

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

**Substantive Meeting
10 January 2022 – 11 January 2022**

Virtual Meeting

Name of registrant: Mr Philip Harvey Dry

NMC PIN: 90Y0576E

Part(s) of the register: Registered Adult Nurse - Sub Part 1 - 6
November 1993

Area of registered address: Durham

Type of case: Misconduct

Panel members: Sue Heads (Chair, Lay member)
Janine Ellul (Registrant member)
Sue Davie (Lay member)

Legal Assessor: Oliver Wise

Hearings Coordinator: Kevin Toskaj

Facts proved: Charge 1

Fitness to practise: Impaired

Sanction: **Conditions of practice order (18 months)**

Interim order: **Interim conditions of practice order (18 months)**

Decision and reasons on service of Notice of Meeting

The panel was informed that the Notice of Meeting had been sent to Mr Dry's email address notified to the Nursing and Midwifery Council (NMC) by secured encrypted email on 3 November 2021.

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Meeting provided details of the allegation, the date after which the meeting would take place, and his right to make written representations to the panel.

In light of the information available, the panel was satisfied that Mr Dry has been served with notice of this meeting in accordance with the requirements of Rules 11A and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Details of charge

That you, a registered nurse:

1. *Having agreed undertakings on 2 March 2019 which were recommended in the light of a case to answer being found in respect of the regulatory concerns set out in Schedule 1, failed to remedy the issues identified in your practice;*

Schedule 1

1. *Failed to ensure that patient safety was protected in that you:*
 - a) *Breached safe medication administration protocols;*
 - b) *Failed to keep adequate nursing documentation;*
 - c) *Failed to identify and escalate clinical concerns;*
 - d) *Communicated poorly with your colleagues;*

Decision and reasons on facts

In reaching its decisions on the facts, the panel took into account all the documentary evidence in this case together with the representations made by the NMC.

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 had regard to the written statements of the following witnesses on behalf of the NMC:

- Ms 1: Clinical Matron in the Specialist and Planned Care Centre employed by South Tees NHS Foundations Trust. Was previously the Ward Manager of the Cardiothoracic High Dependency Unit (“the Unit”) at the time of the concerns.
- Ms 2: Ward Sister at the Unit, employed by South Tees NHS Foundations Trust.
- Ms 3: Clinical Sister at the Unit, employed by South Tees NHS Foundations Trust
- Ms 4: Sister at the Unit, employed by South Tees NHS Foundations Trust.

- Ms 5: Sister at the Unit, employed by South Tees NHS Foundations Trust.

Background

The NMC received a referral on 6 February 2018 from the Associate Director of Nursing at Cook University Hospital (“the Hospital”), part of South Tees NHS Foundation Trust. At the time, Mr Dry was employed as a nurse on the Cardiothoracic High Dependency Unit at the Hospital (“the Unit”). Concerns were raised in relation to Mr Dry’s work as a band 5 nurse.

The background of the concerns was that Mr Dry had omitted to adequately monitor fluid balance, made medication administration and documentation errors, handed over and communicated poorly with colleagues, failed to recognise deterioration in patients, failed to act appropriately on pain assessments, and delayed blood transfusions.

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.

The panel then considered each of the disputed charges and made the following findings.

Charge 1

That you, a registered nurse:

1. *Having agreed undertakings on 2 March 2019 which were recommended in the light of a case to answer being found in respect of the regulatory concerns set out in Schedule 1, failed to remedy the issues identified in your practice;*

Schedule 1

1. *Failed to ensure that patient safety was protected in that you:*
 - a) *Breached safe medication administration protocols;*
 - b) *Failed to keep adequate nursing documentation;*
 - c) *Failed to identify and escalate clinical concerns;*
 - d) *Communicated poorly with your colleagues;*

This charge is found proved.

