Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing

Wednesday, 25 September 2024 - Friday, 27 September 2024
Monday, 30 September 2024
Tuesday, 28 January 2024 – Thursday, 30 January 2025

Virtual Hearing

Name of Registrant:	**Anne Marie Kelly**
NMC PIN	84Y0115N
Part(s) of the register:	Nurses part of the register Sub part 1 RN1: Adult nurse, level 1 (18 May 1987) SPGP: Specialist Practitioner-General Practice Nursing (13 September 1995) V300: Nurse Independent/Supplementary Prescriber (8 March 2004)
Relevant Location:	Co. Donegal and Strabane
Type of case:	Misconduct
Panel members:	Pamela Johal (Chair, lay member) Allwin Jay Mercer (Registrant member) Dr Tim Ward (Lay member) (25 -30 September 2024) Yousuf Rossi (Lay member) (28 – 30 January 2025)
Legal Assessor:	Paul Housego (25-27 September 2024) Juliet Gibbon (30 September 2024, 28 - 30 January 2025)
Hearings Coordinator:	Yewande Oluwalana
Nursing and Midwifery Council:	Represented by Beverley Da Costa (25 – 30 September 2024), Eilish Lindsay (28 - 30 January 2025), Case Presenter

Mrs Kelly:	Present and represented by Nicola Leonard (25 – 30 September 2024) Samantha Madden (28 - 30 January 2025), of Counsel, instructed by the Royal College of Nursing
Facts proved by admission:	Charges 1a, 1b, 2, 3a, 3b, 4, 5a, 5b, 6, 8 and 9
Facts proved:	N/A
Facts not proved:	N/A
No case to answer:	Charge 7
Fitness to practise:	Impaired
Sanction:	**Suspension order (3 months)**
Interim order:	**No order**

Decision and reasons on issue on jurisdiction

Before the hearing could be officially opened on Wednesday 25 September 2024, the panel were concerned with whether the Nursing and Midwifery Council (NMC) had jurisdiction to bring regulatory charges against you where your alleged conduct occurred in the Republic of Ireland and not in any of the home nations of the UK.

The panel asked Ms Da Costa on behalf of the NMC to seek guidance in respect of this point before your case could be opened. A brief adjournment was granted to assist in this request.

When the hearing resumed on Thursday 26 September 2024, Ms Da Costa informed the panel that the NMC were relying on Article 22(3) of the Nursing and Midwifery Order 2001:

> *'22.—(1) This article applies where any allegation is made against a registrant to the effect that—*
>
> *(3) This article is not prevented from applying because the allegation is based on a matter alleged to have occurred outside the United Kingdom or at a time when the person against whom the allegation is made was not registered.'*

Ms Da Costa submitted that she had received the legal assessor's written advice, with which she agreed, and she submitted that the panel have jurisdiction to hear your case.

Ms Leonard on your behalf also stated that she agreed with the legal assessor's advice, and did not take any jurisdictional issue concerning the case.

The panel heard and read the advice of the legal assessor who had regard to the case of *Remedy UK Ltd, R (on the application of) v The General Medical Council* [2010] EWHC 1245 (Admin) (28 May 2010). That advice was that an allegation of misconduct could relate to practice, or to other matters related to a nurse's conduct. Reference to practice could only be reference to misconduct committed while

practising, and you had no authority to practise in the Republic of Ireland. However, an allegation of purporting to do so could be considered misconduct under the second limb of the explanation in *Remedy (UK).* There was thus no issue of the NMC attempting to regulate nursing practice in another sovereign country.

The panel accepted the advice of the legal assessor and decided to proceed.

Decision and reasons to amend charge 1

On Thursday 26 September before the charges were formally read, the panel of its own volition, had regard to Rule 28 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004' as amended (the Rules), decided to amend the wording of charge 1.

The proposed amendment was to remove words from the charge to provide clarity and more accurately reflect the conduct alleged. As drafted the charge could be read as an acceptance that you had a practice in the Republic of Ireland and were charged with acting outside its scope. This was misleading as you accept that you have never had a right to practise in the Republic of Ireland. The panel considered that there was no unfairness to either party in removing that ambiguity without affecting the substance of the allegation. The amendment is set out below:

"That you, a registered nurse:

1) Worked ~~outside the scope of your practice~~ as a nurse in the Republic of Ireland, when you were not entitled to work as a nurse in that jurisdiction, in that you:
    (a) administered aesthetic treatments to patients in the Republic of Ireland;
    (b) administered prescribed medication to patients in the Republic of Ireland.

