

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

**Substantive Hearing  
Tuesday 4, Wednesday 5, Thursday 6 January 2022**

Nursing and Midwifery Council  
2 Stratford Place, Montfichet Road, London, E20 1EJ

<b>Name of registrant:</b>	<b>Ayotunde Musiliu Odukoya</b>
<b>NMC PIN:</b>	16G1892E
<b>Part(s) of the register:</b>	Registered Nurse – Sub Part 1 Mental Health Nursing – 1 August 2016
<b>Area of registered address:</b>	Essex
<b>Type of case:</b>	Misconduct
<b>Panel members:</b>	Peter Cadman (Chair, Lay member) Mark Gibson (Registrant member) Jennifer Portway (Lay member)
<b>Legal Assessor:</b>	Nigel Ingram
<b>Panel Secretary:</b>	Teige Gardner
<b>Nursing and Midwifery Council:</b>	Represented by Beverley Da Costa, Case Presenter
<b>Mr Odukoya:</b>	Present and represented by Thomas Buxton
<b>Facts proved by way of admission:</b>	Charges 1b, 1c, 1d
<b>No case to answer:</b>	Charges 1a
<b>Fitness to practise:</b>	<b>Impaired</b>
<b>Sanction:</b>	<b>Caution Order (12 months)</b>

## Details of charge

*“That you, a Registered Nurse:*

*1) Following an altercation between Patient A and yourself:*

*a. kicked Patient A;*

*Or, in the alternative:*

*b. kicked out at Patient A*

*when:*

*c. Patient A was being restrained by your colleagues.*

*d. it was not necessary for you to physically interact with Patient A to protect yourself, your colleagues, patients or Patient A himself.*

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

## Decision and reasons on application to amend the charge

The panel heard an application made by Ms Da Costa, on behalf of the Nursing and Midwifery Council (NMC), to amend the wording of charge 1.

The proposed amendment was to include the date of the incident, 7 June 2018, into the charge. It was submitted by Ms Da Costa that the proposed amendment would provide clarity and more accurately reflect the evidence.

*“That you, a Registered Nurse:*

*1) On 7 June 2018, following an altercation between Patient A and yourself:*

*a. kicked Patient A;*

*Or, in the alternative:*

*b. kicked out at Patient A*

*when:*

*c. Patient A was being restrained by your colleagues.*

*d. it was not necessary for you to physically interact with Patient A to protect yourself, your colleagues, patients or Patient A himself.*

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

Mr Buxton indicated that he did not oppose the application.

The panel accepted the advice of the legal assessor and had regard to Rule 28 of ‘Nursing and Midwifery Council (Fitness to Practise) Rules 2004’, as amended (the Rules).

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, to ensure clarity and accuracy.

### **Decision and reasons on facts**

At the outset of the hearing, the panel heard from Mr Buxton, who informed the panel that you made admissions to charges 1b, 1c and 1d.

The panel therefore finds charges 1b, 1c and 1d proved, by way of your admissions.

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

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

The panel heard live evidence from the following witness called on behalf of the NMC and CCTV footage from two camera positions of the alleged incident:

- Witness 1: Band 5 Staff Nurse at the Trust, at the time of the incident.

The panel had regard to a second witness statement, however no live evidence was heard by Witness 2.

## **Background**

You were referred to the NMC on 22 August 2018 by the Service Manager of the St Charles Mental Health Unit at the Central & Northwest London NHS Trust (the Trust). You began working at the Trust as a nurse in a Psychiatric Intensive Care Unit on 2 October 2017. The NMC pursued this matter on the basis that on 7 June 2018 you had been a victim of a persistent, aggressive and violent assault from Patient A, who was a large, strong male. The CCTV evidence provided shows that the assault included you being kicked, punched and held in a headlock. It is alleged that immediately following the assault, you physically assaulted Patient A, by kicking him whilst he was on the floor.

## **Decision and reasons on application of no case to answer**

At the conclusion of the NMC case, the panel considered an application from Mr Buxton that there is no case to answer in respect of charge 1a. This application was made under Rule 24(7).

