Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
Monday 23 January 2023 – Tuesday, 31 January 2023

Remitted Hearing
Tuesday, 2 April 2024 – Thursday, 4 April 2024

Virtual Hearing

Name of Registrant:	**Julian Alexander Phillip Faulkner**
NMC PIN	99D0110E
Part(s) of the register:	Registered Nurse – Sub Part 1 Adult Nursing (Level 1) – 7 March 2003
Relevant Location:	Staffordshire
Type of case:	Misconduct
Panel members:	Philip Sayce (Chair, Registrant member) Sophie Kane (Registrant member) Nicola Dale (Lay member) **Remitted Hearing (2 – 4 April 2024)** Paul Grant (Chair, Lay member) Helen Chrystal (Registrant member) David Raff (Lay member)
Legal Assessor:	Charles Parsley **Remitted Hearing (2 – 4 April 2024)** Richard Ferry-Swainson
Hearings Coordinator:	Dylan Easton (Days 1 – 3) Philip Austin (Days 4 – 6) Max Buadi (Day 7) **Remitted Hearing (2 – 4 April 2024)** Stanley Udealor

Nursing and Midwifery Council:	Represented by Stephen Earnshaw, Case Presenter **Remitted Hearing (2 – 4 April 2024)** Represented by Assad Badruddin, Case Presenter
Mr Faulkner:	Present and represented by Thomas Buxton, instructed by the Royal College of Nursing (RCN)
Facts proved:	Charges 1b and 1c
Facts not proved:	Charges 1a and 1d
Fitness to practise:	Impaired
Sanction:	**Suspension order (12 months)**
Interim order:	**Interim suspension order (18 months)**

Details of charge

That you, a registered nurse, whilst working at Fauld House Nursing Home:

1. On a date or dates on or around 28 August 2019:

a) Goaded and/or laughed at Patient A whilst administering her medication;
b) Made a recording of Patient A on your mobile phone;
c) Played the recording of Patient A to one or more of your colleagues;
d) Told one or more of your colleagues that you had sent the recording to your mother.

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

NMC Opening

The NMC received information on 13 November 2020 which subsequently resulted in a referral being made by one of the NMC's own staff.

The allegations before the panel relate to your employment at Fauld House Nursing Home ("the Home"), where you worked between 9 July 2019 and 4 September 2019. Concerns were raised by staff at the Home that you had allegedly shared a recording of yourself in which you were heard mocking and goading a vulnerable, elderly patient with dementia, whilst administering her medication. You allegedly told one or more of your colleagues that you had sent this video recording to your own mother.

You were suspended pending an investigation by the Home, but you resigned on 5 September 2019, prior to a full internal investigation being completed.

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

The panel, of its own volition, determined that parts of this hearing should be held in private on the basis that proper exploration of this case may involve reference to [PRIVATE]. It was of the view that any public interest in these parts of the case being aired in public session is outweighed by the need to protect their privacy in this respect. This application was made pursuant to Rule 19 of the NMC (Fitness to Practise) Rules 2004, as amended ("the Rules").

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

Neither Mr Earnshaw, on behalf of the Nursing and Midwifery Council ("NMC"), nor Mr Buxton, instructed by the Royal College of Nursing ("RCN"), on your behalf, opposed this when [PRIVATE] were raised.

Having heard that there may be reference to the [PRIVATE] witnesses giving evidence in this case, the panel determined to hold such parts of the hearing in private. The panel decided to rule on whether or not to go into private session in connection with these matters as and when such issues are raised.

Decision and reasons on facts

In reaching its decisions on the disputed facts, the panel took account of all the oral and documentary evidence adduced, along with the legal assessor's advice. It also had regard to the submissions made by Mr Earnshaw, on behalf of the NMC, and the submissions made by Mr Buxton, instructed by the RCN, on your behalf.

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 oral evidence from witnesses called on behalf of the NMC who, at the time of the alleged events, were employed in the following roles:

- Ms 1: Registered Nurse at the Home
- Ms 2: Clinical Lead Nurse at the Home
- Ms 3: Care Assistant at the Home
- Ms 4: Care Assistant at the Home

The panel also heard evidence from you at the facts stage of proceedings, along with two other witnesses called on your behalf:

- Mr 5: The son of a patient you cared for privately
- Ms 6 Your mother

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

Charge 1a

1. On a date or dates on or around 28 August 2019:

a) Goaded and/or laughed at Patient A whilst administering her medication;

This charge is found NOT proved.

The panel noted that, ultimately, this case rests on the credibility and reliability of the witnesses it has heard from.

Ms 3 and Ms 4 described an incident they said occurred in the smoking shelter on 28 August 2019. The panel considered Ms 3 and Ms 4's oral evidence to be inconsistent with the other evidence it had received, including the contemporaneous documents which had been provided. The panel was not satisfied that Ms 3 and Ms 4's version of events accurately reflected what had happened in the incident they alleged occurred. It noted that their statements made at an internal level were made ten days apart and contained a remarkably similar phraseology despite both witnesses asserting that they had not discussed them. The panel found both witnesses to have been emotive in their evidence and, at times, evasive. Ms 4 had told the panel that she did not think these issues would "*go as far as this*" but she was aware that she would be getting you in to trouble by raising these allegations to management.

