

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

**Substantive Hearing  
Monday 29 January – Monday 5 February 2024**

**Virtual Hearing**

**Name of registrant:** Carole Rutherford

**NMC PIN:** 07F0655E

**Part(s) of the register:** Registered Nurse Adult – Level 1  
RNA: September 2007  
Community Practitioner Nurse Prescriber  
V100: (June 2012)

**Relevant location:** South Tyneside

**Type of case:** Misconduct

**Panel members:** Peter Wrench (Chair, Lay member)  
Margaret Marshall (Registrant member)  
Suzanna Jacoby (Lay member)

**Legal Assessor:** Nigel Mitchell

**Hearings Coordinator:** Sherica Dosunmu

**Nursing and Midwifery Council:** Represented by Alastair Kennedy, Case  
Presenter

**Mrs Rutherford:** Not present and unrepresented

**Facts proved by admission:** Charges 1, 2

**Facts proved:** Charges 3, 4

**Facts not proved:** N/A

**Fitness to practise:** **Impaired**

**Sanction:** **Suspension order (12 months) – with review**

**Interim order:**

**N/A**

### **Decision and reasons on service of Notice of Hearing**

The panel was informed at the start of this hearing that Mrs Rutherford was not in attendance and that the Notice of Hearing letter had been sent to Mrs Rutherford's registered email address on 28 December 2023.

The panel took into account that the Notice of Hearing provided details of the allegations, the time, dates and means of joining the virtual hearing and, amongst other things, information about Mrs Rutherford's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

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

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Mrs Rutherford has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

### **Decision and reasons on proceeding in the absence of Mrs Rutherford**

The panel next considered whether it should proceed in the absence of Mrs Rutherford. It had regard to Rule 21 and heard the submissions of Mr Kennedy who invited the panel to continue in the absence of Mrs Rutherford.

Mr Kennedy referred the panel to email correspondence between the NMC and Mrs Rutherford in relation to this hearing. He explained that in response to NMC efforts to ascertain Mrs Rutherford's availability, in an email dated 6 November 2023, she indicated that she would not be available on 29 January 2024. He referred the panel to various further attempts made by the NMC to understand what would be convenient for Mrs Rutherford, but no further response has been received from her after 6 November 2023.

Mr Kennedy stated that Mrs Rutherford has disengaged with the NMC and there has been no application for an adjournment. He submitted that given Mrs Rutherford's disengagement since November 2023, there was no reason to believe that an adjournment would secure her attendance on some future occasion. He reminded the panel that there are eight witnesses lined up to give evidence at this hearing who will be impacted by an adjournment. Further, he submitted that there is public interest in the expeditious disposal of this case.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised '*with the utmost care and caution*' as referred to in the case of *R v Jones (Anthony William)* (No.2) [2002] UKHL 5.

The panel has decided to proceed in the absence of Mrs Rutherford. In reaching this decision, the panel has considered the submissions of Mr Kennedy, and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v Jones* and *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mrs Rutherford;

- Mrs Rutherford has not engaged with the NMC since 6 November 2023 and has not responded to any further correspondence from the NMC in relation to these proceedings;
- There is no reason to suppose that adjourning would secure her attendance at some future date;
- Eight witnesses are due to give evidence, and may be caused inconvenience if there was a delay to this hearing;
- Further delay may have an adverse effect on the ability of witnesses accurately to recall events; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mrs Rutherford in proceeding in her absence. Although the evidence upon which the NMC relies will have been sent to her at her registered email address, she will not be able to challenge the evidence relied upon by the NMC and will not be able to give evidence on her own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Mrs Rutherford's decisions to absent herself from the hearing, waive her rights to attend, and/or be represented, and to not provide evidence or make submissions on her own behalf.

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

### **Decision and reasons on application to amend charge 3**

The panel of its own volition considered amending the wording of charge 3. The proposed amendment was to change the wording from 'you' to 'your', in order to correct an apparent typographical error.

