Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
Wednesday 27 July – Thursday 11 August 2022

Friday 30 September 2022

Monday 30 January – Wednesday 01 February 2023

Virtual Hearing

Name of registrant:	Joanne Cresswell
NMC PIN:	01D0644E
Part(s) of the register:	Registered Nurse – Adult Nursing (March 2006)
Relevant Location:	West Bromwich
Type of case:	Misconduct
Panel members:	Christina McKenzie (Chair, Registrant member) Susan Tokley (Registrant member) David Anderson (Lay member)
Legal Assessor:	Nigel Ingram
Hearings Coordinator:	Anya Sharma (27 – 29 July 2022) Alice Byron (2 – 11 August 2022, 30 September 2022, 30-31 January 2023) Amira Ahmed (01 February 2023)
Nursing and Midwifery Council:	Represented by Tom Hoskins, Case Presenter
Ms Cresswell:	Not present and unrepresented (27 July – 30 September 2022) Present and unrepresented (30 January – 1 February 2023)
Facts proved:	Charge 5
Facts not proved:	Charges 1, 2a, 2b, 2c, 3, 4a, 4b and 4c
Fitness to practise:	Impaired

Sanction:	Caution order (18 months)
Interim order:	No order

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Ms Cresswell was not in attendance and that the Notice of Hearing letter had been sent to Ms Cresswell's registered email address on 16 June 2022.

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

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the allegation, the time, dates and venue of the hearing and, amongst other things, information about Ms Cresswell'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 Ms Cresswell 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 Ms Cresswell on 27 July 2022

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

Mr Hoskins referred the panel to the emails sent to Ms Cresswell in regard to the progression of the case and if she would be in attendance at the hearing, dated 28 January 2022, 1 February 2022, 2 February 2022, 31 March 2022, 16 June 2022, 27 June 2022 and 20 July 2022. Mr Hoskins submitted that Ms Cresswell in an email dated

28 January 2022 stated that due to personal circumstances she has been unable to secure legal representation.

Mr Hoskins informed the panel that the Hearings Coordinator had sent Ms Cresswell an email invitation for today's hearing on 26 July 2022. Ms Cresswell had replied to the email on the same day with the following:

> *'Good Afternoon,*
>
> *As I have previously discussed I am currently unable to represent myself [PRIVATE]. I wish the case to continue in my absence and if appropriate I will be in contact with my representatives as soon as I'm able to do so.'*

Mr Hoskins submitted that it is unclear when Ms Cresswell will be able to obtain legal representation and has indicated in her email to the Hearings Coordinator dated 26 July 2022 that she wishes for the case to continue in her absence. He submitted that Ms Cresswell had voluntarily absented herself and invited the panel to proceed in her absence.

Ms Gee (representing Ms 1) submitted that it is Ms 1's interests to proceed with the case. She submitted that is not clear from the correspondence from Ms Cresswell on when she would be able to secure legal representation. Ms Gee submitted that it is important that the hearing is conducted fairly and it is in the interests on the ground of public interest and public protection to proceed.

The panel heard and accepted the advice of the legal assessor.

The panel has decided to postpone its decision on whether to proceed in the absence of Ms Cresswell. In reaching this decision, the panel has considered Mr Hoskins' submissions, the representations from Ms Gee on behalf of Ms 1, Ms Cresswell's email dated 26 July 2022 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.

The panel took into account that Ms Cresswell had referred to [PRIVATE] personal circumstances in the email dated 26 July 2022 as well as in her correspondence with the NMC prior to the start of this hearing. It considered that it would benefit from receiving some medical evidence from Ms Cresswell when reaching its decision on proceeding in her absence and sent the following email to Ms Cresswell's registered email address:

'Good Morning Ms Cresswell,

Thank you for your email.

The Panel are currently considering an application by the NMC to proceed with this regulatory hearing in your absence.

This is not opposed by your co registrant [Ms 1]

The Panel have seen your email of the 28 January 2022 in which you:

- *Consented for the case to be heard together with [Ms 1]*
- *Said you hoped to get legal representation*
- *[PRIVATE]*
- *Wished to prove your innocence.*

You were advised by email from the NMC on the 16 June 2022 of the date and time of this virtual hearing.

On the 27 June 2022 you were asked by an email from the NMC if you planned to attend.

You were made aware that it is open to you to participate virtually.

Do you wish to tell the panel about any reasons why you cannot participate in this hearing?

Could you assist the Panel by responding to the following questions by 9:00am latest tomorrow morning (28 July 2022):

- *Do you have any legal representation, if not when do you think you will have this?*
- *[PRIVATE]*
- *If your case was adjourned today (27 July 2022) could you give the panel an indication of if and when you would be able to participate in a hearing?*

As you aware it is your duty under section 23 of the NMC Code to cooperate with investigations and the panel would appreciate you providing them with this information.'

The panel determined to allow Ms Cresswell until 9:00am on 28 July 2022 to respond to the email sent.

Decision and reasons on proceeding in the absence of Ms Cresswell on 28 July 2022

The panel and parties had sight of the email sent by Ms Cresswell on 28 July 2022, where she detailed her health and personal circumstances and requested an adjournment for a few weeks to secure legal representation.

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

At the outset of his submissions on proceeding in absence, Mr Hoskins made a request that this case be held partially in private on the basis that proper exploration of Ms Cresswell's case includes reference to her health and personal circumstances. The

application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Ms Gee indicated that she supported the application to the extent that any reference to Ms Cresswell's health and personal circumstances should be heard in private.

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 went into private session in connection with Ms Cresswell's health and personal circumstances as and when such issues are raised.

Decision and Reasons on Proceeding in the Absence of Ms Cresswell

Mr Hoskins referred the panel to the case *of Tait v Royal College of Veterinary Surgeons (RCVS)* [2003] UKPC 34. He submitted that in circumstances such as this where matters of health are raised there was a constrained discretion. Mr Hoskins submitted that in this case, the health issue raised by Ms Cresswell has not been evidenced despite the fact that a request by the panel was specifically made to provide evidence, and Ms Cresswell stating in her email response that she could provide evidence. Mr Hoskins submitted that the panel are in a situation similar to the case of *Yusuf v The Royal Pharmaceutical Society of Great Britain* [2009] EWHC 867 (Admin) where the fact that a respondent claimed illness did not itself require an adjournment. Mr Hoskins also referred the panel to Abdalla v Health Professions Council [2009] EWHC 3498 (Admin) where it was held that the panel were entitled to proceed where an appellant does not produce medical evidence to support a claim that she was unable to attend a hearing. Mr Hoskins submitted that the fact of health conditions even if they were not evidenced does not support any suggestion that that would prevent or impede Ms Cresswell's attendance at a hearing, for example concentration, understanding or otherwise.

Mr Hoskins submitted that the description of some of the things that Ms Cresswell has faced gives some cause for concern, but are not dated in terms of any proximity of time ago. He submitted that the panel should bear in mind that this being an allegation of dishonesty, like in *Hyatt v General Medical Council* [2017] EWHC 1889 is a case where the cross examination were she to attend would likely be robust, and the panel should consider in terms of Ms Cresswell's ability to engage fully in proceedings.

Mr Hoskins submitted that the panel have before it a period of knowledge of the proceedings where there has been a lack of engagement. There are also assertions as to ill health, and an invitation to provide evidence which has not been provided despite the indication that there is evidence. He submitted that this is more on the *Abdalla v Health Professions Council* [2009] EWHC 3498 (Admin) whereby the fact of an assertion of a health condition which is not linked to any demonstrable effect on this hearing should not be sufficient reason not to proceed in the absence of Ms Cresswell.

