

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

**Substantive Hearing  
11-18 and 20-22 July 2022**

Virtual Hearing

**Name of registrant:** Julie Elizabeth Kirby

**NMC PIN:** 82B0611E

**Part(s) of the register:** Nurses part of the register Sub part 1  
RN1: Adult nurse, level 1 (21 May 1985)  
RM: Midwife (25 April 1989)  
V300: Nurse independent / supplementary prescriber (19 May 2011)

**Relevant Location:** Dorset

**Type of case:** Misconduct

**Panel members:** Rachel Forster (Chair, Lay member)  
Marian Robertson (Registrant member)  
Laura Wallbank (Registrant member)

**Legal Assessor:** James Holdsworth

**Hearings Coordinator:** Amira Ahmed

**Nursing and Midwifery Council:** Represented by Ben Edwards, Case Presenter

**Mrs Kirby:** Not present and not represented

**Facts proved:** 1, 2, 4, 5, 6, 7, 8 a), b) and 9

**Facts not proved:** 3

**Fitness to practise:** Impaired

**Sanction:** Striking-off order

**Interim order:**

Interim suspension order (18 months)

## **Decision and reasons on service of Notice of Hearing**

The panel was informed at the start of this hearing that Mrs Kirby was not in attendance and that the Notice of Hearing letter had been sent to Mrs Kirby's registered email address on 26 May 2022.

Mr Edwards on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the allegation, the time, dates and venue of the hearing and, amongst other things, information about Mrs Kirby's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

In the light of all of the information available, the panel was satisfied that Mrs Kirby has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

## **Decision and reasons on proceeding in the absence of Mrs Kirby**

The panel next considered whether it should proceed in the absence of Mrs Kirby. It had regard to Rule 21 and heard the submissions of Mr Edwards who invited the panel to continue in the absence of Mrs Kirby. He submitted that she had voluntarily absented herself.

Mr Edwards referred the panel to the letter from Mrs Kirby's previous representative at the Medical Defence Union (MDU) to her NMC case officer dated 05 May 2022 which stated:

*“I write to inform you that I am no longer instructed to represent Mrs Julie Kirby in the proceedings with the NMC.*

*After careful consideration Mrs Kirby has decided she does not wish to engage with the NMC proceedings and will not be participating further in the process.*

*I confirm neither she nor a legal representative will be attending the hearing listed for 11 – 26 July 2022.”*

The panel asked for Mrs Kirby to be contacted on the first morning of the hearing to confirm her non-attendance (11 July 2022). Mr Edwards asked her NMC case officer to do this and Mrs Kirby responded by email at 09.46am stating:

*“I can confirm that I will not be attending the hearing.*

*My [PRIVATE] wellbeing have been severely compromised by the malicious and entirely false allegations made about me and I have no wish to witness them being discussed.”*

The panel then asked for Mrs Kirby to be contacted again and be offered the opportunity to attend the hearing at a later stage after, the NMC witnesses had given their evidence. Mrs Kirby responded to this with an email dated 11 July 2022 at 12.17pm which stated:

*“Thank you for your email.*

*As you will have been previously informed by Emma who was my MDU Solicitor, I can reiterate that I will not be participating in the hearing in any form. I consider the procedure will be injurious to my [PRIVATE] wellbeing as has the whole situation following malicious and spurious allegations.”*

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised '*with the utmost care and caution*'.

The panel has decided to proceed in the absence of Mrs Kirby. In reaching this decision, the panel has considered the submissions of Mr Edwards, the emails from Mrs Kirby, and the advice of the legal assessor. It had particular regard to the factors set out in the decision of *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mrs Kirby;
- Mrs Kirby has informed the NMC that she has received the Notice of Hearing and confirmed she is content for the hearing to proceed in her absence;
- There is no reason to suppose that adjourning would secure her attendance at some future date;
- Four witnesses will be giving live evidence at this hearing;
- Not proceeding may inconvenience the witnesses, their employer(s) and, for those involved in clinical practice, the clients who need their professional services;
- The charges relate to events that occurred in 2019;
- Further delay may have an adverse effect on the ability of witnesses accurately to recall events; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mrs Kirby in proceeding in her absence. Although the evidence upon which the NMC relies will have been sent to her at her registered address, she will not be able to challenge the evidence relied upon by the NMC in person and will not be able to give evidence on her own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any

inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Mrs Kirby's decision to absent herself from the hearing, waive her right to attend, and/or be represented.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Mrs Kirby. The panel will draw no adverse inference from Mrs Kirby's absence in its findings of fact.

