

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

**Substantive Hearing
10-18 January 2022**

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

Name of registrant: Chantal Olivier

NMC PIN: 99F1221O

Part(s) of the register: Registered Nurse –Sub Part 1
Adult Nursing-1 July 1999

Area of registered address: Greater London

Type of case: Misconduct

Panel members: Phillip Sayce (Chair, registrant member)
Mark Gibson (Registrant member)
James Kellock (Lay member)

Legal Assessor: Robin Hay

Hearings Coordinator: Amira Ahmed

Nursing and Midwifery Council: Represented by Gemma Noble, Case Presenter

Ms Olivier: Present and represented by Paula Clements, of Counsel

Facts proved: 3 c), 4 b) in relation to 3 c) and 4 d) in relation to 3 c)

Facts not proved: 1, 2, 3 a), 3 b), 3 d), 4 a), 4 c)

Fitness to practise: Impaired

Sanction: Caution order (12 months)

Interim order: N/A

Details of charge

That you, a registered nurse, on night shift of 29 January 2019:

1. Hit Patient A on or around his head, on one or more occasions;
2. Were rough with Patient A when you provided care;
3. Made unprofessional comments towards and/or in front of and/or about Patient A in that you:
 - a. Told Patient A to behave, or words to that effect;
 - b. Said “I can’t cope with this”, or words to that effect;
 - c. Said “we can either have a good shift or a bad shift, it’s up to you”, or words to that effect;
 - d. Said “It’s up to you, which one will it be”, or words to that effect;
4. One or more of your comments at charges 3a and/or 3b and/or 3c and/or 3d above were:
 - a. Abrupt
 - b. Uncompassionate
 - c. Shouted at Patient A or alternatively, said in a raised voice
 - d. Aggressive

Decision and reasons on application to admit hearsay evidence

Ms Noble, on behalf of the Nursing and Midwifery Council (NMC), made an application under Rule 31 to admit in evidence the transcript of an investigatory interview with Ms 1 dated 24 April 2019. Ms Noble submitted that the evidence is highly relevant and although not provided during the course of the NMC’s investigation, was produced for the purpose of the internal investigations.

Ms Clements on your behalf opposed the application. She submitted that it had no relevance to the charges and that it would be unfair to admit it as there is a dispute in fact.

Ms Noble submitted that Ms 1's transcript was not the sole and decisive evidence that relates to the charges. She said that this is why there is no witness statement.

The panel accepted the advice of the legal assessor. This included that Rule 31 provides that, so far as it is 'fair and relevant', a panel may accept evidence in a range of forms and circumstances, whether or not it would be admissible in civil proceedings.

The panel concluded that there would be significant unfairness to you if the transcript of Ms 1 were admitted in evidence. It therefore refused this application.

Background

The charges arose whilst you were employed as a Band 5 registered nurse at Harefield Hospital (the Hospital) in the Intensive Therapy Unit (ITU). The charges specifically relate to the night shift of 29 January 2019.

You allegedly hit Patient A on or around his head, on one or more occasions and were rough with him when you provided care.

It is also alleged that you made unprofessional comments towards and/or in front of and/or about Patient A in that you allegedly told him to behave, or words to that effect; allegedly said "I can't cope with this", or words to that effect; allegedly said "we can either have a good shift or a bad shift, it's up to you", or words to that effect and allegedly said "It's up to you, which one will it be", or words to that effect.

The purported comments were allegedly abrupt, uncompassionate or aggressive. It was also alleged that you shouted at Patient A or alternatively addressed him in a raised voice.

Decision and reasons on facts

In reaching its decisions on the facts, the panel took into account all the oral and documentary evidence together with the submissions made by Ms Noble and Ms Clements. It accepted the advice of the legal assessor.

