

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

**Substantive Hearing
Thursday 27 – Friday 28 April 2023**

Virtual Hearing

Name of Registrant: **Aubrey Van Wyk**

NMC PIN 04L03720

Part(s) of the register: RN3: Mental health nurse (13 December 2003)

Relevant Location: East Sussex

Type of case: Conviction

Panel members: Shaun Donnellan (Chair, Lay member)
Jodie Jones (Registrant member)
David Crompton (Lay member)

Legal Assessor: Fiona Barnett

Hearings Coordinator: Sharmilla Nanan

Nursing and Midwifery Council: Represented by Shabana Fazal, Case Presenter

Mr Van Wyk: Not present and unrepresented at the hearing

Facts proved: Charge 1

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 Mr Van Wyk was not in attendance and that the Notice of Hearing letter had been sent to Mr Van Wyk's registered email address by secure email on 28 March 2023. Further, the panel noted that the Notice of Hearing was also sent to Mr Van Wyk's representative at onestoplegalconsultancy on 28 March 2023.

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

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the allegation, the time, dates and that the hearing was to be held virtually and, amongst other things, information about Mr Van Wyk's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

In the light of all of the information available, the panel was satisfied that Mr Van Wyk 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 Mr Van Wyk

The panel next considered whether it should proceed in the absence of Mr Van Wyk. It had regard to Rule 21 and heard the submissions of Ms Fazal who invited the panel to continue in the absence of Mr Van Wyk. She submitted that Mr Van Wyk had voluntarily absented himself.

Ms Fazal referred the panel to the documentation which included a telephone note between the NMC and Mr Van Wyk's representative, dated 26 April 2023. She noted that the telephone note states Mr Van Wyk and his representative will not attend the hearing today. She noted that there has been no application for an adjournment and submitted that the matter should proceed today in Mr Van Wyk's absence.

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 has decided to proceed in the absence of Mr Van Wyk. In reaching this decision, the panel has considered the submissions of Ms Fazal, the telephone note between the NMC and Mr Van Wyk's representative dated 26 April 2023 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 Mr Van Wyk or on his behalf;
- Mr Van Wyk's representative has informed the NMC that Mr Van Wyk has received the Notice of Hearing and confirmed that the hearing can proceed in their absence;
- There is no reason to suppose that adjourning would secure Mr Van Wyk's attendance at some future date;
- The charge relates to events that occurred in 2018; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mr Van Wyk in proceeding in his absence. Although the evidence upon which the NMC relies will have been sent to him, he has made no response to the allegations. Mr Van Wyk will not be able to challenge the evidence relied upon by the NMC and will not be able to give evidence on his own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Mr Van Wyk's decisions to absent himself from the hearing, waive his rights to attend, and/or be represented, and to not provide evidence or make submissions on his own behalf.

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

Background

The charges arose whilst Mr Van Wyk was employed as a charge nurse by Priory Heathfield Neuro Rehabilitation Service and the NMC received its referral on 18 June 2018. The concerns referred to allegations of sexual harassment and assault of three members of staff. Mr Van Wyk was subsequently suspended and offered his resignation on 14 June 2018 which was accepted with immediate effect.

The allegations were reported to Sussex Police for investigation who noted a further complaint. Sussex Police confirmed on 22 January 2020 that the Crown Prosecution Service authorised six charges of sexual assault against four complainants.

On 3 February 2022 Mr Van Wyk entered a guilty plea at Lewes Crown Court in respect of four counts of sexual assault. He was sentenced to 36 weeks imprisonment, suspended for 24 months, a restraining order of two years and 10 years on the Sex Offenders

register.

Details of charge

That you, a registered nurse,

1. On 3 February 2022, At Lewes Crown Court were convicted of Sexual Assault on a female x 4 contrary to Section 3 of the Sexual Offence Act 2003

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

Decision and reasons on facts

The charges which concern Mr Van Wyk's conviction and, having been provided with a copy of the certificate of conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3).

Fitness to practise

Having announced its findings on the facts, the panel then considered whether, on the basis of the facts found proved, Mr Van Wyk's fitness to practise is currently impaired by reason of his conviction. There is no statutory definition of fitness to practise. However, the NMC's updated guidance on Impairment states, *"the question that will help decide whether a professional's fitness to practice is impaired is: "can the nurse, midwife or nursing associate practise kindly, safely and professionally?"*

Submissions on impairment

Ms Fazal addressed the panel on the issue of impairment and reminded the panel 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) Grant* [2011] EWHC 927 (Admin).

Ms Fazal submitted that the panel should consider whether Mr Van Wyk's fitness to practise is currently impaired. She submitted that the NMC has previously defined impairment as a registrant's suitability to remain on the on the NMC register without restrictions. She referred the panel to relevant NMC guidance on Impairment, reference DMA-1, dated 27 March 2023 and that it poses the question if a nurse, midwife or nursing associate can practice kindly, safely and professionally.