The panel accepted the advice of the legal assessor, which was that the panel had the power to do so, and that the amendment improved the drafting

and as the effect was to remove ambiguity from a charge which both parties understood was as amended there was no possibility of unfairness to either side.

The panel was of the view that this amendment was in the interests of justice. The panel was satisfied that there would be no prejudice to you and no injustice would be caused to either party by the amendment being made.

Neither Ms Da Costa nor Ms Leonard objected to the panel's decision.

Details of charge (as amended)

That you, a registered nurse:

1) Worked as a nurse in the Republic of Ireland, when you were not entitled to work as a nurse in that jurisdiction, in that you: **[FOUND PROVED BY ADMISSION]**

    (a) administered aesthetic treatments to patients in the Republic of Ireland;

    (b) administered prescribed medication to patients in the Republic of Ireland.

2) Your actions at charge 1 were dishonest in that you knew that you were not entitled to work as nurse in the Republic of Ireland. **[FOUND PROVED BY ADMISSION]**

3) Prescribed supplies of medication in patients' names: **[FOUND PROVED BY ADMISSION]**

    (a) as stock orders;

    (b) which were not intended for use with the named patients.

4) Your actions at charge 3 were dishonest in that you sought to represent that the medication was intended for named patients in your care in Northern Ireland, when you intended to use the medication in treatments for patients in the Republic of Ireland. **[FOUND PROVED BY ADMISSION]**

5) Administered medication to patients in the Republic of Ireland: **[FOUND PROVED BY ADMISSION]**

    (a) without a valid prescription for such medication;

    (b) using medication you had prescribed in the names of other patients.

6) Your actions at 5(b) were dishonest in that you knew that the medication you were administering was not prescribed for the patients you were treating. **[FOUND PROVED BY ADMISSION]**

7) Failed to obtain informed consent from patients to an adequate standard prior to commencing aesthetic treatment. **[NO CASE TO ANSWER]**

8) Failed to ensure the availability of precautionary medications, such as adrenaline, for use in the event of emergency when undertaking aesthetic treatments. **[FOUND PROVED BY ADMISSION]**

9) Undertook one or more of the following tasks in respect of one or more patient(s) of Mourneside Family Practice, without authorisation from the Practice to do so: **[FOUND PROVED BY ADMISSION]**

    (a) Flu vaccination(s);

    (b) Taking blood sample(s).

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

Background

In August 2019, the Health Products Regulatory Authority (“HPRA”), the state regulator for medicinal and other healthcare products in the Republic of Ireland, received a complaint from a member of the public concerning the administration of Botox at ACE Clinic, Letterkenny, Co. Donegal (“ACE Clinic”).

The complainant alleged that Botox was being administered from the clinic by you. In the Republic of Ireland, Botox can only be administered for aesthetic purposes by a Registered Medical Practitioner (Doctor) or a Registered Dentist. At 17:45 hrs on 21 August 2019, HPRA Enforcement Officers Mr 1 and Mr 2 attended ACE Clinic. At the time of their arrival, the Clinic Manager was present, and she indicated that you were working in the back room of the clinic, carrying out Botox procedures. As Mr 1 and Mr 2 entered the room within the rear of the premises, they observed you performing Botox administration procedures on a client.

At the time, the client had Lidocaine numbing cream on her face, and you were preparing a Botox injection. Mr 1 and Mr 2 informed you that the medication was not to be administered and that all medications found on the premises would be seized by the HPRA Enforcement Officers.

You were found in possession of:

- 1 x box of Allergan Botox (in the name of Customer CM)
- 3 x boxes of Allergan Botox (in the name of Customer GM)
- 1 x J-Pro cream containing Lidocaine
- 2 x Hyaluronidase vials (in the name of Customer CM)
- 3 x LMX4 cream (in the name of Customer LF)
- 1 x Hyaluronidase (in the name of Customer LH) Photographs of the seized medication are produced as Exhibit AS/2 and a seized treatment consent form which was also in your possession was produced as Exhibit AS/3.

The names on the medication were of some of your patients in Strabane, Northern Ireland, not customers at ACE Clinic. None of the items in your possession were authorised for use in the Republic of Ireland. The products contained UK licensing numbers, rather than Irish authorised licence numbers, and therefore were not on the market legally in the Republic of Ireland.

