

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

**Substantive Hearing
Monday 6 September 2021 – Monday 13 September 2021
Tuesday 15 February 2022 – Wednesday 16 February 2022**

Virtual Hearing

Name of registrant: **Scott Alexander Macpherson**

NMC PIN: 87A0008S

Part(s) of the register: Registered Nurse – Sub Part 1:
RN1: Adult Nurse, Level 1 (28 May 1990)
RN8: Children’s Nurse, Level 1 (07 May 1992)

Area of registered address: Inverness

Type of case: Misconduct

Panel members: Nicola Jackson (Chair, Lay member)
Frances Clarke (Registrant member)
Tricia Breslin (Lay member)

Legal Assessor: Lachlan Wilson

Panel Secretary: Kevin Toskaj (6-13 September 2021)
Jennifer Morrison (15-16 February 2022)

Nursing and Midwifery Council: Represented by Tope Adeyemi, Case
Presenter (6-13 September 2021)
Represented by Rakesh Sharma, Case
Presenter (15-16 February 2022)

Mr Macpherson: Present and represented by Gary Burton of
Anderson Strathern

Facts proved: All

Fitness to practise: **Impaired**

Sanction: **Suspension order (6 months)**

Interim order:

Interim suspension order (18 months)

Decision and reasons on application to omit evidence

At the outset of the hearing, Mr Burton, on your behalf, requested redactions to be made to the witness statement of Witnesses 2 and 3. He proposed the redactions of paragraphs 14-26 of Witness 3's statement and paragraphs 29-35 and paragraphs 62 of Witness 2's statement. The panel understood that the witnesses were intended to be called and appear before the panel in the hearing.

Mr Burton submitted that the inclusion of these passages is unfair and manifestly prejudicial; the evidence relates to alleged previous misconduct which has not been charged by the Nursing and Midwifery Council (NMC). Mr Burton submitted that if it had been relevant misconduct, it should have been charged by the NMC. He said that these passages have been put forward by the NMC to demonstrate a pattern of behaviour and submitted that the admission of such evidence would have an adverse impact on you in regards to a fair hearing.

Mr Burton referred the panel to the case of *Murphy v General Teaching Council for Scotland* [1997] S.C. 172, where a ruling was made that justice was not done, or was not seen to be done, because the Committee had before it written material which was not relevant to the case.

Ms Adeyemi, on behalf of the NMC, submitted that the comments that are said to have been made by you in Witness 3's statement are similar to the comments outlined in charge 1(a). Ms Adeyemi explained that the material has been put forward by the NMC to demonstrate that you have a propensity to act in a similar way as is alleged.

Ms Adeyemi made submissions to the relevance of the authority outlined by Mr Burton. She submitted that the relevance of *Murphy* was limited; this was a 1996 case and things had moved on since then and it is factually different to the current situation. Ms Adeyemi submitted that in this case the NMC is not relying on hearsay and that the NMC will call live witnesses. Ms Adeyemi submitted that the *Murphy* case involved the

admissibility of a police warning given in 1991 before a Committee of the General Teaching Council for Scotland in 1996 and all parties had agreed that the evidence was irrelevant to the case. She explained that this was not the case in this hearing.

Ms Adeyemi referred the panel to the provisions of the Criminal Justice Act 2003 which governs the admissibility of evidence in legal proceedings. She submitted that evidence is admissible if the information is relevant to the important matter in issue. Ms Adeyemi submitted that the important matter in issue today is whether you made the comments outlined in the charges. She submitted that it is right for evidence, which supports the charges, to be put forward to the panel.

Ms Adeyemi submitted this evidence has not been used by the NMC to “*bolster a weak case*”, but simply to support charges for which there is primary witness evidence. She invited the panel to admit the witness statement evidence; the witness is a registered nurse who is currently employed by the Trust that made the referral.

The panel accepted the advice of the legal assessor, who referred it to the judgement of *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534.

Following the legal advice, Mr Burton said that he failed to see the difference between the witness statement and what is charged. He submitted that the statement is being used to bolster the case against you.

Ms Adeyemi accepted that while the material is being put forward to the panel to bolster the case against you, it is not required to bolster a case that is materially weak.

In reaching its decision, the panel took into account the submissions of Mr Burton and Ms Adeyemi, the advice of the legal assessor, in addition to the case law referred to.

