

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

**Substantive Hearing
Monday 24 – Friday 28 April 2023**

Virtual Hearing

Name of Registrant: Bethany Hannah Pennington

NMC PIN 20L0030E

Part(s) of the register: Registered Nurse – Sub Part 1
Learning Disabilities Nursing – December 2020

Relevant Location: Halton

Type of case: Misconduct

Panel members: Michelle McBreeze (Chair, Lay member)
Claire Rashid (Registrant member)
Louise Guss (Lay member)

Legal Assessor: Caroline Hartley

Hearings Coordinator: Khadija Patwary

Nursing and Midwifery Council: Represented by Alex Radley, Case Presenter
(24 – 27 April 2023)
Represented by Adam Slack, Case Presenter
(28 April 2023)

Miss Pennington: Not present and unrepresented

Facts proved: Charges 1), 2), 3), 4), 5), 6), 7), 8), 9) and charge
10) in part

Facts not proved: Charge 11)

Sanction: Striking-off order

Interim order: Interim suspension order (18 months)

Details of charge

That you, a registered nurse, between 17 May 2021 and 7 July 2021, you:

- 1) Referred to agency staff as “fucking lazy and black”, or words to that effect; **(proved)**
- 2) Referred to agency staff as “fucking lazy”, or words to that effect; **(proved)**
- 3) Referred to agency staff as “fucking lazy bastards”, or words to that effect; **(proved)**
- 4) Referred to Colleague A as “stupid” or words to that effect; **(proved)**
- 5) Referred to members of staff as “imbeciles” or words to that effect; **(proved)**
- 6) In reference to allocating staff breaks, said if the staff didn’t like it then “you would show them the door” or words to that effect; **(proved)**
- 7) Prevented Colleague B (an agency staff member) from going on a break until the end of the shift and directing them to return for the last 30/45mins. This is against ward practice which is to end the shift for last break at 6pm; **(proved)**
- 8) Referred to Colleague C as “stupid old woman on reception” and/or “fucking stupid woman” or words to that effect; **(proved)**
- 9) Said to Colleague D, “the fucking stupid nurses on here don’t teach me anything” or words to that effect; **(proved)**
- 10) Your conduct at charges 1 and/or 7 was racially motivated; **(proved in relation to charge 1)**

11) Your conduct at charges 1-9 was: **(not proved in its entirety)**

- a) Discriminatory, in that you treated colleagues less favourably than others on the basis of, or your perception of, their protected characteristic;
- b) Harassing, in that you created an intimidating, hostile, degrading, humiliating and/or offensive environment.

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

Decision and reasons on application to amend the charge

The panel heard an application made by Mr Radley, on behalf of the NMC, to amend the wording of charge 7).

The proposed amendment was to reflect the evidence which has been served to Miss Pennington prior to these proceedings and this would also reflect the specific allegation. It was submitted by Mr Radley that the proposed amendment would provide clarity and more accurately reflect the evidence.

“That you, a registered nurse, between 17 May 2021 and 7 July 2021, you:

- 7) Prevented Colleague B (**an agency staff member**) from going on a break until the end of the shift **and directing them to return for the last 30/45mins. This is against ward practice which is to end the shift for last break at 6pm;***”

The panel of its own volition amended charge 10) not opposed by the NMC to read:

10) “Your conduct at charges 1 and/or 7 was racially motivated;

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

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

The panel of its own volition decided to amend and add a further wording "*and/or*" to charge 10). The panel was of the view that such an amendment, as applied for, was in the interest of justice. The panel was satisfied that there would be no prejudice to Miss Pennington and no injustice would be caused to either party by the proposed amendment being allowed. It was therefore appropriate to allow the amendment, as applied for, to ensure clarity and accuracy.

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Miss Pennington was not in attendance and that the Notice of Hearing letter had been sent to Miss Pennington's registered email address by secure email on 23 March 2023.

Mr Radley, 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 allegations, the time, dates and that the hearing was to be held virtually, including instructions on how to join and, amongst other things, information about Miss Pennington'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 Miss Pennington 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 Miss Pennington

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

Mr Radley submitted that there had been limited engagement by Miss Pennington with the NMC in relation to these proceedings: she has not responded to the NMC since she had completed and returned the Case Management Form (CMF) in November 2022. As a consequence, there was no reason to believe that an adjournment would secure her attendance on some future occasion.

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*' as referred to in the case of *R v Jones (Anthony William)* (No.2) [2002] UKHL 5.

