

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

**Substantive Hearing
24 August – 2 September 2022**

Virtual Hearing

Name of registrant: Jacqueline Denise Gardner

NMC PIN: 75J1530E

Part(s) of the register: RN1: Adult nurse, level 1 (1 December 2000)

Relevant Location: Wolverhampton

Type of case: Misconduct

Panel members: Yvonne O'Connor (Chair, registrant member)
Kathryn Smith (Registrant member)
Alex Forsyth (Lay member)

Legal Assessor: Robin Hay

Hearings Coordinator: Amira Ahmed
Elena Nicolaou (25 August 2022)

Nursing and Midwifery Council: Represented by Shekyena Marcelle-Brown, Case Presenter

Mrs Gardner: Not present and not represented

Facts proved: All

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 Gardner was not in attendance and that the Notice of Hearing letter had been sent to Mrs Gardner's registered email address on 18 July 2022.

Ms Marcelle-Brown 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 Notice of Hearing provided details of the allegation, the time, dates and venue of the hearing and, amongst other things, information about Mrs Gardner'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 the information available, the panel was satisfied that Mrs Gardner 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 Gardner

The panel next considered whether it should proceed in the absence of Mrs Gardner. Ms Marcelle-Brown submitted that the panel should continue in the absence of Mrs Gardner as she had voluntarily absented herself.

Ms Marcelle-Brown said that this matter was scheduled for a substantive hearing some time ago and Mrs Gardner did not attend, and she did not ask for an adjournment. She said that although the NMC case has changed slightly this does not affect proceeding in Mrs Gardner's absence today.

Ms Marcelle-Brown said that there had been no engagement at all by Mrs Gardner with the NMC in relation to these proceedings today and, as a consequence, there was no reason to believe that an adjournment would secure her attendance on some future occasion. She referred the panel to the last email correspondence from Mrs Gardner on 23 July 2018 which stated:

“I am currently at an out patient appointment and will be here all day, [PRIVATE] It is my intention not to revalidate and obviously will not be working as a nurse...”

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

The panel has decided to proceed in the absence of Mrs Gardner. In reaching this decision, the panel had regard to Rule 21 and to the submissions of Ms Marcelle-Brown. It accepted the advice of the legal assessor. It has 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 had regard to the following matters:

- No application for an adjournment has been made by Mrs Gardner;
- Mrs Gardner has not engaged with the NMC since 2018 and has not responded to any of the letters sent to her about this hearing;
- There is no reason to suppose that adjourning would secure her attendance at some future date;
- Witnesses will be attending to give evidence and not proceeding may inconvenience the witnesses, their employer(s) and those involved in clinical practice and the clients who need their professional services;
- The charges relate to events that occurred in 2018;
- 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 Gardner in proceeding in her absence. Although the evidence upon which the NMC relies has been sent to her, she has made no response to the allegations. Mrs Gardner will not be able to challenge the evidence adduced by the NMC, nor will she be able to give evidence. However, this can be mitigated. The panel can make allowance for the fact that the evidence will not be tested by cross-examination and, it can explore any inconsistencies in the evidence. Furthermore, the limited disadvantage is the consequence of Mrs Gardner's decision to absent herself from the hearing and to be unrepresented. Moreover, she has not provided evidence nor made written representations.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Mrs Gardner.

Details of charge (as amended)

That you, a registered nurse,

- 1) Breached **an Interim** Conditions of Practise Order which was first imposed on 15 December 2017 by the ~~Fitness to Practise Committee~~ **Investigating Committee** of the Nursing & Midwifery Council in that you
 - a) Around July/August 2018, breached condition 5 in that you commenced employment as a business manager which included clinical duties and/or required NMC registration and you did not inform the NMC.
 - b) Around July/August 2018, breached condition 8, in that you commenced employment as a business manager which included clinical duties and/or NMC registration and you did not **provide** information **to** your employer that you were

subject to an interim conditions of practice order and/or provide them with the conditions.

- 2) Your actions set out at Charge 1a) and or 1b) above were dishonest in that by failing to make the relevant notifications you hoped that you would either obtain/retain employment more easily and/or carry out that employment without restriction.