In relation to this application, Mr Buxton submitted that there is no evidence to support charge 1a. He submitted that Witness 1 could not say whether the kick made contact with Patient A or not. Further, he submitted that the CCTV footage is not clear in regard to whether your kick made contact with Patient A. In these circumstances, he submitted that this charge should not be allowed to remain before the panel.

Ms Da Costa submitted that it was for the panel to decide whether there was a case to answer in regard to charge 1a. She readily conceded that the CCTV footage did not show you kicking Patient A.

The panel took account of the submissions made and accepted the advice of the legal assessor.

In reaching its decision, the panel has made an initial assessment of all the evidence that had been presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it could find the facts proved and whether you had a case to answer.

The panel was of the view that, taking account of all the evidence before it, there was no realistic prospect that it would find the facts of charge 1a proved. The panel took into consideration the evidence of Witness 1, who it considered to be reliable and credible, who stated that she could not tell whether the kick made contact with Patient A or not. In addition, the panel accepted Ms Da Costa's submission, in which she conceded that the CCTV does not show that you had kicked Patient A. Additionally, Ms Da Costa accepted there was no medical evidence or corroborating material to support the allegation. Therefore, the panel found no case to answer in regard to charge 1a.

### **Fitness to practise**

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts admitted 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**

Before hearing submissions on misconduct, the panel heard further submissions from Ms Da Costa and Mr Buxton regarding their respective positions on the facts of this case. Ms Da Costa submitted that the NMC's position, in regard to charge 1b, is that you kicked out at Patient A. Ms Da Costa submitted that this can be seen on the CCTV footage.

Mr Buxton submitted that you do not have any recollection of the events, but conceded that you did kick out towards Patient A. Mr Buxton submitted that this action of kicking out occurred in the context of you being assaulted, being in a confused mental state following the assault and was not intended to harm Patient A, rather an act in self-preservation.

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 Da Costa 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 Da Costa identified the specific, relevant standards where your actions amounted to misconduct. She submitted that you engaged in conduct that falls short of what is required of a registered nurse, in that you kicked out at a vulnerable patient. Ms Da Costa submitted that there was the potential that your actions could cause harm to Patient A, other patients and your colleagues who were restraining Patient A. Ms Da Costa submitted that your actions appear to have been carried out due to your emotional state at the time. She submitted therefore that your actions amounted to misconduct.

Mr Buxton submitted that, in all the circumstances of this case, your actions did not fall seriously short of the standards expected of a registered nurse and that, in an already stressful working environment, you were unintentionally involved in an unprovoked and persistent assault by Patient A, who by all accounts is a strong and violent man. He submitted that you were scared for your life during the assault and acted in a manner in order to preserve your life, as anyone else would. He submitted that your colleagues were slow to react to the assault, as seen by another patient pulling you to your feet following the assault. Mr Buxton submitted that this was the most violent assault you had ever been involved in. He submitted that Witness 1, in her evidence, told the panel that you were wincing in pain following the incident. Therefore, your actions were in response to a violent, unprovoked and persistent assault by Patient A, and you carried out your actions in a split second, and they did not result in any harm being caused. Mr Buxton submitted that your actions did not amount to misconduct.

### **Submissions on impairment**

Ms Da Costa 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).

Ms Da Costa submitted one cannot be satisfied that you have had sufficient insight into why you reacted the way you did. She submitted that this could imply that there is a potential that you would react in a similar way in the future if you were to be attacked by another patient in a similar manner. Ms Da Costa accepted that the testimonials provided by you are glowing testimonials and that you have previously had an unblemished career and good practice since the event as well as the further training you have undertaken. However, Ms Da Costa submitted that this does not deal with the fact that, once you were no longer in danger, you kicked out at Patient A, who by that point was being restrained. Therefore, Ms Da Costa submitted that a finding of impairment was required on the ground of public protection.

Ms Da Costa submitted that a finding of impairment was also required in the wider public interest. She submitted that a well-informed member of the public would be concerned to find that you have been found to be not impaired. Ms Da Costa concluded that you are impaired and the first three limbs of the *Grant* test are engaged.