Mr Hoskins referred the panel to the NMC guidance in that panels should resist the temptation to request hearing officers to contact registrants by telephone. A registrant who has decided not to attend the hearing is unlikely to be willing to provide a full response when put on the spot. He submitted that this is merely guidance and the panel are open to explore this option if they see fit. Mr Hoskins submitted however that Ms Cresswell has been asked effectively twice as to the asserted health conditions.

Mr Hoskins submitted that Ms Cresswell's email indicates that a solicitor has yet to be instructed [PRIVATE]. He submitted that in the public interest and the interest of any witnesses that the hearing should take place in a reasonable time of the relevant events is strongly in favour of proceeding and should be afforded significant weight. Mr Hoskins submitted that this case concerns serious allegations and a speedy determination is required to protect the public. He submitted that several witnesses have also been called to give evidence and it would be disproportionate to delay this as witnesses have been scheduled and engaging with the NMC.

Mr Hoskins submitted that there is a strong public interest in the expeditious disposal of the case. He submitted that Ms Cresswell has a right to appear and there is a pattern of non-engagement from Ms Cresswell despite repeated efforts by the NMC to engage her. It is only yesterday and today (27 and 28 July 2022) that Ms Cresswell has engaged again. Mr Hoskins submitted that this has a serious potential of frustrating the regulatory procedure and there is no reason to think that this pattern would not be repeated.

Mr Hoskins submitted that the panel do have before it Ms Cresswell's assertion that she does wish to attend and represent herself, given the unexplained suggestion that there will also be legal representation which may be forthcoming.

Mr Hoskins submitted that the disadvantage of Ms Cresswell not being able to give evidence is a significant factor in favour of adjourning. He submitted that this is a matter of dishonesty and the cross examination is likely to be robust. The evidence that Ms Cresswell will be able to give personally including the panel's assessment of her as a witness is hugely material to this case. Mr Hoskins submitted however that the panel have the advantage in this case of a written response to very similar allegations provided on two occasions at local level, and Ms Cresswell has signed her name to give an account of the allegations that the panel are considering. The panel would also be open to have Ms Cresswell provide references during the course of the hearing.

Mr Hoskins submitted that there is a significant backlog in these proceedings due to the Covid 19 pandemic, and a suggestion of two weeks from Ms Cresswell would be unrealistic in obtaining representation, and an adjournment would be realistically for a few months which would be disproportionate.

Mr Hoskins submitted that the panel have heard from Ms Gee that there is no assertion of prejudice. He submitted that these cases were joined to be heard together for a reason and Ms Cresswell's absence has an impact on the credibility of assertions as far as Ms 1 is concerned. Mr Hoskins submitted that there is prejudice in the panel not considering both cases together.

Mr Hoskins submitted that for these reasons and the weighty factors, particularly the length of any adjournment, the likelihood of representation, and the evidence provided after repeated requests to do so but fundamentally the public interest factor in *Jones v Haywood*, the panel should proceed in Ms Cresswell's absence.

Ms Gee stated that her position as submitted on 27 July 2022 remains the same and that she is content should the panel make a decision not to proceed in Ms Cresswell's absence, to proceed with Ms 1's case and that she would not be prejudiced.

The panel has decided to proceed with the hearing in the absence of Ms Cresswell. In reaching this decision, the panel has considered the submissions of Mr Hoskins, the submissions from Ms Gee, the emails dated 26 and 28 July 2022 received from Ms Cresswell 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:

- Ms Cresswell has made an application for an adjournment;
- There is no reason to suppose in light of the history of non-participation that adjourning would secure Ms Cresswell's attendance at some future date;
- A number of witnesses 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 2017-2018;
- Further delay will inevitably 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.

The panel considered that there will be some disadvantage to Ms Cresswell in proceeding in her absence. Although the evidence upon which the NMC relies will have been sent to Ms Cresswell at her registered address, she has made no response to the

allegations. Ms Cresswell 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.

The panel took into account that whilst Ms Cresswell had asked for an adjournment of a couple of weeks to be granted to allow her to seek legal representation in her email dated 28 July 2022, if an adjournment were granted the case would not resume again for another few months. The panel noted that there is a significant amount of cross referencing between Ms Cresswell's and Ms 1's case that it would be useful to hear the cases together.

The panel also considered that Ms Cresswell has stated in her email dated 28 July 2022 that she hopes to hear from her solicitor today.

The panel noted that whilst Ms Cresswell has stated in her email dated 28 July 2022 that she does have medical evidence to support her health concerns, she is yet to provide any evidence despite the panel's request.

The panel were of the view that it should proceed in the absence of Ms Cresswell. It decided to contact Ms Cresswell again and encourage her to appear when the hearing resumes on Tuesday 2 August 2022.

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

Details of charge [as amended]

That you, a registered nurse:

1) Between 1 April 2017 and 30 April 2018, claimed for and / or represented that you had worked one, or more, shifts, as set out in Schedule A; **[NOT PROVED]**

2) Your conduct at any and/or all of charge 1/Schedule A was dishonest in that: **[NOT PROVED]**

    a) You knew that you had not worked the shift in question;
    b) Intended to create the misleading impression that you had worked the shift in question;
    c) Obtained/intended to obtain payment for work that you had not undertaken;

3) Between 1 April 2017 and 30 April 2018, claimed for and / or represented that you had worked one, or more, shifts as set out in Schedule B; **[NOT PROVED]**

4) Your conduct at any and/or all of charge 3/Schedule B was dishonest in that: **[NOT PROVED]**

    a) Knew that you had not worked the full shift in question/ left before the end of the shift
    b) Intended to create the misleading impression that you had worked the entire shift;
    c) Obtained/ intended to obtain payment for work you had not undertaken;

5) Inappropriately accessed and/or shared one, or more, confidential / whistleblowing complaints / document(s) **[PROVED]**

SCHEDULE A	

	Date / Location
1	01 May 2017 / SNLY5 –Lyndon 5
2	13 May 2017 / SNLY5 –Lyndon 5
3	18 May 2017 / SNLY5 –Lyndon 5
4	20 May 2017 / SNLY5 –Lyndon 5
5	22 May 2017 / SNLY5 –Lyndon 5
6	25 May 2017 / SNLY5 –Lyndon 5
7	02 June 2017 / SNLY5 –Lyndon 5
8	03 June 2017 / SNLY5 –Lyndon 5
9	17 June 2017 / SNLY5 –Lyndon 5
10	22 July 2017 2017 / SNLY5 –Lyndon 5
11	29 July 2017 / SNLY5 –Lyndon 5
12	05 August 2017 / SNLY5 –Lyndon 5
13	15 August 2017 / SNLY5 –Lyndon 5
14	28 September 2017 / SMAMB Acute Medical Ward B (Newton 1)
15	01 October 2017 / SMAMB Acute Medical Ward B (Newton 1)
16	01 December 2017 / SMAMB Acute Medical Ward B (Newton 1)
17	08 January 2018 / SMOPU OPAU Older Persons Assessment Unit
18	14 January 2018 / SMOPU OPAU Older Persons Assessment Unit
19	17 January 2018 / SMOPU OPAU Older Persons Assessment Unit
20	03 February 2018 / SMOPU OPAU Older Persons Assessment Unit
21	26 March 2018 / SMOPU OPAU Older Persons Assessment Unit

SCHEDULE B

	Date / Location
1	02 April 2017 / SNLY5 –Lyndon 5
2	08 April 2017 / SNLY5 –Lyndon 5
3	11 April 2017 / SNLY5 –Lyndon 5
4	12 April 2017 / SNLY5 –Lyndon 5
5	13 April 2017 / SNLY5 –Lyndon 5
6	14 April 2017 / SNLY5 –Lyndon 5
7	15 April 2017 / SNLY5 –Lyndon 5
8	16 April 2017 / SNLY5 –Lyndon 5
9	18 April 2017 / SNLY5 –Lyndon 5
10	19 April 2017 / SNLY5 –Lyndon 5
11	21 April 2017 / SNLY5 –Lyndon 5