The panel accepted your evidence that, because you had challenged the healthcare staff on a number of occasions as to their attitudes and practices, members of that team held a grudge against you. The panel noted that there was evidence in the round to suggest that the atmosphere and culture at the Home was intimidating, and that you had not been supported when raising concerns with management. Whilst Ms 3 and Ms 4 both denied fabricating these events, the panel considered much of their evidence to be implausible, to the point where the panel could not place any reliance upon it.

In taking account of the above, the panel was not satisfied that you had goaded and/or laughed at Patient A whilst administering her medication. It had no other evidence, aside from that given by Ms 3 and Ms 4 to say that you laughed and/or goaded Patient A whilst administering her medication, neither could these witnesses remember the words you used during the alleged incident, nor explain what they meant by the word '*goading*'. Additionally, Ms 1's evidence, which the panel accepted, did not reference any goading by you, or concerns about your communication with Patient A during the recording she heard.

The panel had no evidence to suggest that you had laughed at Patient A during the alleged incident.

Therefore, the panel found charge 1a not proved.

Charge 1b

b) Made a recording of Patient A on your mobile phone;

This charge is found proved.

The panel noted that in her NMC witness statement, Ms 1 had stated:

> *"I recall the registrant coming to me and telling me about a resident who had refused to take her medication. This was common for this resident in that she was often reluctant to take her medication and she was known to be abusive in her reluctance.*
>
> *The registrant had a recording of the resident being abusive towards him. I cannot recall specifically what was said but I can confirm that it was her usual demeanour in that she was refusing her medication and telling the registrant to 'go away' and 'f*** off'.*
>
> *The registrant played the recording to me. I did not ask that he play the recording. It is not normal practice to have recorded the resident. The registrant should not have recorded the resident and so I told him that I did not think that he should be playing the recording. I then made an excuse to leave and left the registrant be.*
>
> *I do not have a copy of the recording as the registrant did not share the recording with me. He just played it for me. I believe the recording was an audio recording but*

the registrant did not show me his phone as he played the recording. As such, my impression is that it was an audio recording but I cannot confirm this…".

Whilst the panel was played an audio recording at the hearing by Mr Buxton, the panel was satisfied that this was not the recording referred to by Ms 1. The content of the recording played to the panel was different from that alleged to be in the recording of Patient A. Mr 5 attended the hearing and confirmed that it was his mother that could be heard in the audio clip, and not Patient A. Mr 5 informed the panel that he had given his consent for you to make this recording of his mother and he explained his reasons for doing so.

You told the panel that you did not make a recording of Patient A on your mobile phone. However, the panel preferred the evidence given by Ms 1, to that of your evidence. The panel considered Ms 1 to be a credible and reliable witness, and it had found her to be a fair and balanced witness who did not appear to demonstrate any ill-will towards you, nor did she attempt to embellish her account. To the contrary, the panel was of the view that Ms 1 had attempted to assist it to the best of her knowledge and belief.

In taking account of the above, the panel was satisfied that you had made a recording of Patient A on your mobile phone.

Therefore, the panel found charge 1b proved.

Charge 1c

c) Played the recording of Patient A to one or more of your colleagues;

This charge is found proved.

The panel noted that Ms 3 and Ms 4 had told the panel that they had heard the recording of Patient A out under the smoking shelter on 28 August 2019. However, in taking account

of its earlier findings, the panel had decided that Ms 3 and Ms 4's evidence was to be seen as inconsistent and unreliable. The panel chose not to rely on Ms 3 and Ms 4's evidence.

Nonetheless, in having regard to its earlier findings in respect of Ms 1, the panel was satisfied that you had played a recording of Patient A to her. Whilst there may have been some confusion as to what date you allegedly played this recording to her, the panel considered Ms 1 to have been clear in what she had heard in this recording and how you came about playing this to her during the handover. Ms 1 explained to the panel that she remembers tea being given to residents at the Home when she was played this recording in the corridor outside of the kitchen, and this incident stuck in her memory. The panel had found Ms 1 to be a credible and reliable witness, and it preferred her evidence to that of your own in this respect.

Therefore, the panel was satisfied that you had played a recording of Patient A to Ms 1, one of your colleagues.

The panel found charge 1c proved.

Charge 1d

d) Told one or more of your colleagues that you had sent the recording to your mother.

This charge is found NOT proved.

The panel noted that the only evidence relating to this charge comes from Ms 3 and Ms 4. Given the panel considered much of their evidence to be implausible, the panel rejected their evidence.

The panel noted that your mother, Ms 6, attended to give oral evidence at this hearing, and she confirmed that she had not received any work-related recordings from you. Ms 6 had stated that you have always been totally professional, and she is not told anything about residents/patients you care for. Whilst the panel was aware that this does not specifically address the charge as you still could have told colleagues that you sent the recording to your mother, it accepted Ms 6's evidence that she had not in fact received anything.

In taking account of its earlier findings, the panel had determined that Ms 3 and Ms 4's evidence was inconsistent and unreliable. The panel did not consider their evidence to accurately and fairly reflect what happened. The panel accepted your account that you did not tell one or more of your colleagues that you had sent the recording to your mother. It had no other evidence before it in relation to this charge, other than the evidence of Ms 3 and Ms 4.

In taking account of the above, the panel was not satisfied that you had told one or more of your colleagues that you had sent the recording to your mother.