Mr Buxton submitted that, if the panel were not with him in his submissions on misconduct, you are not impaired. He referred the panel to the numerous training courses, including Prevention and Management of Violence and Aggression (PMVA), and positive testimonials you have received from your colleagues, and submitted that this shows that you have made efforts to strengthen your practice and that you are a competent and skilled nurse. Further, he submitted that you have had, prior to this incident, an unblemished career as a registered nurse over a number of years. Mr Buxton submitted that a finding of impairment is not necessary on the ground of public protection. He submitted that the risk of repetition in this case is low, and you would not repeat the actions you carried out on the day of the incident. Mr Buxton submitted that

you have written a reflective piece and shown clear insight into the charges levelled against you.

Furthermore, Mr Buxton submitted that an order was also not necessary in the wider public interest. He submitted that a well-informed member of the public would not be concerned if a finding of impairment were not made. He submitted that a well-informed member of the public would consider that your actions were carried out in the context of a violent and unprovoked assault upon you.

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, *Nandi v General Medical Council* [2004] EWHC 2317 (Admin), and *General Medical Council v Meadow* [2007] QB 462 (Admin).

### **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 seriously below of the standards expected of a registered nurse, and that your actions amounted to a breach of the Code. Specifically:

*“1.1 treat people with kindness, respect and compassion*

*3.1 pay special attention to promoting wellbeing, preventing ill-health and meeting the changing health and care needs of people during all life stages*

*3.4 act as an advocate for the vulnerable, challenging poor practice and discriminatory attitudes and behaviour relating to their care*

*20 Uphold the reputation of your profession at all times”*

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. The panel took into consideration the context of the incident. It was of the view that you were violently and persistently assaulted by Patient A, and your actions could be perceived as being as a result of this assault. However, the panel noted that in the CCTV footage, it shows that you kicked out at Patient A whilst he was being restrained. The panel was of the view that your actions did fall seriously low of the standards expected of a registered 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*

The panel was mindful that this incident took place in the context of a vicious, violent and prolonged assault being carried out against you by Patient A. The panel further took into consideration that you told it that you had never been assaulted this badly before. The panel noted that both you and Witness 1 gave evidence that Patient A was a violent and strong man, who required multiple people to restrain him. The panel noted that you said that you had acted in a manner that was out of character for you and that you had feared for your life during the assault, leading to you kicking out at Patient A. The panel noted that your action in kicking out occurred within seconds of you being released from this violent assault on you. The panel considered you to be a reliable and credible witness and accepted this explanation of events and why you carried out your actions.

Furthermore, the panel balanced the context of the incident with your unblemished career as a registered nurse before, and in the three and a half years since, the incident. The panel noted that you have been working in the same environment without any further incidents, and have received glowing testimonials from your colleagues regarding your conduct and practise. The panel noted that in your current mental health

nursing role you have been involved in further violent incidents with patients and you have been required to restrain patients safely, without any incidents similar to that in the charges occurring. Therefore, the panel was satisfied that there is a low risk of repetition in this case.

The panel took into consideration the glowing testimonials you have received, the relevant training you have undertaken to strengthen your practice and the insight you have shown into your actions, and concluded that a finding of impairment is not necessary on the grounds of public protection.

The panel next considered if a finding of impairment is necessary in the wider public interest. The panel considered this very carefully. The panel reviewed the CCTV footage, which clearly showed you kicking out at Patient A once whilst your colleagues were in the process of restraining him. The panel noted that, despite the context of the incident, you were a senior professional at the Trust, who was trained in handling violent patients appropriately and safely. The panel was of the view that public confidence in the professions would be undermined if a senior and experienced nurse at a mental health hospital was found not to be impaired after kicking out at a vulnerable patient who was being restrained. Further, the panel noted that, at the time of the incident, you were mentoring junior staff and meant to be acting as a role model to them. The panel balanced the context of the incident and the test for a finding of impairment in the wider public interests and found that your actions would cause the public to lose confidence in the profession, and the NMC as its regulator, if a finding of impairment were not made in these particular circumstances.

Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired on public interest grounds alone.

## **Sanction**

The panel considered this case and decided to make a caution order for a period of one year. 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.