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 evidence from the following witnesses called on behalf of the NMC:

- Patient A: Patient involved in the alleged incidents.
- Ms 2: Senior Staff Nurse on the ITU at the time of the alleged incidents.
- Ms 3: Nurse in charge of the ITU at the time of the alleged incidents.
- Ms 4: Sister on the ITU but not present at the time of the alleged incidents.

You also gave evidence.

The panel made the following findings:

Charge 1

- 1) Hit Patient A on or around his head, on one or more occasions;

This charge is found NOT proved.

In reaching this decision, the panel took into account Ms 3's evidence that she had discussed the alleged 'hits' on the head with Patient A but he could not remember being struck. Ms 3 said that she checked for any marks or signs of injury to Patient A from the alleged 'hits' but there were no bruises or other marks. The evidence of MS 3 was that on questioning Patient A that night he could not remember any incident involving 'hits' to the head.

The nursing notes recorded that during the day shift Patient A had been fidgety, disturbed and unsettled. The evidence from Ms 2, Ms 3 and from you was that this continued during the night shift. Further the evidence was that Patient A was lucid at times however displayed varying signs of delirium and agitation throughout the night and falling asleep only intermittently. Also, he was on strong medication that may have influenced his recollection and recall of events.

Patient A appeared to have incomplete recollection of the events of the night. He agreed this in evidence, stating that the alleged 'hits' only became real to him when questioned by Ms 4 some time later. The panel had this in mind when considering Patient A's account of the alleged incident.

In your evidence you said that the NG tube had become dislodged. You described how in replacing the NG tube you placed one hand firmly on Patient A's forehead to steady him and used your other hand to reattach the NG tube to his nose. Ms 3 and Ms 4 both explained that it was reasonable for a nurse to hold a patient's head whilst replacing an NG tube. Your evidence was that Patient A must have confused your steadying action with 'hitting'.

The panel noted that the alleged 'hits' were not witnessed by anyone but Patient A and that his recollections of the events of the night were not consistent. Further your evidence about how you re-secured the NG tube was a plausible explanation about why you put pressure on Patient A's forehead, temples and the bridge of his nose.

In the circumstances the panel was not persuaded that it was more likely than not that you 'hit' Patient A as alleged.

The panel therefore found charge 1 not proved.

Charge 2

2) Were rough with Patient A when you provided care

This charge is found NOT proved.

There were before the panel emails to Ms 4 sent by Ms 2 and Ms 3 in February 2019 describing the alleged incidents of the night shift.

In Ms 2's email dated 13 February 2019 she stated:

'...she had been rough with him'

In the transcript from the investigatory meeting dated 16 April 2019 Ms 2 makes comments that were not reported to Ms 3 at the time of the alleged incidents. She states:

'I wouldn't say she was like aggressive towards him, but I wouldn't say she was soft and gentle with him either.'

In his evidence Patient A said that you had been 'rough' when bathing him. Ms 2 who was present during the bathing however made no reference to any such treatment being 'rough', nor was there any evidence of harm or injury to Patient A.

In your evidence you said that you were not in any way 'rough' in your care of Patient A and that he made no complaints to you.

The panel found your evidence to be reliable and persuasive. It preferred your evidence to that of Patient A. Therefore it found charge 2 not proved.

Charge 3

- 3) Made unprofessional comments towards and/or in front of and/or about Patient A in that you:
- a. Told Patient A to behave, or words to that effect; (**Found NOT proved**)
 - b. Said “I can’t cope with this”, or words to that effect; (**Found NOT proved**)
 - c. Said “we can either have a good shift or a bad shift, it’s up to you”, or words to that effect; (**Found proved**)
 - d. Said “It’s up to you, which one will it be”, or words to that effect; (**Found NOT proved**)

The panel took a two stage approach to charge 3, first, in regard to each alleged comment, whether it was in fact made and then, if made, whether it was unprofessional.

- a. In his oral evidence Patient A could not remember what was said. He was asked to give a synopsis but only remembered that it was in an aggressive tone. The panel found Patient A’s recollection to be unreliable perhaps due to the medication he was taking and the fact that he was suffering from delirium.

