge concerns a police caution that Ms Mthembu received on 1 August 2021.

The panel had regard to the notice of hearing that had been sent to Ms Mthembu in relation to the caution charge. The notice informed Ms Mthembu that the panel would be made aware and invited to consider the caution charge 1 following its decision on facts on the misconduct charges 1(a) to 3. The panel was satisfied that they could continue with the facts stage and consider the charge relating to the caution as the notice had been effectively served to Ms Mthembu.

In reaching its decision on the disputed fact, the panel took into account the documentary evidence, which included a copy of the caution charge and a bundle which contained a record of the caution. It also took into account the submissions made by Mr Edwards on behalf of the NMC.

The panel has drawn no adverse inference from the non-attendance of Ms Mthembu.

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

Mr Edwards referred the panel to the 'record of caution' dated 1 August 2021. He submitted that the caution relates to the event concerning Patient A absconding from the Home whilst under the care of Ms Mthembu during the night shift from 10 April 2021 to 11 April 2021.

Mr Edwards submitted that the 'record of caution' sets out the offence and legislation it relates to, namely section 44 (carer ill-treat/wilfully neglect a person without capacity) of the Mental Capacity Act 2005.

Mr Edwards drew the panel's attention to the signature at the bottom of the caution, which is signed by Ms Mthembu on 12 August 2021. He submitted that this clearly shows that Ms Mthembu did receive a police caution on 1 August 2021 for the offence outlined under section 44 of the Mental Capacity Act 2005.

Mr Edwards submitted that there is nothing before the panel to dispute the fact that Ms Mthembu did receive a police caution for the incident in relation to Patient A absconding from the Home. He therefore invited the panel to find this charge proved in light of the evidence available.

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

Charge 1

'Received a police caution on 1 August 2021 for:

Carer ill treat/wilfully neglect a person without capacity -

On 11 April 2021 at Worthing had the care of Patient A who lacked or whom you reasonably believed to lack mental capacity, ill treated or wilfully neglected her by: failing to conduct checks upon her and falsifying records indicating that you had carried out such checks contrary to Section 44 Mental Capacity Act 2005'

This charge is found proved.

The panel had regard to the 'record of caution' dated 1 August 2021, which details that Ms Mthembu was cautioned by the police for the offence under section 44 (carer ill-treat/wilfully neglect a person without capacity) of the Mental Capacity Act 2005. The caution details that this related to the events on 11 April 2021 when Patient A, who was under the care of Ms Mthembu at the time, was discovered missing from the Home.

The panel noted that the caution was signed by Ms Mthembu where she acknowledged and admitted to the offence and agreed to be cautioned.

The panel also noted that the surname (Gwala) on the caution differs to the one the NMC has on record for Ms Mthembu but understood that Ms Mthembu is married and is using her married name. Based on the information available, the panel were content that the name 'Thandi Gwala' on the 'record of caution' is the same person as 'Thandi Elizabeth Mthembu'.

Taking into account the above, the panel therefore finds that the fact in relation to the caution is found proved in its entirety.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved in charges 1(a) to 3 amounts to misconduct and, if so, whether Ms Mthembu's fitness to practise is currently impaired. The panel also considered whether, on the basis of the facts found proved, Ms Mthembu's fitness to practise is currently impaired by reason of her police caution. 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.

In relation to misconduct, the panel adopted a two-stage process in its consideration. Firstly, the panel must determine whether the facts found proved amount to misconduct. Secondly, only if the facts found proved amount to misconduct, the panel must decide whether, in all the circumstances, Ms Mthembu's fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct and impairment

Mr Edwards invited the panel to take the view that the facts found proved amount to misconduct. He referred the panel to the definition of misconduct outlined in the case of *Roylance v General Medical Council (No. 2)* [2000] 1 AC 311.

Mr Edwards also referred the panel to *'The Code: Professional standards of practice and behaviour for nurses, midwives and nursing associates* (2015, updated 2018) (the Code) and submitted that the charges found proved amounted to breaches of the Code. He directed the panel to relevant parts of the Code the NMC considered Ms Mthembu's conduct had breached.