Original charge:

3. *You actions in charge 1 were dishonest in that you knew you had not worked these shifts and intended to make a financial gain from being overpaid for these.*

Proposed charge:

3. *Your actions in charge 1 were dishonest in that you knew you had not worked these shifts and intended to make a financial gain from being overpaid for these.*

Mr Kennedy indicated that he did not oppose this application.

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

The panel was of the view that such amendment would not change the nature of the charge, but simply correct a typographical error. The panel was satisfied that there would be no prejudice to Mrs Rutherford and no injustice would be caused to either party by the proposed amendment being allowed. It determined that it was therefore appropriate to allow the amendment to ensure clarity and accuracy.

**Details of charge (as amended)**

That you, a registered nurse:

1. Claimed payment for shifts on the following dates when you did not work these shifts resulting in an overpayment:
  - a. 16 March 2018 **[PROVED BY ADMISSION]**
  - b. 13 May 2018 **[PROVED BY ADMISSION]**
  - c. 8 July 2018 **[PROVED BY ADMISSION]**
  - d. 5 September 2018 **[PROVED BY ADMISSION]**

- e. 8 September 2018 **[PROVED BY ADMISSION]**
  - f. 30 September 2018 **[PROVED BY ADMISSION]**
  - g. 21 October 2018 **[PROVED BY ADMISSION]**
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- 2. Claimed time off in lieu on 12 and/or 13 November 2018 for shifts worked on 13 and/or 14 October 2018 when you had not worked on these days; **[PROVED BY ADMISSION]**
  
  - 3. Your actions in charge 1 were dishonest in that you knew you had not worked these shifts and intended to make a financial gain from being overpaid for these. **[PROVED]**
  
  - 4. Your actions in charge 2 were dishonest in that you knew you had not worked on 13 and/or 14 October 2018 and intended to make a gain for yourself by claiming time off in lieu. **[PROVED]**

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

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

Mr Kennedy made a request that parts of this case be held in private on the basis that proper exploration of Mrs Rutherford's case involves reference to her private personal circumstances. The application was made pursuant to Rule 19.

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 Rutherford's private personal circumstances, the panel determined to hold those parts of the hearing in private.

### **Decision and reasons on application to read witness statements from Witness 5, Witness 6, Witness 8 and Witness 9**

On 31 January 2024, the panel heard an application made by Mr Kennedy to have the witness statements of Witness 5, Witness 6, Witness 8 and Witness 9 read, and for these witnesses not to be called for oral evidence. He submitted that the evidence from these witnesses was more technical in nature and related to charges 1 and 2. He stated that these witnesses did not provide any evidence central to the dishonesty alleged in charges 3 and 4.

Mr Kennedy referred to a Case Management Form (CMF), completed and signed by Mrs Rutherford. He highlighted that in the CMF Mrs Rutherford indicated that she agreed with the contents of the witness statements from these witnesses. He submitted that it would not be unfair to Mrs Rutherford to allow these witness statements to be read, as Mrs Rutherford has made no challenge to the content of these witness statements.

Further, Mr Kennedy submitted that it would assist more efficient case management to have these witness statements read.

The panel heard and accepted the legal assessor's advice on the issues it should take into consideration in respect of this application. This included Rule 31 which provides that, so far as it is '*fair and relevant*', a panel may accept evidence in a range of forms and circumstances, whether or not it is admissible in civil proceedings.

The panel approached its decision by considering firstly the relevance of these witness statements and then secondly whether it would be fair to admit them, having regard to the principles identified in the case of *Thorneycroft v NMC* [2014] EWHC 1565 (Admin). The

panel took into account that it was being asked to admit four witness statements and that it must therefore give separate consideration to each.

The panel first considered whether it would be relevant to admit all four of the witness statements. It considered the statements individually and noted that none of these witnesses could speak with direct personal experience of Mrs Rutherford's actions, particularly in relation to the dishonesty alleged in charges 3 and 4.

However, in relation to Witness 6, Witness 8 and Witness 9, the panel deemed their evidence relevant to explain some of the technical matters involved in the Trust's investigation and to exhibit some of the documentation relating to this. The panel was satisfied that this applied to all four witness statements.

