

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

**Substantive Hearing
Monday 6 March – Tuesday 14 March 2023**

Virtual Hearing

Name of registrant:	Doris Mbemi Nsah
NMC PIN:	09A1554E
Part(s) of the register:	Registered Nurse – RNMH Mental Health – Level 1 – February 2009
Relevant Location:	Buckinghamshire
Type of case:	Conviction
Panel members:	Rachel Onikosi (Chair, lay member) Dorothy Keates (Registrant member) Brian Stevenson (Lay member)
Legal Assessor:	Charles Parsley
Hearings Coordinator:	Rene Aktar
Nursing and Midwifery Council:	Represented by Maeve Thornton, Case Presenter
Mrs Nsah:	Not present and unrepresented at the hearing
Facts proved:	Charge 1
Facts not proved:	Charges 2, 3
Fitness to practise:	Impaired
Sanction:	Caution order (5 years)

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of the hearing that Mrs Nsah was not in attendance.

The panel had received the Proof of Posting bundle. That included a letter dated 21 February 2023 which was stated to be sent by recorded delivery and by first class post to the address held for Mrs Nsah by the Nursing and Midwifery Council (NMC). The letter enclosed within the bundle gave details only of the two allegations of misconduct. It also set out details of the time and dates of the hearing and that it would be held virtually using Microsoft Teams (for which the link would be sent on the business day before the hearing) as well as information about Mrs Nsah's right to attend, be represented and call evidence, and the panel's power to proceed in her absence.

The panel noted that although there was a receipt of posting to Mrs Nsah on 21 February 2023, and confirmation of delivery on 22 February 2023, there was no statement within the bundle from any person in the NMC confirming that the letter giving Notice of Hearing had been sent to her.

The panel was informed by Ms Thornton, on behalf of the NMC, that it would appear that Mrs Nsah had, in fact, been sent a different Notice of hearing from that in the Proof of Posting bundle, which included details of the conviction allegation, as confirmed by the Mrs Nsah's response to the hearing form dated 23 February 2023.

The panel noted that Rule 11(2)(b) provides that the Notice of Hearing shall be sent to Mrs Nsah, *'in every case, no later than 28 days before the date fixed before the hearing'*.

Ms Thornton provided the panel with an email dated 14 February 2023 in which Mrs Nsah had been requested to accept short notice of the hearing.

'Dear Mrs Nsah,

I hope you're well.

I'm writing to let you know that a virtual hearing has been listed to take place on 6-13 March 2023.

We must serve notice of hearing to a nurse 28 days in advance of any substantive hearing. Unfortunately we have missed this date so we intend to serve notice to you today, which is only 20 days in advance of the hearing. For this reason you have the right to request that the hearing of 6-13 March 2023 be postponed to give you at least 28 days' notice. If, on the other hand, you are happy to accept short notice, we will go ahead with preparations to have this case heard on 6-13 March 2023.

Please can you let me know at your earliest convenience if you're happy to accept short notice? Please don't hesitate to contact me if you have any questions.'

There was an attendance note of a telephone call from Mrs Nsah on 20 February 2023, stating that:

'She apologised for having not yet replied to the email sent to her about short notice, said she recently came back from cameroun. Said she's fine with the short notice. I asked her to send an email confirmation, as we're awaiting this before she's sent the notice. I asked if she'll be attending the hearing, she said she'll get back to me on this but may not attend and would like to send reflection. I asked her to also confirm this in writing and thanked her for her time.'

In an email dated 21 February 2023, Mrs Nsah stated:

'Good morning ... , I am sorry for the late response, I am happy for the hearing to go on as planned from the 6- 13 of March. I equally understand the short notice period and I am fine with it. I shall not be attending the hearing as

well but will be pleased to drop a reflective note to the panel. Whilst waiting to hear from your office, stay blessed.'

The panel accepted the advice of the legal assessor.

Having considered these communications, the panel concluded that Mrs Nsah had waived her right to the full period of notice required by the Rules and was content to accept short notice of the hearing and accordingly the panel found that Mrs Nsah had been served with Notice of the hearing.

