

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

**Substantive Meeting
Wednesday 8 February 2023 – Thursday 9 February 2023**

Virtual Hearing

Name of Registrant:	George Mckinnon
NMC PIN	10A0160S
Part(s) of the register:	Registered Mental health nurse, level 1 - (16 September 2013)
Relevant Location:	South Ayrshire
Type of case:	Conviction
Panel members:	Alan Greenwood (Chair, Lay member) Frances Mary Clarke (Registrant member) Asmita Naik (Lay member)
Legal Assessor:	Alain Gogarty
Hearings Coordinator:	Petra Bernard
Facts proved:	Charge proved
Facts not proved:	Not applicable
Fitness to practise:	Impaired
Sanction:	Striking-off order
Interim order:	Interim suspension order (18 months)

Decision and reasons on service of Notice of Meeting

The panel was informed at the start of this meeting that the Notice of Meeting had been sent to Mr McKinnon's registered email address by secure email on 4 January 2023.

The panel took into account that the Notice of Meeting provided details of the allegation, and otherwise complied with the requirements of Rule 11A (2) of the Nursing and Midwifery Council (NMC) Fitness to Practise Rules 2004 (the Rules).

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Mr McKinnon has been served with notice of this meeting in accordance with the requirements of Rules 11A and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Details of charge

'That you, a registered nurse:

1) On 15 June 2022, at Ayr Sheriff Court, pleaded guilty to an offence contrary to section 3 of the Sexual Offences (Scotland) Act 2009.

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

Background

The charge arose whilst Mr McKinnon was employed as a registered nurse by the Fairknowe Nursing Home (the Home). The NMC received an anonymous referral from the Home on 15 April 2020 in relation to Mr McKinnon's dismissal from the Home due to sexual harassment of colleague. Mr McKinnon was employed by the Home in the position of Deputy Manager.

It was reported that he sexually harassed a junior member of staff, a care assistant, which resulted in his dismissal on 9 April 2020. The behaviour took place whilst he was at work and left the care assistant feeling threatened and unwilling to return to work.

Subsequently the Court confirmed that Mr McKinnon was convicted of an offence contrary to Section 3 of the Sexual Offences (Scotland) Act 2009 on 15 June 2022, following a guilty plea. He was thereafter sentenced on 26 July 2022 to a Community Payback Order.

Decision and reasons on facts

The charge concerns Mr McKinnon's conviction and, having been provided with a copy of the Extract Conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3). No evidence was adduced by the registrant that he was not the person referred to in the Extract. These state:

- '31.— (2) Where a registrant has been convicted of a criminal offence—*
- (a) a copy of the certificate of conviction, certified by a competent officer of a Court in the United Kingdom (or, in Scotland, an extract conviction) shall be conclusive proof of the conviction; and*
 - (b) the findings of fact upon which the conviction is based shall be admissible as proof of those facts.*
- (3) The only evidence which may be adduced by the registrant in rebuttal of a conviction certified or extracted in accordance with paragraph (2)(a) is evidence for the purpose of proving that she is not the person referred to in the certificate or extract.'*

Fitness to practise

Having announced its findings on the facts, the panel then considered whether, on the

basis of the conviction, Mr Mckinnon'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 without restriction.

Representations on impairment

The NMC requires the panel to bear in mind its overarching objective to protect 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. The panel has referred to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin).

The NMC provided statement of case which included written submissions on impairment, as follows:

'Impairment needs to be considered as at today's date, i.e. whether Mr McKinnon's fitness to practice is currently impaired. The NMC defines impairment as a registered professional's suitability to remain on the register without restriction. There is no burden or standard of proof to apply as this is a matter for the fitness to practice panel's own professional judgement.

In relation to impairment, the general approach to what might lead to a finding of impairment was provided by Dame Janet Smith in her Fifth Shipman Report.

A summary is set out in the case of CHRE v NMC & Grant [2011] EWHC 927 at paragraph 76 in the following terms:

"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:

I. 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

II. has [Mr McKinnon] in the past brought and/or is liable in the future to bring the [nursing] profession into disrepute; and/or

III. has [Mr McKinnon] in the past committed a breach of one of the fundamental tenets of the [nursing] profession and/or is liable to do so in the future and/or

IV.

It is submitted that limbs I, II and III are engaged. Dealing with each in turn:

The risk of harm to patients is indirect, but is real. Where colleagues are reluctant or unwilling to work or communicate with a registrant, those in their care risk having gaps in their care or their conditions not being understood through poor communication.