In relation to Witness 5, the panel considered that she also provided evidence relevant to the Trust's investigation, but in relation to its exploration of the potential reasons why Mrs Rutherford might not have been at her normal place of work but could still have been working. It determined that this evidence provided relevant background context to the allegations in this matter.

The panel next considered whether it would be fair to admit these witness statements. The panel determined that in respect of all four witness statements the following applied:

- They were not the sole and decisive evidence in relation to any of the charges;
- Mrs Rutherford has not challenged the contents of any of these statements; and
- Particularly given Mrs Rutherford's agreement with these statements, there was no reason to believe any of the witnesses fabricated their evidence.

Additionally, the panel determined that, given charges 1 and 2 were proved by Mrs Rutherford's admission, it had no ancillary questions to ask Witness 5, Witness 6, Witness 8 and Witness 9 in oral evidence. The panel was of the view that there was no real advantage in testing the evidence of these witnesses. In light of this, it was satisfied that



no injustice or unfairness would be caused by having the witness statements of Witness 5, Witness 6, Witness 8 and Witness 9 read during these proceedings. Accordingly, the panel decided to grant the application.

## **Background**

The NMC received a referral from South Tyneside and Sunderland NHS Foundation Trust (the Trust) regarding Mrs Rutherford's fitness to practise on 10 December 2018. Mrs Rutherford commenced employment with the Trust on 10 September 2007. At the time of the referral, Mrs Rutherford was employed as a Band 7 Safe Care Lead at Clarendon Hospital (the Hospital).

Mrs Rutherford started working as a Band 7 Safe Care Lead on 5 February 2018. In this role, Mrs Rutherford was responsible for managing a community nursing team and typically worked Monday to Friday, between 8:30 and 17:00. Although Mrs Rutherford held a managerial role, she would occasionally work weekend shifts as part of her substantive post and also worked weekend shifts through NHS Professionals' nursing bank (NHSP). In her principal role, one of Mrs Rutherford's responsibilities included updating an 'e-roster', which is an electronic employee scheduling software used to record and manage staffing on shifts. The system operated at the Trust was that if staff worked more than their contracted hours, they would be entitled to claim payments and/or take time off in lieu.

The concerns raised in the referral relate to Mrs Rutherford's claim for additional shifts at the Trust between 16 March 2018 and 21 October 2018. It is alleged that Mrs Rutherford claimed payment for seven shifts she did not actually work during this period. Some of these shifts related to Mrs Rutherford's substantive role at the Trust and other shifts were undertaken through NHSP. As a result of the claims made, Mrs Rutherford was paid £1547.08 for these additional shifts. In addition to the payment received for these shifts, Mrs Rutherford also claimed time off in lieu on 12 and 13 November 2018 for shifts worked on 13 and 14 October 2018. It is alleged that Mrs Rutherford did not actually work on 13 and 14 October 2018.

In response to Mrs Rutherford's time off in lieu claim for 12 and 13 November 2018, discrepancies were noticed on Mrs Rutherford's 'e-roster'. These concerns were escalated, and Witness 1 undertook an investigation on behalf of the Trust. The investigation involved an audit of the 'e-roster', with a review of Mrs Rutherford's:

- payslips in relation to the shifts claimed;
- work and personal diary;
- computer access using her username;
- the Trust's electronic patient record system (EMIS WEB) access; and
- her swipe card report to establish when she entered the premises on particular days.

During the Trust's investigation Mrs Rutherford accepted that she might have made inaccurate claims but said that any inaccurate claims resulted from genuine mistakes as opposed to dishonesty.

On 7 November 2019, the Trust held a disciplinary hearing, which was chaired by Witness 2. In Mrs Rutherford's response at this hearing, she stated: *'Maybe I have made mistakes with the off duty but not intentionally, definitely not intentionally'*. The disciplinary panel found that *'there was no evidence of the Registrant coming into the building on specific days rostered as worked during this period [the period claimed]'*. Further, there was no evidence of entries in Mrs Rutherford's personal work diaries of any work carried out, nor were there any entries in the Trust's EMIS system of her delivering nursing care to patients.