Mr Edwards submitted that Ms Mthembu's conduct did fall below the standards expected of a registered nurse. He submitted that, had Ms Mthembu carried out her role properly and effectively, it is likely that Patient A would have not been able to abscond from the Home. Mr Edwards submitted that, as a result of Patient A absconding from the Home, who was under the care of Ms Mthembu at the time, Patient A was admitted into hospital. He submitted that it was by chance that Patient A did not come to more serious harm. Mr Edwards further submitted that the dishonesty 'strikes at the heart of the nursing profession'.

Mr Edwards therefore invited the panel to find that the proved charges amount to misconduct.

Mr Edwards then proceeded to make submissions on impairment. He referred to the judgment in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin). He submitted that all four limbs of the test set out in the judgment have been met in Ms Mthembu's case.

Mr Edwards made reference to the judgment in the case of *Cohen v General Medical Council* [2008] EWHC 581 (Admin).

Mr Edwards submitted that there is no evidence available before the panel from Ms Mthembu of any remediation of her failings. He further submitted that there is no evidence of Ms Mthembu's insight or understanding on the seriousness of her failings, and the risk of harm she put Patient A in. Therefore, Mr Edwards submitted that there is no information to demonstrate to the panel that this incident will not be repeated in the future.

Mr Edwards referred to Colleague A's live evidence, where he told the panel that when Ms Mthembu was informed that Patient A had absconded from the Home, rather than admit her failings, she disputed this. Mr Edwards submitted that this further demonstrates Ms Mthembu's lack of understanding and insight into her actions.

Mr Edwards also submitted that if the panel were to find no impairment in Ms Mthembu's case, this would undermine public confidence in the nursing profession and the NMC as a regulator. He submitted that the NMC's position is that Ms Mthembu's fitness to practise is currently impaired on the grounds of public protection and public interest, and therefore invited the panel to reach this finding.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments.

Decision and reasons on misconduct

In coming to its decision, the panel had regard to the case of *Roylance v General Medical Council (No. 2)* 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.*'

When determining whether the facts found proved in charges 1(a) to 3 amount to misconduct, the panel had regard to the terms of the Code.

The panel was of the view that Ms Mthembu's actions did fall significantly short of the standards expected of a registered nurse, and that Ms Mthembu's actions amounted to a breach of the Code. Specifically:

1 Treat people as individuals and uphold their dignity

To achieve this, you must:

1.2 make sure you deliver the fundamentals of care effectively.

8 Work co-operatively

To achieve this, you must:

8.2 maintain effective communication with colleagues.

8.3 keep colleagues informed when you are sharing the care of individuals with other health and care professionals and staff.

8.5 work with colleagues to preserve the safety of those receiving care.

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:

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

10.4 attribute any entries you make in any paper or electronic records to yourself, making sure they are clearly written, dated and timed, and do not include unnecessary abbreviations, jargon or speculation.

17 Raise concerns immediately if you believe a person is vulnerable or at risk and needs extra support and protection

To achieve this, you must:

17.1 take all reasonable steps to protect people who are vulnerable or at risk from harm, neglect or abuse.

19 Be aware of, and reduce as far as possible, any potential for harm associated with your practice

To achieve this, you must:

19.1 take measures to reduce as far as possible, the likelihood of mistakes, near misses, harm and the effect of harm if it takes place.

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.

20.3 be aware at all times of how your behaviour can affect and influence the behaviour of other people.

20.4 keep to the laws of the country in which you are practising.

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. With regard to charge 1(a), the panel considered that Ms Mthembu's failure to administer medications to Patient A when required fell short of basic nursing practise and amounted to serious misconduct. Ms Mthembu's actions meant that Patient A did not receive their prescribed medications that night, which may have impacted on her mood and could have aided her in staying in her bed.

With regard to charge 1(b), Patient A was known to abscond from her room in the past, and therefore needed to be regularly checked on throughout the night. The panel considered that it was a serious failing on Ms Mthembu's part in not performing her duties by making regular checks on Patient A throughout her shift, and then falsely telling another colleague that she did.

With regard to charge 2, the panel considered the fact that Patient A is classed as a vulnerable patient who was prescribed medication to help manage her mental health and behaviour. Ms Mthembu falsely recording on Patient A's MAR chart that she had administered Patient A's medications was not only dishonest, but a serious failing as it meant that other colleagues caring for Patient A would have been none the wiser and unable to put into place measures to mitigate any risk caused by the omission (had a medication audit check not been carried out within the Home following the incident).