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

At the outset of the hearing, Mr Edwards made a request that this case be held entirely in private on the basis that proper exploration of Mrs Kirby's case involves personal circumstances relating to her and Patient A. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

Having heard that there will be reference to personal circumstances relating to Mrs Kirby and Patient A, the panel determined to hold the entirety of the hearing in private.

## Details of charge

*That you, a registered nurse, whilst employed at Bridport Medical Centre, “the Centre”,*

1. On 08 July 2019, you carried out the examination listed in Schedule 1, which was not clinically justified.
2. Your conduct at Charge 1 above was sexually motivated.
3. In the event that the examination listed in Schedule 1 was clinically justified, you kept insufficient patient records in relation to this in that you;
  - a. Did not record the reasons for this examination and/or
  - b. Did not record the gynaecological history and/or symptoms Patient A was suffering from and/or
  - c. Did not record the details of Patient A’s consent and/or
  - d. Did not record whether a chaperone was offered to Patient A.
4. Between approximately June 2019 and approximately December 2019 you entered into an inappropriate personal relationship with Patient A.
5. Between approximately June 2019 and approximately December 2019 you entered into a sexual relationship with Patient A.
6. As your personal relationship with Patient A deteriorated, you told them that they were being monitored every time they attended the Centre, when this was not true.
7. Your conduct at Charge 6 above was dishonest as it was motivated to dissuade Patient A from attending the Centre.
8. On notifying your Employer of your personal relationship with Patient A, you made or implied the following statements, which were false;
  - a. That you had originally met Patient A outside of your work as their nurse and/or
  - b. That your personal/sexual relationship did not commence/continue whilst you provided treatment to Patient A.
9. Your conduct at Charge 8 above was dishonest because it was intended to minimise your culpability in relation to the relationship between you and Patient A.

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

**Schedule 1**

Internal vaginal examination



## **Background**

The charges arose whilst Mrs Kirby was employed as a registered Advanced Nurse Practitioner by Bridport Medical Centre (the Centre). Mrs Kirby had worked at the Centre for many years and at the time of the events was also Clinical Services Manager for 50 per cent of her working time. Patient A was a patient of the practice and had attended appointments for her Asthma reviews with Mrs Kirby since 2010.

It is alleged that on 08 July 2019 Mrs Kirby carried out an internal vaginal examination on Patient A which was not clinically justified.

It is alleged that Mrs Kirby's actions in conducting this vaginal examination were sexually motivated. It is also alleged, that in the event that the examination was clinically justified, Mrs Kirby kept insufficient patient records in relation to this in that she did not record the reasons for this examination and/or did not record the gynaecological history and/or symptoms Patient A was suffering from and/or did not record the details of Patient A's consent and/or did not record whether a chaperone was offered to Patient A.

It is also alleged that between approximately June 2019 and approximately December 2019 Mrs Kirby entered into an inappropriate personal relationship with Patient A which then allegedly became a sexual relationship with Patient A.

It is alleged that when Mrs Kirby's personal relationship with Patient A deteriorated, she told Patient A that she was being monitored every time she attended the Centre, when this was not true.

Once Mrs Kirby notified her Employer of her personal relationship with Patient A, it is alleged that she made or implied statements, which were allegedly false. These allegedly included that she had originally met Patient A outside of work as their nurse and/or that her personal/sexual relationship did not commence/continue whilst she provided treatment to Patient A.

## Decision and reasons on facts

In reaching its decisions on the facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Mr Edwards on behalf of the NMC and the reflective statement written by Mrs Kirby.

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

The panel heard live evidence from the following witnesses called on behalf of the NMC:

- Patient A: The patient involved in the allegations at the Centre.
- Dr 1: General Practitioner (GP) for Safeguarding at Dorset Clinical Commissioning Group. She supported the Centre with the investigation into the allegations.
- Ms 1: Deputy Practice Manager at the Centre at the time of events.
- Ms 2: Practice Manager at the Centre and Mrs Kirby's line manager at the time of events.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor.

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

### **Charge 1**

1. On 08 July 2019, you carried out the examination listed in Schedule 1, which was not clinically justified.

### **Schedule 1**

Internal vaginal examination

**This charge is found proved.**

In reaching this decision, the panel took into account Dr 1's evidence that on reviewing Patient A's medical records and seeing the symptoms that were recorded on 8 July 2019, in her opinion, it was not clinically justified to carry out an internal vaginal examination. The panel also noted Patient A's evidence that she had been clear to Mrs Kirby that she felt she had symptoms relating to a Urinary Tract Infection (UTI). In Patient A's oral evidence, it was clear to the panel that she was not aware of blood in her urine and was not worried about vaginal bleeding which contradicts Mrs Kirby's statement to Dr 1 during the safeguarding investigation.