Therefore, the panel found charge 1d not proved.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether your 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, your fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

Mr Earnshaw invited the panel to take the view that your conduct amounted to breaches of *The Code: Professional standards of practice and behaviour for nurses and midwives* (2015) ("the Code"). He did not direct the panel to any specific paragraphs, but submitted that your actions amount to misconduct in the particular circumstances of the case.

Mr Earnshaw referred the panel 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'*. He also referred the panel to the case of *Nandi vs GMC [2004] EWHC 2317 Admin* and stated that your conduct has to be regarded as deplorable by fellow practitioners.

Mr Earnshaw submitted that the panel has found you to have made a recording of an elderly, vulnerable dementia patient, and that you had played this to Ms 1. He submitted that Ms 1 had recalled in her evidence that Patient A had been shouting and swearing.

Mr Earnshaw submitted that no explanation has been given by you as to why you made this recording. He submitted that it is evident that this recording should not have been made and should not have been played to Ms 1.

Mr Earnshaw submitted that the recording you made of Patient A had the potential to impact upon her privacy and dignity.

Mr Buxton invited the panel to look at your actions in isolation. He submitted that the fact that you denied this charge should not impact upon the panel's decision in considering misconduct.

Mr Buxton submitted that your behaviour has to be a serious departure from nursing standards for it to amount to misconduct. He submitted that it is easy to say that this should not have happened, so it therefore amounts to misconduct, but this is too simplistic a view.

Mr Buxton reminded the panel that you were new in post and you were abused by Patient A in the recording the panel have found you to have made. He submitted that you should not have done this recording, as Ms 1 had stated in her evidence, however, given the context of proceedings, your conduct needs to be looked at in isolation.

Mr Buxton submitted that there is no evidence that Patient A came to any harm as a result of you making this recording, or that she was even aware of it. He submitted that there is no evidence to suggest that this was played to anyone other than Ms 1, given the panel found Ms 3 and Ms 4 to be unreliable in what they had said. Mr Buxton submitted that there is nothing before the panel to say that you made this recording out of malice or humour, and there are no aggravating factors evident.

Mr Buxton submitted that registered professionals would consider your actions to have been '*silly*', but would not be of the view that it was deplorable or amounted to misconduct. He invited the panel to find that your actions in recording Patient A and showing Ms 1 did not meet the threshold for serious professional misconduct.

Decision and reasons on misconduct

The panel accepted the advice of the legal assessor. It had regard to the case of *Roylance*.

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

The panel was of the view that your acts and omissions did fall significantly short of the standards expected of a registered nurse, and it considered them to amount to several breaches of the Code. Specifically:

> "***1 Treat people as individuals and uphold their dignity***
> *To achieve this, you must:*
> 1.1 *treat people with kindness, respect and compassion*
>
> ***5 Respect people's right to privacy and confidentiality***
> *As a nurse, midwife or nursing associate, 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.*
> *To achieve this, you must:*
> *5.1 respect a person's right to privacy in all aspects of their care*
> *5.2 make sure that people are informed about how and why information is used and shared by those who will be providing care*
> *5.4 share necessary information with other health and care professionals and agencies only when the interests of patient safety and public protection override the need for 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*
> *20.5 treat people in a way that does not take advantage of their vulnerability or cause them upset or distress*

20.8 act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to"

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, in these circumstances, the panel decided that your actions in charges 1b and 1c found proved fell significantly short of the standards expected so as to justify a finding of misconduct.

The panel noted that it had found you to have made a recording of Patient A, an elderly and vulnerable patient. The panel had no context as to why you made or played this recording, and it considered your actions to have breached Patient A's right to privacy and dignity. It was of the view that, had there been a need to make a covert or overt recording of Patient A, there would have been a process in place to ensure that it was in Patient A's best interests and you would then have had permission to do this.

In recording Patient A swearing and shouting, you failed to respect her vulnerability. Neither Patient A, nor a member of the public, would have expected you to make a recording of any patient in your care without prior approval being given.

In taking account of all the above, the panel determined that other registered nurses would consider your actions to have fallen significantly below the conduct and standards expected.

Therefore, the panel found that your actions in charges 1b and 1c were sufficiently serious so as to amount to misconduct.

Remitted hearing

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

At the outset of the hearing, Mr Buxton on your behalf and Mr Badruddin on behalf of the Nursing and Midwifery Council (NMC), made a joint application that this case should be held partly in private on the basis that proper exploration of this case may involve references to matters relating to [PRIVATE]. The application was made pursuant to Rule 19 of the '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.

The panel determined to hear this hearing partly in private. It will go into private session as and when matters relating to [PRIVATE].

Submissions on impairment

Mr Badruddin referred the panel to the *NMC Guidance on Impairment* especially the question which states:

> '*Can the nurse, midwife or nursing associate practise kindly, safely and professionally?'*

Mr Badruddin highlighted that the concerns in this case do not relate specifically to clinical failings but are directly related to breaches of conduct and standards of behaviour expected from a registered nurse. He submitted that your misconduct amounted to an abuse of the position of trust and confidentiality expected of a registered nurse. He stated

that residents in healthcare institutions are extremely vulnerable, especially when they lack capacity as they are then wholly reliant on the care and professionalism of nurses in charge of their care. Mr Badruddin submitted that you had damaged the reputation of the nursing profession by your abuse of the trust placed in you by Patient A, their family members and the Home. He asserted that you had failed to act professionally and demonstrate compassion, kindness and respect towards Patient A.