Decision and reasons on application under Rule 19

At the outset of the hearing, Ms Thornton made a request that parts of the case would need to be held in private on the basis that proper exploration of Mrs Nsah's case involves reference to her health. The application was made pursuant to Rule 19 of 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

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.

Having heard that there will be reference to Mrs Nsah's health, the panel determined to go into private session as and when such issues are raised.

Decision and reasons on proceeding in the absence of Mrs Nsah

The panel next considered whether it should proceed in the absence of Mrs Nsah. It had regard to Rule 21 and heard the submissions of Ms Thornton who invited the panel to continue in the absence of Ms Nsah. She submitted that Mrs Nsah had voluntarily absented herself.

The panel had previously noted Mrs Nsah's email dated 21 February 2023, in which she stated:

'Good morning ... , I am sorry for the late response, I am happy for the hearing to go on as planned from the 6- 13 of March. I equally understand the short notice period and I am fine with it. I shall not be attending the hearing as well but will be pleased to drop a reflective note to the panel. Whilst waiting to hear from your office, stay blessed.'

In Mrs Nsah's response to the Notice of Hearing dated 23 February 2023, she stated:

...'[PRIVATE]'...

The panel decided to proceed in the absence of Mrs Nsah. In reaching this decision, the panel considered the submissions of Ms Thornton, and the advice of the legal assessor. It 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:

- Mrs Nsah had informed the NMC that she had received the Notice of Hearing and confirmed she is content for the hearing to proceed in her absence;
- The panel was told that three witnesses had been warned and were available to give live evidence and not proceeding may inconvenience the witnesses. Further delay may have an adverse effect on the ability of witnesses accurately to recall events;
- No application for an adjournment has been made by Mrs Nsah;
- The charges relate to allegations between 2019 and 2021; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mrs Nsah in proceeding in her absence. The evidence upon which the NMC relies will have been sent to her by email, she 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 somewhat mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Mrs Nsah's decision to waive her rights to attend, and/or be represented, and not to give live evidence or make oral submissions on her own behalf.

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

Admissions to charges

Following the reading of the charges, the panel moved to consider whether there were any admissions by Mrs Nsah.

Ms Thornton made reference to the extract from the case management form dated 23 February 2023 returned by Mrs Nsah in which she stated that, by ticking the relevant boxes, Mrs Nsah had shown a settled intention to admit the charges, which should be satisfactory and accepted by the panel.

Ms Thornton also made reference to the Agreement for Work Finding Services, in which the TFS Healthcare Limited (TFS) is referred to as the client of the Agency.

The panel noted that the Index to the Registrant's Response Bundle contains a regulatory concern form signed and dated 28 June 2021, and a returned Case Management Form (CMF) dated 6 September 2022. The most recent communication from Mrs Nsah was a reflective piece which Ms Thornton confirmed was returned on 1 March 2023. In each of those documents, Mrs Nsah appears to dispute Charges 2) and 3), claiming that she had informed the predecessor to

Witness 2 as her candidate consultant within the Agency of the matters alleged in those charges. The panel further noted that on the last page of that reflective piece, Mrs Nsah again appears to dispute Charges 2) and 3).

In respect of Charge 1), whilst Ms Nsah appeared to lack full understanding of the position in respect of the criminal charge, she did appear to accept, in all her submissions that she had been convicted of the offence as set out in Charge 1). The panel noted that the memorandum of the conviction included in the Exhibit bundle is not certified so as to meet the requirements of Rule 31 (2)(a). However, it was satisfied that Mrs Nsah had admitted this Charge so as to enable it to be announced as proved.

In respect of Charges 2) and 3), the panel has noted that upon her return from travelling abroad, Mrs Nsah had been invited to accept short notice of the hearing as a result of the NMC's oversight. Having apparently been sent a further response form to that included in the proof of service bundle, she returned the form within a short period on the first page stating:

...[PRIVATE]...