The panel noted Dr 1's contemporaneous report for the Dorset police relating to the allegations Mrs Kirby was facing in which she stated:

*"Taking into account this written information, as general practitioner, is of my opinion that a gynaecological examination was not required. A chaperone must always be offered and the outcome of the decision must be documented in the notes. The diagnosis of a UTI was correct as confirmed by the sample sent to the lab and the right treatment was given."*

Dr 1 also stated in her report:

*“Reflecting on this statement, one could argue that if [Patient A] was worried about vaginal bleeding and cancer recurrence, JK undertook the examination for reassurance purposes. However, there is an argument around JK’s being the right professional to undertake this examination. First of all, JK stated that they knew each other socially and secondly was JK trained to assess for cancer recurrence or was she only trying to exclude bleeding?”*

The panel also noted that the witness statement of Patient A and her oral evidence at this hearing corroborated the information in her police statement. Patient A stated in her police statement:

*“At no point was my cancer mentioned. I would have recalled if it was and would have gone directly to ... the cancer unit at Dorchester Hospital rather than go to the Medical Practice.”*

In her NMC witness statement Patient A states:

*“ I did not discuss with [Mrs Kirby] at this appointment that there was blood in my urine, that I had a vaginal bleed or ovarian cancer. I had no need to. I have no bleeding issues, I have not had any blood loss since the operation ...on 27 February 2019. .... On 10 April 2019, I was given an internal exam and told that I had healed well within days. The gynaecologist said I had healed well.”*

The panel further noted Mrs Kirby’s response to the allegations in her undated letter to Dr 1. It stated:

*“[Patient A] was concerned about the blood in her urine and the potential that this could be a vaginal bleed and indeed a recurrence of her cancer. [Patient A] was reassured that blood in her urine was consistent with a suspected UTI.”*

The panel decided to attach little weight to this statement by Mrs Kirby as it was written once she was aware of the allegations, as a response to Dr 1's investigation. Further, the statement is not supported by what was written contemporaneously in Patient A's medical records. On the balance of probabilities, the panel preferred Patient A's evidence and found charge 1 proved.

## **Charge 2**

2. Your conduct at Charge 1 above was sexually motivated.

### **This charge is found proved.**

In reaching this decision, the panel took into account the advice of the legal assessor in relation to sexual motivation. It noted that Patient A described a friendship with Mrs Kirby during the period of 2015 to 2018 in which she discussed her private life including her sexual orientation with her.

The panel noted that Patient A said she gave consent for Mrs Kirby to conduct the vaginal examination. The panel decided that it did not appear to be informed consent as Patient A did not fully understand why the vaginal examination was happening. The panel also noted from the evidence of Dr 1 that the examination was not clinically appropriate given the symptoms Patient A presented with at her appointment. It also noted the vulnerability of Patient A which Mrs Kirby would have been aware of as Patient A had consulted with Mrs Kirby over a number of years. [PRIVATE]

The panel also took into account that Mrs Kirby was potentially motivated by the pursuit of a future sexual relationship with Patient A. This is supported by the evidence of Patient A about the change in the nurse patient relationship between 2015-18 where information about their private lives and sexual relationships was shared during medical consultations at the Centre. The panel considered the alternative explanation that was given by Mrs Kirby that that she was undertaking the internal examination to reassure Patient A that it

was not a reoccurrence of her cancer. However, the panel found that in the light of the evidence provided by Patient A, this explanation was not plausible. It noted that Mrs Kirby did not document her reasoning for the vaginal examination in Patient A's medical records. Mrs Kirby also stated that she asked if Patient A wanted a colleague to carry out the vaginal examination, as she knew her socially, but that Patient A declined. The panel also noted that Mrs Kirby had not documented this in Patient A's medical records and that reference to being offered a colleague to undertake the vaginal examination did not occur in any of Patient A's written statements. The panel further noted from Patient A's evidence that Mrs Kirby did not fully close the privacy screen curtains whilst she changed for the vaginal examination, leaving her in Mrs Kirby's line of vision which made her feel uncomfortable. Mrs Kirby also did not offer Patient A a chaperone.

Dr 1 agreed that this was not normal practice. She stated that it was at the discretion of the patient to refuse a chaperone for a vaginal examination, but that it was best practice to document this refusal in the patient's medical records. She also explained that it was not usual for nurses to complete consultations with patients that they knew socially, the exception being emergency situations. The panel therefore determined that Mrs Kirby's actions were sexually motivated and found charge 2 proved.