You cooperated with the HPRA investigation and when interviewed under caution by the HPRA officers on 21 August 2019, appeared surprised that you were not permitted to administer Botox within the Republic of Ireland. During your interview, you accepted that you had administered Botox to a total of 18 customers during three visits you had made to ACE Clinic. You attended a second interview under

caution voluntarily on 14 October 2019. No criminal action was pursued against you, as you resided outside HPRA's jurisdiction because the authorities decided that the costs of prosecution would have outweighed the benefits. Instead, they decided to refer your conduct to the NMC for investigation.

The background to the allegations concerning the Mourneside Practice where you were employed commenced in October 2020. Dr 1, the Principal GP for Mourneside Family Clinic in Strabane, Northern Ireland, received two reports concerning a patient at the practice (Patient PM). One report came via one of the practice administrative staff, who reported that you had contacted that staff member by text and asked for Patient PM's medical records to be updated to indicate that he had already received a flu vaccination. By this time, you were no longer employed by Mourneside Family Practice and therefore you should not have been administering routine NHS treatment to patients of the Practice.

The second report came from the District Nursing Sister who contacted the Practice to advise that one of the District Nursing Team had attended Patient PM's house, on instruction from the Practice, to obtain a blood sample. On their arrival, the District Nursing staff member was advised that the patient had already had blood taken by you. Dr 1 subsequently wrote to you and reminded you that, as you were no longer employed by the Practice, then you were not permitted to undertake routine care of patients which should be provided by staff working at the Practice.

Decision and reasons on facts

Following the reading of the charges as amended, the panel heard from Ms Leonard that you make full admissions to charges 1, 2, 3, 4, 5, 6, 8, 9 and all sub charges in their entirety. Ms Leonard submitted that charge 7 is disputed.

The panel therefore finds charges 1, 2, 3, 4, 5, 6, 8, 9 and all sub charges proved in their entirety, by way of your admissions.

Decision and reasons on application of no case to answer

The panel considered an application from Ms Leonard that there is no case to answer in respect of charge 7. This application was made under Rule 24(7).

In relation to this application, Ms Leonard submitted that following the live evidence from Witness 1 who was the expert witness called by the NMC, that there was insufficient evidence presented to the panel in respect of charge 7. Ms Leonard referred the panel to the case of *R v Galbraith* [1981] 1 WLR 1039. She submitted that in her oral evidence Witness 1 said she could not remember part of the evidence relied upon. In respect of the opening statement in her report in which she stated, *'no face-to-face consultations took place neither was written consent obtained'.* Ms Leonard said that when that statement was put to Witness 1, she accepted that it was inaccurate.

Ms Leonard submitted that Witness 1 in evidence stated that she had overlooked the details of the consent form for Person F, or that Person F had previously received treatment for Botox or derma fillers. Her oral evidence was that those who had previously given consent did not need to go through the same procedure as on the first occasion. She said only that a 15 minute "cooling off period" was "a bit tight" not that it was impermissible. She also said that the length of a cooling off period was a matter for the patient. Witness 1 accepted that the form used was the manufacturer's own form and was an appropriate form to use to gain patient consent. Further, she had no knowledge of requirements in the Republic of Ireland for obtaining consent. Her evidence was solely of what would be required in the UK.

Ms Leonard submitted that there was no evidence to suggest that the consent form used by you, which Witness 1 accepted was properly completed and signed by Person F, did not address the standards of the Republic of Ireland.

Ms Leonard submitted that you demonstrated good practice and provided your clients with face-to-face consultations and a cooling-off period for them to consider if they would like to proceed with the procedure. In particular, Ms Leonard highlighted

to the panel that Witness 1, when questioned by the panel, stated that the time a patient takes to consider a procedure is up to the patient and not the prescriber.

Given the use of the right form and the acceptance that it was up to a patient how long to wait, and no evidence about the standard requirements of the Republic of Ireland for the administration of Botox the panel could not, properly advised, find this charge proved, and so there was no case to answer.

Ms Da Costa submitted that the NMC's position is that the panel has heard evidence from Witness 1 who has provided her expert report for consideration of charge 7, and the decision was a matter for the panel. She agreed that the test for the panel was as set out by Ms Leonard.

