

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

**Substantive Hearing
Tuesday 4 January 2022 – Thursday 6 January 2022**

Virtual Hearing

Name of registrant:	Tanya Elizabeth Barker
NMC PIN:	10K0794E
Part(s) of the register:	Registered Nurse – Sub – Part 1 Adult Nursing – April 2012
Area of registered address:	Preston
Type of case:	Misconduct
Panel members:	Sophie Lomas (Chair, Lay member) Allwin Mercer (Registrant member) David Anderson (Lay member)
Legal Assessor:	Nigel Mitchell
Hearings Coordinator:	Emma Bland
Nursing and Midwifery Council:	Represented by Yvonne Ferns, Case Presenter
Mrs Barker:	Present and unrepresented
Facts proved:	Charges 1, 2, 3, 4
Facts not proved:	None
Fitness to practise:	Impaired
Sanction:	Caution order (3 years)

Details of charge

That you, a registered nurse which (sic) was employed by the East Lancashire NHS Trust ('the Trust'):

- 1) *Undertook paid work / shifts for Thornbury Nursing Services ('the Agency') whilst on sick leave / receiving paid sickness absence from Trust on the following dates:*
 - a) *01 May 2014;*
 - b) *31 January 2016;*
 - c) *21 March 2016;*
 - d) *22 March 2016.*

- 2) *Your conduct at any and / or all of charge 1 above was dishonest in that you:*
 - a) *Knew that you were not permitted to work for the Agency whilst on sick leave / receiving paid sickness absence from the Trust;*
 - b) *Intended to conceal from the Trust that you were working for the Agency;*
 - c) *Intended to create the misleading impression to the Trust that you were not fit to work / were sick when that was not the case;*
 - d) *Alternatively, intended to create the misleading impression to the Agency that you were fit to work / not sick, when that was not the case.*

- 3) *Submitted, or caused to be submitted, inaccurate information in one, or more, of the Trust's 'Return to work forms' as follows:*
 - a) *14 May 2014 (covering dates of sickness absence from 01 May 2014 to 02 May 2014) by failing to declare whether you had any other form of employment during the period of sickness;*

- b) *01 February 2016 (covering dates of sickness from 29 January 2016 to 31 January 2016) by declaring that you had not had any other form of employment during the period of sickness;*
 - c) *29 March 2016 (covering the dates of sickness absence from 21 March 2016 to 22 March 2016) by declaring that you had not had any other form of employment during the period of sickness;*
- 4) *Your conduct at any and / all of charges 3(a)- 3(c) above was dishonest in that you:*
- a) *Knew that you had worked / carried out employment with the Agency during the dated dates in question;*
 - b) *Failed to declare / denied that you had worked / carried out employment with the Agency during the dates in question;*
 - c) *Intended to conceal from the Trust that you had worked / carried out employment with the Agency during the dates in question;*

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

Admissions at the Outset of the Hearing

At the outset of the hearing, you informed the panel that you admitted all the charges, but deny current impairment.

The panel therefore finds charge 1 - 4 proved in their entirety, by way of your admissions.

Background

The charges arose whilst you were employed as a registered nurse at East Lancashire Hospitals NHS Trust (“the Trust”), where you had been working as a Band 5 Nurse.

You undertook paid work for Thornbury Nursing Services (“the Agency”) on a number of occasions whilst receiving paid sickness absence from your substantive employer, the Trust. As such, the area of regulatory concern engaged in your matter is dishonesty. The following are some instances of absence which form the basis of the charges;

- 1 May 2014 – 2 May 2014: You claimed sick leave [PRIVATE] at the Trust whilst working a shift for the Agency on 1 May 2014;
- 29 January 2016 – 31 January 2016: You claimed sick leave [PRIVATE] at the Trust whilst working a shift for the Agency on 31 January 2016; and
- 21 March 2016 – 22 March 2016: You claimed sick leave [PRIVATE] at the Trust whilst working for the Agency on two occasions.