12	22 April 2017 / SNLY5 –Lyndon 5
13	24 April 2017 / SNLY5 –Lyndon 5
14	25 April 2017 / SNLY5 –Lyndon 5
15	27 April 2017 / SNLY5 –Lyndon 5
16	29 April 2017 / SNLY5 –Lyndon 5
17	30 April 2017 / SNLY5 –Lyndon 5
18	07 May 2017 / SNLY5 – Lyndon 5
19	08 May 2017 / SNLY5 –Lyndon 5
20	09 May 2017 / SNLY5 –Lyndon 5
21	10 May 2017 / SNLY5 –Lyndon 5
22	14 May 2017 / SNLY5 –Lyndon 5
23	16 May 2017 / SNLY5 –Lyndon 5
24	17 May 2017 / SNLY5 –Lyndon 5
25	28 May 2017 / SNLY5 –Lyndon 5
26	29 May 2017 / SNLY5 –Lyndon 5
27	31 May 2017 / SNLY5 –Lyndon 5
28	01 June 2017 / SNLY5 –Lyndon 5
29	07June 2017 / SNLY5 –Lyndon 5
30	11 June 2017 / SNLY5 –Lyndon 5
31	16 June 2017 / SNLY5 –Lyndon 5
32	18 June 2017 / SNLY5 –Lyndon 5
33	19 June 2017 / SNLY5 –Lyndon 5
34	24 June 2017 / SNLY5 –Lyndon 5
35	25 June 2017 / SNLY5 –Lyndon 5
36	26 June 2017 / SNLY5 –Lyndon 5
37	27 June 2017 / SNLY5 –Lyndon 5
38	29 June 2017 / SNLY5 –Lyndon 5
39	02 July 2017 / SNLY5 –Lyndon 5
40	04 July 2017 / SNLY5 –Lyndon 5
41	07 July 2017 / SNLY5 –Lyndon 5
42	08 July 2017 / SNLY5 –Lyndon 5
43	10 July 2017 / SNLY5 –Lyndon 5
44	11 July 2017 / SNLY5 –Lyndon 5
45	12 July 2017 / SNLY5 –Lyndon 5
46	13 July 2017 / SNLY5 –Lyndon 5
47	15 July 2017 / SNLY5 –Lyndon 5
48	16 July 2017 / SNLY5 –Lyndon 5
49	17 July 2017 / SNLY5 –Lyndon 5
50	18 July 2017 / SNLY5 –Lyndon 5
51	19 July 2017 / SNLY5 –Lyndon 5
52	24 July 2017 / SNLY5 –Lyndon 5
53	26 July 2017 / SNLY5 –Lyndon 5
	27 July 2017 / SNLY5 –Lyndon 5
54	30 July 2017 / SNLY5 –Lyndon 5

55	31 July 2017 / SNLY5 –Lyndon 5
56	01 August 2017 / SNLY5 –Lyndon 5
57	02 August 2017 / SNLY5 –Lyndon 5
58	06 August 2017 / SNLY5 –Lyndon 5
59	16 August 2017 / SNLY5 –Lyndon 5
60	17 August 2017 / SNLY5 –Lyndon 5
61	21 September 2017 / SMAMB Acute Medical Ward B (Newton 1)
62	24 September 2017 / SMAMB Acute Medical Ward B (Newton 1)
63	02 October 2017 / SMAMB Acute Medical Ward B (Newton 1)
64	06 October 2017 / SMAMB Acute Medical Ward B (Newton 1)
65	07 October 2017 / SMAMB Acute Medical Ward B (Newton 1)
66	08 October 2017 / SMAMB Acute Medical Ward B (Newton 1)
67	01 November 2017 / SMAMB Acute Medical Ward B (Newton 1)
68	05 November 2017 / SMAMB Acute Medical Ward B (Newton 1)
69	07 November 2017 / SMAMB Acute Medical Ward N (Newton 1)
70	03 December 2017 / SMAMB Acute Medical Ward B (Newton 1)
71	04 December 2017 / SMAMB Acute Medical Ward B (Newton 1)
72	01 January 2018 / SMOPU OPAU Older Persons Assessment Unit
73	28 January 2018 / SMOPU OPAU Older Persons Assessment Unit
74	01 February 2018 / SMOPU OPAU Older Persons Assessment Unit
75	04 February 2018 / SMOPU OPAU Older Persons Assessment Unit
76	11 February 2018 / SMOPU OPAU Older Persons Assessment Unit
77	14 February 2018 / SMOPU OPAU Older Persons Assessment Unit
78	26 February 2018 / SMOPU OPAU Older Persons Assessment Unit
79	27 February 2018 / SMOPU OPAU Older Persons Assessment Unit
80	02 March 2018 / SMOPU OPAU Older Persons Assessment Unit
81	06 March 2018 / SMOPU OPAU Older Persons Assessment Unit
82	08 March 2018 / SMOPU OPAU Older Persons Assessment Unit
83	12 March 2018 / SMOPU OPAU Older Persons Assessment Unit
84	16 March 2018 / SMOPU OPAU Older Persons Assessment Unit
85	19 March 2018 / SMOPU OPAU Older Persons Assessment Unit
86	20 March 2018 / SMOPU OPAU Older Persons Assessment Unit
87	30 March 2018 / SMOPU OPAU Older Persons Assessment Unit
88	02 April 2018 / SMOPU OPAU Older Persons Assessment Unit
89	09 April 2018 / SMOPU OPAU Older Persons Assessment Unit
90	11 April 2018 / SMOPU OPAU Older Persons Assessment Unit

Decision and reasons on application to amend the charge

The panel heard an application made by Mr Hoskins, on behalf of the NMC, to amend the wording of charge 2b.

The proposed amendment was to correct a typographical error and amend the word “work” to “worked” so that the charge reads correctly in the past tense. It was submitted by Mr Hoskins that the proposed amendment is purely syntaxial to correct a spelling error and would not cause no prejudice to either party.

2) Your conduct at any and/or all of charge 1/Schedule A was dishonest in that:

   […]

   b) Intended to create the misleading impression that you had work**ed** the shift in question;

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

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 Ms Cresswell 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 correct a syntaxial error in the drafting of the charges.

Decision and reasons on facts

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

The panel has drawn no adverse inference from the non-attendance of Ms Cresswell.

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:

- Witness 1: Employment Relations Case Work Team Manager responsible for investigating the allegations
- Witness 2: Band 6 Sister of the Acute Medicine Unit and E-Roster Champion employed by Sandwell and West Birmingham NHS Trust, at the time of the charges
- Witness 3: Project Implementation Officer in the E-Roster Team, at the time of the charges
- Ms 1: Band 6 Ward Sister and Ms Cresswell's co-registrant at this hearing

Background

The charges arose whilst Ms Cresswell was employed as a Band 7 registered nurse and Ward Manager by the Sandwell and West Birmingham NHS Foundation Trust (the Trust).

It is alleged that Ms Cresswell abused the E-Roster system at the Trust, and dishonestly claimed to have worked substantive bank shifts which she did not work, or did not complete, over three wards at the Sandwell Hospital (the Hospital); being Lyndon 5 Ward, Newton 1 (or Acute Medical Unit B) Ward and the Older Person Assessment Unit (OPAU).

It is alleged that Ms Cresswell intended to create the misleading impression that she had carried out or completed the shifts outlined in schedules A and B of the charges,

and dishonestly obtained or intended to obtain payment for such shifts which she knew she had not worked.