The panel took account of the submissions made and heard and accepted the advice of the legal assessor.

In reaching its decision, the panel has made an initial assessment of all the evidence that had been presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it could find the facts proved on the balance of probabilities, so that you had a case to answer in respect of charge 7.

The panel noted there was no evidence from Mr 1 as to informed consent other than that he found the circumstances *"concerning".* Witness 1 gave no evidence as to the minimum standard of what is informed consent for the administration of Botox in the Republic of Ireland. The panel had sight of the consent form signed by Person F, the evidence of Witness 1 was that this was acceptable as it was the manufacturer's own form. This was completed and signed properly. In respect of the cooling off period of 15 minutes, Witness 1 said this would have been insufficient time, however in oral evidence she stated that the time taken would be up to the patient and would not be needed if this was a repeat administration. Her evidence that Botox was usually administered the following day was based on the practical point that in her experience it was usual for the Botox to be prescribed at the face-to-face meeting and so not be available until the following day.

The panel noted that evidence that treatment was *'not best practice'* is not evidence that it was below the minimum standard required, and nor was there any evidence of the minimum standard applicable in the Republic of Ireland. The panel considered whether there was the possibility that there could be no informed consent when you were not authorised to practice in the Republic of Ireland, but the charge was not framed in that way, and that issue was the subject of charge 1.

The panel therefore determined there was no evidence before it that could lead to a realistic prospect that it would find the facts of charge 7 proved, and accepted Ms Leonard's submission that you had no case to answer in respect of charge 7.

Decision and reasons on application of an adjournment

The panel heard an application from Ms Leonard to adjourn the hearing this afternoon (Friday 27 September 2024) and resume on Monday 30 September 2024, to allow you time to prepare to give evidence for the misconduct and impairment and also to provide the panel with a registrant's bundle.

Ms Da Costa submitted that she did not oppose the application.

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

The panel determined to allow the application to adjourn the hearing this afternoon, to afford you time to prepare to give evidence on Monday 30 September 2024 and for the RCN to provide your registrant's bundle to be considered.

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

During the course of you giving live evidence, matters regarding your private life were mentioned. Ms Leonard made an application that when giving your evidence, that this part of the hearing should be held in private on the basis that reference is being made to your [PRIVATE] in order to protect your privacy. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Ms Da Costa submitted she supported the application

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 that whilst you give your oral evidence that this part of the hearing will be held in private, when issues relating to your [PRIVATE].

The hearing was adjourned on Monday 30 September 2024.

The hearing resumed on Tuesday 28 January 2025 with a new lay panel member. Neither party objected to the replacement.

Decisions and reasons on application for your admission at charge 2 to be vacated

Following the conclusion of your evidence on misconduct and impairment, your representative Ms Madden made an application that your admission to charge 2 be vacated. She submitted that from your evidence, you accept the factual element of the charge but not the associated dishonesty.

Ms Madden submitted that in your evidence you do not accept you were dishonest when you had worked in the Republic of Ireland.

Ms Lindsay on behalf of the NMC opposed the application. She submitted that you have received advice throughout the proceedings from the RCN and also legal counsel for these matters. Ms Lindsay referred the panel to the letter from the RCN dated 7 June 2022, in which representations were made that you had accepted the regulatory concerns and also the dishonesty element in relation to the concerns. She reiterated that at the previous hearing in September, you also had the opportunity to

change your admissions at the facts stage, but you did not. If you wanted to change your plea it should have been raised at the facts stage.

Ms Lindsay submitted that the application to vacate your admission to charge 2 is coming with the benefit of hindsight, and that she does not think it would be beneficial to go back given that the panel had previously found charge 2 proved by way of your admission.

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

The panel noted that it has a discretion as to whether to grant this application. The panel was mindful that it must weigh the interests of both you and the NMC and also fairness to both parties when making its decision.

The panel noted that during your evidence indicated that you were not dishonest in relation to this charge. However, the panel also noted that you have been represented throughout the NMC proceedings, from when the regulatory concerns were raised in 2019, and you have received legal advice. You have had opportunities whereby you could have retracted your position in relation to this charge, but this has not happened.

The panel determined that it would not be appropriate in the circumstances to vacate your admission to charge 2 as the panel had not been presented with any compelling reasons and therefore it did not allow Ms Madden's application.

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 ability to practise kindly, safely and professionally.