In reaching this decision, the panel first considered if, on the balance of probabilities, Mr Dry had agreed undertakings with the NMC. The panel had before it Mr Dry's NMC '*Undertakings acceptance / non – acceptance form*' where Mr Dry had ticked to confirm the relevant section '*I have decided that I would like to accept the undertakings offered*'. This document was signed by Mr Dry and dated 2 March 2019.

The panel next referred to the undertakings and examined whether they incorporated the concerns identified in Schedule 1. The panel was satisfied that the undertakings sufficiently addressed these concerns.

Lastly, the panel considered whether or not Mr Dry failed to remedy the issues identified in Schedule 1 relating to his practice. The panel took into account the undertakings in detail.

As agreed in the undertakings, Mr Dry was required to provide information to the NMC about any nursing employment in addition to notifying any potential employers that he was subject to the undertakings. Mr Dry was also required to send the NMC a copy of his practice program and a report from his line manager every month. However, the panel did not have before it any evidence from Mr Dry that he has complied with the undertakings and thus remedied the concerns identified.

The panel was of the view that Mr Dry was to be treated as a person of good character. Should he have been working as a registered nurse, the panel would expect that Mr Dry would have notified his NMC case officer in accordance with undertaking 1. Given that the panel has not had sight of any engagement from Mr Dry since 14 October 2019 when he returned an NMC contact form confirming that he was not working as a nurse, the panel concluded that, on the balance of probabilities, Mr Dry has not been working as a registered nurse. Therefore, it is more likely than not that Mr Dry has failed to remedy the issues outlined in Schedule 1.

Given all of the reasons given above, the panel finds charge 1 proved.

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 Mr Dry's 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, Mr Dry's fitness to practise is currently impaired as a result of that misconduct.

Representations on misconduct and impairment

In coming to its decision, the panel had regard to the case of *Roylance v GMC (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.*'

The NMC 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.

The NMC requires the panel to bear in mind its overarching objective to protect 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. The panel has referred to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin).

The NMC invited the panel to find Mr Dry's fitness to practise impaired on the grounds that it is necessary on the grounds of public protection and is otherwise in the public interest.

The panel accepted the advice of the legal assessor, who advised that a breach of professional duty must be serious if it is to amount to misconduct.

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 Mr Dry's actions and omissions fell significantly short of the standards expected of a registered nurse, and that his actions and omissions amounted to a breach of the Code. Specifically:

1 Treat people as individuals and uphold their dignity

To achieve this, you must:

1.1 treat people with kindness, respect and compassion

1.2 make sure you deliver the fundamentals of care effectively

7 Communicate Clearly

10 Keep clear and accurate records relevant to your practice

To achieve this, you must:

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

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

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

16 Act without delay if you believe that there is a risk to patient safety or public protection

16.1 raise and, if necessary, escalate any concerns you may have about patient or public safety..

18 Advise on, prescribe, supply, dispense or administer medicines within the limit of your training and competence, the law, our guidance and other relevant policies, guidance and regulations

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

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 regulatory concerns in Schedule 1 and covered by the agreed, signed undertakings were wide ranging and covered basic aspects of nursing care. Mr Dry was fully aware of the failings identified by the NMC and has not taken the steps to remedy those failings. The panel took the view that Mr Dry has neither satisfied the undertakings nor has he communicated with the NMC since October 2019.

The panel found that Mr Dry's actions and omissions fell 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, Mr Dry'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. 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*

The panel found limbs a), b), and c) engaged in this case. The panel was of the view that patients were at a risk of harm as a result of Mr Dry's misconduct and the concerns outlined in Schedule 1. The concerns had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute.