There was no evidence from Ms 3 that Patient A had complained to her nor was it witnessed by anyone.

You explained that you had not said ‘behave’ or words to that effect. The panel could not be satisfied that this comment was made and therefore found charge 3 a) not proved.

- b. There was no dispute that this comment was made. Ms 3 said that it was made at the doorway of the nursing cubicle, in a calm manner and in passing. The evidence was that there was a significant level of noise in the area of the cubicle, arising from equipment, alarms and other causes. The panel found, from the evidence of Ms 3 and your evidence that the comment was not addressed to Patient A nor was it made in front of him. Furthermore, in the light of your evidence that you had made the comment as you felt it would be difficult to provide the high standard of care needed by Patient A

the panel found that you were not making it in regard to Patient A's unsettled behaviour but rather as a reflection on yourself.

The panel was satisfied that a nurse may raise concerns about the level of care needed for a patient, and although you could have raised your concerns directly to the nurse in charge the panel found to make this comment was not in itself unprofessional as any such concerns would properly relate to patient safety.

- c. In your written evidence you said that when introducing yourself to a patient:

'It is my usual practice to say, "my name is Chantal and I will be looking after you for this shift." Then to try and set the patient at ease I usually say something like "and I'm sure that we are going to have a good shift." This is the type of greeting I was taught on my initial nursing course in South Africa, and it has stayed with me.'

You said that this is the likely manner in which you greeted Patient A.

The panel decided that it was more likely than not that on this occasion you did say 'we can either have a good shift or a bad shift, it's up to you', or words to that effect; which accords with the evidence of Ms 2. The panel decided that to use this phrase 'it's up to you' was an indication that you were putting your needs for a 'good shift' before the needs of Patient A and was therefore unprofessional. Accordingly, the panel found charge 3 c) proved.

- d. This comment first appears in the investigatory interview of Ms 2 in April 2019. It did not appear in the email dated Feb 2019 or in her witness statement. In your evidence you denied saying this.

The panel could not be satisfied that this comment was made by you and therefore found charge 3 d) not proved.

Charge 4

4) One or more of your comments at charges 3a and/or 3b and/or 3c and/or 3d above were:

- a. Abrupt (**Found NOT proved**)
- b. Uncompassionate (**Found proved in relation to charge 3c) only**)
- c. Shouted at Patient A or alternatively, said in a raised voice (**Found NOT proved**)
- d. Aggressive (**Found proved in relation to charge 3c) only**)

a. Ms 3 in her evidence said that the comment in charge 3 b) was made in passing to her. You also said in your evidence that this comment was not abrupt. There was no evidence presented to the panel that the comment in charge 3 b) was made abruptly. Therefore the panel did not find charge 4 a) in relation to 3 b) proved.

The panel found that in relation to charge 3 c) although in the investigatory interview Ms 2 had described this comment as being made abruptly, in her oral evidence she could not remember the tone used when you told the patient “we can either have a good shift or a bad shift, it’s up to you”, or words to that effect. Therefore the panel could not be satisfied, on balance, that the comment was made abruptly and did not find charge 4 a) in relation to charge 3 c) proved.

b. The panel did not find charge 4 b) in relation to 3 b) uncompassionate as Ms 3 and you both said that it was a comment made in passing and not directed at Patient A. Therefore this charge is not found proved in relation to charge 3 b).

In relation to charge 3 c) being an uncompassionate comment, the panel found it to be said directly to Patient A and was, for all the reasons given for 3 c) was coercive in nature and could be intimidating. It therefore found charge 4 b) in relation to 3 c) proved.

- c. No evidence of shouting nor of your using a raised voice was given by any witness other than Patient A. Furthermore, you denied shouting at Patient A at any stage. The panel found that the recollection of Patient A, who was on strong medication and experiencing delirium at the time was not credible. Moreover, there were specific denials from Ms 2 and Ms 3 about any shouting taking place. Therefore this charge is found not proved.