The panel determined that admitting the additional oral testimony of witnesses that could have probative value in the case did not give rise to any oppression or unfairness

in your case. The panel was cognisant of the fact that you are represented by experienced Counsel. The panel noted that the witness will give live oral testimony and will be subject to cross examination unlike in the case of *Murphy* referred to by Mr Burton. The panel considered that *Murphy* questioned the admissibility of evidence which was hearsay, irrelevant, and not able to be tested.

In relation to the witness scheduled to attend and give evidence in this case, the panel decided that, as a professional panel, they were able to give such evidence its appropriate weight. In any case, the registrant's counsel is able to cross-examine such witnesses, appropriately challenge such evidence, and make submissions on the weight, if any, the panel should give to it.

Moreover, the panel was informed that the material in question was of a similar factual nature relevant to charge 1(a). It also determined that whether or not a charge was brought by the NMC in respect of the material is not a deciding factor on whether it should be admitted as evidence in this case.

For all these reasons, the panel decided to refuse the application for the redactions of evidence as applied for.

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

During the course of your evidence, Mr Burton, on your behalf, made a request that this case be held partly in private on the basis that your evidence involves matters pertaining to your health and personal circumstances and the health and personal circumstances of another who was not involved in the proceedings. The application was made pursuant to Rule 19 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004, as amended ('the Rules').

Ms Adeyemi indicated that she did not oppose the application.

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.

Having heard that your live oral evidence includes some references to your health and personal circumstances and the health and personal circumstances of another who was not involved in the proceedings, the panel determined to hold these parts of the hearing in private.

Decision and reasons on application to amend the charge

The panel heard an application made by Ms Adeyemi, on behalf of the NMC, to amend the wording of charges 1 and 2.

The proposed amendment was to include '*words to the effect of*' in each stem of charge. It was submitted by Ms Adeyemi that the proposed amendment would provide clarity and more accurately reflect the evidence. She submitted that the proposed amendments do not alter the crux of the issue and is based on information provided to you prior to the hearing. She submitted that no injustice would be caused as a result of the amendments. Ms Adeyemi proposed the following amendments:

That you, a registered nurse:

- 1) On 3 May 2018, sexually harassed Student Nurse A, a student nurse under your mentorship, by stating **words to the effect of**:
 - a) 'It'll cost you' and 'how about a blow job instead?'
 - b) 'Don't spit it out now, don't be a spitter';
 - c) That you hadn't yet received 'payment';
 - d) That Student Nurse A still 'owed you'

- 2) On 7 May 2018, sexually harassed Student Nurse A by stating **words to the effect of** 'I don't bite' and 'unless they want me to' following Student Nurse A's refusal of your offer of a neck massage.

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

The panel heard submissions from Mr Burton. He did not oppose the proposed amendments and said that the amendments do not change the mischief of the alleged conduct.

The panel accepted the advice of the legal assessor and had regard to Rule 28.

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.

Details of charge (as amended)

'That you, a registered nurse:

- 1) *On 3 May 2018, sexually harassed Student Nurse A, a student nurse under your mentorship, by stating words to the effect of:*
 - a) *'It'll cost you' and 'how about a blow job instead? [PROVED]*
 - b) *'Don't spit it out now, don't be a spitter'; [PROVED]*
 - c) *That you hadn't yet received 'payment'; [PROVED]*
 - d) *That Student Nurse A still 'owed you' [PROVED]*

2) *On 7 May 2018, sexually harassed Student Nurse A by stating words to the effect of 'I don't bite' and 'unless they want me to' following Student Nurse A's refusal of your offer of a neck massage. [PROVED]*

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

Background

You were referred to the NMC by your employer, Raigmore Hospital, Inverness ('the Hospital'). The referral relates to concerns that on 3 May 2018 and 7 May 2018, you allegedly breached professional boundaries with a colleague (Student Nurse A) and behaved in a sexually inappropriate manner towards him. The incidents allegedly took place in the Highland Children's Unit ('the Ward') of the Hospital, where you were employed as a staff nurse and acting as Student Nurse A's mentor.