During the NMC investigation, Mrs Rutherford provided a reflective statement in which she stated: *'I believe these were genuine mistakes and I feel ashamed and very sad and disappointed in myself that this happened'*.

## **Decision and reasons on facts**

At the outset of the hearing, the panel heard from Mr Kennedy, who informed the panel that Mrs Rutherford has made admissions to charges 1, 2, 3 and 4. He referred the panel to a completed and signed CMF, dated 18 May 2022, in which Mrs Rutherford ticked boxes to indicate that she admitted to charges 1, 2, 3 and 4.

Mr Kennedy also referred the panel to a reflective statement written by Mrs Rutherford. He stated that within this reflective statement Mrs Rutherford's explanation was that her actions in charges 1 and 2 were '*genuine mistakes*'. He submitted that this explanation is inconsistent with the dishonesty alleged in charges 3 and 4. As a result, he invited the panel to place reliance on Mrs Rutherford's admissions to charges 1 and 2 but not charges 3 and 4.

The panel therefore found charges 1 and 2 proved, by way of Mrs Rutherford's admissions.

The panel considered Mrs Rutherford's explanations during the course of the Trust and the NMC's investigations and was not satisfied that her admissions to the two dishonesty charges were unequivocal. In these circumstances, the panel determined that it would be fair and in the interests of justice to treat charges 3 and 4 as denied.

In reaching its decisions on the disputed facts, the panel took into account all the evidence adduced in this case together with the submissions made by Mr Kennedy on behalf of the NMC and Mrs Rutherford's written representations.

The panel has drawn no adverse inference from the non-attendance of Mrs Rutherford.

The panel was aware that the burden of proof rests on the NMC, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that a fact will be proved if a panel is satisfied that it is more likely than not that the incident occurred as alleged.

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

- Witness 1: Divisional Human Resources (HR) Manager at the Trust;
- Witness 2: Divisional Director for Community Services at the Trust;
- Witness 3: Head of Employee Relations at the Trust;
- Witness 4: Matron at the Trust.
- Witness 7: Safe Care Lead at the Trust;

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor.

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

### **Charge 3 and 4**

3. Your actions in charge 1 were dishonest in that you knew you had not worked these shifts and intended to make a financial gain from being overpaid for these.
4. Your actions in charge 2 were dishonest in that you knew you had not worked on 13 and/or 14 October 2018 and intended to make a gain for yourself by claiming time off in lieu.

The panel considered each of these two charges separately.

**These charges are found proved.**

The panel considered that in relation to charge 3, Mrs Rutherford admitted that she claimed payments for seven shifts she did not work between 16 March to 21 October 2018. It considered this in conjunction with Mrs Rutherford's admission that she claimed time off in lieu for shifts she did not work on 13 and/or 14 October 2018 in relation to charge 4. It noted that Mrs Rutherford incorrectly claimed for a total of nine shifts, which it found to be a significant number in a short period of time.

The panel applied the legal test for dishonesty and referred to the case of *Ivey v Genting Casinos* [2017] UKSC 67. When considering charges 3 and 4, the panel considered whether Mrs Rutherford intended to purport that she had worked the shifts she claimed for when she knew she had not done so; and therefore whether her actions were dishonest.

The panel had regard to the fact that the e-roster system Mrs Rutherford used to record these incorrect entries had been in place for six years. It noted that in Witness 4's evidence she explained that Mrs Rutherford received induction training as a Safe Care Lead on how to use the e-rostering system before she was expected to use it. As a Safe Care Lead, Mrs Rutherford was expected to use the e-rostering system for a team of up to 33 staff members. The panel found a pattern of evidence which indicated that Mrs Rutherford, [PRIVATE], was admired as an organised, competent and capable member of staff. The evidence also showed that Mrs Rutherford was regarded as a good nurse. The panel noted that Mrs Rutherford's errors only related to her own shifts and witnesses were not aware of her making any errors in her entries for the staff she managed, or indeed in any other record keeping. The panel was satisfied that the evidence clearly indicated that Mrs Rutherford had a good working knowledge that of the e-roster system and so concluded that her entries in relation to her own shifts were, more likely than not, deliberately recorded incorrectly.