The panel decided to proceed in the absence of Miss Pennington. In reaching this decision, the panel considered the submissions of Mr Radley and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v Jones* and *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 Miss Pennington;
- Miss Pennington has not engaged with the NMC since completing the CMF in November 2022 when she confirmed she would be living abroad and did not intend to attend any hearing dates set;

- There is no reason to suppose that adjourning would secure her attendance at some future date;
- A number of witnesses have attended to give live evidence, others are due to attend;
- 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 2021;
- 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 Miss Pennington in proceeding in her absence. Although the evidence upon which the NMC relies has been sent to Miss Pennington at her registered email address, she has made no response to the evidence in support of the allegations other than to complete the CMF. Miss Pennington 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, having carefully read her response bundle which includes a reflective piece. Furthermore, the limited disadvantage is the consequence of Miss Pennington's decision to absent herself, from the hearing, waive her rights to attend, and/or be represented, and to not provide evidence or make submissions on her own behalf.

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

Background

The charges arose whilst Miss Pennington was employed as a registered nurse at Elysium Healthcare Gateway Recovery Centre (the Centre) from 17 May 2021.

It is alleged that Miss Pennington used inappropriate, racial and offensive behaviour and language towards staff. The panel noted that within the CMF Miss Pennington had ticked the boxes admitting the facts. However, in her narrative that followed she suggested that her words have been taken out of context that staff have used their own opinions.

A number of witnesses have provided their accounts of these allegations:

Witness 1

Witness 1 stated that on 14 June 2021 she had just finished her night shift and was sitting in the lounge when allegedly Miss Pennington came up to her and said that she had been speaking with reception about the agency staff and that they were all “*fucking lazy and black*”. Witness 1 stated that she was shocked at what Miss Pennington had said and reported it to the night manager.

Witness 1 stated that she saw Miss Pennington again that evening and that allegedly Miss Pennington was bragging to Witness 1 that she had made a health care assistant go on his break at 18:00 when he finished his shift at 19:30.

Witness 1 states that Miss Pennington also made an alleged comment to her about one of the older members of staff not being able to complete an assessment, and that she was “*stupid*” or words to that effect.

Witness 2

It is alleged that when Witness 2 was in the back office, Miss Pennington came in and said that the staff were “*imbeciles*” and did not know how to do an incident report, which had fallen to her to do. Witness 2 raised this matter with her manager.

Witness 2 outlines another incident involving the allocation of staff breaks, when Miss Pennington told her that if the staff didn't like the allocations she gave them, she would “*show them the door*”.

Colleague D (Witness 3)

Colleague D said that she was asked to leave her own ward to go and assist Miss Pennington who had been handed the keys temporarily for the medication round on her ward. However, she was not permitted, due to her inexperience and lack of the necessary training to undertake the medication round by herself. When Colleague D asked Miss Pennington what the needs of the particular patients were on the ward she replied, “*nurses were fucking stupid and didn't help her.*”

Colleague D described Miss Pennington as negative and derogatory about the staff on the ward and in particular she referred to Colleague C as the “*stupid old woman on reception.*”

Witness 4

Witness 4 stated that Miss Pennington allegedly caused a member of staff inconvenience by requesting that they work for the last half an hour when they are not normally expected to return to work if they have their break at 18:00. It is further alleged that Miss Pennington deliberately did this to be difficult and she was laughing with colleagues about it.

The Centre conducted a local investigation, and a disciplinary hearing was held at which Miss Pennington denied the allegations and she was dismissed from the Centre on 7 July 2021.

Decision and reasons on facts

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

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

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

- Witness 1: Senior Health Care Assistant at the Centre at the time of the allegations;
- Witness 2: Senior Health Care Assistant at the Centre at the time of the allegations;
- Colleague D: Charge Nurse at the Centre at the time of the allegations;
- Witness 4: Clinical Nurse Manager at the Centre at the time of the allegations.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the witness and documentary evidence provided by the NMC and Miss Pennington's registrants response bundle.

The panel noted that Miss Pennington did not address each individual charge specifically however, it considered Miss Pennington's reflective piece in the CMF where she highlights:

- Low staffing levels
- Lack of support from employer throughout the preceptorship programme and lack of time to complete online learning
- That she should have had a longer supernumerary/shadow period
- After a physical incident with a patient Miss Pennington was frustrated at the lack of support she received from agency nurses at the time and afterwards in the form of a debrief
- Her words and actions have been taken out of context
- Her break allocations were checked over by another member of staff

The panel noted that Miss Pennington said in her CMF that there were some potentially relevant health matters however, the panel were disappointed to note that they did not receive any medical evidence regarding these claims.

The panel took into account the fact that Miss Pennington was young in age, newly qualified, inexperienced and new to the post at the Centre.

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

Charge 1)

- 1) Referred to agency staff as "fucking lazy and black", or words to that effect;

This charge is found proved.

In reaching this decision, the panel took into account Witness 1's oral evidence and her exhibit including her local statement dated 14 June 2021.