Student Nurse A alleged that the first incident occurred on the early afternoon of 3 May 2018, when only the two of you were in a part of the Ward going through his assessment documentation. During a conversation about Student Nurse A's completion of his placement and onward progression into year three, you allegedly said, "*it will cost you*", which Student Nurse A took as a joke and replied, "*I'm well into my overdraft, there's no chance*". You then allegedly leaned back in a chair and said, "*how about a blowjob instead*", which Student Nurse A reported made him feel extremely uncomfortable and embarrassed. When Student Nurse A coughed while taking a drink of water you then allegedly said, "*don't spit it out now, don't be a spitter*"; which Student Nurse A felt was innuendo following the first comment which made him feel extremely uncomfortable. It is further alleged that later in the shift you said to Student Nurse A that you hadn't yet received '*payment*' and that Student Nurse A still '*owed you*'.

On 4 May 2018, Student Nurse A called in sick as he could not face going back into that environment and sought advice from his student representative and one of his parents.

He was advised to report the incident to his University and go back to the Hospital hoping the event was an isolated one. Student Nurse A returned to the Hospital on 7 May 2018. During the beginning of his shift he remarked that he had a sore neck and you offered to massage his neck for him. Student Nurse A declined your offer to which you allegedly replied, *“I don’t bite, unless they want me to”*.

Decision and reasons on facts

Following the charges being read, Mr Burton said that you admit to saying the comments in charge 1(a) but not in the context of sexual harassment. Mr Burton also said that you admit that you offered a neck massage to Student Nurse A but dispute that this was done to sexually harass him.

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 Ms Adeyemi and Mr Burton.

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 witnesses called on behalf of the NMC:

- Student Nurse A: Former Student Nurse at the University of Dundee. Took up a five-week nursing placement with the Hospital.

- Witness 2: Advanced Nurse Practitioner ('ANP') at the Hospital who was instructed to undertake the internal investigation.
- Witness 3: Staff Nurse at the Hospital.
- Witness 4: Staff Nurse at the Hospital.

The panel also heard evidence from you under affirmation.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor, who made reference to the judgements of *R v Hayman* [2008] EWCA 2191, *PSA v HCPC & Leonard Ren-Yi Yong* [2021] EWHC 52 (Admin) and *GMC v Haris* [2020] EWHC 2518 (Admin).

The panel considered the evidence of the witnesses and made the following conclusions:

Student Nurse A: The panel considered Student Nurse A to be open and honest about his experiences and the impact that the alleged conduct had on him both personally and professionally. The panel noted that Student Nurse A was able to confidently explain the conversations he had with you and assisted the panel by contextualising his remarks. Further, the panel was of the view that when Student Nurse A was unsure, he was able to say that he could not recall certain matters. The panel considered the evidence of Student Nurse A to be credible in as much as he was giving his evidence honestly and to the best of his recollection and was consistent over time.

Witness 2: The panel found that Witness 2 presented his evidence in a calm and measured manner when taking the panel through his investigation. The panel noted that

Witness 2 had interviewed many members of staff and was able to detail for the panel the different stages of the investigation and give reasoned explanations.

The panel noted that Witness 2 is an experienced senior nurse who remained neutral when giving answers to the panel. The panel considered the evidence of Witness 2 to be credible in as much as he gave clear factual answers to the best of his ability.

Witness 3: The panel considered the evidence of Witness 3 to be honest, measured and given with maturity. In his evidence, Witness 3 was able to give clear answers as to what he considered to be appropriate workplace jokes and what was inappropriate. The panel was of the view that Witness 3's evidence was balanced and was congruous with his NMC witness statement. The panel considered that Witness 3 is an experienced nurse and was credible in as much as he answered any questions to the best of his ability.

Witness 4: The panel considered the evidence of Witness 4 to be clear, articulate and considered. The panel was of the view that Witness 4 gave measured answers which addressed the questions directly. Moreover, Witness 4 showed neutrality and was prepared to give equal views to both the position of Student Nurse A and yourself. Witness 4 was also open and transparent about any times he may have felt embarrassed. The panel considered that Witness 4's evidence was credible in that he is an experienced nurse who answered the questions accurately and in line with his previous statements.

The panel also considered your evidence under affirmation. The panel was concerned that on occasions, you attempted to deflect your answers where you were challenged or where there was a difference in opinion. The panel had particular note to when you could not accept that you had been at fault when you signed Student Nurse A's Ongoing Achievement Record (OAR) book knowing it had incorrect information in relation to attendance. The panel considered that, on occasions, your evidence was partly unreliable in that it was inaccurate, did not reflect the reality particularly of the

documentary evidence, and sometimes came across as exaggerated in order to protect your position. The panel bore in mind your negative assertions and conclusions made about Student Nurse A's previous placement despite his OAR book identifying no major issues and no action plan required.