An assault on a colleague is a very serious breach of the trust and confidence placed in Mr McKinnon as a professional. Mr McKinnon's actions are a serious departure from the standards expected of a registered professional. Nurses occupy a position of privilege and trust in society and are expected at all times to be professional. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones and therefore it is imperative that nurses make sure that their conduct at all times justifies both their patients' and the public's trust in the profession. The registrant sexually assaulted a colleague whilst both were undertaking their roles in a clinical setting. Although, arguably a one off incident, there were several strands to the assault and from the evidence, it would appear that Mr McKinnon's colleagues were intimidated by him and did not want to work with him.

Criminal sexual offending against a colleague calls into question the fundamental trustworthiness of a registered professional, places that and other colleagues at

risk of harm, and indirectly creates a risk of harm to those in Mr McKinnon's care by the creation of a toxic working environment.

In addition, Mr McKinnon's conviction raises questions about his overall suitability as a nurse. This therefore has a negative impact on the reputation of the profession and, accordingly, has brought the profession into disrepute.

The Code divides its guidance for nurses into four categories which can be considered as representative of the fundamental principles of nursing care.

These are:

- a) Prioritise people;*
- b) Practice effectively;*
- c) Preserve safety and*
- d) Promote professionalism and trust*

The NMC have set out above how, by identifying the relevant sections of the Code, Mr McKinnon has breached fundamental tenets of the profession. These sections of the Code define, in particular, the responsibility to promote professionalism and trust to ensure safe conduct and practise.

The panel may also find it useful to consider the comments of Cox J in Grant at paragraph 101:

"The Committee should therefore have asked themselves not only whether the Registrant continued to present a risk to members of the public, but whether the need to uphold proper professional standards and public confidence in the Registrant and in the profession would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of this case".

Impairment is a forward thinking exercise which looks at the risk Mr McKinnon's practice poses in the future. NMC guidance adopts the approach of Silber J in the case of R (on application of Cohen) v General Medical Council [2008]

EWHC 581 (Admin) by asking the questions whether the concern is easily remediable, whether it has in fact been remedied and whether it is highly unlikely to be repeated.

The NMC's guidance entitled "Can the concern be addressed?" FTP-13a, states as follows:

"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:

- Incidents of harassment (including sexual harassment) that have taken place in a professional context.*

A conviction of this nature is often indicative of underlying attitudinal concerns, which are difficult to put right and are likely to lead to restrictive regulatory action. The NMC consider Mr McKinnon has displayed limited insight. Whilst the NMC have taken account of the evidence to suggest that Mr McKinnon pleaded guilty, Mr McKinnon had not substantially engaged with the NMC's fitness to practise proceedings. Mr McKinnon has also not provided any details as to steps he may have taken to address the concerns identified.

In all of the circumstances, it is submitted that the registrant's actions and omissions fell far below the standards which would be considered acceptable to the profession.

For the reasons above, it is submitted that Mr McKinnon's fitness to practise is currently impaired by reason of the conviction, both on the grounds of public protection and the wider public interest to declare and uphold proper standards of conduct and behaviour.'

The panel accepted the advice of the legal assessor.

Decision and reasons on impairment

The panel next went on to decide if as a result of the conviction, Mr Mckinnon's fitness to practise is currently impaired. The panel considered the seriousness of the conduct which gave rise to the conviction as specified in the Extract Conviction before it. It took into account the conduct admitted by Mr Mckinnon's plea of guilty and based its decision only on the conduct which was admitted.

It considered that the conviction and the actions which gave rise to it constituted breaches of The Code: Professional standards of practice and behaviour for nurses, midwives and nursing associates (2015) (the Code). It identified the following paragraphs of the Code had been breached:

'20 Uphold the reputation of your profession at all times

To achieve this, you must:

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

20.2 act with... integrity at all times, treating people fairly and without... harassment

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

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

20.5 treat people in a way that does not take advantage of their vulnerability...'

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Colleagues must be able to trust nurses. To justify that trust, nurses must be honest and open and act with integrity. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

In this regard the panel considered the judgment of Mrs Justice Cox in the case of *CHRE v NMC and Grant* in reaching its decision. In paragraph 74, she said:

'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's "test" which reads as follows:

'Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her/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 finds that the conduct which led to Mr Mckinnon's conviction amounted to a sexual assault on a vulnerable colleague. Mr Mckinnon's conviction had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute.

The panel considered that limbs a, b and c of Grant are engaged in this case.