- 3) On 24 October 2018 failed to cooperate with an investigation in to your fitness to practice when, during a conversation with Mr A, of the Nursing & Midwifery Council who said he was trying to contact you, you failed to identify yourself.

- 4) On 24 October 2018, failed to cooperate with an investigation in to your fitness to practice when, in response to an enquiry by Mr A, an employee of the Nursing & Midwifery Council, emailed Mr A;
 - a) from Colleague A's email account without identifying that it was you and thus representing that the email was sent by Colleague A and

 - b) provided misleading information in the email referred to in Charge 4a) in that you said you were not working 'in any clinical capacity' when your role required clinical duties and NMC registration.

- 5) Your actions at Charge 3) and/or Charge 4a) and/or Charge 4b) above were dishonest as you were motivated to prevent the NMC identifying that you were working in breach of the interim conditions of practice order and/or frustrate or delay regulatory proceedings

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

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

At the outset of the hearing, Ms Marcelle-Brown made an application that this case should be held partly in private [PRIVATE]. The application was made pursuant to Rule 19.

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.

The panel determined to rule on whether to go into private session [PRIVATE] as and when such issues are raised in order to maintain privacy and confidentiality.

Decision and reasons on application to admit hearsay evidence

Ms Marcelle-Brown applied under Rule 31 for the witness statement of Mr A to be admitted in evidence. Mr A was not present at this hearing and, whilst the NMC had made efforts to ensure his attendance, he was unable to attend the hearing [PRIVATE]

In preparing for this hearing, the NMC had indicated to Mrs Gardner that it was the NMC's intention for Mr A to give evidence. Despite knowledge of the nature of the evidence to be given by Mr A, Mrs Gardner has not attended this hearing. Ms Marcelle-Brown therefore submitted that it would not be unfair to Mrs Gardner if Mr A's evidence were admitted as hearsay.

Ms Marcelle-Brown submitted that there is a good reason for Mr A not being available [PRIVATE] and he is not expected to be able to do so before this substantive hearing concludes. She submitted that Mr A's evidence is relevant as he was a direct witness who had a relevant telephone conversation with Mrs Gardner. She also submitted that the evidence is relevant because it deals with charges 3, 4 and consequently 5.

The panel has heard that Mr A's statement had been prepared in anticipation of being used in these proceedings and contained the paragraph, 'This statement ... is true to the best of my information, knowledge and belief' and signed by him.

Ms Marcelle-Brown referred the panel to the case of *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin). She submitted that if this evidence is admitted the panel will doubtless give it appropriate weight.

In reaching its decision the panel considered all the information before it together with the submissions of Ms Marcelle-Brown. It accepted the advice of the legal assessor. The panel had well in mind the relevant factors for its consideration set out in the case of *Thorneycroft v NMC*:

- (i) whether the statements were the sole and decisive evidence in support of the charges;*
- (ii) the nature and extent of the challenge to the contents of the statements;*
- (iii) whether there was any suggestion that the witnesses had reasons to fabricate their allegations;*
- (iv) the seriousness of the charge, taking into account the impact which adverse findings might have on the Appellant's career;*
- (v) whether there was a good reason for the non-attendance of the witnesses;*
- (vi) whether the Respondent had taken reasonable steps to secure their attendance; and*
- (vii) the fact that the Appellant did not have prior notice that the witness statements were to be read.*

In regard to the *Thorneycroft* factors the panel was satisfied that the evidence of Mr A was not the sole and decisive evidence in support of the charges. The panel was aware that Mrs Gardner had been provided with a copy of Mr A's statement and, as the panel had already determined, she had chosen voluntarily to absent herself from these proceedings and therefore would not be in a position to cross-examine this witness. Further, the panel was satisfied that Mr A as an Investigator for the NMC was objective and there was

nothing to suggest that he had fabricated the information. The panel accept that the charges include allegations of dishonesty which may have a significant impact on Mrs Gardner's career. The panel were satisfied that there was a good reason for the non-attendance of Mr A and had heard that the NMC had taken reasonable steps to secure his attendance. The panel further accepted that Mrs Gardner was only notified today of this application. However, the panel heard that Mr A's unavailability was only made known to the relevant NMC team shortly before the start of the hearing.