Mr Badruddin referred the panel to the test formulated By Dame Janet Smith in the *Fifth Shipman Report,* quoted in the case of *CHRE v NMC and Grant* [2011] EWHC 927 (Admin). He submitted that limbs a, b and c of the *Grant* test are engaged in this case (as detailed below).

With regards to limb a of the *Grant* test, Mr Badruddin submitted that your misconduct caused direct emotional and psychological harm and distress to Patient A. He submitted that you deliberately failed to uphold Patient A's dignity as there was no reason to record Patient A and share that recording with a colleague, regardless of Patient A's cognitive ability. He stated that members of the public, including patients and their families would not expect patients in healthcare institutions, to be recorded without permission at their most vulnerable state in life.

Mr Badruddin submitted that your misconduct also poses a risk of harm to the public. He submitted that vulnerable patients and members of the public would be deterred from accessing care from health care institutions, knowing that there are nurses who could record them and share such recordings inappropriately with their colleagues.

With regards to limbs b and c of the *Grant* test, Mr Badruddin submitted that your conduct in breaching Patient A's privacy, has brought the nursing profession into disrepute. He submitted that the requirements to maintain the dignity and confidentiality of patients are provided in the Code and therefore, you had breached these fundamental tenets of the nursing profession. The public do not expect a nurse to act as you did and they expect

nurses to adhere at all times to the appropriate professional standards which fully safeguard the interests, health and wellbeing of patients.

Mr Badruddin referred the panel to the principles set out in the case of *Cohen v General Medical Council* [2008] EWHC 581 (Admin). He submitted that the regulatory concerns in this case are capable of remediation, and you had provided a detailed reflective account of the concerns. Mr Badruddin however submitted that, in your reflective account, you had focused on the difficulties you had faced at the Home rather than solely focusing on the impact of your conduct on Patient A, their family, your colleagues and the wider reputation of the nursing profession.

Mr Badruddin submitted that it is the position of the NMC that you have developing insight and limited remorse into your actions as you have failed to accept that the incidents occurred.

Mr Badruddin submitted that there is evidence of a pattern of misconduct in this case. He highlighted that this was not the first time you had violated the dignity of a vulnerable patient as similar incidents had occurred in 2006, which resulted in you being struck off the register in 2009. He submitted that although this was a different setting, it demonstrated a pattern in which when you found yourself in a stressful or difficult situation at work, it led to you committing misconduct and breaching the Code. Mr Badruddin submitted that such a pattern of misconduct demonstrates a high risk of repetition if you were allowed to practise unrestricted.

Mr Badruddin submitted that, in light of the above reasons, it is the position of the NMC that both public protection and public interest grounds were engaged in this case. He concluded that it was necessary to make a finding of impairment on both grounds to protect the public and uphold the reputation of the nursing profession and to maintain public confidence in the NMC as an effective regulator.

Mr Buxton referred the panel to your reflective statement and submitted that although you do not accept the findings of fact in this case, the panel should not equate such non-acceptance as a lack of insight. He submitted that there are several legal authorities that support the fact that an admission of misconduct is not a condition precedent as to whether you have demonstrated sufficient insight into the gravity and impact of the misconduct.

Mr Buxton highlighted that the NMC had stated that in your reflective statement, you had focused on the difficult circumstances you had faced in the Home. He submitted that in every reflective statement, including the models issued to registrants by the NMC, registrants are required to consider all relevant matters including their own feelings about the incidents. He asserted that the panel should note from the evidence before it, including the transcripts of the previous hearing, that there was an atmosphere of intimidation at the Home and you were not supported at work. He highlighted that it was in the context of such an environment that as a new employee, you had made a recording of Patient A and played it to Ms 1. Ms 1 also confirmed during her oral evidence that the healthcare assistants at the Home were "*cliquey*", lazy and unsupportive. Ms 1 also explained the context in which you had made the recording during the course of the hearing.

Mr Buxton therefore submitted that this was not a case of malicious and abusive behaviour towards a patient and it was an isolated incident in which there was no harm caused to Patient A.

Mr Buxton then took the panel through various sections of your reflective statement. He submitted that your reflective statement demonstrated that you have shown sufficient insight into the gravity and impact of the misconduct on Patient A, their family, your colleagues, the nursing profession and the wider public.

Mr Buxton also referred the panel to the various training courses you had completed. He submitted that those courses are relevant to the regulatory concerns and demonstrated

your willingness to update yourself with the nursing knowledge and skills relevant to the areas of concern and to strengthen your nursing practice.

Mr Buxton highlighted that you had worked as a nurse from September 2019 until October 2020 in a similar setting to the Home, without any concerns raised about your nursing practice. He referred the panel to the various testimonials made on your behalf, which demonstrated that you are a caring and empathetic nurse. Mr Buxton submitted that you have taken sufficient steps to demonstrate that the concerns have been remediated.

Mr Buxton highlighted that the NMC had made reference to your previous regulatory history in which you were struck off and restored to the register. He submitted that the current regulatory concerns were not as serious as the previous regulatory concerns and you are fully remediated in that regard.