The panel noted that Mrs Rutherford received financial gain from accepting payment and time off in lieu for shifts she did not work. It took into account that Mrs Rutherford was experiencing [PRIVATE]. In respect of motive, the panel found that Mrs Rutherford's gain in relation to these charges, were consistent with [PRIVATE] at the time. The panel

therefore determined that, on the balance of probabilities, Mrs Rutherford intended to make financial gain from her incorrect entries and to acquire time off.

The panel bore in mind Mrs Rutherford's account given during the Trust's investigation and in response to the NMC. It noted that Mrs Rutherford provided no real explanation as to why or how the entries were inputted incorrectly on the system but only referred to them as '*genuine mistakes*'. The panel carefully analysed the Trust's e-roster. It considered that it was highly unlikely that Mrs Rutherford would make nine separate errors in a nine month period in relation to the shifts specified in the charge while making no errors in her entries relating to others members in her team. It found no other plausible explanation other than Mrs Rutherford's motivation outlined above.

The panel concluded that, by the standards of ordinary and decent people, Mrs Rutherford's actions were dishonest when she claimed overtime payments and time off for shifts, which she knew she did not work.

Accordingly, the panel found charges 3 and 4 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 Mrs Rutherford's fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's suitability to remain on the register unrestricted.

The panel, in reaching its decision, has recognised its statutory duty to protect the public and maintain public confidence in the profession. Further, it bore in mind that there is no burden or standard of proof at this stage and it has therefore exercised its own professional judgement.

The panel adopted a two-stage process in its consideration. First, the panel must determine whether the facts found proved amount to misconduct. Secondly, only if the facts found proved amount to misconduct, the panel must decide whether, in all the circumstances, Mrs Rutherford's fitness to practise is currently impaired as a result of that misconduct.

### **Submissions on misconduct**

Mr Kennedy 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.*'

Mr Kennedy invited the panel to take the view that the facts found proved amount to misconduct. He referred the panel to the terms of 'The Code: Professional standards of practice and behaviour for nurses and midwives 2015' (the Code), in making its decision. He identified the specific, relevant standards where Mrs Rutherford's actions amounted to misconduct.

Mr Kennedy stated that by Mrs Rutherford's own admission, she accepts that her actions fell below the standards expected of a registered nurse. He submitted that Mrs Rutherford claimed money and time off she was not entitled to, which resulted in a financial impact on the Trust and added to the workload of her colleagues, who had to cover her duties when she was not there. He submitted that Mrs Rutherford's actions carried on for many months and crossed the threshold into professional misconduct.

### **Submissions on impairment**

Mr Kennedy moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. It also included reference to the cases of *Council for*

*Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin) and *Cohen v General Medical Council* [2008] EWHC 581 (Admin).

Mr Kennedy stated that Mrs Rutherford accepted that her fitness to practise is impaired, but this is a matter for the panel's own independent decision.

Mr Kennedy submitted that limbs 'b' and 'd' of the test set out by Dame Janet Smith in the fifth Shipman report and adopted in 'Grant' were engaged in this case:

- a) ...
- b) *Has in the past brought and/or is liable in the future to bring the profession into disrepute;*
- c) ...
- d) *has in the past acted dishonestly and/or is liable to act dishonestly in the future.*

Mr Kennedy submitted that in the charges found proved it is clear that Mrs Rutherford's actions brings not only her personal reputation into disrepute, but it also has the potential to impact the wider nursing profession. He submitted that Mrs Rutherford's behaviour is not what the public or colleagues would expect of a registered nurse.