The panel considered whether Mrs Gardner would be disadvantaged if the hearsay evidence of Mr A is admitted.

There was also public interest in the issues being explored fully which supported the admission of this evidence into the proceedings.

In these circumstances, the panel was satisfied that this evidence was relevant and that it would not be unfair to Mrs Gardner if it were admitted. The panel will of course give appropriate weight to this evidence and will bear in mind that it will not be tested before it.

Decision and reasons on application to amend the charge

Ms Marcelle-Brown made an application to amend the wording of charge 1 (b).

The proposed amendment was to amend a typographical error as the words 'provide' and 'to' are missing from the charge. It was submitted by Ms Marcelle-Brown that the proposed amendment would provide clarity and more accurately reflect the evidence:

b) Around July/August 2018, breached condition 8, in that you commenced employment as a business manager which included clinical duties and/or NMC registration and you did not **provide** information **to** your employer that you were

subject to an interim conditions of practice order and/or provide them with the conditions.

Further, the panel identified that, for the sake of clarity, the stem of charge 1 should read:

- 1) 'Breached **an Interim** Conditions of Practise Order which was first imposed on 15 December 2017 by the ~~Fitness to Practise Committee~~ **Investigating Committee** of the Nursing & Midwifery Council in that you...

The panel accepted the advice of the legal assessor and had regard to Rule 28.

The panel was satisfied that the proposed amendments were cosmetic and that no injustice would arise if they were made. The panel therefore made the appropriate amendments.

Background

The charges arose whilst Mrs Gardner was employed as a registered nurse by First Call Healthcare Ltd (the Agency). It is alleged that Mrs Gardner breached an interim conditions of practice order which was first imposed on 15 December 2017 by the Investigating Committee of the NMC. It is alleged that around July/August 2018, Mrs Gardner breached condition 5 by commencing employment as a business manager which included clinical duties and/or required NMC registration and she did not inform the NMC.

Further around July/August 2018, Mrs Gardner breached condition 8, in that she allegedly commenced employment as a business manager which included clinical duties and/or required an NMC registration and did not provide information to her employer that she was subject to an interim conditions of practice order and/or provide them with the conditions.

Further, Mrs Gardner's actions above were alleged to be dishonest in that by failing to make the relevant notifications she hoped that she would either obtain/retain employment more easily and/or carry out that employment without restriction.

It is alleged that on 24 October 2018 Mrs Gardner failed to cooperate with an investigation into her fitness to practise when, during a conversation with Mr A, of the Nursing & Midwifery Council who said he was trying to contact her, she failed to identify herself. She then provided misleading information to Mr A by sending an email from an email account that was not hers, stating that Mrs Gardner was not working 'in any clinical capacity' although her role required clinical duties and an NMC registration.

It is alleged that Mrs Gardner's actions were dishonest in that she was motivated to prevent the NMC identifying that she was working in breach of the interim conditions of practice order and/or to frustrate or delay regulatory proceedings.

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 Marcelle-Brown. 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:

- Ms 1: Owner of First Call Healthcare Ltd
where the charges arose.

- Mr 2: Investigation Manager at the NMC at the time of events.

The panel also took into account the hearsay evidence of the following witness:

- Mr A: Investigator at the NMC at the time of events

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

Charge 1

1. Breached **an Interim** Conditions of Practise Order which was first imposed on 15 December 2017 by the ~~Fitness to Practise Committee~~ **Investigating Committee** of the Nursing & Midwifery Council in that you
 - a) Around July/August 2018, breached condition 5 in that you commenced employment as a business manager which included clinical duties and/or required NMC registration and you did not inform the NMC.

This charge is found proved.

In reaching this decision, the panel took into account Ms 1's witness statement and her evidence in which she said that a registered nurse qualification was required for the role that Mrs Gardner had accepted as this role included 'clinical duties' which involved interviewing registered nurses for employment and conducting investigations relating to clinical practice. She said that Mrs Gardner was aware of this when accepting the role.