The panel considered Witness 1's local statement dated 14 June 2021 in which she stated that *"BP walked into the lounge, without introducing herself, and said to [Witness 1] that she has had "words with reception" that she is "sick of agency staff" as they are "all f**king lazy". There were other members of staff in the lounge area, including black members of staff. BP then went closer to [Witness 1], speaking more quietly, "and they're all black".*

The panel noted that Miss Pennington may have appeared to know that she was wrong in referring to agency staff members as *"and they're all black"* as she made the reference whilst whispering and leaning into Witness 1. The panel further noted that Witness 1 in her oral evidence was consistent and credible. In relation to this incident Witness 1 did not delay in reporting the matter to the night manager later that day as she had stated in her oral evidence that this really upset her.

The panel determined that on the balance of probabilities Miss Pennington referred to agency staff as "fucking lazy and black", or words to that effect.

Therefore, the panel finds this charge 1) proved.

Charge 2)

2) Referred to agency staff as "fucking lazy", or words to that effect;

This charge is found proved.

For the same reasons as in charge 1) the panel was satisfied that on the balance of probabilities Miss Pennington referred to agency staff as "fucking lazy", or words to that effect.

Therefore, the panel finds this charge 2) proved.

Charge 3)

3) Referred to agency staff as “fucking lazy bastards”, or words to that effect;

This charge is found proved.

In reaching this decision, the panel took into account Colleague D’s oral evidence and her exhibit including her local statement dated 17 June 2021.

During Colleague D’s oral evidence the panel referred Colleague D to her local statement in which she referenced Miss Pennington stating “*f**king lazy bastards*”, Colleague D in her response to the panel replied that “*as she had been new onto the ward on that day she had asked Miss Pennington what they should do with work allocations and that Miss Pennington had replied ‘you do it’...‘if they are left to their own devices they are fucking lazy bastards.’*”

The panel was satisfied that on the balance of probabilities Miss Pennington referred to agency staff as “fucking lazy bastards”, or words to that effect.

Therefore, the panel finds this charge 3) proved.

Charge 4)

4) Referred to Colleague A as “stupid” or words to that effect;

This charge is found proved.

In reaching this decision, the panel took into account Witness 1’s witness statement, and oral evidence.

The panel considered Witness 1's statement in which she stated that "...she did make a comment to me once about one of the older members of staff not being about the complete an assessment, I can't remember her exact words but it was along the lines that she was being stupid." The panel was satisfied that on the balance of probabilities Miss Pennington referred to Colleague A as "stupid" or words to that effect.

Therefore, the panel finds this charge 4) proved.

Charge 5)

5) Referred to members of staff as "imbeciles" or words to that effect;

This charge is found proved.

In reaching this decision, the panel took into account Witness 1's witness statement, Witness 1 and 2's oral evidence and Witness 2's exhibit including her local statement dated 14 June 2021. The panel also considered the disciplinary meeting minutes dated 18 June 2021.

The panel considered Witness 2's local statement dated 14 June 2021 in which it was stated that "BP called some staff "imbeciles" for having difficulty entering an IRIS (which [Witness 2] believed referred to a very good and experienced member of staff who doesn't have good IT skills and needed support with this task)."

The panel further considered Witness 2's statement in which she stated that "on the day of the incident I came into the back office and Beth had just come out of the toilet and she was commenting that she had a lot of work to do. She said that the staff were 'imbeciles' and don't know how to do an IRIS (incident report)."

The panel noted that Witness 4 questioned Miss Pennington during the disciplinary hearing and he asked Miss Pennington “*Do you recall calling a HCA an imbecile because they didn’t know how to use a computer?*” to which Miss Pennington responded “*No I wouldn’t use the word imbecile.*” However, the panel determined that Witness 1 and 2’s evidence was consistent with each other in relation to this matter and it noted that Witness 2’s evidence was contemporaneous, and she was consistent in her account during oral evidence. The panel noted that the simple definition of “*imbecile*” is “*a stupid person*” and it was satisfied that on the balance of probabilities Miss Pennington referred to members of staff including Colleague A as “imbeciles” or words to that effect.

Therefore, the panel finds this charge 5) proved.

Charge 6)

- 6) In reference to allocating staff breaks, said if the staff didn’t like it then “you would show them the door” or words to that effect;

This charge is found proved.

In reaching this decision, the panel took into account Witness 1’s local statement dated 14 June 2021, Witness 2’s witness statement and local statement dated 15 June 2021. The panel considered Witness 2’s statement in which she stated that “*There was another incident involving the allocation of staff breaks. She told me that when she gave out the allocations that if the staff don’t like it then “she would show them the door...”*”

The panel also considered Witness 2’s local statement in which it was stated that “*BP talked about how she had given less favourable allocations/breaks to agency staff and they can leave if they don’t like it.*”

The panel further considered Witness 1's local statement in which she stated that *"Following this, in the nurses office, BP made a number of derogatory comments about HCA's e.g. calling them "lazy" and talking about how she is going to challenge them and if they don't like it, they can leave."*

The panel determined that on the balance of probabilities Miss Pennington in reference to allocating staff breaks, said if the staff didn't like it then "you would show them the door" or words to that effect.