The panel then considered each of the disputed charges and made the following findings. For each charge, the panel first considered whether it can be proved on the balance of probabilities that each comment was said to Student Nurse A. If the panel found the facts proved, it then moved on to consider whether such conduct amounted to sexual harassment as outlined in the stem of the charges.

Charge 1(a)

1) *On 3 May 2018, sexually harassed Student Nurse A, a student nurse under your mentorship, by stating words to the effect of:*

a) *'It'll cost you' and 'how about a blow job instead?'*

The facts of this charge are found proved.

In reaching this decision, the panel considered the submissions from Mr Burton that you admitted to making the comments outlined.

The panel therefore found the facts of the charge proved on the basis of your admission.

Charge 1(b)

1) *On 3 May 2018, sexually harassed Student Nurse A, a student nurse under your mentorship, by stating words to the effect of:*

b) *'Don't spit it out now, don't be a spitter';*

The facts of this charge are found proved.

The panel had regard to the contemporaneous evidence from Student Nurse A which stated, *'he then continued with that subject matter and when I coughed on my water, he remarked "now don't spit it out".'* The panel noted that Student Nurse A maintained that such a comment was made in both his NMC witness statement and live oral evidence. Student Nurse A stated in his NMC witness statement, *'I reached for my water bottle and took a drink; as I did so, Scott continued – "Don't spit it out now, don't be a spitter". This seemed to me to be an innuendo, relating to the earlier 'blowjob' comment.'* The panel considered Student Nurse A's oral evidence to be consistent with his previous statements in relation to this charge.

The panel also took into account further material which supports such a comment being made. In Student Nurse A's interview during Witness 2's investigation, he stated, *'I reached for my bottle to take a drink when Scott continued and then said 'you better not be a spitter'.*

The panel concluded that notwithstanding the evidential variations in the exact wording of the comment, on the balance of probabilities, it is more likely than not that you said to Student Nurse A words to the effect of *'Don't spit it out now, don't be a spitter'.*

Charge 1(c)

1) *On 3 May 2018, sexually harassed Student Nurse A, a student nurse under your mentorship, by stating words to the effect of:*

c) *That you hadn't yet received 'payment';*

The facts of this charge are found proved.

In reaching its decision, the panel placed weight on the contemporaneous evidence of Student Nurse A where he wrote, *'I continued with my shift but a couple times over the rest of the shift he brought up the fact that I would owe him extra or reminding me that I still hadn't given him the 'payment'.'*

The panel noted that this was maintained in Student Nurse A's interview during Witness 2's investigation where he stated, *'however Scott said it on multiple occasions (6 to 7 times) about not receiving payment.'*

The panel noted that Student Nurse A in his witness statement and oral testimony did not stand by the number of occasions amounting to six to seven times, suggesting that three to four would be more accurate. Nevertheless, the panel concluded that on the balance of probabilities, it is more likely than not that you said on at least one occasion to Student Nurse A words to the effect that you hadn't yet received *'payment'*.

Charge 1(d)

1) *On 3 May 2018, sexually harassed Student Nurse A, a student nurse under your mentorship, by stating words to the effect of:*

d) That Student Nurse A still 'owed you'

The facts of this charge are found proved.

The panel concluded that the evidence relating to this charge was interconnected to charge 1(c).

Similar to the evidence outlined above when proving the facts of charge 1(c), the panel had regard to Student Nurse A's NMC witness statement which reads, *'on several occasions – 3 or 4 – over the course of the rest of the shift, Scott made further*

comments about how he hadn't received "payment" yet and that I still owed him; I took that to be in reference to the blowjob comments'.

The panel found on the balance of probabilities that you had also said to Student Nurse A on at least one occasion words to the effect that he still 'owed you'.

The test for sexual harassment

Before reaching any conclusions on the charges, both of which amounted to charges of sexual harassment, the panel first considered what was the appropriate test for sexual harassment. Both representatives before the panel agreed that the appropriate test would be the definition provided in the Equality Act 2010 ('the Equality Act'). The panel accepted the advice of the legal assessor who drew attention to the case of *PSA v HCPC and Leonard Ren-Yi Yong* [2021] EWHC 52 (Admin) where it was held that the regulatory body is obliged under the Public Sector Equality Duty (PSED) to use the Equality Act definition. The panel was advised that that specific finding was debatable because the panel is acting in a judicial capacity under schedule 18 of the Equality Act and is excluded from the PSED under s. 149(9) and schedule 18 paragraph 3; it was also debatable because the Equality Act expressly affords sole jurisdiction of matters alleging contraventions within the workplace to the Employment Tribunal.