Mrs Nsah then proceeded to tick the boxes to admit the charges and impairment. However, when she submitted her reflective piece a week later, she again appeared to dispute Charges 2) and 3), stating:

“Although the agency also refused I did not disclose to them when I join that I was being investigated by the NMC, they later changed their story and accepted by email that I told them on the first day I spoke with my consultant. There should be an email in your office to testify to that.”

Due to the ambiguity and inconsistency in Mrs Nsah's responses in respect of Charges 2) and 3), the panel could not be confident in accepting that there were clear admissions by Mrs Nsah in regard to Charges 2 and 3).

The panel additionally noted that the NMC's own evidence contained the terms of Mrs Nsah's agreement with the Agency in which it is stated that she accepted that the Agency was not her employer. Accordingly, the panel determined only to treat Charge 1) as admitted but that it would proceed to hear evidence in respect of Charges 2) and 3).

In light of the admission, the panel found Charge 1) proved.

Decisions and reasons on application to admit hearsay evidence

The panel heard an application made by Ms Thornton, under Rule 31 of the NMC's Fitness to Practise Rules 2004 to admit the statement of Witness 3 dated 2 February 2023 into evidence.

The NMC had made unsuccessful efforts to contact Witness 3 on 8 March 2023 with a view to her attending to give evidence to secure their attendance. Consequently, the NMC applied to adduce their evidence as hearsay.

Ms Thornton informed the panel that Witness 3 would not be in attendance. She provided the panel with an email chain in December 2022 between the Witness and an NMC Paralegal discussing the Witness' willingness to attend the hearing. In an email dated 22 December 2022, the Witness stated:

'So your team have still decided to bring me to a hearing and give evidence for someone I have never worked with, and the only time I knew anything about this person is at the time you requested details. Information were pulled from records as requested.

But it is ok. I will do what is requested and report the exact same, that I do not know this individual personally nor professionally, and was forced to be there to waste the courts time.

The next time I am in a situation like this I will ensure the HR department provide information as now I am caught up in a situation that has nothing to do with me.

Please ensure the investigators are fully aware of this as I will not be made to pretend I have anything to do with this candidate. The alleged even took place before I started my employment with TFS, and yet I am the one summoned to give evidence. I do not believe your legal team knows what they are doing.'

To which a response from an NMC Paralegal on 23 December 2022 stated:

'We do not wish to cause you any distress. We would be grateful if you could sign the statement which was sent to you on 3 November 2022, we would then have your evidence/statement as read so you will not be required to attend. Given you simply produced documentation there would be no questions for you. To use the documentation, we require a witness/witness statement to exhibit it and that is the reason why we have taken a statement from you.'

Witness 3's statement was signed on 2 February 2023. On 14 February 2023, the NMC sent Witness 3 a letter by email, giving her notice that she would be required to attend the hearing to give evidence on 7 and 8 March 2023. There does not appear to have been any response from the Witness to that letter.

At the outset of the hearing, Ms Thornton informed the panel that she expected Witness 3 would give evidence on 7 or 8 March 2023. The hearings coordinator made attempts via email and telephone call to contact Witness 3 between 6 and 8 March 2023 to confirm her availability but received no response from the Witness.

The hearings coordinator contacted the NMC Paralegal who responded in an email on 8 March 2023 that:

‘Please see attached emails from the witness below: we assured her that her evidence/statement would be read and so she would not be required to attend.’ [The emails referred to include those set out above]

Ms Thornton reminded the panel that by virtue of Rule 31 hearsay evidence is admissible:

“Evidence

Rule 31 (1) – Upon receiving the advice of the legal assessor, and subject only to the requirements of relevance and fairness, a Practice Committee considering an allegation may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings (in the appropriate Court in that part of the United Kingdom in which the hearing takes place).”

In her submissions, Ms Thornton referred to the cases of NMC v Ogbonna [2010] EWCA Civ 1216, R (Bonhoeffer) v GMC (2012) IRLR 37 and White v NMC [2014] EWHC 520 (Admin). She submitted that the evidence of Witness 3 is important in supporting Charges 2) and 3) and it is in the interest of fairness to have the statement admitted as hearsay. Mrs Nsah had received the statements and exhibits and has had an opportunity to respond.