On 30 July 2018, the HR Department at the Trust commissioned an Investigation into allegations you had worked fraudulently. A fact-finding interview was held on 5 September 2018. You initially denied the allegations. However, after being shown documents from the Agency, you made admissions to the Trust at local level [PRIVATE].

A disciplinary hearing was held by the Trust and you were dismissed from your employment on 30 November 2018.

You made full admissions to NHS Counter Fraud investigators on 5 June 2019 when interviewed under caution [PRIVATE]. You offered to pay back the sick pay received from the Trust. An NHS Anti-Fraud Specialist Report details the amount paid to you during sickness leave was £5,303.63.

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

You applied, under Rule 19, to have those matters relating to your health and personal circumstances heard in private. Ms Ferns, on behalf of the Nursing and Midwifery Council (NMC), supported your application. The panel accepted the advice from the Legal Assessor and determined that the matters which you raise in your evidence which describe your personal and health circumstances would be held in private and would not be published on the public record.

Your evidence under affirmation

[PRIVATE]

[PRIVATE]

[PRIVATE]

[PRIVATE]

[PRIVATE]

You provided the panel with further information regarding your employment history since your dismissal from the Trust in late 2018. Shortly after dismissal, you became a Carer [PRIVATE]. You also worked two-nights a week in a nursing home to give you focus and help you get back into nursing. In January 2020, at the start of the COVID-19 pandemic, you accepted a full-time role as a nursing home manager for residents with learning disabilities. You worked in this role from January 2020 – July 2020. From July 2020 - February 2021, you worked in a clinical lead position at a specialist unit for patients with Huntington's disease.

You explained that you went back to work for the NHS in February 2021 as a respiratory nurse on a high dependency unit. You provided your NHS employer with positive references and were open and honest with regard to your prior dismissal and pending NMC proceedings. You explained that your NHS employer is satisfied with your current performance as a respiratory nurse and your clinical skills. Upon your return to the NHS, you completed mandatory training, further learning and skills training, and revalidated twice.

You explained that you have worked as a registered nurse since your dismissal from the Trust in 2018. You stated that you love nursing, and have worked throughout the pandemic [PRIVATE]. Throughout this time, you have undertaken training and your employers have had no concerns with regard to any aspect of your clinical knowledge or practice. There have not been further incidents of dishonesty. It is on this basis, that you submit your current fitness to practise is not impaired.

You expressed remorse for your past actions and looking back in hindsight, you acknowledged that these were dishonest actions and poor decisions. You explained that your life has developed in the eight years since the misconduct. [PRIVATE] You also informed the panel that you have paid approximately half of the money back to the Trust and continue to make repayments under a Court agreement. You stated that you “*love nursing*”, it is a significant part of your life, and you see your “*future in respiratory nursing*”.

[PRIVATE].

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

Ms Ferns invited the panel to take the view that the facts found proved amount to misconduct. The panel had regard to the terms of 'The Code: Professional Standards of Practice and Behaviour for Nurses and Midwives 2015' (the Code) in making its decision.

Ms Ferns identified the areas of the code engaged by your actions.

Ms Ferns submitted that your repeated actions of dishonesty are serious and fall short of what would be expected of a registered nurse in the circumstances. She further submitted that your failings involve a serious departure from expected standards.

Submissions on impairment

Ms Ferns 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. In considering the issue of your fitness to practise, Ms Ferns reminded the panel of its duty to protect and satisfy the wider public interest. This includes declaring and upholding proper standards of conduct and behaviour, and the maintenance of public confidence in the profession and the regulatory process.

Ms Ferns referred the panel to the case of Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin).

Ms Ferns informed the panel that you have engaged with the NMC and demonstrated insight by way of your full acceptance of the charges, but deny that your fitness to practise is currently impaired by reason of your misconduct.