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

Ms Lindsay invited the panel to take the view that the facts found proved amount to misconduct. She provided the following written submissions:

> *'8. The NMC submits that Ms Kelly's conduct fell significantly short of the standards expected of a registered nurse when she:*
>
> • *Worked as a nurse administering aesthetic treatment and administering prescribed medication to patients in the Republic of Ireland when she knew she was* [not] *entitled to do so. In doing so, the registrants conduct was dishonest.*
>
> • *Prescribed supplies of medication in patients' names as stock orders which were not intended for use with the named patients. In doing so, the registrant behaved dishonestly as she sought to represent that the medication was intended for named patients in her care in Northern Ireland, when you intended to use the medication in treatments for patients in the Republic of Ireland.*
>
> • *Administered medication to patients in the Republic of Ireland without a valid prescription for such medication and using medication she had prescribed in the names of other patients. In using medication*

prescribed in the names of other patients, the registrant acted dishonestly as she knew that the medication she was administering was not prescribed for the patients you were treating.

• Failed to ensure the availability of precautionary medications, such as adrenaline, for use in the event of emergency when undertaking aesthetic treatments.

• Undertook flu vaccinations and taking blood samples at Mourneside Family Practice, without authorisation from the Practice to do so.

9. In the NMC's submission, the concerns are wide ranging.

10. Specially, when considering the Code, the NMC would draw the Panel's attention to the following paragraphs as being relevant:

18 Advise on, prescribe, supply, dispense or administer medicines within thelimits [sic] *of your training and competence, the law, our guidance and other relevant policies, guidance and regulations*

To achieve this, you must:

18.1 prescribe, advise on, or provide medicines or treatment, including repeat prescriptions (only if you are suitably qualified) if you have enough knowledge of that person's health and are satisfied that the medicines or treatment serve that person's health needs

20. Uphold the reputation of your profession at all times

To achieve this, you must:
20.1 keep to and uphold the standards and values set out in the Code

20.2 act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment

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

To achieve this, you must:

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

21.4 make sure that any advertisements, publications or published material you produce or have produced for your professional services are accurate, responsible, ethical, do not mislead or exploit vulnerabilities and accurately reflect your relevant skills, experience and qualifications

11. Breaches of the code do not automatically amount to a finding of misconduct however submit that the facts found proved are serious and consequently should be marked as such.

12. The Panel should have regard to R (on the application of Remedy UK Ltd) v General Medical Council [2010] EWHC 1245 (Admin) who stated that misconduct must be 'sufficiently serious that it can properly be described as misconduct going to fitness to practise'.

13. The NMC submit that the misconduct in this case is "sufficiently serious" that it can be properly described as misconduct both individually and cumulatively in respect of the charges found proven by way of admission. In all the circumstances, it is submitted that the panel should consider Registrant's conduct falls far below the standards which would be considered acceptable and that the facts found proved amount to misconduct.'

Ms Madden also provided written submissions:

'<u>Misconduct</u>

…

3. *At the outset, I can indicate that, albeit it is noted that it remains a matter of judgement for the panel, that the Registrant accepts that her conduct is likely to give rise to a finding of misconduct.*

4. *The panel will be aware of the various case law on misconduct. It is suggested that Roylance and Nandi are a useful starting point.*

5. *In Roylance v GMC [2000] 1 AC 311 it was stated that:*

> *Misconduct is "a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances".*

6. *Nandi v GMC [2004] EWHC 2317 (Admin), Collins J indicated that the test of seriousness must be given its proper weight:*

> *…in other contexts there has been reference to conduct which would be regarded as deplorable by fellow practitioners. It is of course possible for negligent conduct to amount to serious professional misconduct, but the negligence must be to a high degree.*

7. *It is submitted that ultimately the question of misconduct is a matter for the judgement of the panel. Lord Justice Clark in Mallon v General Medical Council [2007] ScotCS CSIH17 at [18] emphasised the element of judgement that was central to a finding of professional misconduct:*

> *The statute does not lay down any criterion of seriousness; nor does the case-law. Descriptions of serious professional misconduct such as "conduct which would be regarded as deplorable by fellow practitioners" … tend, we think, to obscure rather than assist our understanding. In view of the infinite varieties of professional misconduct, and the infinite range of circumstances in which it can occur, it is better, in our opinion, not to pursue a definitional chimera.*