In relation to charge 3, the panel considered the fact that Patient A's abscondence from the Home resulted in her being admitted into hospital in an unkempt state after being found wandering the streets by a member of the public. When Ms Mthembu was informed about Patient A's abscondence, she failed to admit the fact that she did not check on Patient A throughout her shift, which was dishonest and is serious a failing on Ms Mthembu's part. Although Patient A was prone to absconding, the panel considered that this incident could have likely been avoided had Ms Mthembu performed her duties as expected.

Overall, the panel therefore found that Ms Mthembu's actions, in relation to the proved charges 1(a) to 3, did fall seriously short of the conduct and standards expected of a nurse and amounted to serious misconduct.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct and caution, Ms Mthembu's 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:

'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 determined that Patient A was put at unwarranted risk of harm as a result of Ms Mthembu's misconduct and caution. Ms Mthembu's misconduct and caution has breached the fundamental tenets of the nursing profession and therefore 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. The panel therefore considered that all four limbs of the test set out above in the case of Grant has been met in Ms Mthembu's case.

With regard to insight, the panel has received no evidence from Ms Mthembu that demonstrates her understanding of the seriousness of her failings and the impact this had on the patient involved, as well as the nursing profession. The panel noted that whilst Ms Mthembu has acknowledged and accepted a police caution for the incident involving Patient A, there is still no substantial evidence of insight or reflection from Ms Mthembu.

The panel was satisfied that the nature of misconduct in this case is capable of being addressed. However, the panel has received no evidence of remediation from Ms Mthembu following the incident and after receiving the caution. The panel is unaware of any steps Ms Mthembu has taken to address the concerns in this case and strengthen her practice, as well as address the associated dishonesty. As a result, the panel considered that there is a risk of repetition of Ms Mthembu actions. Although Ms Mthembu has indicated that she has retired from nursing and left the UK, this may change in the future. Without any evidence from Ms Mthembu to show that she has

made efforts to strengthen her practice, the panel are not reassured that such misconduct will not be repeated again in the future.

Based on the above, the panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

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

The panel considered that public confidence in the nursing profession would be undermined should a finding of impairment not be made in Ms Mthembu's case. Taking into account the proved charges, its finding of misconduct, and the police caution Ms Mthembu received for this incident, the panel considered that an informed member of the public would expect the NMC as a regulator to take appropriate action and restrict Ms Mthembu's practice. Based on this, the panel therefore also finds Ms Mthembu's fitness to practise impaired on the grounds of public interest.

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

Sanction

The panel has considered this case carefully and has decided to make a striking-off order. It directs the registrar to strike Ms Mthembu off the register. The effect of this order is that the NMC register will show that Ms Mthembu has 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 Edwards informed the panel that in the Notice of Hearing, dated 27 October 2022, the NMC had advised Ms Mthembu that it would seek the imposition of a striking off order if it found Ms Mthembu's fitness to practise currently impaired.

Mr Edwards submitted that the proved misconduct and caution in this case, which the panel found amounted to current impairment, resulted in Patient A not receiving the relevant care they required and absconding from the Home. He submitted that, when Ms Mthembu was told about Patient A's abscondence, she disputed this rather than admit her failings.

Mr Edwards submitted that, taking into account Patient A's abscondence from the Home whilst under Ms Mthembu's care, the falsifying of Patient A's records and the continued dishonest behaviour from Ms Mthembu after Patient A's abscondence was discovered, the only appropriate sanction to impose to address the seriousness of this case is that of a striking off order. He submitted that such behaviour from Ms Mthembu makes it impossible for her to remain on the register.

Mr Edwards referred to the other sanctions available to the panel. He submitted that the imposition of a conditions of practice order would not be appropriate in this case. Given that the proved misconduct involves dishonesty, it would be difficult to formulate conditions around this, particularly as Ms Mthembu has shown to be dishonest throughout the matter and only acknowledged her failings during the police interview.

Mr Edwards also submitted that the imposition of a suspension order would not be appropriate in this case. He submitted that Ms Mthembu's temporary removal from the register would not satisfy the public protection and public interest element of this case.