Mr Buxton submitted that the panel can be satisfied that you are now capable of practising kindly, safely and professionally as a registered nurse. He submitted that prior to you being placed on the Disclosure and Barring Service (DBS) barred list on 29 October 2020, between September 2019 and October 2020, you had been practising unrestricted as a registered nurse, without any further concern being raised about your nursing practice. You had been put forward for a position of deputy manager which demonstrated that you had, even at that stage, strengthened your practice.

Mr Buxton acknowledged that the three limbs of the *Grant* test referred to by Mr Badruddin had been engaged by your conduct at the time but submitted that none of the limbs would be engaged in the future, as impairment is a forward-looking exercise. He submitted that in light of the evidence of your insight and strengthened practice (demonstrated through your year of practice as a nurse without further concerns, your reflective statement, your training certificates and testimonials), there is a low risk of repetition in this case and a finding of impairment is not necessary on the grounds of public protection and public interest.

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

Decision and reasons on impairment

The panel next went on to decide if, as a result of your misconduct, your fitness to practise is currently impaired.

Registered 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. 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/ 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) *….'*

The panel found that limbs a, b and c of the Grant test are engaged in this case, both in the past and looking forward. It was of the view that at the time of these incidents, your misconduct placed Patient A and her family at unwarranted risk of harm and, whilst there was no evidence of harm occurring, had the very real potential to cause actual harm in terms of emotional and psychological distress. The panel was of the view that if Patient A and/or her family had been aware that you had covertly recorded Patient A in an agitated state and then shared this recording with a colleague, it was highly likely that they would have been both distressed and concerned by your conduct. The panel considered that your misconduct amounted to an abuse of the trust that exists between a registered nurse and a service user as you failed to respect and uphold the privacy and dignity of Patient A and apparently gave no thought to the impact of your actions on both Patient A and her family.

The panel determined that your misconduct constituted a serious breach of the fundamental tenets of the nursing profession as you failed to treat Patient A kindly and with respect and dignity and thereby failed to uphold the standards and values of the nursing profession. Thus, you brought the reputation of the profession into disrepute.

The panel had regard to the NMC Guidance on Impairment especially the question which states:

> '*Can the nurse, midwife or nursing associate practise kindly, safely and professionally?'*

The panel is aware that this is a forward-looking exercise and, accordingly, it went on to consider whether your misconduct is remediable and whether you had strengthened your nursing practice.

The panel had regard to the case of *Cohen v GMC* where the court addressed the issue of impairment with regard to the following three considerations:

a. *'Is the conduct that led to the charge easily remediable?*

b. *Has it in fact been remedied?*

c. *Is it highly unlikely to be repeated?'*

In considering these factors, the panel had regard to the nature and context of the misconduct, the extent to which it is remediable and any efforts you had made to remediate your conduct.

Regarding insight, the panel took account of your reflective statement. The panel was mindful that given your denial of the facts found proved, it was not possible for you to provide an explanation as to the reasons for your actions as set out in charges 1b and 1c. It noted, however, that you have demonstrated some developing insight into the inappropriateness of the covert recording of patients without their consent and its potential impact on patients, their families, your colleagues, the nursing profession and the wider public. In your reflective statement, you discussed the ethics and principles around the recording of patients and the importance of obtaining consent for such recordings. However, the panel concluded that you had failed to demonstrate an in depth

understanding of the potential impact of your misconduct on Patient A and/or her family as well as the reputation of the nursing profession, and therefore had demonstrated limited insight into your misconduct.

The panel took account of the various training courses that you had completed, particularly those that are relevant to the areas of concern. It noted that you had kept yourself updated with the relevant knowledge and skills in the areas of concern.

The panel took into account that prior to you being placed on the DBS Child and Adult Barred list on 29 October 2020, you had practised unrestricted as a registered nurse between September 2019 and October 2020, with no further concerns raised about your nursing practice. In this regard, the panel took particular account of the positive references related to your work as a nurse during this period, as well as the other testimonials you provided.

Nevertheless, the panel bore in mind that you had been struck off the register in 2009 for misconduct that included actions where you had failed to respect and uphold the dignity of patients under your care. It took into account that you were subsequently restored to the register, however, the panel was concerned that this current misconduct took place within two years of your restoration to the register and that the incident occurred within two months of your employment as a registered nurse at the Home. The panel was of the view that there was a connection between the conduct, which is attitudinal in nature, that led to you being struck off in 2009 and the current case. Whilst your misconduct in relation to the previous case was of a far more grave nature, both cases involved a failure to uphold and respect the dignity and privacy of vulnerable patients under your care. The panel was concerned that the lessons which you should have taken from the circumstances that led to your previous striking off had not been fully learned. Therefore, in accordance with the case of *Cohen* above, the panel could not be satisfied that the behaviour was highly unlikely to be repeated.

The panel noted that you had highlighted the unfavourable working environment and culture at the Home. However, the panel considered that such circumstances could not justify or explain your conduct towards Patient A.

The panel was also of the view that the nature of your misconduct was such that it could discourage members of the public from seeking/accessing appropriate care when required for themselves or their vulnerable relations. Family members might well be reluctant to place relations living with dementia in the care of healthcare providers if they felt that their dignity might be compromised in this way.

In light of all the above, the panel determined 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 proper professional standards for members of those professions.