- d. Although the panel has found charge 3 b) not proved it did find that the comment 'I can't cope with this' or words to that effect had been said. For the reasons given above there is nothing to indicate that the comment in charge 3 b) was made in an aggressive manner and the panel therefore found this charge in relation to 4 d) not proved.

It appeared to the panel that the comment in charge 3 c) placed too much emphasis on the role of Patient A on the shift. As a consequence the panel found it not to be collaborative and was a coercive comment. Ms 2's evidence was that the comment was 'massively inappropriate'. She also said in the investigatory interview in April 2019 said that it was like 'emotional blackmail'. Furthermore the panel was satisfied that the implicit message within the comment was inherently aggressive. The panel decided charge 4 d) in relation to 3 c) was proved.

Fitness to practise

The panel next considered 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 to 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. Second, 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 Noble submitted that the facts found proved amounted 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 Noble identified the specific, relevant standards where, in her submission, your actions amounted to misconduct. She submitted that the comment you made at charge 3c) to Patient A was aggressive and tantamount to a threat. She submitted that your conduct may indicate issues with professionalism and attitude. She said that your actions had fallen far below the standards that were expected of a registered nurse.

Ms Clements submitted that it is very clear that the incident on 29 January 2019 was a single occurrence in a 20 year unblemished career. She said that you had spent a further four months in the same department at the Hospital after the incident without any further issues.

Ms Clements submission was that you have undertaken a solid piece of reflection and have also taken a step back to look at the issues and recognise how you had failed in some instances. She said that this is demonstrated by your acknowledgement of the NMC Code and specific standards in your reflection piece. Ms Clements further submitted that the charges found proved do not amount to misconduct.

Submissions on impairment

In regard to the question of impairment, Ms Noble referred to the panel's overriding duty to protect the public and to address 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 Noble acknowledged your reflective piece but stated that it was mainly blaming others for what occurred that night. She submitted that you have not shown insight into your actions and therefore that there is a risk of repetition.

Ms Noble submitted that your fitness to practise is currently impaired by reason of your misconduct. Her submission was that this was on public protection grounds as your comment at charge 3c) was essentially 'emotional blackmail' as stated by Ms 2 in her evidence. Further, that you were also impaired on public interest grounds as the public would not expect a nurse to act in this way when caring for a patient.

Ms Clements explained that you are currently working in an ITU at a different hospital with similar pressures to those you had faced at the Hospital, and there have been no complaints or issues raised against you. She pointed to the positive references from your current line manager and other work colleagues which described you as a team player who is inherently kind and compassionate. Ms Clements submitted that you have set out what you think your previous issues and failings were, and have recognised that you need to prioritise people. Ms Clements also referred to the training courses you have undertaken addressing communication skills, safeguarding and maintaining your own wellbeing.

Ms Clements submitted that you have a longstanding unblemished professional record and have shown full insight into the incident. She said that you have fully engaged with the Hospital investigation and the NMC investigation. She submitted that there is no risk to patients in your care and therefore the ground of public protection is not met.

Ms Clements submitted that your fitness to practise is not currently impaired.

In reaching its decision the panel considered all the information before it together with the submissions of Ms Noble and Ms Clements. It had regard to the NMC guidance on insight and strengthened practice. It accepted the advice of the legal assessor

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 that your actions amounted to a breach of the Code. Specifically:

1 Treat people as individuals and uphold their dignity,

1.1 treat people with kindness, respect and compassion

2 Listen to people and respond to their preferences and concerns

2.1 work in partnership with people to make sure you deliver care effectively

2.6 recognise when people are anxious or in distress and respond compassionately and politely

20 Uphold the reputation of your profession at all times

20.1 keep to and uphold the standards and values set out in the Code

20.2 ... treating people fairly and without ... bullying ...