The panel heard and accepted the legal assessor’s advice which included reference to the case of Thorneycroft v NMC [2014] EWHC 1565 (Admin) and the guidance in that decision as to the factors which a panel should take into account in considering an application to admit evidence under Rule 31.

The panel went on to consider whether it would be relevant and fair to admit the statement of Witness 3.

The panel considered the admissibility criteria set out in *Thorneycroft*. While the panel felt that Witness 3 had no reason to fabricate her evidence, there were inconsistencies between the evidence in her witness statement and that provided

within the witness statement of Witness 2. Given the potential importance of this difference of viewpoint and the seriousness of the charges against Mrs Nsah (and the NMC Sanction bid of a striking-off order), it was important that Ms 3's evidence could be challenged. The panel felt that it would be unfair to Mrs Nsah if this challenge could not take place.

The panel noted that Witness 3's witness statement and exhibits are not the sole evidence relating to Charges 2) and 3). Additionally, the panel noted that according to Witness 3, she indicates in her witness statement that she did not know Mrs Nsah personally and it noted what she had said in her email of 22 December 2022 as recorded above.

In considering whether it would be fair to admit Witness 3's witness statement and exhibits, the panel further noted that Mrs Nsah had been provided with a copy of this evidence. In her responses, Mrs Nsah had been consistent in maintaining that she had informed Witness 2 's predecessor as Mrs Nsah's consultant of the matters set out in Charges 2) and 3). ...[PRIVATE].

At the time when Mrs Nsah was asked to accept short notice of the hearing, the NMC had notified Witness 3 that she should attend to give evidence. In fact, there may have been a good explanation for the non-attendance of Witness 3 because the NMC itself accepted that it had assured her that she would not have to attend. But in light of that assurance, it could not be said that the NMC had taken reasonable steps to secure her attendance. As Witness 3 had been given notice to attend to give evidence, Mrs Nsah had been put in the disadvantageous position of not having received prior notice that the statement of Witness 3 was to be read.

Taking those matters into account, the panel concluded that it would not be fair to Mrs Nsah to admit the witness statement and exhibits. Having determined that it would not be fair to admit Ms 3's witness statement and exhibits into evidence, the panel decided to reject this application.

Details of charge

That you, a registered nurse:

1. On 21 December 2020, at Oxford Magistrate's Court, you were convicted of the charge that between 6 May 2016 and 16 May 2017 at Berkshire committed fraud in that you dishonestly made a false representation to Oxford Health NHS Foundation Trust, to make a gain, namely sickness pay in the sum of £5915.78, for yourself. Contrary to sections 1 and 2 of the Fraud Act 2006. **(proved by admission)**

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

2. Between 30 April 2019 and 2 February 2021 you failed to disclose to your employer that you were under investigation by the Nursing and Midwifery Council. **(not proved)**
3. Between 22 December 2020 and 2 February 2021 you failed to disclose to your employer that you had been convicted of a criminal offence on 22 December 2020. **(not proved)**

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

Background

Mrs Nsah had been working as a Band 5 Nurse at the Oxford Health NHS Foundation Trust (the Trust) on the Ashurst Ward since 15 June 2010. On a number of occasions between May 2016 and May 2017. ...[PRIVATE]...

During the Trust's investigation, it was identified that Mrs Nsah had been paid a total net salary of £5915.78 by the Trust during this period of sick leave, in respect of

those occasions when she had been working shifts in various healthcare settings where she had been placed by K-Care.

The Trust referred the matter to NHS Counter Fraud which completed a full investigation. Mrs Nsah was invited to attend a disciplinary hearing on 22 January 2019, which resulted in her dismissal on 30 January 2019. Mrs Nsah appealed this decision, and an appeal hearing was held on 26th April 2019 when the original decision to dismiss was upheld. The Trust made a referral to the NMC in May 2019.