Therefore, the panel finds this charge 6) proved.

Charge 7)

- 7) Prevented Colleague B (an agency staff member) from going on a break until the end of the shift and directing them to return for the last 30/45mins. This is against ward practice which is to end the shift for last break at 6pm;

This charge is found proved.

In reaching this decision, the panel took into account Witness 1's oral evidence and her local statement dated 14 June 2021. It also considered Witness 2's oral evidence.

The panel considered Witness 1's local statement in which she stated that *"At approximately 7pm, a black, agency member of staff walked onto the ward. [Witness 1] had assumed that they were here for the night shift. BP laughed and said that he has been here on a day shift and she gave him the 5pm to 7pm break but made him return for 7pm for a half an hour. [Witness 1]'s understanding was that BP had did this purposely and found it funny."* The panel noted that this was consistent with Witness 1's oral evidence.

The panel further noted that during Witness 2's oral evidence she confirmed that she had been told by another staff member that this incident had occurred. It determined that on the balance of probabilities Miss Pennington prevented Colleague B from going on a break until the end of the shift and directing them to return for the last 30/45mins.

Therefore, the panel finds this charge 7) proved.

Charge 8)

- 8) Referred to Colleague C as "stupid old woman on reception" and/or "fucking stupid woman" or words to that effect;

This charge is found proved.

In reaching this decision, the panel took into account Colleague D's witness statement and oral evidence and her exhibit including her local statement dated 17 June 2021.

The panel considered Colleague D's local statement dated 17 June 2021 in which it was stated that *"[Colleague D] challenged her on this and BP stopped making these comments about [Colleague C], but then throughout the shift, made a number of derogatory remarks about members of staff. For example, calling some of the healthcare workers; "f**king lazy bastards".*

The panel considered Colleague D's statement in which she stated that *"The initial derogatory language was targeted at the night coordinator and Bethany had made remarks such as 'fucking stupid woman', however, this was not a personal attack and Bethany would have said anything about anyone she was not targeting someone specifically."*

The panel noted that Colleague D challenged Miss Pennington in regards to her remarks and when questioned during oral evidence, Colleague D stated that *“she almost scoffed at what I said and walked off from the conversation.”* Further in Colleague D’s evidence she gave appropriate detail that this incident was in relation to Miss Pennington having to cover a different ward to the ward she thought she would be working on. She stated that *“Miss Pennington’s ward was Ash ward however, she was put on a different ward that day. Then she was asked not to go there but to go back to her own ward and was asked to hold the medication keys but not to use them and wait for me to arrive. Miss Pennington believed she should not have the keys and I was there to support her very quickly and she was not very happy.”* Colleague D informed the panel that the ward had quite a lot of patients with physical and mental health complexities and that *“it still provokes some anxiety in me, and I’ve done that medication round a few times. Medication had to be given in liquid or crushed and even covert form.”*

The panel determined that on the balance of probabilities Miss Pennington referred to Colleague C as “stupid old woman on reception” and/or “fucking stupid woman” or words to that effect.

Therefore, the panel finds this charge 8) proved.

Charge 9)

- 9) Said to Colleague D, “the fucking stupid nurses on here don’t teach me anything” or words to that effect;

This charge is found proved.

In reaching this decision, the panel took into account Colleague D’s witness statement and oral evidence and her exhibit including her local statement dated 17 June 2021.

The panel considered Colleague D's statement in which she stated that "*Bethany was derogatory, she was not a pleasant person to work with. I went to do medication for patients in the morning. I was not familiar with that ward and asked Bethany what she usually does, and what the usual process was. Bethany said 'the fucking stupid nurses on here don't teach me anything.'* Bethany made unnecessary comments about nurses, when Bethany was asked her about medication and if she had done it before and what she would usually do, she seemed angry."

In Colleague D's oral evidence when she was asked why Miss Pennington would have been angry, Colleague D stated that "*in all honesty she seemed angry the whole time, there was a lot of swearing. She was new to the role and the hospital, and I was shocked.*" The panel noted that on this day Miss Pennington was handed the keys for the medication cupboard, whilst being the only nurse on a difficult ward when she anticipated being elsewhere. Then she was asked by the nurse who came to supervise her on the medication round for specific advice regarding administration of medicines for individual patients, even though Miss Pennington was not signed off as competent as she was still in her probationary period. The panel noted that this situation may have overwhelmed Miss Pennington.

The panel was satisfied that on the balance of probabilities Miss Pennington said to Colleague D, "the fucking stupid nurses on here don't teach me anything" or words to that effect.

Therefore, the panel finds this charge 9) proved.

Charge 10)

10) Your conduct at charges 1 and/or 7 was racially motivated;

This charge is found proved in relation to charge 1) only.