### **Charge 3**

3. In the event that the examination listed in Schedule 1 was clinically justified, you kept insufficient patient records in relation to this in that you;
  - a. Did not record the reasons for this examination and/or
  - b. Did not record the gynaecological history and/or symptoms Patient A was suffering from and/or
  - c. Did not record the details of Patient A's consent and/or
  - d. Did not record whether a chaperone was offered to Patient A.

**This charge is found not proved.**

As the panel have found that the conduct listed in charge 1 was not clinically justified, there is no need to consider charge 3.

#### **Charge 4**

4. Between approximately June 2019 and approximately December 2019 you entered into an inappropriate personal relationship with Patient A.

#### **This charge is found proved.**

The panel noted that Patient A explained that she and Mrs Kirby had personal chats about their partners and sexual relationships during consultations at the Centre, which were scheduled as double appointments by Mrs Kirby to allow time for these conversations. The panel also took into account the contemporaneous evidence including the personal messages between Patient A and Mrs Kirby.

The panel noted the letter Mrs Kirby sent to the Centre on 15 October 2019. It stated

*“After a recent attempt by the above patient to blackmail me after a long friendship and short relationship...”*

The panel also noted the undated reflective statement of Mrs Kirby which stated:

*“The incident involved me developing a close friendship and short relationship with a patient registered at the Surgery where I was employed as Clinical Services Manager... In relation to the extent of a relationship, this was limited to kissing and cuddling.*

...

*Allowing a relationship to develop with Patient A not only compromised me professionally, I breached the professional confidence and trust that Patient A deserved as a patient. Reflection has facilitated an understanding of the power imbalance and I recognise that it is always the responsibility of the healthcare professional to manage and maintain appropriate boundaries. My behaviour was wrong, inappropriate and unprofessional. [sic]"*

The panel determined that you did enter into an inappropriate relationship with Patient A between approximately June 2019 and December 2019. The panel therefore found charge 4 proved.

### **Charge 5**

5. Between approximately June 2019 and approximately December 2019 you entered into a sexual relationship with Patient A.

**This charge is found proved.**

The panel took into account Mrs Kirby's reflective statement in which she stated:

*"Although the relationship developed consensually, I understand that as a healthcare professional I should have set and maintained clear sexual boundaries and not allowed the relationship to progress."*

In the same reflective statement Mrs Kirby states:

*"...I do however accept the regulatory concerns that have been raised regarding my relationship with Patient A. I transgressed sexual boundaries with a patient which is wrong, this will never be repeated."*

The panel noted Patient A's witness statement which contains examples of her sexual relationship with Mrs Kirby. She stated:



*“On 2 September 2019, I picked Julie up in the layby in the evening and had sex”.*

The panel also noted that Patient A’s oral evidence of having a sexual relationship with Mrs Kirby is consistent with what is written in her most contemporaneous statement as contained in the police report and her NMC witness statement.

The panel therefore found charge 5 proved.

### **Charge 6**

6. As your personal relationship with Patient A deteriorated, you told them that they were being monitored every time they attended the Centre, when this was not true.

**This charge is found proved.**

The panel noted Ms 2’s oral evidence in which she stated that the Centre was monitoring appointment schedules to ensure that Patient A was not seen by Mrs Kirby but they were not monitoring Patient A’s attendance at the Centre. Ms 2 in her NMC witness statement states that she had a call with Patient A about this matter and reassured her that the Centre was only monitoring the appointment schedules to ensure that Patient A was not booked to see Mrs Kirby for future appointments.

On the balance on probabilities, the panel found that Mrs Kirby told Patient A an exaggerated version of why there was ‘monitoring’ in place in order to deter her from visiting the Centre. The panel heard evidence that Mrs Kirby was concerned that Patient A would divulge their relationship to the GPs at the Centre and therefore had good reason to keep Patient A away from the Centre. The panel decided that it is more likely than not that Patient A believed Mrs Kirby when she told Patient A that her attendance at the Centre was being ‘monitored’. The panel preferred Patient A’s evidence.

The panel noted that there was no evidence on this subject from Mrs Kirby in her statements written for the local investigations provided to the panel by the NMC or her reflective statement.

The panel therefore found charge 6 proved.