It is further alleged that Ms Cresswell breached confidentiality in respect of a whistleblowing report which was marked as confidential and contained within the email account of Witness 2. It is alleged that Ms Cresswell intentionally accessed this confidential email and forwarded and shared its contents with Ms 1, thereby breaching confidentiality.

Ms Cresswell denied the allegations raised against her during the local investigation.

Before making any findings on the facts, the panel heard and accepted the written advice of the legal assessor. It considered the witness and documentary evidence provided by both the NMC and Ms 1.

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

Evidence before the Panel in Respect of Charges 1 and 3

The panel first considered the quality and veracity of the evidence before it in relation to charges 1 and 3. It noted that majority of the documentary evidence relied upon by the NMC was gathered by Witness 1 in her investigation of the allegations. The panel first considered the quality of this investigation and whether it could be relied upon to support the charges brought against Ms Cresswell by the NMC. The panel considered the evidence which Witness 1 had compiled in carrying out this investigation in turn, being: information received from the E-Roster software; car parking records; access pass swipe records; controlled drugs administration records; patient records and EBMS records; Ms Cresswell's attendance at Red/Green meetings and off duty records and allocation sheets.

The panel had regard to the E-Roster system and the documentary evidence surrounding this, including the Barnacle Report, as well as the oral evidence of

Witnesses 1, 2 and 3. It bore in mind that Ms Cresswell was responsible for shift management on the E-Roster The panel noted that the Barnacle Report indicated that there were missing hours included for both Ms Cresswell and Ms 1, but also heard from Witness 2, who it found to be clear and cogent, that there were similar issues relating to missing hours relating to other staff in the Trust, however she reported that she was not aware that other staff in the Trust had missing hours to the same extent.

The panel also accepted the evidence of Witness 2, who was the E-Roster champion for the Trust. She explained that the E-Roster system was introduced into the Trust in around December 2016 and began to present issues around three months after it was introduced. She explained that the E-Roster system presented practical issues when using the software, such as a “time lag” when a member of staff changed wards. Witness 2 said that, when this happened, their manager would have to undertake a bureaucratic exercise in which they were required to email the electronic staff records team, who in turn emailed the E-Roster team who could then change the location on the system. She told the panel that this process usually took “some time” and recalled that Ms 1 had this issue when she was transferred from one ward in the Trust to another.

Witness 2 further said that there was some confusion between some of the wards not recording substantive shifts on E-Roster and only using it for bank and agency shifts. She reported that, because of this, there was no way to prevent overlapping shifts being logged.

Witness 2 said that Ms Cresswell’s understanding of the software was extremely limited, in her oral evidence, she said:

> *“She [Ms Cresswell] didn’t know how to build a roster. She wasn’t aware of the need to record stuff in real – shifts in real-time. She didn’t understand the time balances, how to look at them, how they were worked out, where they even were showing on the – so on the left side of the roster, and she even said that she had never had any formal training on E-Roster. She had worked on a pop-up ward before who were just using bank shifts so she wasn’t aware of how to input substantive shifts correctly*

and look at how much people were working, for instance in a month, in the four week block, and it was just a general feel of, like I say, of her not having no clue"

Witness 2 further explained that the training on the E-Roster system was ad hoc, with Ms Cresswell calling her when she required assistance, and Witness 2 attending the ward to advise Ms Cresswell.

The panel noted that Witness 3 said that he thought Ms Cresswell's knowledge of the E-Roster system was similar to that of others in the same role, such as Witness 2. However, the panel were unsure of the basis of this view, as it noted Witness 2 had spent more time working alongside Ms Cresswell with the E-Roster system. In light of this, the panel preferred Witness 2's evidence as to Ms Cresswell's understanding of the E-Roster software.

In assessing the veracity of the E-Roster evidence, the panel noted that there was concern expressed by Witness 2 about Ms Cresswell's lack of understanding of the purpose of this software, alongside technical issues with the software itself. The panel therefore determined that it could place limited reliance on the evidence provided in respect of the E-Roster system.

The panel went on to consider the car park records, which Witness 1 used in her investigation to assist her to establish whether or not Ms 1 was present at the Hospital on the dates in question.

The panel heard from Ms 1 and Witness 1 that there was an issue with the car park barrier and at times it was left in an open position, during which time vehicles were free to enter and leave the car park without swiping in or out. The panel noted that there was a dispute between Witness 1, who said this issue arose around once or twice a month, and Ms 1, who said that the car park was open more frequently. The panel bore in mind that Witness 1 was not based at the Hospital for work, so did not attend the site as often

as Ms 1. The panel therefore found Ms 1's account to be plausible and preferable to that of Witness 1.

The panel also noted the responses given by Ms Cresswell at the local level investigation, that on occasions her partner would drop her off at work or pick up her car from the car park whilst she was working. Ms Cresswell also said that she may be required, on occasion, to attend meetings at Birmingham City Hospital during her working day, therefore she would take her car to such meetings on occasion, which the panel also found to be plausible.

The panel concluded that, in light of the evidence about the car park barrier and explanations given by Ms Cresswell in her local investigation, which the panel found to be plausible, the weight which it could attach to this evidence was relatively low.

The panel next considered the ward access pass swipe systems, which Witness 1 relied on to form part of her investigation. The panel heard evidence from Witness 1, that she had selected sample dates and looked at ward swipe entry and exit data, and concluded that on the dates selected and charged, Ms Cresswell's swipe access data did not match up with her rostered shifts, therefore she was absent from work and/or had left her shift early.

The panel heard evidence from Witness 2 and Ms 1 who explained the layout of the wards. The panel accepted Ms 1's evidence that it was usual practice for doors to be held open for members of staff, who would not in these circumstances independently swipe their passes into the ward. These witnesses also told the panel that it was commonplace to open the ward doors and exit by an automatic "exit button", which would not require swipe pass exit. The panel found this account to be plausible, and the members of the panel who are familiar with how hospitals operate could agree with Ms 1's explanation of how she would follow through an open door held by another person to be the reality of how the many nurses operate in hospital wards.

The panel also heard from Ms 1 that Ms Cresswell's role required her to be away from the wards for meetings up to three times a day, and that Ms Cresswell also attended

meetings at other hospitals within the Trust, although Witness 1 gave evidence that Ms Cresswell's swipe access cards would also work also at these hospitals.

The panel considered all the evidence in relation to this part of Witness 1's investigation and concluded that, although swipe access cards would likely give an indicator of the staff who were on site at any given time, the purpose of these cards is to be a security measure and such cards were not intended to ascertain the location of staff at all times. Having accepted Ms 1's explanation of how the ward access passes could be used infrequently, the panel determined that there were clear deficiencies in the reliance on this evidence for the purpose of Witness 1's investigation. The panel therefore concluded that little weight could be attached to this evidence.

The panel next considered the information which was gathered from the controlled drug administration register for the purpose of her investigation. The panel noted the 'dip test' approach which Witness 1 had employed during her investigation and noted that the same dates were selected for the controlled drug evidence as with the other evidence, such as car park records, access pass swipe records and patient notes. The panel noted that the controlled drug records before it did not demonstrate that Ms Cresswell had administered controlled drug medications on the dates selected.

The panel bore in mind the evidence of Ms 1 in respect of this matter. She said that Ms Cresswell or Ms 1 were ordinarily the nurses in charge of the wards they worked on and said that any of the registered nurses working clinically on a ward would have the responsibility to deliver and record the administration of controlled drugs in the register. The nurse in charge or senior nurse would have the responsibility for security and reconciliation of the controlled drugs cupboard, which she said was recorded twice a day in the controlled drug stock count record. The panel noted that such records had not been sought out for the purpose of the Trust investigation and were not before the panel at this hearing.