Ms Fazal applied the judgment outlined in the case of *CHRE v NMC and Grant*. She submitted that no patients were placed at unwarranted risk of harm but that the members of staff were also members of the public and that that Mr Van Wyk's conduct took place at work. She submitted that Mr Van Wyk's colleagues were young, vulnerable women who were frightened to speak up or challenge his behaviour. She reminded the panel that the women were junior to Mr Van Wyk who was a charge nurse at the material time. She submitted that Mr Van Wyk's conduct has in the past and is liable in the future to breach the fundamental tenets of the profession and to bring the profession into disrepute.

Ms Fazal submitted that the nature of Mr Van Wyk's convictions are considered to be extremely serious and that the nature of these convictions would raise fundamental questions about the registrant's trustworthiness as a professional. She submitted that Mr Van Wyk's offending was directly linked to his nursing practice as it took place in the workplace.

Ms Fazal referred the panel to the judgement in the case of *Cohen v General Medical Council* [2008] EWHC 581 (Admin) and the NMC guidance on 'How we determine seriousness', Reference FTP-3, dated 1 July 2022. She submitted that Mr Van Wyk's conduct in the convictions is not easily remediable and that there is no evidence of his

insight, remediation or reflection that has been available to the NMC. She submitted that Mr Van Wyk received a significant sentence for his criminal conviction.

Ms Fazel invited the panel to make a finding of impairment on public protection and public interest grounds.

The panel accepted the advice of the legal assessor which included reference to relevant judgments.

Decision and reasons on impairment

The panel next went on to decide if as a result of the conviction, Mr Van Wyk's fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must 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.

The panel considered the NMC's guidance, 'Can the concern be addressed?', Reference FTP-13a, dated 1 July 2022. It states:

“Examples of conduct which may not be possible to address, and where steps such as training courses or supervision at work are unlikely to address the concerns include:

- *criminal convictions that led to custodial sentences*
- *...*
- *Incidents of harassment (including sexual harassment) that have taken place in a professional context”*

In light of this, the panel had regard to Mr Van Wyk's criminal conviction. It noted that the colleagues who he had sexually assaulted and harassed in the workplace, that were the subject of the conduct underlying the criminal conviction, and he was in a position of seniority in the workplace.

The panel had regard to the sentencing remarks made by HHJ Gold QC at Mr Van Wyk's criminal sentencing hearing, who stated:

“Well, your attitudes towards fellow workers, fellow female workers, was abysmal, Mr Van Wyk. You appear to have had no understanding of other people's personal space or their right to go to work and conduct themselves in a professional manner, without being sexually pestered by the likes of you. It's appalling behaviour, as I hope you now understand, over a significant course of time. And as I've already said to your counsel, had you contested this case and been convicted by a jury, as you inevitably would have been, you would have been going straight to prison.”

The panel applied 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/their fitness to practise is impaired in the sense that S/He/They:

- a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
- b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
- c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
- d) ...'*

The panel was of the view that limbs a, b and c were engaged in this case. The panel found that patients were not put at risk of harm however the conduct underlying Mr Van Wyk's criminal convictions happened in the workplace to a number of his colleagues over a period of time thereby raising public protection concerns.

The panel first considered whether the conduct which gave rise to the conviction was easily remediable. In so doing it had regard to the NMC's guidance above, 'Can the concern be addressed?'. Given the serious nature of the behaviour, which was attitudinal in nature, the panel found that it would be very difficult to remediate. Nevertheless, it considered whether Mr Van Wyk had made any efforts to remediate the conduct which gave rise to the conviction.

The panel considered that Mr Van Wyk has not demonstrated any insight. It noted that Mr Van Wyk entered a guilty plea to the criminal charges but has not provided a response to

the regulatory charges. It bore in mind that Mr Van Wyk has not demonstrated any acceptance or contrition for his actions and conduct in these proceedings. The panel bore in mind that Mr Van Wyk has not provided a reflective statement which demonstrates his understanding of how his actions could have potentially put patients at risk of harm, why what he did was wrong and how this impacted negatively on the reputation of the nursing profession, his workplace or colleagues.

The panel also took into account that it had no evidence of any attempts made by Mr Van Wyk to address the conduct underlying his conviction.

The panel is therefore of the view, that there is a risk of repetition as it had no evidence of insight or remorse from Mr Van Wyk. The panel determined that a finding of impairment is necessary on the grounds of public protection.

The panel found that Mr Van Wyk had in the past and was still liable to bring the nursing reputation into disrepute, and the same could be said for breaching the fundamental tenets of the nursing profession.