### **Charge 7**

7. Your conduct at Charge 6 above was dishonest as it was motivated to dissuade Patient A from attending the Centre.

### **This charge is found proved.**

The panel determined that by exaggerating the degree of monitoring of Patient A, Mrs Kirby's motive was to deter her from attending the Centre and prevent Patient A from telling her colleagues about the sexual relationship between them. Mrs Kirby knew that Patient A was not being monitored every time she attended that Centre and that only the appointment bookings were being monitored. She therefore knew that this was an untrue statement. An ordinary decent person would believe that telling a patient an untrue and exaggerated version of events is dishonest.

Applying the appropriate two stage test set out in *Ivey v Genting* [2017] UKSC 67, the panel decided that Mrs Kirby was dishonest in her actions, and that her motivation was to dissuade Patient A from attending the Centre. The panel therefore found charge 7 proved.

### **Charge 8**

8. On notifying your Employer of your personal relationship with Patient A, you made or implied the following statements, which were false;
  - a. That you had originally met Patient A outside of your work as their nurse and/or

**This charge is found proved.**

The panel took into account that Mrs Kirby in her statements was clear that she knew Patient A from the Centre. The panel noted her reflective statement in which she stated

*“I appreciate I only informed my employers when it reached crisis point. I now realise I should have been open and honest and transparent with them before this occurred.”*

The panel then noted Patient A’s local statement to the police in which she stated:

*“When her work found out, Julie told the Medical Centre that we had known each other socially since 2007, rather than through her work in 2010, and I backed her up on that as I did not want to get her in trouble.”*

It also noted that in Patient A’s NMC witness statement she corroborated her earlier statement by stating:

*“I first met Julie in 2010 when she joined the practice. She was my new asthma nurse.”*

The panel then noted Ms 1’s witness statement in which she stated:

*“I also ascertained that the relationship was not conducted on the premises or whilst Julie was her nurse. Julie told me that she didn’t meet the patient through work (she said she was a friend of a friend). Julie went to great lengths to tell me that had not acted inappropriately with regards to her work.”*

The panel further noted Ms 2’s witness statement which also states:

*“Julie told me that she knew Patient A personally as Bridport is a small town and that she knew Patient A through a friend of a friend. There appeared to be a social link as to how Julie knew her”.*

The panel decided that on the balance of probabilities on the evidence before it, Mrs Kirby did make the false statement to her employer that she met Patient A outside of work. It therefore found charge 8 a) proved.

### **Charge 8**

- b. That your personal/sexual relationship did not commence/continue whilst you provided treatment to Patient A.

### **This charge is found proved.**

The panel noted that there is evidence that an appointment occurred on 8 July 2019. It noted Patient A's written and oral evidence, in which she explained that a further appointment occurred with Mrs Kirby on 29 or 30 August 2019, when Mrs Kirby telephoned Patient A and asked her to attend the Centre. At this appointment, their sexual relationship started.

Patient A stated:

*"I went to the medical centre on 29 or 30 August 2019 to see Julie. The receptionist said I couldn't see Julie. The receptionist was a bit stroppy but called Julie and she collected me. We walked to her office. Julie walked in front of me.*

*It was just me and Julie. Julie asked how I was and I said not too bad. Julie asked me what we were going to do. I assumed Julie meant, what are we going to do about the consultant. I said I don't know.*

*The conversation, then shifted. I don't know how it moved on. Julie started talking about her husband and her lecturer from Bournemouth University (Julie called him Mr 1).*

*Julie told me that she was still living with her husband and that she would tell her husband that she was going out with the girls when she was meeting up with Mr 1. Julie told me she had not had sex with her husband for about 2 years. I said "how boring". Julie replied, not really because I am having fantastic sex with Mr 1 (her lecturer).*

*She was excited when I said that I would be in a threesome with them. It was like she thought that she hit the jackpot. There was I was sitting in front her. She was giggly. She said that she couldn't wait to tell Mr 1. She said that she was going to message him.*

*During this appointment Julie touched my arm a few times, stroking it. Besides this we had no further physical contact.*

*It ended very nicely. She said that she was excited. She said that she would ring me or message me to meet up."*

The panel noted that there was no appointment recorded in Patient A's medical records on or around 29 or 30 August. However, Ms 2, in her oral evidence, explained that on 29 or 30 August, Mrs Kirby was on phased return from sick leave, and was only undertaking her role as the Clinical Services Manager. She was not undertaking clinical work. Therefore, she would not have been allocated a treatment room and would have had to see Patient A in a meeting room. Ms 2 also explained that as Mrs Kirby had instigated the meeting, as a follow up appointment for a referral, she should have documented the appointment in the system herself.

The panel determined that it was more likely than not that this meeting happened and that Mrs Kirby had initiated a sexual relationship at that meeting which continued in the weeks which followed.