The panel considered the veracity of this evidence in assisting it to conclude whether Ms Cresswell was in attendance on the wards in question on the dates contained in the schedules annexed to charges 1 and 3. It bore in mind that the panel did not have

before it information about the exact nature of patients in the wards, but it concluded that it was plausible that there may well be days where controlled drugs were not administered on acute medical admissions and older persons assessment unit wards. The panel accepted the evidence of Ms 1 and concluded that it would not expect it to be the nurse in charge or ward leader's role to carry out all or most of the daily administration and recording of controlled drugs, which may be the reason why Ms Cresswell's input into the controlled drug administration register was sporadic rather than consistent.

The panel concluded that the controlled drug administration register was helpful to a limited extent in showing when Ms Cresswell was on duty and would have been of assistance to Witness 1's investigation in this respect, however it could not be relied upon to demonstrate when Ms Cresswell was not on duty, or absent when she was expected to be on shift, as it would not be expected that she would record in this book every day. The panel concluded that the controlled drugs stock count record would have been of more assistance in this respect, however this was not interrogated for the purpose of the Trust investigation. The panel therefore concluded that limited reliance could be based on the controlled drug administration register used for the purpose of establishing Ms Cresswell's presence at the Hospital on the dates specified in the schedules to the charges.

The panel then went on to consider the patient records examined for the purpose of Witness 1's investigation. The panel noted the records examined by Witness 1 related to scanned records relating to a sample of two patients from a ward of 33 beds on each date investigated.

The panel heard from Ms 1 about practices on the wards, including the acute medical admissions unit. She said that whiteboards were most frequently used to record live updates of the location of patients on the ward and staff allocations to those patients. She made reference to the use of red and orange folders which were used for recording bank shifts worked. The panel noted that there were no copies of such documents before it, and it was unclear which recording systems were used on which wards. Ms 1 also told the panel that scanned versions of patient notes were not always properly

uploaded to the Clinical Document Architecture (CDA) system, which Witness 1 used to access patient notes for the purpose of her investigation.

The panel considered the veracity of this evidence, the panel concluded that the senior nurse or nurse in charge may be less likely to be responsible for individual patients therefore the likelihood of them writing in specific records would be lower than the band five registered nurses on the units. The panel took into account the specimen sample of patient records taken by Witness 1, being two patients from a 33-bed ward, over multiple dates when it is alleged that Ms Cresswell absconded from or did not attend her shifts. The panel also bore in mind that an adult medical admissions unit is likely to be a busy ward with multiple changes in patients over the course of a shift, as patients were admitted and then moved to different wards.

The panel accepted that Witness 1 was likely to need to use a specimen sample of patient records for the purpose of her investigation as it would create practical difficulties for her to consider all patients records for all the dates in question. However, it concluded that the specimen sample adopted was impracticably small to help to establish whether or not Ms Cresswell was working on ward on the dates investigated. It accepted Ms 1's evidence that whiteboards were used to document the live location of patients and allocation of staff. Red and orange folders were also used to document bank shifts worked. Ms 1 said that patient records were not always properly uploaded to the CDA system. It was not clear to the panel what standard recording systems were in place on the wards in question. In light of this, and the absence to any reference to these documents in the Trust investigation, the panel felt that little weight could be given to the evidence from the small sample of selected patient records.

The panel also heard from Witness 1 about her reliance on data retrieved from the Emergency Bed Management System (EBMS) as part of her investigation. This software was described by Witness 2 as a system in which a nurse would allocate patients to a bed, which was protected by a password. The panel heard that Ms Cresswell made twelve entries into this system over the dates investigated. The panel also heard from Ms 1 about the practical use of EBMS on the wards, in which she said in her examination in chief:

*"**Ms Gee:** […] Moving slightly on to the types of data that were investigated by Witness 1, we have spoken about the EBMS used on the wards. When you are on the ward are you able to give us an indication, and please do tell me if you are not, of how many of the staff approximately would be logging on to the EBMS during that shift, how many other people have the authority to use it on a ward?*

***Ms 1**: I have not got the numbers but every nurse, healthcare, doctor, physiotherapist, everybody in the team have access to this, so it is not a one person access, all have access.*

***Ms Gee**: If you were on a ward with others would you delegate updating the EBMS?*

***Ms 1**: Yes, sometimes, as long as it is done that's the main thing. As long as it is up to date by someone and they tend to update it as we go along as you are able to. Sometimes it is not updated at all, sometimes the system is down and we have to go to paper.*

***Ms Gee**: How often does that happen during the period we are looking at?*

***Ms 1**: Quite often, it is an IT issue when the system is crashed. Sometimes you have got a patient sat in a bed on the system that is actually home because there is an IT problem and we can't take off that patient and there is another patient in that bed but you can't then allocate them to that bed because of system error. It is a problematic system."*

The panel found Ms 1's evidence in relation to this system to be clear and credible. It noted that multiple members of staff have access to the EBMS and therefore the data collected from this software could not be attributed to Ms Cresswell as the senior nurse or the nurse in charge. It further accepted that this system presented technical issues

and understood that it has since been replaced at the Trust. In light of the above, the panel concluded that the evidence gathered from the EBMS was inherently weak.

The panel next considered the reference to “Red/Green Meetings” to discuss patient safety in discharging them from the Hospital. Ms 1 explained that, as the senior nurse or nurse in charge, Ms Cresswell or Ms 1 were responsible for attending these meetings three times a day. She told the panel that these meetings lasted around 45 minutes to one hour per meeting and the first meeting took place around 10:00; the second took place at some point between 12:00 and 15:00 and the final meeting at approximately 18:00. The panel found Ms 1 to be clear and cogent in her explanation of the purpose of these meetings, when and how often they took place and that the senior or nurse in charge’s attendance at such meetings was mandatory. The panel noted that such meetings were likely to take a considerable amount of time out of Ms Cresswell’s working day and may provide an explanation as to why there was no evidence of her footprint on the ward for significant periods during a shift.

The final piece of documentary evidence which the panel considered was the off-duty records and allocation sheets. The panel heard and accepted the evidence of Ms 1, that Ms Cresswell habitually completed the allocation sheets in advance of shifts by looking at the off-duty records, before knowing which patients were assigned to specific beds. In light of this, the panel found it difficult to assess how valid these records and allocation sheets were in real time, and therefore could not assess the value of this information in relation to the charges.

The panel next had regard to the approach taken by Witness 1 to the Trust investigation and analysed the methodology which underpins the allegations before the panel. It concluded that was a pragmatic decision taken by Witness 1 to take a sampling approach in her investigation, given the volume of dates, patients, and data. The panel heard that Witness 1 was carrying out four other investigations into different matters, not related to Ms Cresswell’s case, at the same time.

The panel went on to consider Witness 1’s approach in looking at data from the same dates on the dip test sample during her investigation. The panel appreciated that

Witness 1 was the sole person tasked with the investigation, which involved vast amounts of data. The panel accepted Witness 1's evidence, who accepted when asked that the investigation was not a 'gold standard' as she was limited by time pressure and did not have the resources to manage the complete data set relating to these allegations. The panel therefore understood that Witness 1 was required to limit how much data she could analyse for the purpose of her investigation.

The panel then considered the evidence as a whole. The panel bore in mind that it had identified concerns about the weight which could be attributed to each set of data. The panel heard the evidence of Ms 1, who said that there was information available to Witness 1 which would provide a more reliable indicator of when she and Ms Cresswell were on shift, such as the controlled drug stock record which the senior nurse or nurse in charge would have been required to reconcile every shift. The panel were also surprised that the red and orange folders were not sought during the course of Witness 1's investigation. These records would likely have been of equal or greater assistance to demonstrate bank shifts worked than the small sample of patient records selected.