The panel bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health safety and well-being of the public, and to uphold/protect the wider public interest, which 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 took into consideration the nature of the conduct underlying Mr Van Wyk's criminal conviction. The panel bore in mind that Mr Van Wyk received a sentence of 36 weeks imprisonment, suspended for 24 months, a restraining order of two years and 10 years on the Sex Offenders register. The panel was of the view that an informed member of the public would be concerned to learn that a nurse with the conviction that Mr Van Wyk has is able to practise with no restrictions on his NMC registration. On this basis, the panel determined that a finding of impairment on public interest grounds was required.

Having regard to all of the above, the panel was satisfied that Mr Van Wyk'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 Mr Van Wyk off the register. The effect of this order is that the NMC register will show that Mr Van Wyk 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

Ms Fazal submitted that sanction is a matter for the panel's independent professional judgment and that in this case the only appropriate sanction is a striking off order. She reminded the panel that any sanction imposed should be proportionate and balance the rights of the registrant with the public interest but that the reputation of the profession is more important than the fortunes of any individual member. She took the panel through the aggravating and mitigating features of the case. She made submissions as to why the other sanctions were inappropriate in light of the facts of this case. She submitted that the panel should consider the SG and bear in mind that this was not a single instance of misconduct, Mr Van Wyk had sexually assaulted four different colleagues on a number of occasions over a period of time which demonstrate repetition. She submitted that there is evidence of harmful, deep seated personality or attitudinal problems. She noted that Mr Van Wyk had initially denied these allegations during the police interview and entered a guilty plea to the criminal charges at court. She submitted that Mr Van Wyk has not engaged with the NMC and has not provided any information for the panel to consider. She submitted that Mr Van Wyk's behaviour was a significant departure from the

standards expected of a nurse and that a striking off order was the only appropriate order in the circumstances.

Decision and reasons on sanction

Having found Mr Van Wyk'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:

- Egregious behaviour to multiple colleagues, on a number of occasions over a period of time.
- Mr Van Wyk was in a position of seniority to the colleagues he sexually assaulted.
- Initially denied the allegations at the police interview.
- Altitudinal concerns in respect of Mr Van Wyk's lack of engagement or communication to the NMC.
- Lack of insight or remorse demonstrated during the NMC regulatory proceedings.

The panel also took into account of the following mitigating feature, but gave it limited weight:

- Mr Van Wyk entered a guilty plea at the Crown Court.

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, and the public protection issues identified, an order that does not restrict Mr Van Wyk'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 the seriousness of the conduct underlying Mr Van Wyk's conviction 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 Mr Van Wyk'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 conduct underlying the conviction in this case. Furthermore, the panel concluded that the placing of conditions on Mr Van Wyk's registration would not adequately address the seriousness of this case and would not protect the public or serve the public interest.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The panel bore in mind that the SG states the circumstances where a suspension order may be appropriate however the panel was of the view that the conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel bore in mind that Mr Van Wyk has not demonstrated any insight or evidence to address the conduct underlying the charge. The panel took into consideration that it could only impose a suspension order when it was confident that the registrant had addressed the conduct outlined in the regulatory concern. The panel took into consideration that this was not a single of instance of misconduct. The panel noted that there is a serious breach of the fundamental tenets of the profession.

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?*

Mr Van Wyk actions were significant departures from the standards expected of a registered nurse. The panel was of the view that Mr Van Wyk was in a position of trust and had seniority to his colleagues that he had sexually assaulted in the workplace. It noted that Mr Van Wyk's behaviour happened on a number of occasions with different colleagues. The panel bore in mind that a fundamental tenet of the nursing profession is to be trustworthy but that Mr Van Wyk had broken this trust through his conduct and establish his lack of professionalism. The panel was of the view that Mr Van Wyk's conduct underlying the charge and his lack of engagement exhibit a attitudinal concern. The panel was of the view that the findings in this particular case demonstrate that Mr Van Wyk's actions were serious and to allow him to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

The panel also bore in mind the principles set out in *CHRE v GDC and Fleischmann* [2005] EWHC 87 Admin. It noted that Mr Van Wyk had been sentenced in the crown court to a to 36 weeks imprisonment, suspended for 24 months, a restraining order of two years and 10 years on the Sex Offenders register. The panel bore in mind that Mr Van Wyk was

still serving his sentence and that it would be entirely inappropriate for him to remain on the NMC register in these circumstances.

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that Mr Van Wyk's conviction is fundamentally incompatible with him remaining on the register and the appropriate and proportionate sanction is that of a striking-off order. Having regard to the effect of Mr Van Wyk's actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct himself, the panel has concluded that nothing short of this would be sufficient in this case.

The panel considered that this order was necessary to protect the public, 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.

This will be confirmed to Mr Van Wyk's 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 Mr Van Wyk's own interests until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

The panel took account of the submissions made by Ms Fazal. She submitted that interim suspension order for a period of 18 months to allow for any potential appeal period which

is essential in the circumstances of this case. Ms Fazal submitted that an interim order is necessary on the grounds of public protection and is otherwise in the public interest.

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 to cover any potential period of appeal.

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

That concludes this determination.