On the basis of the evidence before it, the panel found charge 8 b) proved.

## **Charge 9**

9. Your conduct at Charge 8 above was dishonest because it was intended to minimise your culpability in relation to the relationship between you and Patient A.

**This charge is found proved.**

The panel noted Ms 1's witness statement in which she stated:

*"Julie went to great lengths to tell me that had not acted inappropriately with regards to her work."*

The panel also noted Ms 2's witness statement which stated:

*"Julie confirmed that she had never seen Patient A on the premises whilst they were in a relationship. Julie wanted to make it clear to us at that time that the surgery had not been compromised in any way. She had not breached any boundaries."*

*Julie told me that she knew Patient A personally as Bridport is a small town and that she knew Patient A through a friend of a friend. There appeared to be a social link as to how Julie knew her".*

The panel also noted Mrs Kirby's letter to the Centre dated 15 October 2019 in which she stated

*"I did not see Patient A as a patient during or even after things ended."*

However, it also notes that Mrs Kirby in her reflective statement admits that she had transgressed sexual boundaries with Patient A and admits that her behaviour was wrong and will never happen again.

The panel considered that there is evidence from Mrs Kirby's two colleagues that she told them a different story to what actually happened to minimise her culpability.

Mrs Kirby knew that she had met Patient A at the Centre in her capacity as Advanced Nurse Practitioner which included acting as her asthma nurse and that the relationship had commenced whilst she was still providing treatment to Patient A. As Clinical Services Manager and a nurse, Mrs Kirby would have known that this relationship between a nurse and her patient was wrong. The panel heard from Ms 2 that Mrs Kirby was the 'go to' nurse for advice on issues regarding professional nursing standards in her role as Clinical Services Manager. The panel concluded that any ordinary decent person would consider telling employers an incomplete version of the situation in order to hide your culpability as dishonest.

Therefore, having again applied the appropriate test, charge 9 is found 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 Mrs Kirby'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, Mrs Kirby's 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.'

Mr Edwards invited the panel to take the view that the facts found proved amount to misconduct. The panel had regard to 'The Code: Professional standards of practice and behaviour for nurses and midwives (2015' (the Code) in making its decision.

Mr Edwards identified the specific, relevant standards where Mrs Kirby's actions amounted to misconduct. He submitted that Mrs Kirby's actions did fall significantly short of the standards expected of a registered nurse.

### **Submissions on impairment**

Mr Edwards 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. He referred to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin).

Mr Edwards submitted that Mrs Kirby's fitness to practise is currently impaired and there is nothing before the panel to demonstrate a reduced risk to the public if she were allowed to practise unrestricted. He also submitted that Mrs Kirby was dishonest to Patient A and her colleagues, and that dishonesty is difficult to remediate. Furthermore, he submitted that



she has not shown full insight into her actions. He submitted that there is very limited evidence of insight, acceptance, or remorse from Mrs Kirby and that such serious attitudinal issues are also difficult to remediate. He explained that there still is a risk of repetition, and that a finding of current impairment should be made on both public interest and public protection grounds.

The panel 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 Code.

The panel was of the view that Mrs Kirby's actions did fall significantly short of the standards expected of a registered nurse, especially a nurse in a leadership role, and that Mrs Kirby's actions amounted to a breach of the Code. Specifically:

### **Prioritise People**

*You put the interests of people using or needing nursing or midwifery services first. You make their care and safety your main concern and make sure that their dignity is preserved and their needs are recognised, assessed and responded to. You make sure that those receiving care are treated with respect, that their rights are upheld ...*

**1** Treat people as individuals and uphold their dignity

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

**1.2** make sure you deliver the fundamentals of care effectively

**4** Act in the best interests of people at all times

**4.2** make sure that you get properly informed consent and document it before carrying out any action

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

### **To promote professionalism and trust**

*You uphold the reputation of your profession at all times. You should display a personal commitment to the standards of practice and behaviour set out in the Code. You should be a model of integrity and leadership for others to aspire to. This should lead to trust and confidence in the professions from patients, people receiving care, other health and care professionals and the public.*

## **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** act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment

**20.3** be aware at all times of how your behaviour can affect and influence the behaviour of other people

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

**20.6** stay objective and have clear professional boundaries at all times with people in your care (including those who have been in your care in the past), their families and carers

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

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel found that Mrs Kirby's actions did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct. It noted that Mrs Kirby was the Clinical Service Manager at the Centre and was managing other nurses and healthcare assistants and should have acted as a role model. The panel determined that Mrs Kirby's actions would be regarded as deplorable by fellow registrants and the public in that they involved a number of breaches of the Code including dishonesty, breach of trust, abuse of power and sexual misconduct, which impacted upon a vulnerable patient. The panel further noted that Mrs Kirby minimised her culpability with regards to her relationship with Patient A and covered up the full extent of her misconduct to her employers.