The panel considered that the allegations against Ms Cresswell during the Trust investigation, which are the basis of the charges before the panel today, were very serious and related to dishonesty. In light of this, the panel was of the view that a more substantial investigation into the shifts in question was required. The panel appreciated the time constraints and practical difficulties faced by Witness 1 in carrying out her investigation, however the panel concluded that in carrying out this investigation Witness 1 selected measures which would be more suitable to establish whether junior nurses were at work, rather than measures which would identify the presence of a senior nurse with different roles and responsibilities.

The panel also noted that Witness 1 believed the information taken from E-roster was correct, notwithstanding what the panel were told in the evidence of Witness 2, that there were significant issues with this software. On balance, the panel preferred the evidence of Witness 2.

The panel concluded that the evidence before it was inconsistent with the allegations raised against Ms Cresswell. It noted that there was tangible evidence of Ms Cresswell's attendance at the Hospital on dates when it was alleged that she was not present in Schedule A, for example:

- 18 May 2017: evidence of an entry log swipe at 09:30
- 2 June 2017: parking data, door entry data and an EBMS entry
- 3 June 2017: two EMBS entries
- 17 June 2017: evidence of an entry log swipe into the Accident and Emergency Department of the Hospital
- 15 August 2022: 22 door swipes into Lyndon 5 ward

The panel concluded that, in light of the seriousness of the allegations of dishonesty, the expectation would be that the Trust investigation would be carried out to a gold standard, which Witness 1 accepted was not done. The panel concluded that available evidence from Witness 1's investigation could not be relied upon to definitively support Witness 1's findings that Ms Cresswell was absent on the dates specified in the charges and schedules.

The panel then went on to consider the extent of any independent investigation which the NMC carried out prior to drafting the charges against Ms Cresswell. The panel concluded that, on the evidence before it, the NMC primarily relied on the Trust investigation and appeared not to have carried out an independent investigation or verification of the information which it received from the Trust, or seek additional information from the Trust. Having found the scope of the Trust investigation was insufficient to sustain the allegations on which the charges were based, the panel concluded that, on the balance of probabilities, there was insufficient evidence before it to support charges 1 and 3.

Charge 1

That you, a registered nurse:

1. Between 1 April 2017 and 30 April 2018, claimed for and / or represented that you had worked one, or more, shifts, as set out in Schedule A;

This charge is found NOT proved.

Having concluded that the Trust investigation failed to support the allegation which underpins this charge, and in the perceived absence of any significant evidence from an independent investigation of the allegations by the NMC, the panel find that, on the balance of probabilities, there is insufficient evidence before it to sustain that between 1 April 2017 and 30 April 2018, Ms Cresswell claimed for and / or represented that she had worked one, or more, shifts, as set out in Schedule A.

The panel therefore found this charge not proved.

Charge 2)

2. Your conduct at any and/all of charge 1/Schedule A was dishonest in that:

    a) You knew that you had not worked the shift in question;
    b) Intended to create the impression that you had worked the shift in question;
    c) Obtained/intended to obtain payment for work that you had not undertaken;

This charge is found NOT proved.

Having found charge 1 not proved, the panel was not required to consider charge 2.

The panel therefore found this charge not proved.

Charge 3)

3. Between 1 April 2017 and 30 April 2018, claimed for and / or represented that you had worked one, or more, shifts as set out in Schedule B;

This charge is found NOT proved.

Having concluded that the Trust investigation failed to support the allegation which underpins this charge, and in the perceived absence of any significant evidence from an independent investigation of the allegations by the NMC, the panel find that, on the balance of probabilities, there is insufficient evidence before it to sustain that between 1 April 2017 and 30 April 2018, Ms Cresswell claimed for and / or represented that she had worked one, or more, shifts, as set out in Schedule B.

The panel therefore found this charge not proved.

Charge 4)

4. Your conduct at any and/all of charge 3/Schedule B was dishonest in that:

    a) You knew that you had not worked the shift in question;
    b) Intended to create the misleading impression that you had worked the shift in question;
    c) Obtained/intended to obtain payment for work that you had not undertaken;

This charge is found NOT proved.

Having found charge 3 not proved, the panel was not required to consider charge 4.

The panel therefore found this charge not proved.

Charge 5)

5. Inappropriately accessed and/or shared one, or more, confidential / whistleblowing complaints/ document(s)

This charge is found proved.

In reaching this decision, the panel took into account all the documentary evidence before it, alongside the oral and witness evidence of Witness 2 and Ms 1.

The panel had regard to the email which was allegedly inappropriately accessed and/or shared by Ms Cresswell. Although the panel did not have sight of the body of this email, it had regard to the email subject, being “in confidence”. The panel found the oral evidence of Witness 2 in respect of the nature of this email to be clear, credible, and consistent with her witness statement, in which she states:

> *“Emails containing confidential whistleblowing concerns were forwarded from my work email account”*

In light of this, the panel was satisfied that the email was a document which contained confidential information and whistleblowing concerns.

The panel heard from Witness 2 that this document was forwarded from her email account which was left logged on to a shared computer terminal, but could not confirm who had forwarded the email. The panel heard that there was a significant period of time between the date on which Witness 2 had received the email and the date on which it was accessed. It also heard from Witness 2 that this email was stored within a folder on her email account.

The panel bore in mind that Ms Cresswell was not present at the hearing and had not directly responded to the charges. However, the panel considered Ms Cresswell’s responses to this allegation during the Trust investigation, when she admitted to accessing the email account, but suggested that she believed that it was her own email account which she was accessing.

The panel considered the evidence before it and preferred the account of Witness 2 over that of Ms Cresswell. The panel heard that Ms Cresswell’s name was not on the email inbox and would have expected that she would have immediately recognised that it did not belong to her. Having accepted the evidence that the confidential whistleblowing email was not a new email and was stored in a folder, rather than in the

inbox, the panel found it highly unlikely that Ms Cresswell came across this email without deliberate interrogation of Witness 2's email account. The panel was therefore satisfied that, on the balance of probabilities, that Ms Cresswell knowingly accessed and deliberately interrogated Witness 2's email account and accessed one, or more, confidential / whistleblowing complaints / document(s) and that charge 5 is proved on this basis.

The panel went on to consider whether Ms Cresswell shared the email which she accessed. The panel found the oral evidence of Witness 2 to be clear, credible, and consistent with her witness statement, in which she set out:

> *"During the period in which they gained access to my work account, emails containing confidential whistleblowing concerns were forwarded from my work email account to the work email account belonging to Ms 1. I did not forward these confidential emails to either Ms 1 or Ms Cresswell"*

The panel heard in Ms 1's oral evidence that she received an email from Witness 2 whilst Ms 1 was on the ward. Ms 1 said that she went to the office on the ward expecting to find Witness 2, as she was not expecting that email to be sent, and instead found Ms Cresswell, who had also printed out the email for Ms 1 to look at. The panel found this evidence to be plausible and credible and therefore found that, on the balance of probabilities Ms Cresswell inappropriately accessed and/or shared one, or more, confidential / whistleblowing complaints / document(s).

The panel therefore found this charge 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 Ms Cresswell'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, Ms Cresswell's fitness to practise is currently impaired as a result of that misconduct.