Ms Ferns referred the panels attention to the case of Cohen v GMC [2007] EWHC 581 (Admin), where the court set out three matters which it described as being 'highly relevant' to the determination of the question of current impairment:

1. Whether the conduct that led to the charge(s) is easily remediable
2. Whether it has been remedied
3. Whether it is highly unlikely to be repeated

Applying these questions to the circumstances of your case, Ms Ferns submitted that:

1. The regulatory concerns in your case are capable of remediation by way of satisfactory performance in the identified areas of concern.
2. You had provided some evidence of remediation, as you have been employed as a registered nurse without any concerns being raised. Ms Ferns submitted that it is a

matter for the panel to determine whether you have already remediated your conduct in relation to the charges and referred it to the case of *Meadow v GMC* (2007) EWCA Civ 1390.

3. In light of your admitted misconduct and limited evidence of remediation, it was a matter for the panel to consider if you were liable in the future to repeat the behaviour and conduct. She also invited the panel to consider whether the reputation of the nursing profession would be damaged if you were be permitted to practise unrestricted.

Ms Ferns submitted that your failings relate to core nursing requirements of honesty and integrity and in light of these failings, a finding of current impairment is necessary to declare and uphold proper standards. She submitted that for the reasons outlined, your fitness to practise is currently impaired, both on the grounds of public protection and the wider public interest. Ms Ferns submitted that a finding of impairment is also necessary to maintain public confidence in the profession and the NMC as a regulator. She submitted that public confidence would be undermined if your behaviour was allowed to pass effectively unmarked.

Ms Ferns reminded the panel of the overarching objectives of the NMC. Given the seriousness of this case and the failings identified, she invited the panel to conclude a finding of current impairment is necessary on both public protection and public interest grounds.

You expressed disappointment and sadness at the content of NMC submissions, and stated that you do not regard your fitness to practise to be currently impaired. You explained that you have been practising as a registered nurse since the incidents without any regulatory concerns being raised. You explained that you have admitted your misconduct and were compliant with the NHS Counter Fraud Investigation. You explained that you had lost your job due to your actions and you regard this as a substantial punishment. You reminded the panel that no patient has been harmed in your care and

that the safety of your clinical practice has not been questioned. For these reasons, you do not agree that your fitness to practise is currently impaired.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Roylance v General Medical Council_(No 2) [2000] 1 A.C. 311, Cohen, Grant, PSA v GMC and Uppal 2015 EWHC 1947 and GMC v Chaudhary 2017 EWHC 2561.*

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.

The panel was of the view that your actions did fall significantly short of the standards expected of a registered nurse, and agreed with Ms Ferns that these amounted to breaches of the Code. Specifically:

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 integrity and honesty at all times

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

21 Uphold your position as a registered nurse, midwife or nursing associate

To achieve this, you must:

21.3 act with honesty and integrity in any financial dealings you have with everyone you have a professional relationship with

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 is serious and fell short of expected standards. The panel noted that there were repeated incidents of admitted dishonesty, for a significant amount of money, over a prolonged period of time. The panel was mindful that the admitted conduct was not a single, isolated incident.

The panel was mindful of the NMC duty to protect the profession and declare and uphold proper standards.

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. 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 this matter did not engage any public protection issues and that you were not liable to cause patient harm. However, the panel determined that you had breached fundamental tenets of the profession relating to honesty and integrity and therefore brought its reputation into disrepute. The panel was mindful that the public expect nurses to be honest, and noted that public confidence in the profession is undermined by dishonest behaviour. 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 was satisfied that limbs b, c and d were engaged with regard to your past conduct.

In considering whether you are liable to repeat matters found proved in the future, the panel considered the extent of your remorse, remediation and insight.

The panel noted that you had demonstrated a good level of insight and made early admissions with regard to your dishonest conduct. The panel noted the passage of time between the occurrence of the incidents between 2014 – 2016, and the investigation that detected your misconduct in 2018 which ultimately resulted in your dismissal from the Trust. The panel noted that you have worked in a position of trust as a registered nurse since your dismissal for approximately three years without any regulatory concern in relation to your conduct or practice. The panel noted you had worked over the past two years, during the COVID-19 pandemic, in several stressful environments. In doing so, the panel was of the view that you had demonstrated you were capable of working without further incidents of dishonesty, [PRIVATE].