### **Decision and reasons on impairment**

The panel next went on to decide if as a result of the misconduct, Mrs Kirby'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 and to maintain professional boundaries. 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 heard that Patient A suffered emotional and psychological harm requiring counselling, as a result of Mrs Kirby's misconduct. Mrs Kirby's misconduct has breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute. The panel 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 noted that Mrs Kirby had voluntarily absented herself from this hearing and has not provided any recent reflections to this panel. The panel took account of Mrs Kirby's

undated reflective statement where she details undertaking online training and reading articles relating to maintaining professional boundaries. However, the panel noted that it has not had sight of any evidence of Mrs Kirby's online training in terms of certificates of attendance or reflective pieces to demonstrate what she has learnt to strengthen her practice. The panel also noted that Mrs Kirby has not shown any insight into how her actions impacted on her colleagues or the nursing profession.

The panel noted that Mrs Kirby has shown fluctuating levels of acceptance of her culpability in relation to her relationship with Patient A.

The panel noted that there is a thread of blame and deflection from herself throughout Mrs Kirby's written evidence and in her oral accounts given to her colleagues. The panel noted this in the text messages sent to Patient A in March 2020, in her statement for the safeguarding investigation and in her oral account to her colleagues. The panel noted the undated letter to Dr 1 stating:

*"Therefore the allegation made against me is completely false. Additionally, I consider this to be a vindictive and personal attack as a result of me declining a relationship with [Patient A] in September 2019."*

The panel further noted that in Mrs Kirby's undated reflective statement, she demonstrated some insight into her actions as she stated:

*"Although the relationship developed consensually, I understand that as a healthcare professional I should have set and maintained clear sexual boundaries and not allowed the relationship to progress. Allowing a relationship to develop with [Patient A] not only compromised me professionally, I breached the professional confidence and trust that [Patient A] deserved as a patient. Reflection has facilitated an understanding of power imbalance and I recognise that it is always the responsibility of the healthcare professional to manage and maintain appropriate boundaries. My behaviour was wrong, inappropriate and unprofessional."*

*I am aware that in hindsight I should not in any capacity have developed anything other than a professional relationship with my patient I am disappointed in myself that I acted unprofessionally...”*

The panel noted that Mrs Kirby initially denied her actions in the local investigations but appeared to show some insight in the undated reflective piece. However, most recently when contacted on the first day of this hearing regarding attendance, Mrs Kirby has been inconsistent and shown a lack of insight by stating the following:

*“I consider the procedure will be injurious to my [PRIVATE] wellbeing as has the whole situation following malicious and spurious allegations.”*

The panel is of the view that, on the basis of the evidence before it, there is a risk of repetition based on Mrs Kirby’s lack of insight into her actions. The panel therefore decided 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 determined that a finding of impairment on public interest grounds is also required.

Having regard to all of the above, the panel was satisfied that Mrs Kirby’s fitness to practise is currently impaired.

## **Sanction**

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Mrs Kirby off the register. The effect of this order is that the NMC register will show that Mrs Kirby has been struck-off the register.

In reaching this decision, the panel had regard to all the evidence that has been adduced in this case and to the Sanctions Guidance (SG) published by the NMC. The panel accepted the advice of the legal assessor.

## **Submissions on sanction**

Mr Edwards informed the panel that the NMC had advised Mrs Kirby that it would seek the imposition of a striking-off order if it found her fitness to practise currently impaired. He submitted that the dishonesty in this case related to not only to sexual misconduct but also to Mrs Kirby's attempts to minimise her culpability with regards to her relationship with Patient A.

Mr Edwards explained that a striking-off order is the most appropriate sanction in this case as it involves serious attitudinal issues and a real risk of repetition.

## **Decision and reasons on sanction**

Having found Mrs Kirby'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:

- Mrs Kirby's significant lack of insight.
- Patient A suffering emotional and psychological harm from Mrs Kirby's actions.
- Patient A was a vulnerable patient and Mrs Kirby was aware of this.
- Serious breach of Patient A's trust by Mrs Kirby.
- Serious abuse of her position as Mrs Kirby was a part of the leadership team at the Centre.
- Mrs Kirby misled her employers by minimising her culpability regarding her relationship with Patient A.