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

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel concluded that the charges found proved collectively do amount to misconduct.

Decision and reasons on impairment

The panel then considered whether 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 found that Patient A was at real risk of being caused emotional harm had he heard the comment you made in charge 3 c) as it was uncompassionate and aggressive. Therefore your misconduct has breached the fundamental tenets of the nursing profession and also brought its reputation into disrepute.

In regard to insight, the panel considered your reflective piece and your engagement with the NMC investigation. It was satisfied that the misconduct found is capable of being addressed. Therefore, the panel considered whether or not you have taken steps to strengthen your practice. The panel found that you have demonstrated a satisfactory level of insight recognising the regulatory concerns identified, the impact on Patient A and the nursing profession. The panel took into account your references including that from your current line manager and your testimonials. The panel found that your insight was supported by the relevant training you have subsequently undertaken.

In these circumstances the panel is satisfied that there is a low risk of repetition. It had in mind that you are a highly experienced nurse who had a long standing career and the charges found proved are in regard to one comment relating to a single patient. The panel therefore decided that a finding of impairment is not 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 proper professional standards for members of those professions.

The panel found your comment to a vulnerable patient to be aggressive and uncompassionate. It therefore concluded that public confidence in the profession would be undermined if a finding of impairment were not made. The panel found your fitness to practise impaired on the ground of public interest alone.

Sanction

The panel has determined to make a caution order for a period of 12 months. 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 together with the submissions of Ms Noble and Ms Clements and it had regard to the Sanctions Guidance (SG) published by the NMC. It has accepted the advice of the legal assessor.

Submissions on sanction

Ms Noble said that the NMC had revised its sanction bid of a 12 month suspension order and now submits that a six month suspension order is more appropriate in the light of the panel's findings.

In regard to a conditions of practice order, Ms Noble submitted that this would not be appropriate in the light of the public protection ground not being found. She submitted that if the panel were not minded to impose a suspension order then a lengthy caution order would be appropriate.

Ms Noble's submission was that although the charge found proved related to a single incident, it was found to be aggressive and therefore a temporary suspension from the register would be proportionate. She said that would mark the seriousness of the charges found proved.

Ms Clements submitted that you have had a 20 year unblemished practice history and that this was a one-off incident. She said that since the incident you have been in practice in ITU for a further three years with no issues. Ms Clements emphasised that you hold yourself to a very high professional standard.

She submitted that if the panel were to take no further action, you would be able to practice unrestricted as an ITU nurse whose experience would be important to patient care. Ms Clements said that if the panel did not agree, her submission would be that a caution order for a period 12 months would be sufficient to mark the misconduct.

Decision and reasons on sanction

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, it may have such a consequence. The panel had regard to the SG but was aware the decision on sanction is a matter for its own professional judgement.

The panel took into account the following aggravating features:

- A vulnerable patient in ITU

The panel also took into account the following mitigating features:

- Efforts to strengthen her practice;
- Your attendance at relevant training courses

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 as misconduct of this kind requires a sanction.

Next, in considering whether a caution order would be appropriate, 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 has found that you have shown insight into your conduct. The panel has heard there have been no adverse findings in relation to your practice either before or since this incident.

The panel did consider a conditions of practice order as a sanction however it concluded that such an order would not be appropriate in the absence of a need for public protection. The panel further considered that a suspension order would be disproportionate as the aggression was not physical but related to a single comment and the misconduct was at the lower end of the spectrum. It would not be in the public interest that an otherwise good nurse should be suspended.

The panel have in mind that this was a single incident in a 20 year unblemished career, that there is a low risk of repetition and that you were impaired solely on the public interest ground. It therefore decided that a caution order would be a sufficient sanction and would

address public interest concerns. 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 this sanction. The panel has determined that to impose a caution order for a period of 12 months would be the appropriate and proportionate response as the misconduct was at the lower end of the spectrum.

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.