Mr Edwards moved on to address the aggravating and mitigating factors of this case. He submitted that the aggravating factors are as follows: Ms Mthembu's conduct exposed Patient A to serious risk of harm; Patient A was in an unkempt manner when

found and admitted into hospital, and it was only by chance that she did not come to more serious harm; and there is no evidence from Ms Mthembu of remediation of her failings. Mr Edwards then submitted that the mitigating factors are as follows: Ms Mthembu made some admissions to the allegations during the police interview displayed limited remorse for her conduct. However, he noted that Ms Mthembu has not provided a reflection piece to demonstrate her understanding of her behaviour and her current insight.

Based on his submissions, Mr Edwards therefore invited the panel to consider imposing a striking off order.

The panel accepted the advice of the legal assessor.

Decision and reasons on sanction

Having found Ms Mthembu's 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:

- A vulnerable patient was exposed to a serious risk of harm, and was found in an unkempt manner when admitted into hospital after absconding from the Home;
- There is no evidence of insight and/or remediation from Ms Mthembu; and
- Dishonesty in relation to Ms Mthembu's professional conduct and practice.

The panel also took into account the following mitigating features:

- Ms Mthembu made some admissions (albeit limited) to the allegations during the police interview; and

- Ms Mthembu accepted a police caution for the matter.

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 Ms Mthembu'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 Ms Mthembu's misconduct and police caution 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 a conditions of practice order on Ms Mthembu's registration would be a sufficient and appropriate response. The panel consider that there were areas of concern, specifically medication management and record keeping, that are capable of being managed by the formulation of conditions. However, Ms Mthembu has provided the panel with no evidence to demonstrate that she has or is willing to work on addressing these concerns and strengthen her practice. The panel had had no reassurance from Ms Mthembu that, if it were to formulate practical and workable conditions, she would comply with them. In addition, given the level of dishonesty involved in this case, and the panel having no evidence in front of it of Ms Mthembu's insight into the seriousness of such dishonesty, the panel were not satisfied that effective conditions could be formulated to mitigate the risks identified. The panel therefore concluded that placing conditions on Ms Mthembu's registration would not adequately address the seriousness of this case, nor would it protect the public.

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

The panel has not received any evidence of remediation from Ms Mthembu by way of either: a reflective piece demonstrating her insight into the matter and the impact this had on those involved and the nursing profession; additional training in the areas of concern to demonstrate efforts in strengthening her practice; or testimonials from either previous or current colleagues attesting to her character and practice. The panel also considered the seriousness of Ms Mthembu's dishonesty in attempting to cover up her failings and mislead other staff into believing that she had performed her duties. It also considered Ms Mthembu's initial denial of her failings which she maintained up until her police interview.

The panel considered that the proved misconduct and police caution in this case 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 Ms Mthembu's actions is fundamentally incompatible with Ms Mthembu remaining on the register. The panel were therefore not satisfied that the public would be sufficiently protected, or that the public interest would be met if Ms Mthembu were allowed to resume her nursing practice in the future.

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?*

Ms Mthembu's actions were significant departures from the standards expected of a registered nurse and are fundamentally incompatible with her remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Ms Mthembu's actions were serious and to allow her to continue practising would not sufficiently protect patients and the public.

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

The panel considered that this order was necessary to protect patients and 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.

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 Ms Mthembu's own interest until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

Mr Edwards submitted that the NMC are seeking the imposition of an 18-month interim suspension order.

Mr Edwards submitted that, in light of the panel's findings of impairment and decision to impose a striking off order, an interim suspension order is necessary on the grounds of public protection and is otherwise in the public interest.

Mr Edwards submitted that, as the current substantive order will procedurally not take effect until after the 28-day appeal period, and due to the length of time it takes for appeal cases to be dealt with by the court, an 18-month period would be appropriate. He submitted that this length of time will sufficiently cover the appeal period, and any subsequent appeal hearing should Ms Mthembu wish to appeal the panel's decision.

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. Due to its findings on impairment and sanction, the panel considered it is necessary to ensure that the public is protected immediately before the striking off order takes effect. The panel considered that if no interim order were imposed at this time, the public will be unprotected against the risks identified in this case should Ms Mthembu decide to resume her nursing

practice during the 28-day appeal period. In light of the above, the panel therefore decided to impose an interim suspension order for a period of 18 months, to ensure that Ms Mthembu's practice is restricted during this time, and to cover the appeal period and any subsequent appeal hearing.

This interim suspension order will take effect immediately.

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

That concludes this determination.