The panel also took into account the following mitigating features:

- Mrs Kirby worked at the practice for over ten years with no issues raised.
- Mrs Kirby's former colleagues explained that she was highly regarded as a nurse within the Centre.
- [PRIVATE]

The panel found that this was a serious case involving dishonesty and sexual misconduct of a vulnerable patient over an extended period of time. This case is therefore at the upper level of seriousness. Mrs Kirby abused her position of trust and power and covered up the extent of her misconduct to her employers when things went wrong in order to preserve her career and limit her culpability. Further, she blamed Patient A rather than accept responsibility herself.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the nature and seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the nature and seriousness of the case, and the public protection and public interest issues identified, an order that does not restrict Mrs Kirby's practice would not be appropriate in



the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Mrs Kirby's misconduct was at the upper end of the spectrum and that a caution order 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 impose a caution order.

The panel next considered whether placing conditions of practice on Mrs Kirby's registration would be a sufficient and appropriate response. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case and the fact that it involves serious attitudinal issues. Mrs Kirby showed very little insight and has not engaged with the proceedings. The panel also noted that Mrs Kirby has said she does not intend to practise as a nurse again. Furthermore, the panel concluded that the placing of conditions on Mrs Kirby's registration would not be practicable or adequately address the seriousness of this case and would not protect the public.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that suspension order may be appropriate where some of the following factors are apparent:

- a single instance of misconduct but where a lesser sanction is not sufficient
- no evidence of harmful deep-seated personality or attitudinal problems
- no evidence of repetition of behaviour since the incident

In this case, the conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse and breached a number of the fundamental tenets of the profession. The panel noted that this was not a one-off

incident but continued over a considerable period of time. The panel found that Mrs Kirby exhibited serious attitudinal issues particularly in relation to her abuse of trust. The panel also found that she minimised her culpability, gave an incomplete version of events to her employers and sought to blame Patient A rather than take responsibility for her actions. Mrs Kirby has shown very limited insight, which has been inconsistent, and the panel found that there was a risk of repetition of her behaviour in the future. Therefore, Mrs Kirby's actions are fundamentally incompatible with her remaining on the register.

Therefore, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction in this case.

Finally, in looking at a striking-off order, the panel took note of the following paragraphs of the SG:

- *Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?*
- *Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?*
- *Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?*

There were serious concerns about Mrs Kirby's professionalism raised in this case and given that the panel found that her breaches of the Code fell into the upper end of the serious category, the panel determined that striking Mrs Kirby off the register would be the only sanction which would be sufficient to protect patients and the public, uphold professional standards and maintain public confidence in the nursing profession.

The panel also took account of the SG in relation to the dishonesty found. This case involved several examples of the forms of dishonesty which are most likely to call into

question whether a nurse, midwife or nursing associate should be allowed to remain on the register. They are:

- deliberately breaching the professional duty of candour by covering up when things have gone wrong, especially if it could cause harm to patients
- misuse of power
- vulnerable victims
- direct risk to patients

The panel also noted the SG in relation to sexual misconduct which explained that that this type of misconduct will be particularly serious if the nurse has abused the special position of trust that they hold as a registered nurse. The panel determined that Mrs Kirby's actions were a breach of her position of trust and were a significant departure from the standards expected of a registered nurse. The panel concluded that Mrs Kirby's actions are fundamentally incompatible with her remaining on the register. Mrs Kirby's actions have brought the profession into disrepute and have adversely affected the public's view of how a registered nurse should conduct herself. The panel was of the view that the findings in this case demonstrate that Mrs Kirby's actions were extremely serious and to allow her to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors and all the evidence before it, the panel determined that the only appropriate and proportionate sanction is that of a striking-off order. This order will mark the importance of maintaining public confidence in the profession and will send a clear message to the public and the profession about the standards of behaviour required of a registered nurse.

This will be confirmed to Mrs Kirby in writing.

### **Interim order**

As the striking-off 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 Mrs Kirby's own interest until the striking-off sanction takes effect.

### **Submissions on interim order**

The panel took account of the submissions made by Mr Edwards. He submitted that an 18 months interim suspension order would be appropriate in this case and would be in line with the findings made by the panel.

The panel accepted the advice of the legal assessor.

### **Decision and reasons on interim order**

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

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. The panel therefore imposed an interim suspension order for a period of 18 months.

If no appeal is made, then the interim suspension order will be replaced by the substantive striking off order 28 days after Mrs Kirby is sent the decision of this hearing in writing.

That concludes this determination.