Mr Kennedy explained that, in relation to insight, Mrs Rutherford has admitted the facts behind charges 1 and 2 from a very early stage, and also provided a reflective statement. He submitted that, despite this, Mrs Rutherford has not recognised and accepted her behaviour was dishonest and has therefore not reflected on that aspect of it. In light of this, he invited that panel to consider whether Mrs Rutherford was fully aware of the effect her actions had on her colleagues as well as the potential impact on the wider profession.

Mr Kennedy submitted that, if the panel was not satisfied that Mrs Rutherford has demonstrated full remediation, then there is a risk of repetition. He submitted that whilst



there is nothing to suggest that Mrs Rutherford has repeated her actions in the facts found proved, there is also nothing to show that she has not repeated them either. He submitted that although the charges occurred almost six years ago, there is no information about what Mrs Rutherford has been doing since. He stated that the panel has not received any references or testimonials to indicate that Mrs Rutherford has since demonstrated honest practice in any field. He submitted that in these circumstances, there is no evidence of remediation.

Mr Kennedy highlighted that the financial impropriety in this case related to Mrs Rutherford's employer. He submitted that as a result, the panel may find that public protection is not particularly a strong issue in this case. He submitted that there is no suggestion that Mrs Rutherford took money from patients during home visits, but this may become a fear held by patients who are aware of the circumstances of this case in the future. He submitted that the public would be appalled to learn that a nurse would behave in the way Mrs Rutherford had done and this type of behaviour could result in public reluctance to engage with members of the nursing profession. He concluded that a finding of impairment is therefore necessary in the public interest, to uphold public confidence and to maintain proper standards in the profession.

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

### **Decision and reasons on misconduct**

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

The panel was of the view that Mrs Rutherford's actions did fall significantly short of the standards expected of a registered nurse, and that Mrs Rutherford's actions amounted to a breach of the Code. Specifically:

***'20 Uphold the reputation of your profession at all times***

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

*20.2 act with honesty and integrity at all times...*

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

***21 Uphold your position as a registered nurse, midwife or nursing associate***

*21.3 act with honesty and integrity in any financial dealings you have with everyone you have a professional relationship with, including people in your care'*

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. In assessing whether the facts found proved amounted to misconduct, the panel considered the charges individually and collectively, as well as the circumstances of the case as a whole. It took account of all the evidence before it.

The panel considered that in charges 1 and 2 Mrs Rutherford claimed for shifts she did not work, extracting over £1500 from the NHS and unearned time off. It regarded this as an unacceptably low standard of professional behaviour. Given its findings in relation to charges 3 and 4, Mrs Rutherford dishonestly misappropriated public funds and acquired paid time off to which she was not entitled. The panel reminded itself that honesty and integrity are fundamental to the nursing profession and Mrs Rutherford demonstrated a pattern of dishonesty when she claimed for a significant number of shifts she knew she did not work. It determined that Mrs Rutherford's actions in each charge would be considered deplorable by fellow practitioners and damaging to the trust that the public places in the profession.

The panel therefore concluded that Mrs Rutherford's actions did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

**Decision and reasons on impairment**

The panel next went on to decide if as a result of the misconduct, Mrs Rutherford's fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional. 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) has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

Taking into account all of the evidence adduced in this matter, the panel was not satisfied that Mrs Rutherford's actions placed patients at unwarranted risk of harm. It bore in mind that the concerns in this case were not related to Mrs Rutherford's clinical practice and her misconduct did not directly relate to patient care. The panel therefore determined that limb 'a' of the 'test' was not engaged.

However, the panel was satisfied that Mrs Rutherford's misconduct did engage limbs 'b', 'c' and 'd' of the 'test'. Having found that Mrs Rutherford dishonestly misappropriated public funds and claimed time off that she was not entitled to, it determined that Mrs Rutherford's misconduct had breached the fundamental tenets of the nursing profession and brought its reputation into disrepute. It was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charges relating to dishonesty extremely serious.