On 22 December 2020, Mrs Nsah appeared at the Oxford Magistrates Court where she was convicted of the following offence:

“Between 06/05/2016 and 16/05/2017 at Berkshire committed fraud in that you dishonestly made a false representation, namely that you dishonestly made a false representation to Oxford Health NHS Foundation Trust namely that you were unfit for work but were working, intending to make a gain, namely sickness pay, for £ 5915.78. Contrary to sections 1 and 2 of the Fraud Act 2006”.

The sentence imposed was:

“Fine £1250. Compensation Order to the Trust in the sum of £5915.78. To pay a surcharge to fund victim services of £125. To pay costs of £995 to the Crown Prosecution Service”.

Mrs Nsah had registered with TFS on 11 July 2017. Following her referral, the NMC commenced an investigation into her fitness to practice and approached the Trust and the Agency for information about the allegations against Mrs Nsah.

Decision and reasons on facts

The panel had earlier found Charge 1) proved by way of Mrs Nsah’s admission.

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

The panel has drawn no adverse inference from the non-attendance of Mrs Nsah. 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 accepted the advice of the Legal Assessor.

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

- Witness 1: Service Manager – Oxford
Health NHS Foundation Trust
- Witness 2: Team Leader – TFS
Healthcare, Mental Health
Division

In considering Charges 2) and 3) the panel had regard to the evidence adduced by the NMC including the written statements and oral evidence of Witness 1 and Witness 2 and Ms Thornton's submissions. It had regard to the written submissions from Mrs Nsah in her Registrant's response bundle and in her reflective piece dated 1 March 2023.

The panel accepted the advice of the Legal Assessor.

Charge 2)

2) Between 30 April 2019 and 2 February 2021 you failed to disclose to your employer that you were under investigation by the Nursing and Midwifery Council.

This charge is found NOT proved.

In reaching this decision, the panel took into account Witness 1's and Witness 2's oral and documentary evidence. The panel particularly noted the information in Mrs Nsah's Regulatory Concern Response Form signed and dated 26 June 2021, her returned CMF dated 6 September 2022, and her reflective statement on 1 March 2023.

The panel took into account Witness 2's statement, in particular: *"The Registrant contacted me around February 2021, when she became aware that I was her new Candidate Consultant. She provided information regarding her circumstance, including her conviction and NMC's investigation. The Registrant verbally explained the whole situation regarding her conviction and how it happened. She also explained there was an NMC's investigation. I believe the Registrant was informing me of her conviction and the NMC's investigation to make me aware of her situation, in case I was contacted by the NMC."*

In her oral evidence, Witness 2 confirmed she became involved with Mrs Nsah when she took over the role as Mrs Nsah's Candidate Consultant for the Agency from 2 February 2021 onwards. It was identified on questioning from the panel to Witness 2 that the Candidate Consultant role in the agency was mainly as a contact for registrants to book shifts and for the Consultant to process payments for such shifts. All other professional and employment concerns were dealt directly by the clinical teams, and Witness 2 indicated they were instructed to pass any such information onwards to the clinical team as they had no electronic systems to record any professional issues.

Ms 4, who was the previous Candidate Consultant for Mrs Nsah had left the Agency. Before the departure of Ms 4, Witness 2 told the panel that *“I had previously been to the office and seen [Ms 4] once or twice...she gave a virtual handover of going through her candidates at the time...there were no physical documents.”* Witness 2 confirmed that there were no discussions about Mrs Nsah having disclosed the NMC investigation or her conviction. Witness 2 informed the panel that she did not receive any documentation and would not have expected to discuss any concerns of this nature.

Witness 2 further told the panel that *“as soon as [Mrs Nsah] found out I was her Consultant, she let me know about the NMC investigation and conviction. She went into detail, and I was surprised that it had escalated to that. From our contact, I would not have expected that from her.”* Witness 2 in her evidence told the panel that such disclosures would usually be passed to the Clinical Team. Far from receiving any complaints or issues about Mrs Nsah, Witness 2 went on to say, *“she was a great worker. I had no issues with her. She has always been honest, and we have had great feedback.”* In those circumstances, Witness 2 did not have further concerns about the matters based on positive feedback she had received about Mrs Nsah in her role. The panel also noted it did not receive any evidence about any personnel records maintained by the Agency in which the information passed on by Witness 2 might have been recorded.