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

Mr Hoskins identified the specific, relevant standards where Ms Cresswell's actions amounted to misconduct. He invited the panel to have regard to his written submissions in respect of misconduct, which set out:

> *"[…]*
>
> *17. The NMC submit that, […], the conduct is sufficiently serious to make it misconduct because:*

a. *It undermines an important function of confidentiality in whistleblowing;*
b. *It was a calculated act. For example, in the Panel's finding that the email was stored in a folder and dated some time before the Registrant's onward conveyance of it;*
c. *There is no legitimate explanation for its discovery and onward conveyance and the explanations Ms Cresswell has advanced previously have been found to be false;*
d. *The actions in sending it on not only publicised more widely a private document (and would have permitted further circulation) put also others at risk of suspicion, namely Ms 1 who has herself faced regulatory proceedings in part because of a similar allegation;*
e. *The seniority of Ms Cresswell as a Band 7 nurse of some significant experience is an aggravating feature, firstly, because she would be aware of the confidentiality attached to whistleblowing reports and the cogent reasoning behind this and, secondly, because she is the very person to whom other whistle blowers could have reported to in the confidence that she would behave appropriately.*
f. *Breach of confidentiality and failure to cooperate with investigative procedures are breaches of the NMC Code of Conduct, specifically:*
    i. *And by analogy, paragraph 5.4: As a nurse or midwife, you owe a duty of confidentiality to all those who are receiving care. This includes making sure that they are informed about their care and that information about them is shared appropriately.*

    ….

    5.4 share necessary information with other healthcare professionals and agencies only when the interests of patient safety and public protection override the need for confidentiality, and
    ii. *8.4 work with colleagues to evaluate the quality of your work and that of the team*

iii. *16.4 acknowledge and act on all concerns raised to you, investigating, escalating or dealing with those concerns where it is appropriate for you to do so*

iv. *23 Cooperate with all investigations and audits. This includes investigations or audits either against you or relating to others, whether individuals or organisations. It also includes cooperating with requests to act as a witness in any hearing that forms part of an investigation, even after you have left the register.*

[…]

19. For the reasons outlined above, the Committee are invited to find that:

a. The facts found proved constitute misconduct; […]"

NMC Submissions on impairment

Mr Hoskins 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); *Zygmunt v. GMC* [2008] EWHC 2643 (Admin); and *Cohen v. GMC* [2008] EWHC 581 (Admin).

Mr Hoskins invited the panel to have regard to his written submissions in respect of misconduct, which set out:

[…]

14. The Committee will again be very familiar with the of cited case of CHRE v. NMC and Paula Grant [2011] EWHC 927 (Admin), where it was said at paragraph 76:

"Do our findings of fact in respect of the registrant's misconduct... 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."*

15. *It is submitted that of the test elucidated in the case of Grant, only paragraph b is relevant for this Committee's deliberations.*

[…]

18. *The basis of the misconduct finding above provides sufficient basis to find the single limb of Grant relied upon proved. It will no doubt be argued that this was a single slip in a long and senior career. It may be the case that Ms Cresswell may wish to assist the Panel with providing evidence of learning, reflection, practise since and demonstrate an understanding of her misconduct and a promise it will not happen again. However, as the evidence currently before the Panel stands:*
    a. *Ms Cresswell deliberately prioritised her own position over that of a genuine complaint made against her;*
    b. *The Panel have rejected her explanation of innocent mistake advanced in formal proceedings at Trust level;*
    c. *While this sort of action is perhaps liable to being remedied, there is no evidence of remediation to date in this case;*
    d. *There is no insight demonstrated to date in respect of the allegations found proved. The panel cannot be satisfied that it will not be repeated.*

19. *For the reasons outlined above, the Committee are invited to find that:*

[…]

b. *Ms Cresswell's fitness to practise remains currently impaired."*

Mr Hoskins invited the panel to have regard to the whistleblowing emails. He highlighted that the reason why Witness 2 was in possession of these was because they had already been sent to her by Ms 5, a senior matron at the Trust, in breach of the Trust's whistleblowing policy.

Ms Cresswell's Evidence on Misconduct and Impairment

Ms Cresswell gave evidence under affirmation. She told the panel that she is a passionate nurse with over 20 years' experience in the NHS. She said that, since leaving her post at the Trust, she has worked as a Band 5 nurse on a respiratory ward, caring for acutely unwell patients during the Covid-19 Pandemic. She said that she has undertaken lots of training and has assisted senior managers at her most recent post in dealing with whistleblowing concerns.

Ms Cresswell told the panel about the incident outlined in charge 5. She said that she never intended to breach confidentiality and would never breach the confidentiality of a patient. She said that it was her own confidentiality which was breached as the email was about herself, which she described as "*horrible to find*".

Ms Cresswell explained how she came to find the whistleblowing email. She said that it was on a shared desktop computer, and that each user should have logged off their emails when not at the terminal. She said that she assumed that the computer was logged into her email account, and she opened the email as she saw her name in the subject. She did not accept that the email was in a folder in Witness 2's inbox. She said that once she saw the email, she realised that there had been a breach of confidentiality by a senior matron, Ms 5, to a band 6 nurse, Witness 2.

Ms Cresswell said that she was "*devastated*" when she read the whistleblowing complaint about her management at the Trust. She said that she has not read it since. Ms Cresswell explained that, at the time she found it, she discussed this email with Ms 1 and considered that she needed to prove that a whistleblowing letter had been breached by Ms 5, in order to prove her own innocence, so she could establish a trail of such breach. Ms Cresswell said that she knew that no patients were at risk of harm and patient confidentiality was not breached. Ms Cresswell said that she would categorically never breach another person's confidentiality again.

Ms Cresswell said that she had no intention to act maliciously or breach the confidentiality of the anonymous whistle-blower, but "*instinctively"* forwarded on the email to protect herself by keeping a record of the breach of confidentiality by Ms 5, whose actions she said were malicious. She told the panel that multiple employees of the Trust became aware of the anonymous complaint because of Ms 5's actions. She said that she was desperate to continue in her role as a Band 7 nurse at the Trust and therefore sought to stop the whistleblowing allegations being made about her.

Ms Cresswell explained the culture of the Trust at the time the incident arose. She said that malicious allegations had been made against her. She said that she felt that such allegations were made as a consequence of her being the only nurse of her ethnicity who worked on the ward. She said that there were failings, and she had a lack of support from the Trust when she expressed concerns. Ms Cresswell said that she felt that other nurses were seeking to get her nursing position within the Trust and phrased it in her evidence before the panel, that they were trying to *"get her post".* Ms Cresswell told the panel that she could not speak to her manager Ms 5, as she was the person whose conduct she was concerned about. Ms Cresswell said she wasn't listened to by the Trust. She said that she would handle the same situation differently now, as she is up to date and confident with confidentiality and governance guidance. Ms Cresswell said that she would never breach governance or confidentiality again and would always seek advice from a senior member of staff if she was unsure of what to do.

Ms Cresswell said that this incident has taught her a lesson, and she would never act on instinct in future. She said that, were she to find herself in the same situation again,

she would approach a senior member of staff, which she could not do at the time as her complaint was in relation to Ms 5. Ms Cresswell said that she could also seek advice from HR or the matron of another department, or a whistleblowing guardian allocated to work within the Trust.

When asked by Mr Hoskins, Ms Cresswell explained the effect that a breach of confidentiality may have on whistleblowing complaints. She said that people may not raise concerns for fear that it would not be handled correctly. She accepted that this might impact on patient care. Ms Cresswell said that she would promote whistleblowing in the workplace as a manager cannot correct concerns if they do not know anything has gone wrong.

Ms Cresswell told the panel about the training which she has undertaken on whistleblowing. She said that, prior to the incident, the Trust training on whistleblowing was infrequent. She said that she has completed two online training courses of around an hour on confidentiality and governance. Ms Cresswell said that she will always have regular updates and training to remain compliant with her obligations as a nurse.

Ms Cresswell told the panel about what she has done since the incident. She told the panel that she [PRIVATE] worked as a Band 5 agency nurse on a Covid-19 ward. She said that she was well-respected by her colleagues, who are willing to write statements on her behalf. Ms Cresswell said that she cares a lot about her patients and would stay behind after work to look after them, and that she would do this again in the future.

[PRIVATE]

When asked about her future plans in nursing, Ms Cresswell said that she wishes to return to a substantive NHS post.