Regarding insight, the panel took into account that Mrs Rutherford made some early admissions during the Trust's investigation. It also had regard to Mrs Rutherford's response to the regulatory concerns, in which she expressed remorse for the claims she has made. It found that Mrs Rutherford demonstrated some remorse and some insight. However, the panel noted that Mrs Rutherford attributed her actions to '*genuine mistakes*', thereby not accepting her dishonesty found proved. In these circumstances, the panel found that Mrs Rutherford has not fully addressed all the concerns in this case. It noted that in her response, Mrs Rutherford did not demonstrate a full understanding of why what

she did was wrong, how this impacted negatively on the reputation of the nursing profession or how she would handle situations differently in the future. The panel determined that Mrs Rutherford demonstrated limited insight and remorse.

The panel determined that the misconduct in this case evidenced behaviour that is inherently more difficult to put right, since it raises concerns about attitudinal issues. The panel considered the evidence before it and concluded that it has not received any information to suggest that Mrs Rutherford has taken any steps to address the specific concerns raised by her actions, such as deeper reflection on the consequences of her conduct/dishonesty or testimonials attesting to her more recent conduct at work.

The panel was of the view that due to the limited insight and remorse, as well as the lack of any evidence demonstrating trustworthy conduct in the period since 2018, there remains a risk of repetition. The panel considered that Mrs Rutherford's actions set out in the charges found proved demonstrated a pattern of repeated dishonesty in which she deliberately misappropriated public funds and acquired unearned time off from her employer. The panel determined that in the absence of further information, it could not be satisfied that Mrs Rutherford would act differently in similar circumstances in the future.

The panel bore in mind the overarching objectives of the NMC; to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

Having found that Mrs Rutherford's misconduct did not place patients at unwarranted risk of harm, the panel did not find Mrs Rutherford's fitness to practise impaired on public protection grounds.

However, the panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case. It considered that an

informed member of the public would consider Mrs Rutherford's actions to be serious and would expect it to be appropriately marked as unacceptable. The panel therefore found Mrs Rutherford's fitness to practise impaired on the grounds of public interest.

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

## **Sanction**

The panel has considered this case very carefully and has decided to make a suspension order for a period of 12 months with a review. The effect of this order is that the NMC register will show that Mrs Rutherford's 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 accepted the advice of the legal assessor.

## **Submissions on sanction**

Mr Kennedy invited the panel to consider whether the least restrictive sanction would be proportionate, and if it was not, the panel should then consider escalation until it arrives at a sanction with the most appropriate outcome.

Mr Kennedy outlined aggravating features he identified in this case:

- Breach of trust;
- Dishonesty over a period of nine months;
- Premeditated deception;
- Personal financial gain;

- Lack of full insight.

Mr Kennedy also outlined the mitigating features he identified in this case:

- Some engagement and admissions;
- Some insight and remorse;
- Personal mitigation.

Mr Kennedy informed the panel that in the Notice of Hearing, dated 28 December 2023, the NMC had advised Mrs Rutherford that it would seek the imposition of a 12 month suspension order with a review, or a striking off order.

Mr Kennedy submitted that making no order or imposing a caution order would not be proportionate given the seriousness of this case.

Mr Kennedy submitted that a conditions of practice order would not be appropriate. He submitted that given there are no clinical concerns in this case, conditions could not be formulated.

Mr Kennedy submitted that whilst there is undoubtedly considerable personal mitigation in this case, the panel must consider the reputation of the nursing profession. He submitted that it is the NMC's position that the repeated dishonesty in this case warrants a removal from the register in the public interest. He submitted that the panel must determine whether the removal should be permanent or temporary. He reminded the panel of its previous findings that Mrs Rutherford's behaviour did not create public protection concerns.

Mr Kennedy submitted that a period of suspension could allow Mrs Rutherford time to reflect and consider how her behaviour would have affected employers, colleagues and the reputation of the nursing profession.

Mr Kennedy referred the panel to the SG, specifically, SAN-2 '*considering sanctions for serious cases.*' He highlighted that the section of the SG dealing with cases relating to dishonesty explains that not all dishonesty are considered equally serious. He stated that the dishonesty in this case did not involve patients, but on the other hand involved premeditation and personal financial gain. He submitted that as a result, the dishonesty in this case is not on the lower end of the scale.