The panel then went on to consider the Regulatory Concern Response Form submitted by Mrs Nsah dated 26 June 2021 which states the following:

“I did disclose to my consultant at TFS Healthcare that I was referred to NMC by my previous workplace Oxford health.

I explained to her everything that had happened, she was aware of the days I had to go to court and even when I was dismissed from oxford health, I told her.

She told me that was fine, and that if I needed any support I should not hesitate to contact her and that she was going to discuss it with her

managers, but since she did not come back to me with any concerns I did not know otherwise.

When [Witness 2] introduced herself to me as my new consultant in February 2021, the first question I asked her was if my former consultant Kiera handed over my issue with NMC. I told her that I was under investigation with the NMC as I was referred questioning my fitness to practice. I told her I was charged with fraud by false representation and explained to her everything that had happened. She told me not to worry, that she will discuss it with her manager. I requested for her direct line and contact details as I needed to pass it on to NMC in case they needed to talk to her. She gave me her number and told me that was fine, not to worry about it.

I was very surprised when your letter came to me saying my current employer was not aware that I am under investigation by the NMC.”

The panel noted that Witness 2’s evidence corroborates Mrs Nsah’s account that she had told Ms 4 that she was under investigation with the NMC and that she was charged with fraud by false representation.

The panel also took into account a statement in the Regulatory Concern Response Form signed and dated 26 June 2021 which Mrs Nsah states, *“I was told by Maria that she was not contacted but it was the clinical lead that was contacted, my question to her why she did not hand it over if she is not the one dealing with such information. She did promise me on the phone on 21.9.21 that she was going to give me a direct email address of the clinical lead.”*

Although Mrs Nsah had provided this full response as early as 26 June 2021, the panel did not receive any evidence from the NMC of any attempts to contact Ms 4 to confirm whether what Mrs Nsah was saying in her response was correct. In the panel’s view, the essence of Charge 2 (and of Charge 3) is that Mrs Nsah did not tell Ms 4 of the matters alleged while Ms 4 was her consultant. It is for the NMC to prove that Mrs Nsah did not do so, not for Mrs Nsah to prove that she did do so.

The panel concluded that both Witness 2's evidence and Mrs Nsah's comprehensive responses were consistent and had both explained the same narrative. The panel was therefore not satisfied on the balance of probabilities, that Mrs Nsah had not disclosed the NMC investigation to the Agency during the period stipulated.

In light of the above, the panel therefore finds Charge 2) not proved.

Charge 3)

3) Between 22 December 2020 and 2 February 2021 you failed to disclose to your employer that you had been convicted of a criminal offence on 22 December 2020.

This charge is found NOT proved.

The panel determined that Charge 3) is not proved essentially for the same reasons as Charge 2) and in particular because of the failure of the NMC to obtain evidence from Ms 4 which might have clarified the position. In Mrs Nsah's Registrant's response bundle, in an email dated 19 September 2021 from Mrs Nsah to Witness 2, she states: *"I did ask you whether [Ms 4] my previous consultant handed over my NMC issues with you, your response was that you did not really have a proper hand over from her as it was done in a hurry...I told you [Ms 4] was aware even of the dates I went to Court and I repeated them to you..."*

Therefore the panel was not satisfied on the balance of probabilities, that Mrs Nsah had not disclosed her conviction to the Agency during the period stipulated.

The panel noted Ms Thornton's submissions as to whether in Charges 2) and 3) the word 'employer' accurately reflected the status of the Agency but given the findings of the panel as to the failure of the NMC to prove that Mrs Nsah had not made the relevant disclosures, the panel did not consider it needed to make any findings in this regard.

Submissions on impairment

Ms Thornton provided her submissions on impairment addressing the panel on the need to have regard to protecting the public and the wider public interest. Her submissions included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. She referred to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin).

Ms Thornton referred the panel to the NMC Code for professional standards of practice and behaviour for nurses and midwives (2015) ('the Code'), when making its decision. She submitted that the dishonesty in this case flows from the conviction and is wholly related to the employment of Mrs Nsah as a registered Nurse.