The panel had regard to the serious nature of your misconduct and the public protection issues it had identified and determined that public confidence in the profession, particularly as the misconduct involved a failure to respect and uphold the dignity of a patient, would be undermined if a finding of impairment were not made in this case. For these reasons, the panel determined that a finding of current impairment on public interest grounds is required. It decided that this finding is necessary to mark the seriousness of the misconduct, the importance of maintaining public confidence in the nursing profession, and to uphold proper professional standards for members of the nursing profession.

Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired on both public protection and public interest grounds.

Sanction

The panel has considered this case very carefully and has decided to make a suspension order for a period of twelve months. The effect of this order is that the NMC register will show that your registration has been suspended.

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 heard evidence from the following witness called on your behalf:

- Ms 7: Former deputy manager at Littleover Nursing Home. Ms 7 was your manager at Littleover Nursing Home between September 2019 and around May 2020.

The panel accepted the advice of the legal assessor.

Submissions on sanction

Mr Badruddin informed the panel that in the Notice of Hearing, dated 4 March 2024, the NMC had advised you that it would seek the imposition of a striking-off order if the panel found your fitness to practise currently impaired.

Mr Badruddin submitted that the aggravating factors in this case were as follows:

- A violation of respect and dignity of a vulnerable patient.
- Potential emotional and psychological harm caused to Patient A.
- A previous striking-off order for similar concerns.
- An abuse of a position of trust.

- A breach of confidentiality and privacy.
- That you were placed on both the DBS Child and Adult Barred list on 29 October 2020.
- A failure to demonstrate sufficient level of remorse, insight and remediation.
- Deep-seated personality and attitudinal issues stemming from the concerns.

Mr Badruddin submitted that the panel may consider the following mitigating factors:

- Engagement with these proceedings and the NMC
- Evidence of training and keeping up to date with relevant knowledge and skills in the areas of concern.
- The context of the incidents and your evidence of a difficult environment at the Home.

Mr Badruddin submitted that, in considering the available sanctions from the least restrictive order, taking no action would be wholly inappropriate in this case given the seriousness of the concerns and the fact that the misconduct has not been fully remediated. It would not be sufficient to address the public protection concerns and meet the public interest considerations in this case.

Mr Badruddin submitted that a caution order would not be a proportionate sanction as such sanction is only appropriate where the case is at the lower end of the spectrum. He asserted that given the serious nature of the concerns and the risk of repetition, this case does not fall within that category.

Mr Badruddin submitted that a conditions of practice order would not be appropriate in this case given that the charges found proved were not in relation to your clinical practice. The concern related to your attitude. He submitted that that there are no workable, measurable or proportionate conditions that could be formulated to address the concerns in this case. He stated that there are no conditions which could be put in place to prevent a nurse from inconspicuously recording a patient suffering from dementia.

Mr Badruddin highlighted that you are currently subject to a DBS decision that prevents you from working with vulnerable persons. In this regard, he referred the panel to the NMC Guidance (FTP-13). He submitted that the DBS decision renders any conditions of practice order unworkable and a conditions of practice order would not address the public protection and public interest issues engaged in this case.

Mr Badruddin referred the panel to the NMC Guidance on Suspension Orders (SAN-3d). He stated that the NMC accepted that in considering this case in isolation, it could be said that this was a single instance of misconduct as the incidents appeared to have occurred within one shift around 28 August 2019 and there has been no evidence of a repetition of the concerns since the incident. However, Mr Badruddin highlighted that the panel had found that this was not the first time that you had violated a patient's dignity nor was it the first time that you had shared inappropriate media to a colleague at work. He noted that the panel had also determined that there is a connection between the previous concerns in 2006 and the current concerns, which are both attitudinal in nature.

Mr Badruddin submitted that, given the serious nature of the concerns and the panel's findings, a suspension order is therefore not appropriate nor proportionate in this case. He submitted that a suspension order would not be sufficient to protect the public and meet the public interest considerations in this case.

Mr Badruddin submitted that the most appropriate and proportionate sanction to be imposed in this case is a striking-off order. He submitted that your conduct in violating Patient A's dignity and breaching confidentiality raises fundamental concerns around your trustworthiness and professionalism. He asserted that your misconduct is aggravated by your previous adverse NMC regulatory finding, your lack of remediation, your abuse of your position of trust and causing potential harm to a vulnerable patient.

Mr Badruddin submitted that these concerns are incompatible with continued registration as a registered nurse and public confidence in the nursing profession would not be maintained if you were allowed to remain on the register. He concluded that the public

protection and public interest considerations in this case would only be addressed by your removal from the register.

Mr Buxton submitted that in considering the appropriate sanction to be imposed, the panel should apply the principle of proportionality in this case. He asserted that the NMC sanction bid failed to take the principle of proportionality into consideration as it was based on its initial sanction bid at the outset of proceedings in 2023.

Mr Buxton submitted that these proceedings were very different from the proceedings in 2023. He highlighted that the NMC had made the same sanction bid at the commencement of the proceedings in 2023 where there were four charges before the previous panel. However, the most serious charge, which involved alleged goading of Patient A, had not been found proved because the panel had attached little weight to the evidence of the healthcare assistants. Mr Buxton noted that the two remaining charges consisted of recording Patient A and sharing such recording with a colleague with no evidence of malice. Mr Buxton submitted that a striking-off order would not, therefore, be a proportionate sanction for the charges found proved.