Nevertheless, both counsel had agreed that the panel should follow the Equality Act 2010 definition of sexual harassment and, while nothing the panel finds in this regard would act as binding on any employment tribunal, using the Equality Act definition was advised to be safe and reliable when considering the charges brought against you.

The panel therefore assessed the comments found proved within the charges in the context of the Equality Act wording, which provides that sexual harassment occurs when a person engages in unwanted (i.e. unwelcome) conduct of a sexual nature that has the purpose or effect of:

- violating someone’s dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

In deciding whether conduct has the effect referred to, each of the following must be taken into account—

- (a) the perception of the alleged victim;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

Decision and reasons on whether the conduct in Charge 1 amounted to sexual harassment.

In reaching its decision, the panel first considered if the comments were unwelcome or unwanted. It noted in your evidence that you said that “*banter*” between yourself and Student Nurse A was commonplace. However, the panel heard no specific examples of any exchange in jokes that could have given you the impression that such comments were welcomed. The panel noted that Student Nurse A detailed past experiences with you, such as his upbringing and [PRIVATE], [PRIVATE], and [PRIVATE]. The panel was of the view that these conversations demonstrated the trust that Student Nurse A placed in you as his colleague and mentor. Further, the panel had no evidence, particularly from other members of staff, to attest to any workplace jokes being made by Student Nurse A towards you. The general view from these staff members was that Student Nurse A was quiet and introverted.

The panel next considered whether the comments in charge 1 were sexual in nature. The panel was of the following view:

- *It'll cost you' and 'how about a blow job instead?* – The panel took into account your oral evidence in which you accepted that this comment was sexually suggestive, lewd and constituted innuendo.
- *'Don't spit it out now, don't be a spitter';* - The panel considered this comment to be sexually suggestive and innuendo relating to the earlier *'blowjob'* comment.
- *That you hadn't yet received 'payment' and that Student Nurse A still 'owed you'* – The panel considered that these comments related to the comments made earlier and were similarly sexual in nature on account of their association with the earlier comments.

The panel was of the view that the facts found proved had the effect of creating an intimidating, hostile, degrading, humiliating and offensive environment for Student Nurse A and had the effect of violating his dignity. The panel noted that following that shift, he took absence on 4 May 2018 as he felt unable to attend due to the events on 3 May 2018. He then returned for his next scheduled shift on 7 May 2018. The panel also had regard to his oral evidence where he stated that he was left upset, uncomfortable, felt overwhelmed by the situation, and eventually left nursing. The comments were made in a separate area of the ward and certainly had the effect of violating Student Nurse A's dignity and creating a degrading and humiliating environment.

In light of all of the above, the panel found that the conduct as proved in limbs (a), (b), (c), (d) of charge 1 amounts to sexual harassment and, accordingly, finds the charge proved in its entirety.

Charge 2

- 2) *On 7 May 2018, sexually harassed Student Nurse A by stating words to the effect of 'I don't bite' and 'unless they want me to' following Student Nurse A's refusal of your offer of a neck massage.*

The facts of this charge are found proved.

The panel considered that in relation to this charge, Student Nurse A is consistent in his various accounts. In his NMC witness statement, Student Nurse A stated, *‘Scott then said – “I don’t bite...” – and paused, before adding in a suggestive manner – “...unless they want me to”. I took this to be a further sexually suggestive comment.’*

The panel noted that Student Nurse A was also consistent in his contemporaneous statement where he wrote, *‘Again I was very uncomfortable and refused his offer and he replied saying “I don’t bite...well not unless they want me to”.’*

The panel also bore in mind Student Nurse A’s comments during the internal investigation:

‘Scott had said that he was good with giving neck massage as it was all about fingers, I reacted and went red and said no. Scott then said ‘seriously I don’t bite, not if you don’t want me too’.’