There was before the panel email correspondence between Mrs Gardner and Ms 1 on 10 July 2018 in which Ms 1 stated:

“Great talking with you

I would be delighted if you consider joining the management team at First Call Healthcare.

...

Requirements NMC registration”

Mrs Gardner responded on 17/18 July 2018:

“Thank you [Ms 1], I'm really looking forward to being part of the First Call team again. As you would expect I will be starting my 'homework' to gather information. Once again thank you for the opportunity.”

Mr A's evidence was that despite several attempts to contact Mrs Gardner during July/August 2018 he was unable to confirm her current employment status. It was not until a telephone call on 24 October 2018 to Mrs Gardner's previous employer 'R care' that it was established she was working for an agency called First Call.

In the light of this evidence the panel was satisfied that Mrs Gardner did not inform the NMC as required that she had commenced employment as a business manager with 'clinical' duties'.

The panel therefore determined this charge is found proved.

Charge 1

b) Around July/August 2018, breached condition 8, in that you commenced employment as a business manager which included clinical duties and/or NMC registration and you did not provide information to your employer that you were

subject to an interim conditions of practice order and/or provide them with the conditions.

This charge is found proved.

Ms 1's evidence was that Mrs Gardner did not tell her employer that she was subject to an interim conditions of practice order. She said that Mrs Gardner told her that there were some 'issues' with her previous employment and that she had been referred to the NMC but that it was at an early stage and she would keep Ms 1 informed of any developments.

Ms 1 further said that had she been made aware that Mrs Gardner was subject to an interim conditions of practice order, she would have expected this to have been the main subject of discussion during Mrs Gardner's interview and that everything else would be secondary. Ms 1 also said that she was not provided with a copy of the conditions in the interim conditions of practice order by Mrs Gardner. She said that it was provided to her later by the NMC.

Mr 2 in his evidence said that on 8 November 2018 he telephoned Ms 1 and asked if she had been aware of the interim conditions of practice order, and that she confirmed that she was not aware of this. The panel found that this corroborates Ms 1's evidence.

The panel therefore found charge 1 (b) proved.

Charge 2

2. Your actions set out at Charge 1a) and or 1b) above were dishonest in that by failing to make the relevant notifications you hoped that you would either obtain/retain employment more easily and/or carry out that employment without restriction.

This charge is found proved.

Mrs Gardner did not inform the NMC that she had taken a role that included clinical responsibilities and required an NMC registration. The panel was satisfied that by failing to do so Mrs Gardner had deliberately set out to deceive the NMC. In this regard the panel had in mind the following email exchanges.

An email sent by Mrs Gardner to Mr A on 23 July 2018 stating:

“It is my intention not to revalidate and obviously will not be working as a nurse...”

This email was sent despite Mrs Gardner having already accepted a clinical role with the Agency which she knew required NMC registration.

A later email exchange on 15 August 2018 between Mrs Gardner and her former employer at R care in which her employer asked for some clarification as requested by the NMC stated:

“Hi I have just been told you have resigned your post with us. I have just had the NMC contact me today asking for your contact details as they wish to ring you. They also want to know if your still working as a nurse. Can you confirm both these questions”

Mrs Gardner responded:

“I'm not working as a nurse or in any kind of care role. I'm not working in any kind of care facility”. [sic]

This email was also sent on 15 August 2018 by Mrs Gardner despite her having commenced employment in a post that included a clinical role with the Agency on 6 August 2018.

The panel concluded that Mrs Gardner did this in order to prevent the NMC from knowing that she had accepted this post and to avoid the risk that the NMC would inform her employer of the restrictions on her practice.

In the light of its findings under charge 1 (b) the panel concluded that Mrs Gardner had deliberately misled her employers by accepting the additional clinical responsibilities and by not informing them of the restrictions on her practice. Further, that she did so in order to secure the role she was being offered. The panel therefore determined that in these circumstances Mrs Gardner had acted dishonestly.

There was evidence before an NMC panel reviewing Mrs Gardner's interim conditions of practice order that she had complied previously with the conditions. It was clear to today's panel that Mrs Gardner knew of the need to provide information about her interim conditions of practice order as she had previously done so when employed at R care.