In relation to Charge 1), Ms Thornton submitted that the conviction is fundamentally serious because of the trust that the public places in the nursing profession. Mrs Nsah was found guilty of dishonesty on 76 separate occasions over a long period.

Ms Thornton submitted that Mrs Nsah was an experienced nurse who should be well informed on the Code. She further submitted that the conduct was an abuse of the trust of her employer. Ms Thornton submitted that this demonstrates a lack of insight in relation to the conduct, considering the length of time that the conduct occurred.

The panel accepted the advice of the legal assessor which included reference to the cases of *Grant* and *Yeong v GMC* [2009] EWHC 1923 [Admin].

Decision and reasons on impairment by reason of conviction

The panel went on to decide whether, as a result of conviction, Mrs Nsah'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. In considering fitness to practice, there is no burden or standard of proof, but the panel

has exercised its own professional judgement, having careful regard to the overarching objectives of the NMC. The panel has taken into account Mrs Thornton's submissions and the contents of the Registrant's Response Bundle, (including the testimonial from a registered mental health nurse who appears to have been aware of Mrs Nsah's referral), as well as Mrs Nsah's reflective piece received by the NMC on 23 March 2023.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and trustworthy.

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 she:

- 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...*
- d) Whether the registrant has in the past acted dishonestly and/or is liable to act dishonestly in the future.*

The panel considered that limb a) was not relevant but that limbs b), c) and d) have been engaged.

The panel heard nothing which gave rise to concern about Mrs Nsah's clinical practice. Ms 2 confirmed that the feedback she received from clients concerning Mrs Nsah's clinical performance was consistently positive. The panel did not consider that Mrs Nsah either had put patients at unwarranted risk of harm or was liable to do so in the future.

The panel found that Mrs Nsah had brought the nursing profession into disrepute by way of her conviction for fraud and that, due to the nature of the dishonesty, she breached the fundamental tenets of the profession of honesty, trust and integrity.

The panel acknowledged that it is not easy to demonstrate strengthening of practice in cases involving dishonesty. However, Mrs Nsah has accepted the facts of her conviction in Charge 1) and the panel acknowledged that since the conviction, Mrs Nsah has been making payments of compensation with a view to reimbursing the Trust.

The panel had regard to comments in her reflective statement received by the NMC 1 March 2023 that, *"In court, the judge explained to me why anyone from outside will call it fraud. I learnt a lot from my court appearances too."* She also stated that, *"I am not making excuses or blaming anyone for my actions, I take full responsibility on the part I played."*

The panel acknowledged Mrs Nsah's responses in her Registrant's Response Bundle and her reflective piece indicate a degree of insight. Mrs Nsah had shown clear remorse but the panel considered that her insight is not fully developed in that she does not appear to have recognised the impact of her course of conduct on the reputation of the profession.

Because Mrs Nsah had not shown full understanding of her offence, the panel determined that there remains a risk that it could be repeated in the future. However, it regarded the risk of repetition as being relatively low given Mrs Nsah's stated wish to learn from the offence, and her passionate wish to retain her status as a Nurse and continue with her career.

The panel bore in mind that 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.

Having regard to all of the above, the panel nevertheless considered that an informed member of the public would be concerned if a registered nurse convicted of fraud were not found to be impaired at this time. Public confidence in the nursing profession, and in the NMC as a regulator, would be significantly undermined. The panel therefore determined that in this case a finding of impairment on public interest grounds was required.

The panel was satisfied that Mrs Nsah's fitness to practise is currently impaired.

Submissions on sanction

Ms Thornton informed the panel that in the Notice of Hearing, dated 21 February 2023, the NMC had advised Mrs Nsah that it would seek the imposition of a strike-off order if it found Mrs Nsah's fitness to practise currently impaired. During the course

of the hearing, the NMC revised its proposal and submits that a strike-off order is more appropriate in light of the panel's findings.