The panel further took into account the further references in the evidence, particularly Witness 2’s NMC statement in which he stated, *‘Student Nurse A recalled feeling uncomfortable and refusing to sit down as directed, at which point he alleged that Mr Macpherson stated – “I don’t bite, unless you want me to”.’*

While there were some differences in the reported wording, Student Nurse A was substantially consistent in the wording which he recalled in his contemporaneous record, witness statement, and oral testimony.

The panel therefore determined that there is sufficient and consistent evidence to support the facts of the charge on the balance of probabilities.

Decision and reasons on whether the conduct in Charge 2 amounted to sexual harassment

The panel was of the view that words to the effect of *'I don't bite'* and *'unless they want me to'* were unwanted and are sexually suggestive in nature. While it accepted that the sole comment of *'I don't bite'* may not have sexual undertones, the further comment of *'unless they want me to'* creates the impression of sexual innuendo.

The panel considered that in making these comments, you created a humiliating and offensive environment for Student Nurse A. The panel had regard to Student Nurse A's general feelings at the time where it is stated in his contemporaneous evidence that the comments made him *'more uncomfortable'*. The panel also considered Student Nurse A's feelings which are exhibited in his NMC witness statement:

'I took this to be a further sexually suggestive comment, and was totally speechless that it had happened again and so openly. I just stared at my water bottle and wished that I could run out or disappear.'

In light of all of the above, the panel concluded that on the balance of probabilities, the conduct found proved amounted to the sexual harassment of Student Nurse A. The panel found Charge 2 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 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. Secondly, 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 reaching 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.*’ It also had regard to *Nandi v General Medical Council* [2004] EWHC 2317 (Admin).

Mr Sharma introduced written submissions into the record in relation to misconduct and impairment. He submitted that the facts found proved amount to serious professional misconduct, referring to specific, relevant standards of ‘The Code: Professional standards of practice and behaviour for nurses and midwives’ (2015) (‘the Code’) that were breached.

Mr Burton did not dispute the applicability of the case law cited by Mr Sharma. He submitted that in the light of the allegations found proved, you fully accept that the charges amount to misconduct, and that any member of the public or of the profession would reach the same conclusion.

Submissions on impairment

Mr Sharma moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. This included reference to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin).

Mr Sharma submitted that although this case did not involve clinical concerns, the type of conduct found proved is likely to have a detrimental impact on how a team works together, leading to the breakdown of communication and trust. He submitted that your conduct would be viewed very dimly by the public and other professionals, and that conduct of a sexual nature of any description is so serious as to breach the fundamental tenets of upholding dignity and acting professionally.

Mr Sharma submitted that the panel heard evidence that suggested you had a history of making sexual remarks in an inappropriate setting, which makes it likely that your behaviour is deep rooted. He submitted that you had shown no evidence of strengthening your practice in relation to this type of conduct. Mr Sharma submitted that Student Nurse A was a member of the public, and as such, deserved to be treated with dignity and have the protection afforded by the standards of behaviour expected of nurses. Therefore, a finding of impairment on the grounds of public protection was necessary. He further submitted that the public interest required a finding of impairment in order to uphold confidence in the profession and in the NMC as its regulator.

Mr Burton informed the panel that whilst you were adamant that this type of conduct would not be repeated, you were aware of the public's view of these charges, and you have instructed him to accept that your fitness to practise is impaired. Although he acknowledged that it did not detract from the seriousness of the charges, Mr Burton invited the panel to consider your conduct in the context of a long career as an experienced nurse, in which no regulatory action had been previously taken. Mr Burton

submitted that evidence provided by colleagues, including Student Nurse A himself, was very complimentary of your nursing skills. He submitted that your acceptance of the factual basis of the charges at the start of the hearing showed emerging insight, and that your insight had developed further since the previous hearing.

The panel accepted the advice of the legal assessor, which included reference to a number of relevant judgments. It also had regard to the NMC's published guidance on cases that involve harassment, discrimination and victimisation ('How we determine seriousness', reference FTP-3, last updated 29 November 2021). The panel were reminded by the legal assessor that not all of the elements of the Equality Act's definition of harassment needed to apply in order to satisfy the test of harassment.

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. It noted that whilst you have accepted that the charges found proved amounted to misconduct, it was ultimately a matter for the panel's professional judgement.

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.

[...]

1.3 avoid making assumptions and recognise diversity and individual choice.

[...]

1.5 respect and uphold people's human rights.'

'8 Work cooperatively

To achieve this, you must:

[...]