The panel therefore could find no reason for Mrs Gardner failing to tell her employer of the conditions other than to obtain the offer of employment.

The panel has determined that Mrs Gardner's actions in 1 (a) and 1(b) were dishonest. It therefore found charge 2 proved.

Charge 3

3. On 24 October 2018 failed to cooperate with an investigation in to your fitness to practice when, during a conversation with Mr A, of the Nursing & Midwifery Council who said he was trying to contact you, you failed to identify yourself.

This charge is found proved.

Mr A's evidence was that in a telephone call on 24 October 2018 he spoke to someone who answered to the name of 'Jacqui'. However, when he mentioned Mrs Gardner's full

name as part of his enquiry, the person to whom he was speaking did not identify herself as Mrs Gardner.

Mr 2 in his evidence described his telephone conversation with Mrs Gardner on 23 November 2018. He produced his telephone note of the call:

“I asked if she'd spoken to [Mr A] before and she said she wasn't sure. I asked if she'd spoken to [Mr A] recently and not given her name, as she had with me just now, and she admitted she had.”

In the light of Mrs Gardner admission, the panel found that she did fail to cooperate with the NMC by not identifying herself.

The panel therefore found this charge proved.

Charge 4

4. On 24 October 2018, failed to cooperate with an investigation in to your fitness to practice when, in response to an enquiry by Mr A, an employee of the Nursing & Midwifery Council, emailed Mr A;
 - a) from Colleague A's email account without identifying that it was you and thus representing that the email was sent by Colleague A and

This charge is found proved.

Mr A's evidence was that following the telephone conversation referred to under charge 3 he received an email on 24 October 2018, from the email account of colleague A which stated:

“Further to the earlier phone call I can confirm that Jacqueline Gardner has worked for First Call healthcare since August 6th 2018.”

Ms 1 in her evidence said that colleague A had left the organisation and could not have sent the email. Ms 1 confirmed that Mrs Gardner had been given access to colleague A’s email account so that she could review relevant information in relation to the clinical issues Mrs Gardner was required to address. She further confirmed that Mrs Gardner had her own employment email address.

Mr 2 in evidence referred to his telephone note dated 23 November 2018 which stated:

“I asked if she had then sent [Mr A] an email from her retired colleague [colleague A] email account, and she said that she had done. The registrant said "I've been really stupid" and apologised. I said that it was important to be open and honest and engage with us to help us progress our case, and the registrant said she understood and she was sorry.”

The panel was satisfied that Mrs Gardner did send this email using colleague A’s email address. The panel therefore found this charge proved.

Charge 4

- b) provided misleading information in the email referred to in Charge 4a) in that you said you were not working ‘in any clinical capacity’ when your role required clinical duties and NMC registration.

This charge is found proved.

The email that the panel has found was sent by Mrs Gardner from colleague A’s email address to Mr A, stated:

“Further to the earlier phone call I can confirm that Jacqueline Gardner has worked for First Call healthcare since August 6th 2018. She is not working in any clinical capacity within any of the services, but works within the office environment”

The panel have already determined that the role being undertaken by Mrs Gardner included clinical responsibility. Indeed, Ms 1 in her evidence said that the additional role Mrs Gardner had been offered and accepted included clinical duties and therefore required an NMC registration.

The panel therefore found this charge proved.

Charge 5

5. Your actions at Charge 3) and/or Charge 4a) and/or Charge 4b) above were dishonest as you were motivated to prevent the NMC identifying that you were working in breach of the interim conditions of practice order and/or frustrate or delay regulatory proceedings

This charge is found proved.

The panel has found under charges 3, 4 (a) and 4(b), that Mrs Gardner had failed to identify herself, misrepresented herself as colleague A and gave the NMC inaccurate information about her role.

The panel is satisfied that Mrs Gardner did this in order to prevent the NMC identifying that she was working in breach of the interim conditions of practice order and to frustrate the regulatory proceedings that could result from such a breach.

The panel has therefore concluded that her actions under charges 3, 4(a) and 4(b) were dishonest.