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, *Cheatle v General Medical Council* [2009] EWHC 645, *Cohen* v *General Medical Council* [2008] EWHC 581 (Admin), *Council for the Regulation of*

Healthcare Professionals v (1) General Medical Council and (2) Biswas [2006] EWHC 464 (Admin), *Calhaem v General Medical Council* [2007] EWHC 2606 Admin, *Spencer v General Optical Council* [2012] EWHC 3147 and *General Medical Council v Meadow* [2007] QB 462 (Admin).

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 Ms Cresswell's actions did fall significantly short of the standards expected of a registered nurse, and that Ms Cresswell's actions amounted to a breach of the Code. Specifically:

> *'**5 Respect people's right to privacy and confidentiality***
>
> ***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*
> *20.3 be aware at all times of how your behaviour can affect and influence the behaviour of other people*
> *20.8 act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to*
> *20.10 use all forms of spoken, written and digital communication (including social media and networking sites) responsibly, respecting the right to privacy of others at all times.'*

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel had regard to its findings on the facts in respect of charge 5. It considered Ms Cresswell's actions of looking at Witness 2's email inbox by mistake can properly be deemed as an error. However, when she realised that it was

not her account which she was looking at, Ms Cresswell should have immediately stopped looking at the emails and logged off Witness 2's account on the computer.

However, the panel concluded that Ms Cresswell's action in forwarding on the whistleblowing complaint to Ms 1, in breach of confidentiality, governance and General Data Protection Regulation (GDPR) policies was a serious breach and amounted to misconduct. Further, it considered that this also compromised Ms 1 and placed her at at risk of suspicion in breaching the same policies. While it noted that Ms Cresswell recognised that Ms 5's conduct in sending the email to Witness 2 was wrong, she then went on to replicate the very same action as Ms 5 by forwarding the same email to Ms 1. The panel concluded that other nurses, fellow professionals and members of the public would consider Ms Cresswell's actions in respect of charge 5 to be so serious to amount to misconduct, and the panel concluded that this was further aggravated by her considerable management experience and seniority as a Band 7 nurse at the Trust.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, Ms Cresswell'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 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) *[…]*

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 bore in mind the nature of the charge found proved, and noted that it related to a single incident of misconduct, and that there are no concerns before it in respect of Ms Cresswell's clinical competency as a nurse. The panel found that there was no evidence before it to suggest that patients were directly put at risk and caused physical and emotional harm as a result of Ms Cresswell's misconduct.

The panel concluded that Ms Cresswell's misconduct had breached a fundamental tenet of the nursing profession, namely maintaining confidentiality, and therefore brought its reputation into disrepute.

The panel considered that Ms Cresswell's insight into the impact of her behaviour on her colleagues was limited. It found that, in her evidence, although she accepted that she had made a mistake in forwarding on the email, Ms Cresswell still seemed to demonstrate a lack of awareness of the significance in not adhering to data protection policies, her culpability in breaching the policies, and the risk which such conduct presents to colleagues in that others could be dissuaded from whistle-blowing, were they to learn that their concerns would not be dealt with in strict confidence.

The panel was satisfied that the misconduct in this case is capable of being addressed. Therefore, the panel carefully considered the evidence before it in determining whether or not Ms Cresswell has taken steps to strengthen her practice. The panel took into account Ms Cresswell's oral evidence, that she has undertaken training in respect of confidentiality and governance, however, it has not received any confirmation of this. The panel had regard to her description of this training and noted that there was no evidence yet before it to suggest that Ms Cresswell has undertaken any training at all beyond that mandated by her agency in order for her to work as a nurse. The panel noted that there was an extensive variety of accessible sources which Ms Cresswell could have looked to in order to strengthen her practice, however, there was no evidence before the panel that she had taken any steps to do so. While Ms Cresswell told the panel in her evidence that she could produce testimonials from colleagues as well as certificates, at the time of handing down the determination, nothing had been placed before the panel.

The panel was encouraged to hear that Ms Cresswell has recognised some strategies which would prevent the same situation from happening again, however she has not at this stage been able to demonstrate how she would deploy them in the workplace. The panel considered that, although the risk of repetition towards colleagues is low, such risk remains for the reasons outlined above. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind the overarching objectives of the NMC; to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public

confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

In addition, the panel concluded that public confidence in the profession and the NMC as a regulator would be undermined if a finding of impairment were not made in this case and therefore also finds Ms Cresswell's fitness to practise impaired on the grounds of public interest.

Having regard to all of the above, the panel was satisfied Ms Cresswell's fitness to practise is currently impaired.

Sanction

The panel considered this case very carefully and decided to make a caution order for a period 18 months. The effect of this order is that Ms Cresswell's name on the NMC register will show that she is subject to a caution order and anyone who enquires about her registration will be informed of this order.

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 Hoskins submitted that a caution order for a period of 12 months is appropriate and proportionate in this case. He submitted that it was a single act by Ms Cresswell rather than a course of conduct. He explained that the basis of the finding of impairment centred around the need to mark past failings and restore public confidence in the profession which a caution order can achieve in this case.

The panel also bore in mind Ms Cresswell's submissions in which she stated that she has learnt a valuable lesson and agrees with the 12-month caution order that has been

put forward by the NMC as a sanction. Ms Cresswell told the panel that going forward she will ensure that her training and the training of others is always up to date. She submitted that she envisages returning to work as a nurse as soon as possible [PRIVATE].

Decision and reasons on sanction

Having found Ms Cresswell'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:

- Ms Cresswell was a Band 7 nurse with considerable experience in a managerial role at the time of the event.
- Ms Cresswell implicated another member of staff and breached confidentiality when she forwarded the information to them.
- Her insight is not fully developed.

The panel also took into account the following mitigating features:

- Ms Cresswell's insight has moved on markedly since the event.
- Ms Cresswell said passionately that she has learnt from the incident.
- A number of particularly positive references from a range of professional colleagues.
- Ms Cresswell's actions were not premeditated and did not relate to patient care.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the breach of confidentiality being a serious failure.

Consequently, the panel decided that it would be neither proportionate nor in the public interest to take no further action.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the SG, which states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'*

The panel noted that Ms Cresswell has shown developing insight into her conduct. The panel noted that she apologised to this panel for her misconduct. The panel has been told that there have been no adverse findings in relation to Ms Cresswell's practice either before or since the event.

The panel has decided that a caution order would adequately address the public interest in this case. The panel considered that Ms Cresswell was a very experienced nurse in a senior role and that the incident involved a serious breach of data protection requirements. It also noted that because of that breach she did not provide the level of role modelling needed to junior staff. Having considered the general principles above and looking at the totality of the findings on the evidence, the panel has determined that to impose a caution order for a period of 18 months would be an appropriate and proportionate response. It would mark not only the importance of maintaining public confidence in the profession, but also send the public and the profession a clear message about the standards required of a registered nurse.

The panel did consider whether it would be proportionate to impose a more restrictive sanction and looked at a conditions of practice order. The panel noted it was not a clinical incident and no patients were involved. The panel considered that it was a personal insight issue regarding a confidentiality breach and a conditions of practice order would not be workable and practical.

The panel noted that Ms Cresswell is not currently working as a nurse and consider that an 18-month caution order is appropriate to mark the seriousness of the breach of confidentiality as well as allowing her to gain support and training from her employer.

At the end of this period the note on Ms Cresswell's entry in the register will be removed. However, the NMC will keep a record of the panel's finding that her fitness to practise had been found impaired. If the NMC receives a further allegation that Ms Cresswell's fitness to practise is impaired, the record of this panel's finding, and decision will be made available to any practice committee that considers the further allegation.

This decision will be confirmed to Ms Cresswell in writing.

That concludes this determination.