[PRIVATE]

The panel noted that you had taken steps towards remediation by making repayments to the Trust. The panel also noted that you had revalidated and undertaken further training and learning as part of your current NHS nursing role.

The panel was of the view that the risk of repetition is low and you are not liable to repeat your misconduct. [PRIVATE].

However, the panel also considered public interest and public confidence in the profession. The panel was mindful of the comments of Mrs Justice Cox in this regard. Notwithstanding the context of the misconduct and your progress since then, the panel was mindful of the need to uphold proper standards and public confidence in the profession, and noted that these would be undermined if a finding of impairment was not

made in relation to your dishonest conduct in this case. Therefore, the panel finds your fitness to practise impaired on the ground of public interest alone.

Sanction

The panel considered this case very carefully and decided to make a caution order for a period of three years. The effect of this order is that your name on the NMC register will show that you are subject to a caution order and anyone who enquires about your registration will be informed of this order.

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

Ms Ferns informed the panel that the NMC had advised you that it would seek the imposition of a caution order for a period of up to 5 years, or suspension order for a period of up to 6 months, if it found your fitness to practise currently impaired.

Ms Ferns reminded the panel of the sanction guidance (SG) which states the purpose of a sanction is to protect the public and maintain public confidence. This is also made clear in the NMCs overriding objectives contained in the statutory framework. She submitted that any sanction decision is subject to the test of proportionality.

Ms Ferns acknowledged that your fitness to practice has been found impaired on grounds of public interest alone, and submitted further factors to be taken into consideration when deciding the issue of sanction.

Ms Ferns addressed the aggravating factors in this matter: your misconduct involved dishonesty relating to work and was in breach of trust, it was not isolated, but repeated

over a two-year period. Ms Ferns submitted that your insight was not yet complete, and your remediation of your dishonesty was also incomplete at this stage. Ms Ferns stated that there were possible attitudinal concerns behind your prolonged dishonesty. She also reminded the panel of the damage dishonesty has to the reputation of the profession.

Ms Ferns then addressed the mitigating factors: you made local admissions, your misconduct did not involve patient harm or clinical practice concerns and [PRIVATE]. Ms Ferns stated that you were making repayments. She reminded the panel that you had engaged with the NMC, the regulatory process and this hearing. Ms Ferns stated you had no fitness to practice history.

Ms Ferns addressed the sanctions available in this matter in ascending level of seriousness. She submitted that taking no further action would be wholly inappropriate in view of the seriousness of your misconduct and the finding of current impairment on the ground of public interest. Ms Ferns submitted your misconduct has brought the nursing profession into disrepute and you have breached a fundamental tenet of nursing. She submitted that it would be neither proportionate nor in the public interest to take no further action. This sanction would not mark the seriousness of the dishonesty or secure the trust of the public.

Ms Ferns submitted a caution order is used to address concerns at the lower end of the spectrum and reminded the panel of the relevant section within the sanction guidance. Ms Ferns noted that your fitness to practise is currently impaired on the ground of public interest alone. Taking this into account, alongside the aggravating features outlined that are serious in nature, she submitted a caution order may be a suitable sanction in the circumstances. A caution order for a period of 5 years would mark the conduct and send a message that your behaviour was unacceptable. Ms Ferns submitted a caution order of a long duration would be in recognition of the concerns and not restrict you from practising.

Ms Ferns submitted a conditions of practice order is unlikely to be suitable in relation to this finding of impairment on the sole ground of public interest. A conditions of practice

order is usually put in to place to address specific concerns and must be appropriate, measurable, workable and proportionate. Ms Ferns submitted this matter related to your dishonesty, and was not a matter in which there are identifiable areas of training and supervision.