In reaching this decision, the panel took into account the evidence as considered in charge 1) and 7).

The panel noted that in charge 1) the use of the words “*and black*” were racially motivated as there was no other reason for saying them and particularly given the way Miss Pennington said them. The panel heard from Witness 1 that she was shocked by the comments made by Miss Pennington.

In relation to charge 7), the panel determined that on the basis of the evidence presented by the NMC it was unable to find charge 7) racially motivated.

Therefore, in the light of the above, the panel determined that Miss Pennington’s conduct only in relation to charge 1) was racially motivated.

Charge 11)a)

11) Your conduct at charges 1-9 was:

- a) Discriminatory, in that you treated colleagues less favourably than others on the basis of, or your perception of, their protected characteristic;

This charge is found NOT proved.

The panel noted that charges 1) and 8) include discriminatory comments regarding individuals with protected characteristics however, on the basis of the evidence presented the rest of the charges do not. Therefore, the panel determined that due to the wording of the charge charges 1)-9) were not proved.

Charge 11)b)

11)Your conduct at charges 1-9 was:

- b) Harassing, in that you created an intimidating, hostile, degrading, humiliating and/or offensive environment.

This charge is found NOT proved.

The panel noted that Miss Pennington had only been at the Centre from 17 May 2021 until 7 July 2021 and due to the lack of evidence in relation to the chronology of the events and the periods of time over which these incidents are said to have occurred it was not possible to identify a pattern of harassing behaviour.

In light of the above, the panel therefore finds that the NMC has not discharged its burden of proof and finds charge 11)b) not 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 Miss Pennington'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, Miss Pennington'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 Radley, in his written submissions dated 27 April 2023, stated that:

1. *'The Panel will be aware that the professional standards of practice and behaviour for nurses, midwives and nursing associates sets the professional standards that patients and public tell the NMC that they expect.*
2. *When a nurse has fallen short of the Code, what they did or failed to do may be **serious professional misconduct**. The NMC assert that Miss Pennington's actions amounts to serious professional misconduct here.*
3. *Whilst the actions and failings are not directly related to clinical practice, they can be serious professional misconduct because these issues relate to the nurses, role as a registered professional and the potential impact on the ward.*
4. *The NMC say that the behaviour namely the bullying and harassment of colleagues, in the way of the facts found against Ms Pennington, amounts to misconduct.*
5. *The NMC represent that the ethnic discriminatory concerns here (count 1 and 10) raise fundamental questions about Miss Pennington as a registered professional. It could be argued that they suggest a deep-seated attitudinal issue by displaying discriminatory views and behaviours and the Panel will be aware that the NMC are required to protect public confidence in all nurses, and uphold professional standards. In this case the Panel have recognised the potential risk based on the findings.*
6. *The NMC say that these charges raise misconduct. They are not simply breaches of a local disciplinary policy or minor concerns, they are matters at the heart of and fundamental to the professionals practice. It is a serious discriminatory concern at the heart of a caring profession.*
7. *The panel will be aware that seriousness is an important concept which informs various stages of our regulatory processes. The public's trust and confidence in all nurses, demonstrating the behaviour found by Ms Pennington here must, we assert, amount to a serious misconduct.*

8. *When considering seriousness of the misconduct, you will take into account evidence of any relevant contextual factors. The Panel have already carried out a full review and it is not necessary to recite all of the facts here.*

The Code

9. *The Code says that nurses, midwives and nursing associates must treat people fairly without discrimination, bullying or harassment.*
10. *It also states that individuals should be aware of how their behaviour can affect and influence the behaviour of others, be sure not to express personal beliefs inappropriately and use all forms of communication responsibly (Para 20.2, 20.3, 20.7 and 20.10).*
11. *The Panel will, no doubt, take concerns about bullying, harassment, discrimination very seriously. It can have a serious effect on workplace culture, and therefore patient safety if it is not dealt with effectively. This we would represent underpins the need to identify this behaviour as serious misconduct in the case of Ms Pennington.*

Discrimination

12. *A person **discriminates** against another person under the Equality Act 2010 if they treat them less favourably than they would treat others because of a protected characteristic (Equalities Act ss13 – 19). Where a professional on the register displays discriminatory views and behaviours, this can amount to a serious departure from the NMC's professional standards and thus serious misconduct. Here the inference is that Ms Pennington believes that black agency staff are "Lazy."*

Harassment

13. *It is noted that the charge (11) relating to harassment was not made out but the NMC ask the Panel to consider the behaviour of the charges proven in the following way.*

14. **Harassment** *is defined by the Equality Act 2010 as someone engaging in unwanted conduct that's related to a protected characteristic [or is of a sexual nature]. The behaviour has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.*