8.2 maintain effective communication with colleagues.'

'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

[...]

20.5 treat people in a way that does not take advantage of their vulnerability or cause them upset or distress.

[...]

20.8 act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to.'

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel was of the view that the conduct found proved was so deplorable and so significant a departure from professional standards that it amounted to nothing short of serious misconduct. It had regard to its earlier findings that the facts found proved *'had the effect of creating an intimidating, hostile, degrading, humiliating and offensive environment for Student Nurse A and had the effect of violating his dignity.'* The panel found that the Equality Act's definition of harassment was entirely engaged.

The panel found that your actions did fall seriously short of the conduct and standards expected of a 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. 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) [...].'*

The panel was satisfied that that your misconduct risked compromising the ability of Student Nurse A to function effectively as a member of the team, including its impact on

communications within the team, and therefore putting patients at an unwarranted risk of harm. The panel was also satisfied that your misconduct, by its very nature, breached the fundamental tenets of the nursing profession, and therefore brought its reputation into disrepute. Accordingly, the panel found that limbs (a) through (c) of *Grant* were engaged.

At this stage of proceedings, the panel has not been presented with any evidence of you strengthening your practice. It considered Mr Burton's submission that you have been reflecting on the incidents between the conclusion of the earlier proceedings and now, and wish to assure the panel that similar conduct will not be repeated. However, the panel saw no evidence to support this. Furthermore, whilst you have accepted the charges on a factual basis, you have not accepted that your conduct amounted to harassment.

The panel considered your oral evidence from the fact-finding stage of the hearing. It noted that you expressed remorse, but was of the view that it was weighted towards the impact these proceedings have had on you and not towards the impact of your behaviour on Student Nurse A. The panel also heard some evidence that you have behaved similarly on a previous occasion, and is concerned about the risk of repetition. The panel heard no evidence to satisfy its concerns in this regard. In all the circumstances, the panel therefore determined 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 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 was of the view that the public would be extremely concerned if a finding of impairment was not made in these circumstances. It therefore determined that a finding of impairment on public interest grounds is also 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 suspension order for a period of six 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 Sharma informed the panel that in the Notice of Hearing, dated 4 August 2021, the NMC had advised you that it would seek the imposition of a six-month suspension order if it found your fitness to practise currently impaired. He introduced written submissions into the record in relation to sanction.

Mr Sharma referred the panel to relevant case law and guidance. He reminded the panel of the effect on Student Nurse A of your misconduct, and that it had a long-term impact on both his career and his health, and that these incidents were not isolated. With regard to the appropriate sanction, he submitted that a caution order would not be appropriate due to the seriousness of the charges, and there was only limited insight from you. He asserted that a conditions of practice order would also not be appropriate to the charges, as they did not involve clinical matters, and therefore a conditions of

practice order would not be relevant or workable. Mr Sharma submitted that a striking-off order would be disproportionate, and that you have had a long career demonstrating strong clinical abilities, and that there may be a public interest in allowing you to resume your career at a later date.

Mr Burton reminded the panel that the public interest must be at the forefront of its mind, but any sanction imposed must go no further than necessary. He accepted that a sanction was not intended to be punitive, although it may have this effect on you.

Mr Burton asked the panel to take into account your developing insight as well as your acceptance of the conduct found proved, submitting that you expressed clear regret and remorse in your oral evidence. He submitted that a conditions of practice order would be appropriate to address your misconduct, which could require you to undertake a course on equality in the workplace, and have regular meetings with your line manager to discuss your conduct towards other colleagues. Mr Burton also suggested that you be required to produce a reflective statement on the impact your conduct had on Student Nurse A and other colleagues. He submitted that this would allow you to remediate your practice whilst satisfying the public interest.

Mr Burton submitted that if the panel were not with him in this respect, a three-month suspension order would protect the public and maintain confidence in the professions. It would also allow time for you to consider further the impact your actions had on Student Nurse A, to prepare your reflection and to assure a future panel that these incidents will not be repeated.

Mr Burton submitted that a striking-off order would be disproportionate and unduly harsh, in that you have fully engaged with this process and provided full answers to the panel. He submitted that remediation was possible where developing insight is shown. Mr Burton submitted that you have been a valued member of the nursing profession for many years, and to strike you from the register would deprive the public of an

experienced practitioner. He submitted that your ongoing interim suspension order has had a significant financial impact on you.