Ms Ferns submitted a suspension order could be appropriate as it would mark the seriousness of the misconduct and send a clear message. She submitted a suspension order of up to 6 months could be appropriate but anything longer would be disproportionate.

Ms Ferns submitted a striking off order would not be appropriate and whilst it would acknowledge the seriousness of dishonesty, such an order would be disproportionate and unnecessarily punitive. This does not appear to be a case in which the conduct is incompatible with ongoing registration.

Ms Ferns acknowledged that there is no evidence of any repetition of the failures since you were dismissed from the Trust.

Ms Ferns reminded the panel of the factors outlined and the concept of proportionality and submitted that the panel may consider that the appropriate sanction is a five-year caution order. However, she noted it was a matter for the panel to consider the full range of sanction up to a six-month suspension order.

The panel also bore in mind your oral submissions. You were of the view that it would be a loss to the public and patients if you were suspended because you had worked as a registered nurse during the COVID-19 pandemic. You highlighted the continuing need for nurses. You said that you needed to continue working for your own sanity and peace of mind. You explained that you would struggle financially if a suspension order was imposed and your family would also suffer.

You explained that a caution order would acknowledge your behaviour. You felt that five years was a long time period for a caution order, especially as the misconduct happened a very long time ago. You explained that you had lost your job at the time the misconduct was discovered and you thought this was a significant punishment in itself. You explained your job loss caused a break in your career and you lost out on promotion because of this.

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. 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:

- Your dishonesty related to work and was a breach of trust;
- Your dishonest conduct was not isolated and spanned a two-year period;
- There was damage to the reputation of the profession

The panel also took into account the following mitigating features:

- Your level of insight and understanding;
- [PRIVATE]
- Local admissions at an early stage;
- Your reparation in the form of repayments to the Trust;
- Your misconduct did not result in patient harm and was not clinical in nature

The panel did not accept Ms Ferns submissions that your insight and remediation were not complete, nor did they find any evidence of any attitudinal concerns. In fact, the panel determined that you have a very good level of insight and have demonstrated regret and remorse for your actions. Further, the panel determined that you have remediated by working successfully as a carer and nurse since the incidents and by making repayments.

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.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the SG, which 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 noted you have shown a good level of insight into your conduct. The panel further noted that you had acknowledged your conduct at an early stage. The panel has no evidence before it to suggest that there has been a repetition of regulatory concerns since the last incident of dishonesty in 2016. The panel acknowledged that you had continued to work full-time as a nurse during the COVID-19 pandemic. [PRIVATE].

The panel considered whether it would be proportionate to impose a more restrictive sanction and looked at a conditions of practice order. The panel noted your matter was serious and related to dishonesty, rather than any alleged deficiency in your clinical practice. As such, a conditions of practice order would not be appropriate and it would be difficult to formulate workable conditions in relation to the identified misconduct. The panel concluded that no useful purpose would be served by a conditions of practice order. The panel further considered that a suspension order would be disproportionate in the specific context of this case.

The panel has decided that a caution order would adequately address the public interest concerns in this case. The panel determined that a three-year caution order is appropriate and proportionate, and in light of all the circumstances of this case, including the fact that the misconduct took place over five years ago and there has been no repetition in that time and you have been working successfully since.

The panel has determined that to impose a caution order for a period of three years would be the appropriate and proportionate response. It would mark not only the importance of maintaining public confidence in the profession, but also send the public and the profession a clear message about the standards required of a registered nurse. For the next three years, your employer - or any prospective employer - will be on notice that your fitness to practise had been found to be impaired and that your practice is subject to this sanction.

At the end of this period the note on your entry in the register will be removed. However, the NMC will keep a record of the panel's finding that your fitness to practise had been found impaired. If the NMC receives a further allegation that your fitness to practise is impaired, the record of this panel's finding and decision will be made available to any practice committee that considers the further allegation.

This decision will be confirmed to you in writing.

That concludes this determination.