15. *It's necessary to take the perception of the person who's the subject of the conduct, or any witness to it, and any other circumstances into account. As well as harassment linked to a protected characteristic as defined by the Equality Act, harassment can also be unwanted conduct that is unrelated to a protected characteristic which someone finds offensive or which makes someone feel intimidated or humiliated, such as, the calling of colleagues imbeciles.*

16. *Harassment relating to the professional context must be taken very seriously (NMC guidance). Staff who have given evidence about the concerns of this nature can be profoundly affected. See evidence of [Witness 1] and [Colleague D], and this could negatively affect public protection and the trust and confidence that the public places in the nursing profession.*

17. *The public sector equality duty (PSED) was created by the Equality Act 2010 and requires Nurses to have due regard to the need to:*

- *Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010*
- *Advance equality of opportunity between people who share a protected characteristic and those who do not*
- *Foster good relations between people who share a protected characteristic and those who do not*

18. *The NMC assert that the number of concerns here are so serious that it may be less easy for the nurse, to put right the conduct and the problems in their practice, but particularly the aspect of their attitude which led to the incidents happening, i.e. their approach to race/colour of skin, and the approach to senior, in years, staff.*

19. *Normally, In cases like this, The Panel will be keen to hear from the nurse about their reflection on the concerns and taken opportunities to show insight into what happened. Here Ms Pennington has not attended, and does not accept the allegations.*

Particular areas of the code being engaged

The NMC say the following areas of the CODE are engaged

20. Working cooperatively – 8.2, 8.4, 8.7

21. Sharing skill and knowledge – 9.3, 9.4

22. Uphold the reputation of the profession – 20.1, 20.2, 20.3, 20.4, 20.5, 20.6, 20.7, 20.8 and 20.10

23. Cooperate with investigations – 23'

Submissions on impairment

Mr Radley moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. This included reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin).

Mr Radley, in his written submissions dated 27 April 2023, stated that:

1. *'The Panel are now considering whether Ms Pennington's fitness to practise 'is impaired' (Art 22(1)(a) of the Nursing and Midwifery Order 2001).*
2. *Impairment is not defined in the legislation. There have been many legal cases which have developed the concept of impairment and the factors that should be considered when deciding whether a professional's fitness to practise is impaired. The question that will help decide whether a professional's fitness to practise is impaired is:*

***"Can the nurse, midwife or nursing associate practise
Kindly, safely and professionally?"***

3. *The NMC represent that this question is answered negatively. The NMC represent that the professional's fitness to practise is impaired.*
4. *The panel having made the decision on the facts and Misconduct and will be deciding whether a professional's fitness to practise is **impaired**.*

5. *A decision about whether a professional's fitness to practise is impaired takes a holistic approach, so that anything that's relevant is considered. It is dependent on the individual circumstances surrounding each concern. There are a range of different factors.*
6. *The panel will no doubt ask themselves if any part of the CODE has been breached or is liable to be breached in the future. Any breach would be considered alongside other relevant factors. The NMC refer the panel to the earlier concerns on the breaches of the CODE.*
7. *The NMC say that the breaches of the CODE involves breaching a fundamental tenet of the profession, the Panel would be entitled to conclude that a finding of impairment is required in Ms Pennington's case. The finding of impairment, the NMC assert, is required to mark the unacceptability of the behaviour, emphasise the importance of the fundamental tenet breached, and to reaffirm proper standards or behaviour (Yeong v GMC [2009] EWHC 1923 (Admin)).*
8. *The Fitness to Practise Panel will consider the context in which things have happened. Here the panel will be asked to consider;*
 - *Personal factors relating to the professional*
 - *The professional's working environment and culture*
9. *The NMC say neither adversely affected the professional's ability to practice professionally and as a consequence the professional will not be able to demonstrate that they are currently able to practise kindly, safely and professionally.*

10. *The third area of context is the learning, insight and steps the professional has taken to strengthen their practice. Here the professional has given limited input to the process, has not attended to explain her case and has in fact demonstrated a wish to leave the profession. There is no evidence that she has addressed or taken steps to address any concerns or risks identified in the case. The professional has not provided:*

- *evidence of further relevant training or supervision*
- *information relating to reflection and understanding of the issues raised in the proven allegations*
- *insight regarding the proven allegations*
- *details of steps taken to address the concerns raised by the proven allegations*
- *evidence from others as to current skills and fitness to practise*

Whether it is likely that the conduct will be repeated is also a concern for the NMC as there appear to be deep seated Discrimination issues, expressed even after a very recent course of training (Witness 4). This will impact on the professional's ability to practise kindly, safely and professionally, resulting in the NMC, suggest a finding of impairment.

11. *The consequences of the professional's conduct thankfully did not have a direct or serious consequence on a patients care. However, behaviour found could impact the long term atmosphere and care being provided.*

12. *The Regulatory concerns from the code are reinforced here.*

13. *For these reasons the NMC say that Ms Pennington's practice is impaired.'*

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Roylance v General Medical Council (No 2)* [2000] 1 A.C. 311 and *CHRE v NMC and Grant*.