Mr Buxton outlined the timeline of the events that occurred from the incidents in question in August 2019 to your self-referral to the NMC in November 2020. He highlighted that at the time of your resignation from the Home, you were not aware of the concerns raised against you and that your former manager had reported you to the DBS. You started working in Littleover nursing home from September 2019 to October 2020. In August 2020, you were promoted to the role of deputy manager after Ms 7 had encouraged you to apply for the role, due to your professionalism and good practice as a registered nurse.

Mr Buxton stated that you were placed on the DBS barring list on 29 October 2020 and on 19 November 2020, you referred yourself to the NMC. He submitted that the panel should attach little weight to your placement on the DBS barring list, in its decision on sanction. He highlighted that the DBS is a different regulator which applies different tests on wider facts and uses a different system of obtaining evidence. He submitted that it was a matter

for the panel's professional judgement in determining the appropriate sanction to be imposed in this case.

Mr Buxton submitted that the incidents that occurred in 2006 that led to your removal from the register in 2009, were significantly different from the incidents in 2019. He submitted that the charges found proved in 2009 were of a more serious nature than the current concerns in this case. He highlighted that despite your removal from the register, you were able to prove to the panel at the restoration hearing that you were a fit and proper person to be on the register and capable of effective and safe practice. He stated that evidence was presented at that hearing to demonstrate a complete change of character and behaviour on your part, and that panel accepted the evidence that you had matured and had sufficient insight. [PRIVATE]. Mr Buxton therefore submitted that you had fully remediated the concerns that led to your removal from the register and this factor should be considered in determining the appropriate sanction to be imposed in this case.

Mr Buxton submitted that the panel should consider the following mitigating factors:

- Various positive testimonials made on your behalf including the oral evidence of Ms 7, which attest to your kind and empathetic care as well as your efficacy as a registered nurse.
- You practised without concern for over a year following the incidents, during the course of which you were promoted to the position of deputy manager.
- Evidence of extensive and relevant Continued Professional Development (CPD).
- The isolated nature of the incidents.

Mr Buxton submitted that you are passionate and committed to nursing and you would like to be provided with another chance to show that you can practise safely, kindly and professionally as a registered nurse. He submitted that a striking-off order is the ultimate sanction which would close any future prospects of your restoration to the register and prevent you from applying for a removal from the DBS barred list.

Mr Buxton stated that he accepted the submissions of Mr Badruddin that taking no action, a caution order or a conditions of practice order would not be appropriate nor proportionate in this case, but it was a matter for the panel's own judgement.

Mr Buxton referred the panel to the NMC Guidance on Suspension Orders (SAN-3d). He submitted that the fact that your misconduct is in relation to failure to respect and uphold the dignity of a patient, does not on its own amount to a deep-seated attitudinal problem. He asserted that your misconduct in 2006 was starkly different from your misconduct in this case and it should not be considered as evidence of a longstanding deep-seated attitudinal problem.

Mr Buxton submitted that there has not been any repetition of your misconduct since the incidents occurred in 2019 and the several positive testimonials including Ms 7's oral evidence demonstrate your good practice as a registered nurse. He submitted that you have demonstrated considerable insight (though it was found by the panel to be developing) into your misconduct and the panel should not consider your lack of acceptance of the facts proved and the level of your insight as factors in increasing the severity of any sanction.

Mr Buxton submitted that a period of suspension would address the public protection and public interest considerations in this case. He submitted that a striking-off would be unduly punitive and disproportionate, given the particular circumstances of this case and the evidence of remediation before the panel. He reminded the panel that you had earlier been made subject to a six-month suspension order and that you are still on the DBS barred list which would prevent you from immediately returning to practice until it is removed.

Decision and reasons on sanction

Having found your 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 identified the following aggravating features:

- A previous striking-off order for concerns, which although far more serious than the misconduct in this case, also related to your not affording appropriate dignity and respect to patients in your care and which were also attitudinal in nature.
- Repetition of similar concerns within two months of your employment as a registered nurse at the Home. This was your first nursing role since being restored to the register.
- Your abuse of a position of trust
- Your conduct placed Patient A at risk of potential harm in terms of emotional and psychological distress.
- Your failure to respect and uphold the privacy and dignity of a vulnerable patient.
- Your placement on the DBS Child and Adult Barred list on 29 October 2020.

The panel also identified the following mitigating features:

- Evidence of working as a registered nurse between September 2019 and October 2020 without further concerns raised about your nursing practice and being promoted to the role of deputy manager during this period.
- Evidence that you have kept up to date with your practice by completing various training courses, including in the areas of concerns.
- Various positive references provided in relation to your work as a registered nurse including very positive oral evidence from Ms 7 as to your professionalism and your seriousness in addressing the issues which had arisen.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. It had found that there remains a risk of repetition and that you are currently impaired on both public protection and public interest grounds. The panel therefore determined that it would neither protect the public nor be in the public interest to take no further action.