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 Gardner'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 Gardner's fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

Ms Marcelle-Brown referred 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 Marcelle-Brown submitted that the facts found proved amount to misconduct. She submitted that the panel should have regard to the terms of 'The Code: Professional standards of practice and behaviour for nurses and midwives 2015' (the Code) and the NMC guidance on seriousness and dishonesty in making its decision.

Ms Marcelle-Brown identified the specific, relevant standards where Mrs Gardner's actions amounted to misconduct. She submitted that in acting dishonestly Mrs Gardner's conduct fell significantly short of that expected of a registered nurse.

Submissions on impairment

Ms Marcelle-Brown referred to 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 Marcelle-Brown submitted that there is evidence that Mrs Gardner has attitudinal issues as she continued to try to deceive the NMC and her employers over a sustained period. She said Mrs Gardner has shown no evidence of insight, remorse or remediation. Further Ms Marcelle-Brown said that the fact that Mrs Gardner has not provided any reflection into her actions and what she would do differently shows that risk of repetition remains.

Ms Marcelle-Brown submitted that Mrs Gardner breached fundamental tenets of the nursing profession namely honesty and integrity. She submitted that Mrs Gardner's fitness to practice is currently impaired on public protection and public interest 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 terms of the Code.

The panel concluded that Ms Gardner's actions did fall significantly short of the standards expected of a registered nurse and amounted to breaches of the Code. Specifically:

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...

23 Cooperate with all investigations and audits

23.3 tell any employers you work for if you have had your practice restricted or had any other conditions imposed on you by us or any other relevant body

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. The panel found that in:

- a) failing to notify the NMC that she had accepted a post that required an NMC registration and
- b) failing to notify her employer of the interim conditions of practice order,

she was in breach of that order which the panel has concluded is a serious matter. The panel considered the NMC's guidance on seriousness which states that serious misconduct which is more difficult to put right includes:

“deliberately using false qualifications or giving a false picture of employment history which hides clinical incidents in the past, not telling employers that their right to practise has been restricted or suspended, practising or trying to practise in breach of restrictions or suspension imposed by us”

The panel concluded that Mrs Gardner's breach of the interim conditions of practice order, her failure to cooperate with the investigation and misleading the NMC and her employer

amounts to misconduct and this misconduct is serious and are significant departures from the standards expected of a registered nurse.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, Mrs Gardner's fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. 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 finds that Mrs Gardner failed to notify her employer of the restrictions on her practice and therefore placed patients at risk of harm. The interim conditions of practice order was imposed by the NMC in order to protect the public by applying a degree of oversight to Mrs Gardner in her practice. By failing to notify her employers Mrs Gardner prevented the interim conditions of practice order being applied and therefore placed patients at a potential risk of harm. The panel also found that Mrs Gardner's misconduct had breached fundamental tenets of the nursing profession namely honesty and integrity and therefore brought its reputation into disrepute. The panel has of course found that Mrs Gardner has acted dishonestly. It was satisfied that confidence in the nursing profession would be significantly undermined if its regulator did not find charges relating to dishonesty serious.

The panel having decided that all four limbs in the Shipman test are engaged, it considered whether there would be any repetition. In this regard, the panel asked itself three questions. First, whether Mrs Gardner's conduct is easily remediable; second,

whether she has remedied her misconduct; third, whether she is highly unlikely to repeat her misconduct.

The panel has concluded that Mrs Gardner's conduct indicated deep seated attitudinal issues and that her actions are not easily remediable as she repeated her behaviour over a period of time. The panel then had regard to the fact that Mrs Gardner has provided no evidence of remorse, strengthening of her practice or insight into her failings. In these circumstances the panel decided that there is a risk of repetition.

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

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

The panel determined that a finding of impairment on public interest grounds is also required because members of the public would be concerned that a nurse who had deceived her employers and her regulator would be allowed to practice unrestricted.

Having regard to all the above, the panel was satisfied that Mrs Gardner's fitness to practise is currently impaired.

Sanction

The panel next considered what if any sanction to impose. It has decided to make a striking-off order. It directs the registrar to strike Mrs Gardner off the register. The effect of this order is that the NMC register will show that Mrs Gardner has been struck-off the register.