Decision and reasons on misconduct

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of the Code.

The panel was of the view that Miss Pennington's actions did fall significantly short of the standards expected of a registered nurse, and that Miss Pennington's actions amounted to a breach of the Code. Specifically:

'8 Work co-operatively

To achieve this, you must:

8.1 respect the skills, expertise and contributions of your colleagues, referring matters to them when appropriate

8.2 maintain effective communication with colleagues

9 Share your skills, knowledge and experience for the benefit of people receiving care and your colleagues

To achieve this, you must:

9.1 provide honest, accurate and constructive feedback to colleagues

9.3 deal with differences of professional opinion with colleagues by discussion and informed debate, respecting their views and opinions and behaving in a professional way at all times

20 Uphold the reputation of your profession at all times

To achieve this, you must:

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

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

20.4 keep to the laws of the country in which you are practising

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

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 was of the view that the public will be concerned to know that Miss Pennington made a racially motivated comment in referring to agency staff members as “*fucking lazy and black*” and repeatedly used derogatory language about colleagues including those with protected characteristics. The panel noted that Miss Pennington was a newly qualified nurse who was inexperienced and given too much responsibility on a ward that had patients with complex needs which were factors that were likely to have contributed to her behaving inappropriately.

In respect of all the charges found proved, the panel found that Miss Pennington’s actions did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, Miss Pennington'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. They must make sure that their conduct 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) ...
- 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) *her integrity could not be relied upon'*

The panel considered that Miss Pennington's misconduct had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute. It was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charge 1) and 10) (in part) extremely serious.

The panel took into account that Miss Pennington was young and newly qualified at the time of the incidents, she was working on a ward with patients that had complex needs. Miss Pennington had alleged in her CMF that the Centre was understaffed, and that she felt that she was not supported in the role. Witness evidence presented in the course of the hearing disputed Miss Pennington's allegations.

However, the panel considered that Miss Pennington's insight is limited. The panel noted that Miss Pennington did not provide any direct evidence addressing the misconduct apart from her reflective piece in the CMF. Miss Pennington in her reflective piece did not demonstrate an understanding of why what she did was wrong and how this impacted negatively on the reputation of the nursing profession. It further noted that in Miss Pennington's reflective piece she stated that she would need to undertake some retraining, but she did not provide any evidence that it had happened. The panel was of the view that Miss Pennington did not apologise to the agency staff members for her misconduct and did not sufficiently demonstrate how she would handle the situation differently in the future.

In relation to remorse, the panel noted that Miss Pennington did not demonstrate any remorse in her reflective piece in the CMF.

The panel was satisfied that the misconduct in relation to charges 1) and 10) in part is capable of remediation. However, the panel noted that it is difficult to remediate derogatory remarks or attitudinal issues. Therefore, the panel carefully considered the evidence before it in determining whether or not Miss Pennington has remedied her practice. The panel was of the view that Miss Pennington did not demonstrate any remediation, nor has she evidenced any relevant training.

The panel was of the view that Miss Pennington has not yet been able to demonstrate that she remedied her practice or demonstrated any meaningful insight. Miss Pennington did not satisfy the panel that the risk of repetition was sufficiently reduced.

The panel decided that a finding of impairment is not necessary on the grounds of public protection. However, the panel bore in mind the overarching objectives of the NMC; to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

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

Having regard to all of the above, the panel determined that Miss Pennington'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 Miss Pennington off the register. The effect of this order is that the NMC register will show that Miss Pennington has been struck-off the register.

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

Submissions on sanction

Mr Radley, in his written submissions dated 27 April 2023, stated that:

‘Proportionality

- 1. The Panel will be seeking to find a fair balance between Ms Pennington, the nurses rights and our **overarching objective of public protection** (Huang v Secretary of State for the Home Department [2007] UKHL 11)*
- 2. The NMC’s case is that The FTP committee can Justifiably restrict the Nurses right to practice in this case.*
- 3. The panel will consider whether the sanction with the least impact on the nurse, practise would be enough to achieve public protection, looking at the reasons why the nurse, isn’t currently fit to practise and any aggravating or mitigating features.*
- 4. The sanction will of course be considered from the least serious to the most serious to achieve public protection.*
- 5. The Panel can conclude that the Nurse is not fit to practice currently because.*

Aggravating features

The representations on aggravating factors are

- 1. any previous regulatory or disciplinary findings – None*
- 2. Racially aggravated.*
- 3. lack of insight into failings*
- 4. Impact on the profession*
- 5. a culture of blame – blaming other staff for failings*

Mitigating features

The mitigating features are;

- 1. No direct patient harm*
- 2. Age and immaturity*

Proposed sanction

- 1. Striking off*
 - Racist language – lack of insight here*
 - Negative and Hostile environment created.*
 - Comments made in front of other staff in the daily briefing*
 - A representation to be removed from the register*
 - Lack of insight or acceptance of the wrong.'*

Mr Radley, in his oral submissions further stated that the evidence from the witnesses was that Miss Pennington was a relatively newly qualified nurse and that she was given a substantial responsibility in working on the ward at the Centre. He submitted that it is clear from the evidence that Miss Pennington was under pressure from the work she was carrying out. However, Mr Radley submitted that a striking off order is the most appropriate due to the seriousness of Miss Pennington's use of discriminatory language.