### **Submissions on sanction**

Ms Da Costa informed the panel that in the Notice of Hearing, dated 29 November 2021, the NMC had advised you that it would seek the imposition of a suspension order for 4 or 6 months if it found your fitness to practise currently impaired, and this remains the NMC's position notwithstanding the panel's determination of no case to answer in regard to charge 1a. Ms Da Costa submitted that your actions in charges 1b, 1c and 1d were incompatible with working as a registered nurse without restrictions.

The panel also bore in mind Mr Buxton's submissions that a suspension order would neither be proportionate or necessary. He submitted that this was a single event, short lived in nature and no harm was caused to Patient A. However, Mr Buxton accepted that kicking out at a patient is unacceptable. Nevertheless he submitted that, as a finding of impairment was not made on the ground of public protection, the panel could consider imposing a caution order. He submitted that as you have strengthened your practice since the incident and have been working in a similar environment for three and a half years without incident, a caution order would be the most appropriate and proportionate order. Mr Buxton submitted that a suspension order could lead to you losing your current employment. He submitted that it would not be in the public interest for the nursing profession to lose a nurse as skilled as you. Mr Buxton submitted that a 12 month caution order would be the most proportionate length.

### **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 Sanctions Guidance (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:

- You were a team leader at the Trust
- You kicked out at Patient A who was vulnerable and was being restrained

The panel also took into account the following mitigating features:

- You had been victim to a prolonged assault from Patient A, which included kicking, punching and being held in a headlock, in which you acted in line with your duties and responsibilities during the course of the active assault
- You have been working for three and a half years since the incident in the same environment, without any further incident
- You have provided very positive testimonials from colleagues, including your supervisor
- Your previous good character and work history
- Evidence of your insight, in both your reflective statement and your oral evidence
- Clear evidence of you strengthening your practice, as seen by your promotion, undertaking relevant training and the award for outstanding achievement at work, for which you were nominated

The panel first considered whether to take no action but concluded that this would be inappropriate in the circumstances of this 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 NMC had properly conceded that there was no criticism of your actions leading up to the assault on you nor during that prolonged assault. The kicking out was not with intent to assault, as again conceded by the NMC. It had taken place in the seconds immediately after those who helped you had managed to separate you

from Patient A, who was still struggling with other staff. Afterwards, you left the area for medical treatment.

The panel considered that you have shown insight into your conduct. The panel further noted that you made admissions to all of the charges, wrote a reflective statement regarding the incident and have taken steps to strengthen your practice. You have fully engaged with the NMC since your referral and you have been working as a registered nurse in the same challenging environment without any further incidents for the last three and a half years. In all the circumstances, the panel was satisfied that you do not pose a risk to the public and the risk of repetition in this case is low. Therefore, the panel concluded that a caution order is the most appropriate and proportionate sanction in this case that would meet the public interest.

The panel considered whether it would be proportionate to impose a more restrictive sanction and looked at conditions of practice order, but concluded that this would not be appropriate in the circumstances of this case.

The panel did consider the suspension order proposed by the NMC. The panel was of the view that you do not pose a risk of harm to the public, as seen by you working successfully in a similar challenging environment since the incident occurred for the past three and a half years, without any further incidents. The panel found that the incident was isolated and happened after a prolonged and violent assault upon you. The panel was of the view that the circumstances leading to you kicking out at Patient A were both challenging and unusual, and your actions were as a result of this. You have offered insight into your actions and have strengthened your practice since, as seen by the relevant training courses you have undertaken and the glowing testimonials you have received from your colleagues. Therefore the panel was of the view that there is a minimal risk of repetition in this case.

The panel concluded that no useful purpose would be served by a suspension order. It is not necessary to protect the public, as you do not pose a risk. The panel found that a suspension order would not be in the public interest, as it considered you to be a skilled and experienced mental nurse working in an extremely challenging environment. The

panel was of the view that a well-informed member of the public would consider your behaviour to be inappropriate, but would not lose confidence in the profession, or the NMC as its regulator, if it found that you were not suspended.

The panel has therefore concluded that a caution order would adequately protect the public. Having considered the general principles above and looking at the totality of the findings on the evidence, the panel has determined that to impose a caution order for a period of 12 months 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 12 months, 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 a restriction.

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 any 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.