In reaching this decision, the panel has had regard to all the evidence that has been adduced together with the submissions of Ms Marcelle-Brown and the Sanctions Guidance (SG) published by the NMC. It has accepted the advice of the legal assessor.

Submissions on sanction

Ms Marcelle-Brown referred to aggravating and mitigating features that she said the panel could consider. She submitted that an appropriate sanction is that of a striking off order. She submitted that a lesser sanction would not be appropriate.

Ms Marcelle-Brown submitted that removal from the register is not only an appropriate and proportionate step but is also the only sanction which would sufficiently protect the public and address public interest concerns.

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, may have such consequences. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel found there to be the following aggravating features:

- Mrs Gardner's deliberate and repeated acts of dishonesty over a period of time to avoid regulatory restrictions
- Mrs Gardner's blatant disregard of the interim conditions of practice order imposed by her regulator
- Mrs Gardner's lack of insight into her misconduct
- Mrs Gardner's pattern of misconduct and dishonesty

- Mrs Gardner's abuse of a position of trust when using an ex-colleagues' email account
- Mrs Gardner placing patients at a risk of harm by not adhering to her interim conditions of practice order

The panel found there to be the following mitigating features:

- Mrs Gardner made some initial admissions to Mr 2
- There is evidence to suggest that Mrs Gardner was under pressure from an NMC investigation involving a previous employer
- Issues relating to Mrs Gardner's [PRIVATE].

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

Misconduct of this nature demands a sanction.

The panel then considered a caution order but again determined that, due to the serious nature of the misconduct and the public protection issues, an order that does not restrict Mrs Gardner's practice would be neither appropriate nor sufficient to protect the public. 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 decided that Mrs Gardner's misconduct was not at the lower end of the spectrum and that a caution order would be insufficient to protect the public.

The panel then considered whether conditions of practice order would be a sufficient and appropriate sanction. The panel could identify no relevant, proportionate, workable or measurable conditions that could be formulated, in the light of the matters found proved. Mrs Gardner's misconduct cannot be addressed through retraining. Furthermore, Mrs Gardner has not previously adhered to an interim conditions of practice order and the

panel could not be satisfied that she would do so if a further order was imposed. The panel has concluded that a conditions of practice order would be inappropriate and insufficient to protect the public and to address public interest concerns.

The panel then considered a suspension order. It has found that there is evidence of a harmful, deep seated attitudinal problem. Mrs Gardner abused her position of trust, whilst making calculated actions in misleading her employer and the NMC. Therefore, the panel determined that Mrs Gardner's dishonesty was at the upper end of the scale of seriousness. Furthermore, there was no evidence before the panel to indicate that Mrs Gardner has any insight into her misconduct nor that she does not pose a significant risk of repeating similar dishonest behaviour. The panel had in mind the lack of evidence from Mrs Gardner that she is willing to engage with the NMC and would wish to return to nursing practice. Furthermore, the panel has found that Mrs Gardner's misconduct is fundamentally incompatible with her remaining on the register.

The panel therefore determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

When then considering a striking-off order, the panel had in mind 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?*

Mrs Gardner's misconduct was a significant departure from the standards expected of a registered nurse. It was clear to the panel that her serious breach of fundamental tenets of the profession is incompatible with her remaining on the register.

Furthermore, the serious nature of the misconduct found proved was such that to allow Mrs Gardner to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

The panel therefore determined that the only appropriate, proportionate and sufficient sanction is that of a striking-off order. Having regard to the effect of Mrs Gardner's actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct herself, the panel has concluded that nothing short of this would be sufficient, appropriate, and proportionate.

This extreme sanction would mark not only the importance of maintaining public confidence in the profession but would also send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

This will be confirmed to Mrs Gardner 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 Gardner's own interest until the striking-off sanction takes effect.

Submissions on interim order

Ms Marcelle-Brown submitted that an interim suspension order for a period of 18 months is necessary in this case. She submitted that this would be in line with the findings made by the panel both on public protection and public interest grounds.

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 Gardner is sent the decision of this hearing in writing.

That concludes this determination.