Mr Kennedy stated that it does not appear that the money has been repaid and the onus is on the debtor to seek out the creditor. Therefore, it is Mrs Rutherford's responsibility to make efforts to pay the money back.

Mr Kennedy invited the panel to consider that during the course of the NMC investigation, Mrs Rutherford applied for voluntary removal from the register and her application was refused. He submitted that the panel may feel that given Mrs Rutherford's lack of insight into her dishonesty and her lack of commitment to the profession, her behaviour is incompatible with her remaining on the register.

### **Decision and reasons on sanction**

Having found Mrs Rutherford's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel identified the following aggravating features:

- Extracting public funds through a breach of trust;
- Dishonesty over a period of nine months;
- Premeditated deception;



- Personal financial gain;
- Limited insight into her dishonesty.

When considering the aggravating features in this case, the panel had regard to Mrs Rutherford's reflective statement in which she stated that she would like to repay the sum she acquired from the Trust. The panel sought to establish whether this had been repaid and was informed that the Trust's Counter Fraud team did not seek or receive payment from Mrs Rutherford. The panel found no evidence from its enquiries to suggest that Mrs Rutherford has sought to repay the sum owed by any alternative means.

The panel also identified the following mitigating features:

- Early admissions to some of the charges;
- Some insight and remorse;
- Some personal mitigation [PRIVATE].

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, an order that does not restrict Mrs Rutherford's practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Mrs Rutherford's 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 Mrs Rutherford's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. It noted that Mrs Rutherford's misconduct was not related to her clinical practice and was not something that can be addressed through retraining. The panel was therefore of the view that there are no practical or workable conditions that could be formulated, given the nature of the facts found proved in this case. The panel concluded that the placing of conditions on Mrs Rutherford's registration would not adequately address the seriousness of this case and would not meet the public interest.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that a 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 noted that the concerns in this case did not relate to a single instance of misconduct. However, it also noted that Mrs Rutherford's misconduct related to a single course of action [PRIVATE]. It bore in mind that prior to this misconduct Mrs Rutherford held a longstanding unblemished career and it did not receive any evidence of deep-seated personality or attitudinal problems. It also took into account that it did not receive any evidence of repetition of similar conduct since. The panel was satisfied that Mrs Rutherford understands that what she did was wrong, even though she has hitherto been reluctant to accept the implications of her dishonesty.

The panel also had regard to the NMC's guidance on '*seriousness*' and '*cases involving dishonesty*' (Reference: SAN-2). The panel noted that not all dishonesty was equally serious, and the more serious type of dishonesty will call into question whether a nurse should be allowed to remain on the register. It noted that the dishonesty in this case was not at the lower end of seriousness, given the premeditated deception and financial gain.

However, having balanced Mrs Rutherford's actions against significant personal mitigation at the time and her previously unblemished career as a nurse, the panel determined that the misconduct in the circumstances of this case was not fundamentally incompatible with remaining on the register. It concluded that a suspension order would be the appropriate and proportionate sanction.

The panel considered that this order is necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse. It determined that a suspension order for a period of 12 months, with a review, was appropriate in this case to mark the seriousness of the misconduct.

At 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.

The panel noted the fact that Mrs Rutherford had previously applied unsuccessfully for voluntary removal from the register. However, it was conscious that her plans for the future may change.

A future panel reviewing this case would be assisted by:

- An update regarding Mrs Rutherford's current work and future intentions;

- A reflective statement addressing the panel's findings on misconduct, including reflections on dishonesty and how her actions impact on professional standards and conduct and maintaining public confidence in the profession;
- Testimonials relating to any work, paid or unpaid that she has undertaken, particularly demonstrating trustworthiness in the professional environment; and
- Attendance and engagement at a future hearing.

This will be confirmed to Mrs Rutherford in writing.

That concludes this determination.