The panel 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 your 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 your misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. 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 your registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the SG, in particular:

> *'Conditions may be appropriate when some or all of the following factors are apparent:*
>
> - *no evidence of harmful deep-seated personality or attitudinal problems;*
> - *identifiable areas of the nurse or midwife's practice in need of assessment and/or retraining;*
> - *no evidence of general incompetence;*
> - *potential and willingness to respond positively to retraining;*
> - *……..;*
> - *patients will not be put in danger either directly or indirectly as a result of the conditions;*

- *the conditions will protect patients during the period they are in force; and*
- *conditions can be created that can be monitored and assessed.'*

The panel was of the view that the misconduct identified in this case could not be addressed through retraining as the concerns are not related to your clinical practice. Rather, the concerns are attitudinal in nature. The panel determined that, given the seriousness of the concerns and its attitudinal nature, there are no practicable or workable conditions that could be formulated. It noted that you are currently on the DBS Child and Adult Barred list and therefore, a conditions of practice order would not be practicable. Consequently, the panel decided that a conditions of practice order would not adequately protect the public nor be in the public interest.

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 Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour;*
- *…….;*
- *……..'*

The panel acknowledged that when considering this case in isolation, it was a single instance of misconduct. However, it noted that you had been struck off the register in 2009 for concerns of a far more serious nature which had in common with this instance of misconduct, a failure to treat patients with dignity and respect. The panel took into account that you had practised unrestricted as a registered

nurse between September 2019 and October 2020, with no further concerns raised about your nursing practice. In this regard, it noted the various positive references made on your behalf and the oral evidence of Ms 7 who gave a positive account of your professionalism and compassionate practice whilst working as a registered nurse between September 2019 and October 2020. The panel also noted that you had demonstrated some insight in your reflective statement, albeit limited, and had completed various training courses, including in the areas of concern.

Therefore, the panel was of the view that although the concerns are attitudinal in nature, there was no evidence before it to indicate any harmful deep-seated attitudinal problems in this case. Furthermore, whilst the panel had, for the reasons previously stated in its impairment decision, found that there was a risk of repetition, nonetheless, you had demonstrated some insight (albeit not complete at this stage) and therefore in the panel's judgement, you do not pose a significant risk of repetition.

The panel carefully considered the submissions of Mr Badruddin in relation to the imposition of a striking-off order in this case. It also considered following paragraphs of the SG with respect to imposing a striking-off order:

- *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?*

However, in taking account of all the evidence before it, including the seriousness of your misconduct, the steps you had taken to strengthen your nursing practice and the positive testimonials on your behalf, the panel concluded that a striking-off order would be

disproportionate. Although your misconduct raises questions about your professionalism, it was, in the panel's view, not to the extent that required your removal from the register. There was evidence, since the incidents, of you practising safely and effectively such that the panel was content that a striking-off order would be unduly punitive and disproportionate, and therefore, not the appropriate sanction. Whilst the panel acknowledges that a suspension order may have a punitive effect, it would be unduly punitive in this case to impose a striking-off order. It was of the view that a striking-off order could deprive the public of a registered nurse who has the potential to return to nursing practice in the future. Therefore, a striking-off order would not serve the public interest considerations in this case.

Consequently, the panel was satisfied that in this case, the misconduct was not fundamentally incompatible with remaining on the register and that public confidence in the nursing profession could be maintained if you were not removed from the register.

Balancing all of these factors, the panel concluded that a suspension order would be the appropriate and proportionate sanction to protect the public and address the public interest in this case. It was satisfied that a suspension order for a period of twelve months would provide you with an opportunity to demonstrate evidence of sufficient insight into your misconduct and that your fitness to practise is no longer impaired. The panel determined that this order is necessary to protect the public, mark the seriousness of the misconduct, maintain public confidence in the profession, and send to the public and the profession, a clear message about the standard of behaviour required of a registered nurse.

The panel noted the hardship such an order will inevitably cause you, however, this is outweighed by the public interest in this case.

The panel decided that a review of this order should be held before the end of the period of the suspension order.

Before the end of the period of suspension, another panel will review the order. At the review hearing, the panel may revoke the order, or it may confirm the order, or it may replace the order with another order.

Any future panel reviewing this case may be assisted by:

- An updated reflective statement demonstrating sufficient insight as to your misconduct and the panel's findings.
- Any references or testimonials attesting to your capability to perform your duties, in whatever role, professionally in any paid or unpaid work subsequent to this hearing.
- Further relevant training courses undertaken in the areas of concern.
- Your engagement and attendance at any future review hearing.

This will be confirmed to you in writing.

Interim order

As the suspension 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 your own interests until the suspension sanction takes effect.

Submissions on interim order

The panel took account of the submissions made by Mr Badruddin. He referred the panel to the NMC Guidance on Interim Orders (IMT 2 and 3). He submitted that given that the concerns are serious and the panel's findings, an interim suspension order for a period of 18 months is necessary in order to protect the public and also in the public interest, to cover the 28-day appeal period before the substantive order becomes effective.

Mr Buxton submitted that you are not currently under any restriction and given that you are still subject to the DBS barred list, an interim order would not be necessary in this case. He stated that if an appeal was successful, you would not still be able to practise as a registered nurse until you are removed from the DBS barred list.

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

Decision and reasons on interim order

The panel noted that it was not aware of the details of the DBS process and therefore could not rely on the fact that you are currently on the DBS barred list, in reaching its decision on an interim order. The panel determined that an interim order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and it had found a risk of repetition of your misconduct as set out in the reasons for imposing the substantive 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 in order to protect the public and otherwise in the public interest, during any potential appeal period. The panel determined that not to impose an interim order would be inconsistent with its earlier decisions.

If no appeal is made, then the interim suspension order will be replaced by the substantive suspension order 28 days after you are sent the decision of this hearing in writing.

That concludes this determination.