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:

- As Student Nurse A's mentor, you were in a position of trust and in a position to influence Student Nurse A's progression in nursing training. There was a considerable age gap between you and Student Nurse A. His situation required from you, as his mentor, nurturing and guidance in a workplace where he was inexperienced. All these factors together meant that your behaviour placed Student Nurse A in a vulnerable position.
- Your misconduct was not a one-off incident; it was repeated over a short period of time from 3-7 May 2018. It had a clear detrimental impact on Student Nurse A's ability to function in his placement, as well as having potential long-term effects. The panel heard in evidence that Student Nurse A felt extremely uncomfortable in his interactions with you relating to the charges found proved. The panel also heard that Student Nurse A was advised to leave his placement early, and ultimately left his nursing studies as a result of the impact of your misconduct.

The panel also took into account the following mitigating features:

- You have engaged fully with these proceedings and were able to give direct evidence to assist the panel.

The panel noted that you have expressed regret. However, as mentioned above, it was concerned that it appeared to be focused more on the impact of these proceedings on you rather than the impact of your misconduct on Student Nurse A. The panel also considered your level of insight to be negligible, and has not seen any evidence to support the assertion that your insight has developed since the previous adjournment of these proceedings.

As outlined in its decision on impairment, the panel noted that you accepted the factual basis of the charges at the outset, but did not accept that your actions amounted to sexual harassment of Student Nurse A. It also noted that your acceptance of misconduct and impairment of your fitness to practise came only after the charges were found proved.

The panel first considered whether to take no action, but concluded that this would be wholly inappropriate in view of the seriousness of the charges found proved. 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 charges found proved, 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. It was mindful that any conditions imposed must be proportionate, measurable and workable. The panel noted that no clinical concerns had been identified that required assessment or retraining. It was not satisfied that the level of behavioural change and improvements to your insight that are required from you could be facilitated through conditions of practice.

Furthermore, the panel concluded that the placing of conditions on your registration would not adequately address the seriousness of this case. It decided that it would be neither proportionate nor in the public interest to impose a conditions of practice order.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The panel concluded that your misconduct was a very serious departure from professional standards, which, when combined with a negligible level of insight, requires temporary removal from the register in order to maintain public trust and confidence in the professions. The panel determined that, when combined with the nearly three years you have been temporarily suspended from the register, a six-month suspension order is appropriate in this case to mark the seriousness of the misconduct.

The panel gave serious consideration to imposing a striking-off order. It recognised the balance between the public interest in upholding proper professional standards and the public interest in enabling an experienced nurse whose clinical abilities are well-regarded to return to practice. The panel had regard to your willingness to engage with these proceedings and to your assurances that you would not repeat this misconduct, and concluded that at this time, a striking-off order would be disproportionate. Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in your case to impose a striking-off order.

Balancing all of these factors, the panel has concluded that a suspension order of six months would be the appropriate and proportionate sanction in this case to mark the seriousness of the misconduct. It would also allow you sufficient time to reflect on your

conduct and its impact on Student Nurse A and the public and the profession, and to undertake any appropriate training to support such reflection and insight.

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

Towards 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:

- Evidence of completion of training in equality and diversity, which includes a focus on the impact of harassment. This should include face-to-face training.
- Application of your learning from these courses in the form of a reflective statement, using a recognised reflection model. It should show insight into how your behaviour affected Student Nurse A and how you would change your behaviour accordingly in the future;
- Evidence of keeping up to date with professional practice; and
- Any relevant references or testimonials.

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 interests until the suspension order 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 Sharma. He submitted that an 18-month interim suspension order was necessary; to not impose such an order would be contrary to the panel's finding on the necessity of the sanction imposed. Mr Sharma reminded the panel that should you not lodge an appeal within the 28-day period, the interim suspension order would fall away and the substantive suspension order would take immediate effect.

Mr Burton had no opposition to an interim order in principle. However, his understanding was that you are already subject to an interim suspension order that has been extended by the Court of Session until 3 May 2022. He submitted that if that was the case, there is no need for another interim order.

The panel accepted the advice of the legal assessor, who advised that the imposition of a substantive order brings an end to any interim order in its own right, whether it has been extended or not, according to Article 31(5)(a)(iv). Therefore, that gives rise to the necessity of an interim order as outlined by Mr Sharma.

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.

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.