The panel accepted the NMC's written representations in relation to remediation:

'In Cohen v GMC [2007] EWHC 581 (Admin), 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*

The three questions set out in Cohen (above) can be answered as follows:

- 1. The regulatory concerns in this case are capable of remediation by way of training and satisfactory performance in the identified areas of concern.*
- 2. Sufficient evidence of remediation has yet to be provided.*
- 3. At present, the concerns are highly likely to be repeated should the registrant be permitted to practise on an unrestricted basis in light of the non-compliance with the undertakings.'*

The panel had no material evidence before it from Mr Dry in relation to insight, remediation, and remorse. The panel was therefore of the view that there is a high risk of repetition and subsequently a risk of serious harm to patients should he be permitted to practise without restriction. Further, since the time of the concerns, Mr Dry has not provided a reflective response to the concerns addressing the risk of repetition. There is no evidence that Mr Dry has changed his practice as a result of concerns outlined in Schedule 1.

The panel therefore determined that a finding of impairment is necessary on the grounds of public protection.

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

The panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds his fitness to practise impaired on the grounds of public interest.

Having regard to all of the above, the panel was satisfied that Mr Dry's fitness to practise is currently impaired both on the grounds of public protection and the wider public interest.

Sanction

The panel has considered this case very carefully and has decided to make a conditions of practice order for a period of 18 months. The effect of this order is that Mr Dry's name on the NMC register will show that he is subject to a conditions of practice order and anyone who enquires about his 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.

Representations on sanction

The panel noted that in the Notice of Meeting, dated 3 November 2021, the NMC had informed Mr Dry that it would seek the imposition of a conditions of practice order for a period of 12 months if the panel found Mr Dry's fitness to practise currently impaired.

Decision and reasons on sanction

Having found Mr Dry'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 risk of harm to patients;
- Mr Dry's failure to remedy the concerns;
- Limited evidence of remediation or full insight;
- Limited engagement - No contact from Mr Dry with the NMC since October 2019 and no responses to emails and letters following that date.

The panel also took into account the following mitigating feature:

- Early acceptance of the regulatory concerns which demonstrates some insight.

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.

The panel then considered the imposition of a caution order. The panel took into the SG in relation to caution orders, in particular:

“A caution order is only appropriate if the Fitness to Practise Committee has decided there's no risk to the public or to patients requiring the nurse, midwife or nursing associate's practice to be restricted...”

The panel reminded itself of its earlier findings and noted that it found Mr Dry's fitness to practise impaired on both public protection and public interest grounds. The panel noted that a caution order does not restrict Mr Dry's practice. In light of the seriousness of the clinical practice concerns in Schedule 1 and the risk of repetition, the panel determined that a caution order would not adequately address the panel's concerns nor would it address the public protection and public interest issues identified. The panel considered that Mr Dry's 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 Mr Dry's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the SG, in particular:

- *No evidence of harmful deep-seated personality or attitudinal problems;*
- *Identifiable areas of the nurse or midwife's practice in need of assessment and/or retraining;*
- *No evidence of general incompetence;*
- *The conditions will protect patients during the period they are in force; and*
- *Conditions can be created that can be monitored and assessed.*

The panel determined that it would be possible to formulate appropriate and practical conditions which would address the failings highlighted in this case. The concerns in this case relate mostly to clinical failings in respect of medicines administration, record keeping, communication and escalation and the panel noted that the concerns outlined are remediable and can be addressed by conditions of practice. The panel was of the view that a conditions of practice order would be sufficient to protect the public whilst marking the seriousness of the identified concerns.

Balancing all of these factors, the panel determined that that the appropriate and proportionate sanction is that of a conditions of practice order.

The panel was of the view that to impose a suspension order would be disproportionate at this time. A suspension order would not be a reasonable response in the current circumstances of this case, at least until Mr Dry is given a further opportunity to engage with the NMC, explain how he has remediated his fitness to practise, and set out his future practice intentions to a reviewing panel. A future reviewing panel would have all the sanctions available to it, including a suspension or strike off order.

Having regard to the matters it has identified, the panel has concluded that a conditions of practice order will mark the importance of maintaining public confidence in the profession, and will send to the public and the profession a clear message about the standards of practice required of a registered nurse.