Decision and reasons on sanction

Having found Miss Pennington'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:

- Miss Pennington's behaviour in charge 1) was racially aggravated;
- Behaviour in charge 8) related to an individual's protected characteristics;
- Lack of insight into the failings;
- Miss Pennington blamed other staff for her failings;
- There is no evidence that Miss Pennington has taken steps to remediate the failings; and
- Limited engagement with the NMC.

The panel also took into account the following mitigating features:

- Miss Pennington was a young, newly qualified and inexperienced nurse;
- Two of the witnesses that the panel heard from during the course of the hearing expressed some sympathy towards Miss Pennington as she was young and inexperienced, Witness 2 stated that:

"I gave Beth the benefit of the doubt as she was young and new to the role, I think she had only been working at the Centre for a few weeks. I think that she came in wanting to prove herself but I don't think she was mean or malicious on purpose. She was very young and inexperienced and she had come into a really busy mental health and dementia ward, the patients we care for can't be cared for in normal care

homes and I think the pressure got to her. I believe her behaviour was down to age, pressure and inexperience.”

- Parts of Miss Pennington’s nursing training would have taken place during the Covid-19 pandemic;
- There was no direct patient harm;
- The use of racially motivated language was a one off incident; and
- Miss Pennington states that the disciplinary proceedings at the Centre were short and that she did not have much time to explain herself fully.

The panel noted that the charges before them were single incidents that had occurred during a short time scale. However, they were extremely varied, and the language/actions were derogatory and unkind in nature. The Centre’s investigation notes before the NMC were limited and lacked detail. The panel was of the view that it would have assisted them if they had greater detail of her time employed with them including Miss Pennington’s training records.

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

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case an order that does not restrict Miss Pennington’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 Miss Pennington’s misconduct was not at the lower 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 Miss Pennington'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. The misconduct identified in this case was not something that can be easily addressed through training as it was attitudinal in nature. Furthermore, the panel concluded that the placing of conditions on Miss Pennington's registration would not adequately address the seriousness of this case. The panel noted that in her last communications with the NMC, Miss Pennington stated that she was not working in a healthcare environment and was out of the country.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that a 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; and*
- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour.*

The conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel noted that the serious breach of the fundamental tenets of the profession evidenced by Miss Pennington's actions is fundamentally incompatible with Miss Pennington remaining on the register.

The panel has no evidence that Miss Pennington has insight into her behaviour and therefore cannot be satisfied that there is no risk of repetition. Equally, due to the lack of evidence and her non-attendance it is not been possible to assess what her attitudes towards diversity are and therefore the success or otherwise of any remediation is also impossible to assess.

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

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?*

The panel also took note of NMC guidance “*How we determine seriousness*” and “*Serious concerns based on public confidence or professional standards.*”

The panel determined that Miss Pennington’s actions were significant departures from the standards expected of a registered nurse and are fundamentally incompatible with her remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Miss Pennington’s actions were serious and to allow her to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

The panel also took into account the following:

- The lack of evidence in Miss Pennington’s reflective piece regarding the impact of her actions on her colleagues and the public’s confidence in the nursing profession;
- The impact upon public confidence which may lead to members of the public avoiding using health and care services;
- Lack of testimonials and references;

- There is no evidence that Miss Pennington has taken steps to remediate the failings; and
- There was no evidence relating to the medical issues that Miss Pennington alluded to in her CMF.

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the effect of Miss Pennington'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 in this case.

The panel considered that this order was necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

Submissions on interim order

The panel considered the submissions made by Mr Slack that an interim suspension order should be made to cover the appeal period. He submitted that an interim order is necessary to protect the public interest. He invited the panel to impose an interim suspension order for a period of 18 months to cover the appeal period and any appeal if made.

The panel accepted the advice of the legal assessor.

Decision and reasons on interim order

The panel was satisfied that an interim suspension order is necessary to protect the public interest. The panel had regard to the seriousness of the misconduct and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order. It considered that to not impose an interim suspension order would be inconsistent with its earlier findings.

Therefore, the panel made 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 striking-off order 28 days after Miss Pennington is sent the decision of this hearing in writing.

This will be confirmed to Miss Pennington in writing.

That concludes this determination.