Ms Thornton submitted that dishonesty is a very serious charge and strikes at the heart of the midwifery profession. She submitted that the public and fellow practitioners expect midwives to act with honesty and integrity at all times.

Ms Thornton proposed the following aggravating factors:

- The conviction for a dishonesty case is very serious
- That there has been a personal gain from the breach of trust in relation to her employer at the NHS whereby fraud has been committed against the NHS
- A contravention of NHS's policies
- Mrs Nsah has not shown reflection
- Mrs Nsah's contravention of providing the healthcare needs which were required for patients at the hospital where Mrs Nsah was employed.
- Mrs Nsah's dishonesty over a prolonged period of time.

Ms Thornton submitted that such serious dishonesty concerns made it incompatible for Mrs Nsah to remain on the register. She submitted that no workable conditions could be formulated that would address the risk of repetition, and a striking-off order was the only appropriate order.

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

Decision and reasons on sanction

Having found Mrs Nsah's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. 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 took into account the following aggravating features:

- Prolonged period of incidents leading to the conviction
- Abuse of Mrs Nsah's position of trust

- Dishonesty and lack of integrity resulting in financial gain
- Insufficient insight of the conviction
- Was not open with her employer about her medical issues and reports
- Answering no comment throughout disciplinary proceedings and that she had not been cooperative.

The panel also took into account the following mitigating features:

- Mrs Nsah had been under stress from unfounded previous allegations
- The level of remorse that Mrs Nsah has shown
- Paying back the debts over a period of time
- That Mrs Nsah appears to be a good nurse and that she continues to work in the agency with no previous regulatory concerns

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the finding of dishonesty. 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 was of the view that all dishonesty is serious. The panel noted that it needed to mark the public interest concerns in this case, but that this was at the lower end of the spectrum of dishonesty.

The panel noted that Mrs Nsah has shown insight into her conduct. The panel noted that she made admissions and apologised to this panel for her misconduct, showing evidence of genuine remorse. Mrs Nsah has engaged with the NMC since the referral. Further it noted that Mrs Nsah has been provided with of positive

testimonials from Witnesses, especially from Ms 2, which speaks to her skill and competence as a registered nurse. The panel was of the view that the charges happened a few years ago and she has not received any further concerns regarding her practice or honesty. Therefore, the panel determined that there is a low risk of Mrs Nsah repeating her misconduct in this case.

The panel considered whether it would be proportionate to impose a more restrictive sanction and looked at a conditions of practice order. The panel noted that there are no conditions that can address dishonesty. The panel concluded that no useful purpose would be served by a conditions of practice order.

The panel concluded that no useful purpose would be served by a conditions of practice order. It is not necessary to protect the public and would not assist Mrs Nsah's return to the nursing practice. The panel further considered that a suspension order would be wholly disproportionate in this case.

The panel carefully considered the submissions of Ms Thornton in relation to the sanction that the NMC was seeking in this case. The panel noted that it would be usual for a panel to decide to make a suspension order or strike off order in cases relating to dishonesty. For the reasons outlined above the panel considered that a suspension order would be disproportionate in this case in all the circumstances. The panel was of the view that Mrs Nsah's dishonesty was not for her personal gain and that it was of a lack of understanding of the Code. The panel noted that Mrs Nsah has been working with the agency with no issues since the conviction was imposed, and that there has been no further concerns raised about her dishonesty or nursing practice.

The panel took into account that Mrs Nsah is a good skilled Nurse with no previous concerns and that no interim order has been taken since the investigation. The panel was of the view that there is a public interest in maintaining a skilled and competent nurse on the register who is described as maintaining safe practice and has good clinical performance. The panel further took into account that Mrs Nsah has practiced for four years before the NMC referral and practiced over the two years since her conviction.

The panel has decided that a caution order would adequately mark the public interest concerns in this case. For the next five years, any employer will be on notice that your fitness to practise had been found to be impaired and that Mrs Nsah's practice is subject to a caution order. 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 five years would be the 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.

At the end of this period the note on Mrs Nsah'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 Mrs Nsah'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 Mrs Nsah in writing.

That concludes this determination.