The panel determined that the following conditions are appropriate and proportionate in this case:

'For the purposes of these conditions, 'employment' and 'work' mean any paid or unpaid post in a nursing, midwifery or nursing associate role. Also, 'course of study' and 'course' mean any course of educational study connected to nursing, midwifery or nursing associates.

1. At any time you are employed or otherwise providing nursing services, you must place yourself and remain under the supervision of a workplace line manager, mentor or supervisor nominated by your employer, such supervision to consist of working at all times under the direct supervision of a registered nurse of band 6 or above until such time as you are deemed capable of working without supervision by your line manager, mentor or supervisor.
2. You must work with your workplace line manager, mentor or supervisor to create a personal development plan (PDP). Your PDP must address the following concerns:
 - Safe medication administration protocols;
 - Nursing documentation and record keeping;
 - The identification and escalation of clinical concerns;
 - Communication with colleagues.

You must:

- Send your case officer a copy of your PDP within 14 days of it being approved by your line manager, mentor or supervisor.

- Meet with your workplace line manager, mentor or supervisor at least every two weeks to discuss your progress towards achieving the aims set out in your PDP.
 - Send your case officer a report from your workplace line manager, mentor or supervisor 7 days prior to any NMC review hearing. This report must show your progress towards achieving the aims set out in your PDP.
3. You must keep the NMC informed about anywhere you are working by:
- a) Telling your case officer within seven days of accepting or leaving any employment.
 - b) Giving your case officer your employer's contact details.
4. You must keep the NMC informed about anywhere you are studying by:
- a) Telling your case officer within seven days of accepting any course of study.
 - b) Giving your case officer the name and contact details of the organisation offering that course of study.
5. You must immediately give a copy of these conditions to:
- a) Any organisation or person you work for.
 - b) Any agency you apply to or are registered with for work.
 - c) Any employers you apply to for work (at the time of application).
 - d) Any establishment you apply to (at the time of application), or with which you are already enrolled, for a course of study.

6. You must tell your case officer, within seven days of your becoming aware of:
 - a) Any clinical incident you are involved in.
 - b) Any investigation started against you.
 - c) Any disciplinary proceedings taken against you.

7. You must allow your case officer to share, as necessary, details about your performance, your compliance with and / or progress under these conditions with:
 - a) Any current or future employer.
 - b) Any educational establishment.
 - c) Any other person(s) involved in your retraining and/or supervision required by these conditions.

The period of this order is for 18 months. This will provide time for Mr Dry to secure employment if he is not currently employed as a nurse and to address the concerns.

Before the end of the period of the order, a panel will hold a review hearing to see how well Mr Dry has complied with the order. At the review hearing the panel may revoke the order or any condition of it, it may confirm the order or vary any condition of it, or it may replace the order for another order.

Any future panel reviewing this case would be assisted by:

- Mr Dry's ongoing engagement and his attendance at a future review hearing; and,
- A written reflective piece addressing the identified concerns.

This will be confirmed to Mr Dry in writing.

Interim order

As the conditions of practice 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 Mr Dry's own interests until the conditions of practice sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Representations on interim order

The panel took account of the representations made by the NMC:

'Given that there is a risk that patients would be placed at an unwarranted risk of harm should the registrant be permitted to practise without any restrictions and the public interest is engaged, it is submitted that an interim order is necessary for the protection of the public and is otherwise in the public interest. It is further submitted that an interim conditions of practice order for a period of 18 months should be imposed to allow for any potential appeal period.

In the event no appeal is made, the interim order will fall away once the 28-day appeal period has elapsed, and the substantive order will take effect.'

Decision and reasons on interim order

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

The panel concluded that the only suitable interim order would be that of a conditions of practice order, as to do otherwise would be incompatible with its earlier findings. The conditions for the interim order will be the same as those detailed in the substantive order and will be for a period of 18 months, to allow for the possibility of an appeal to be made and determined.

If no appeal is made, then the interim conditions of practice order will be replaced by the substantive conditions of practice order 28 days after Mr Dry is sent the decision of this hearing in writing.

That concludes this determination.