The panel considered that Mr Mckinnon's actions were very serious and involved a subordinate colleague. Mr Mckinnon's actions brought the profession into disrepute, and the public would be shocked to learn of his actions. There has been no evidence before the panel of any insight, reflection, remediation or remorse from Mr McKinnon in respect of his actions, and nothing to demonstrate that he has an understanding of the impact his actions could have had on colleagues, patients, the public and the wider profession.

The only responses received from Mr McKinnon other than his guilty plea to the charge, is an application to voluntarily remove himself from the register.

The panel considered that patients were put at potential risk of harm as a result of the conduct which led to Mr Mckinnon's conviction. His actions created an atmosphere which may have led to a lack of communication regarding patient care and therefore potentially placed patients at risk.

The panel considered that there has been no change in the level of risk, as Mr Mckinnon failed to engage substantially with the regulatory proceedings and there is no evidence that he has made any attempts to address his actions. The panel also noted that Mr Mckinnon's actions involved a subordinate colleague and therefore constituted an abuse of power. The panel considered that there remains a risk of harm to the public and a risk of repetition. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel determined that, in this case, a finding of impairment on public interest grounds is required, due to the importance of upholding professional standards. In

addition, the panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in a case involving a sexual assault, and therefore also finds Mr Mckinnon's fitness to practise impaired on the grounds of public interest.

Regarding insight, the panel considered that whilst Mr Mckinnon made an admission to the charge by his plea of guilty in Court, there is nothing further before it to show any insight or remorse into his actions.

In its consideration of whether Mr Mckinnon has taken steps to strengthen his practice, the panel is of the view that there is no evidence of remediation in this case. The panel is of the view that there is a risk of repetition based on Mr Mckinnon's underlying attitudinal concerns.

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 patients, 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.

Having regard to all of the above, the panel was satisfied that Mr Mckinnon's fitness to practise is currently impaired.

Sanction

Representations on sanction

The panel noted that in the Notice of Meeting, dated 4 January 2023, the NMC had advised Mr Mckinnon that it would seek the imposition of a striking-off order if it found Mr Mckinnon's fitness to practise currently impaired.

The panel accepted the advice of the legal assessor.

Decision and reasons on sanction

The panel considered the seriousness of the conduct which gave rise to the conviction as specified in the Extract Conviction before it. It took into account that was the conduct admitted by Mr Mckinnon's plea of guilty and based its decision only on the conduct which was admitted.

Having found Mr Mckinnon'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:

- Breach of trust
- Abuse of power
- Limited insight
- No remorse

The panel considered that the only mitigating features in this case were the plea of guilty and the absence of previous convictions or referrals.

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 Mckinnon's practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower*

end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.' The panel considered that Mr Mckinnon's conviction was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Mr Mckinnon's registration would be a sufficient and appropriate response. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case. The conduct which gave rise to the conviction in this case was not something that can be addressed through retraining. Furthermore, the panel concluded that the placing of conditions on Mr Mckinnon's registration would not adequately address the seriousness of this case and would not protect the public.

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

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

The panel considered that this is a serious case resulting in a criminal conviction. Mr Mckinnon's actions involved sexual assault on a colleague. There is evidence suggesting attitudinal concerns. It considered that Mr Mckinnon has not provided any information or evidence that indicates he has any insight into his actions or the impact that they would in all likelihood have had on colleagues, patients, the public and the wider profession. There is nothing before the panel that demonstrates that Mr Mckinnon has addressed the concerns or demonstrated remorse, and it has not received any reflective piece from him.

Mr Mckinnon's actions, as highlighted by the conviction was a significant departure from the standards expected of a registered nurse. The panel noted that the serious breach of the fundamental tenets of the profession evidenced by Mr Mckinnon's actions is fundamentally incompatible with him remaining on the register.

In this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction, nor would it address the wider public interest.

The panel noted that Mr Mckinnon was given a Community Payback Order: Supervision Period of six months on 26 July 2022.

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 Mckinnon's actions were significant departures from the standards expected of a registered nurse, and are fundamentally incompatible with him remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Mr Mckinnon'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.

Balancing all of these factors and after taking into account the conduct resulting in the conviction before it during this case, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the matters it identified, in particular the effect of Mr Mckinnon'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 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.

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

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

Representations on interim order

The panel took account of the representations made by the NMC that if a finding is made that Mr Mckinnon's fitness to practise is impaired and a restrictive sanction imposed it considered an 18 month interim suspension order should be imposed on the basis that it is necessary for the protection of the public and 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 conviction and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

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

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

That concludes this determination.