The decision in every case as to whether the misconduct is serious has to be made by the Panel in the exercise of its own skilled judgment on the facts and circumstances and in the light of the evidence…

8. *R (on the application of Remedy UK Ltd) v General Medical Council [2010] DWHC 1245 (Admin) at 37, after a review of the authorities, identified ten principles to assist in determining whether the conduct in question constituted misconduct. It is submitted that the relevant principles are as follows:*

(1) Misconduct is of two principal kinds. First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith [sic] *the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession.*

(2) Misconduct falling within the first limb need not arise in the context of a doctor exercising his clinical practice, but it must be in the exercise of the doctor's medical calling. There is no single or simple test for defining when that condition is satisfied.

(3) Conduct can properly be described as linked to the practice of medicine, even though it involves the exercise of administrative or managerial functions, where they are part of the day to day practice of a professional doctor. These functions include the matters identified in Sadler, such as proper record-keeping, adequate patient communication, proper courtesy shown to patients and so forth. Usually a failure adequately to perform these functions will fall within the scope of deficient performance rather than misconduct, but in a sufficiently grave case, where the negligence is gross, there is no reason in principle why a misconduct charge should not be sustained.

(4) Misconduct may also fall within the scope of a medical calling where it has no direct link with clinical practice at all. Meadow provides an example, where the activity in question was acting as an expert witness. It was an unusual case in the sense that Professor Meadow's error was to fail to recognise the limit of his skill and expertise. But he failed to do so in a context where he was being asked for his professional opinion as an expert paediatrician. Other examples may be someone who is involved in medical education or research when their medical skills are directly engaged.

(5) Roylance demonstrates that the obligation to take responsibility for the care of patients does not cease simply because a doctor is exercising managerial or administrative functions one step removed from direct patient care. Depending upon the nature of the duties being exercised, a continuing obligation to focus on patient care may co-exist with a range of distinct administrative duties, even where other doctors with a different specialty have primary responsibility for the patients concerned.

(6) Conduct falls into the second limb if it is dishonourable or disgraceful or attracts some kind of opprobrium; that fact may be sufficient to bring the profession of medicine into disrepute. It matters not whether such conduct is directly related to the exercise of professional skills.

(7) Deficient performance or incompetence, like misconduct falling within the first limb, may in principle arise from the inadequate performance of any function which is part of a medical calling. Which charge is appropriate depends on the gravity of the alleged incompetence. Incompetence falling short of gross negligence but which is still seriously deficient will fall under section 35C(2)(b) rather than (a).

(8) Poor judgment could not of itself constitute gross negligence or negligence of a high degree but it may in an appropriate case, and particularly if exercised over a period of time, constitute seriously deficient performance.

(9) Unlike the concept of misconduct, conduct unrelated to the profession of medicine could not amount to deficient performance putting fitness to practise in question. Even where deficient performance leads to a lack of confidence and trust in the medical profession, as it well might - not least in the eyes of those patients adversely affected by the incompetent doctor's treatment - this will not of itself suffice to justify a finding of gross misconduct. The conduct must be at least disreputable before it can fall into the second misconduct limb.

(10) Accordingly, action taken in good faith and for legitimate reasons, however inefficient or ill-judged, is not capable of constituting misconduct within the meaning of section 35C(2)(a) merely because it might damage the reputation of the profession.

9. *It is a matter for the judgement of the panel as to whether the matter/s which have been accepted amount to misconduct.*

10. *The Registrant concedes that the findings could amount to misconduct on her part.'*

Submissions on impairment

Ms Lindsay moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. This included

reference to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin).

Ms Lindsay provided the following written submissions:

> *'Impairment*
>
> *…*
>
> *14. Should the panel find that the charges found proven do amount to misconduct, the panel should consider whether the registrant's fitness to practice is impaired, as of today.*
>
> *15. Considering question of impairment, you must 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.*
>
> *16. There is no definition of "impairment" provided by the NMC's legislative framework. However, the NMC defines "fitness to practise" as the suitability to remain on the register without restriction.*
>
> *17. A general approach to what might lead to a finding of impairment was given by Dame Janet Smith in her Fifth Shipman Report. A summary is set out in Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin) at paragraph 76 in the following terms:*
>
> *Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:*
>
> *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.

18. In this case, it is submitted that limbs a, b, c and d are engaged.

19. The NMC submit that the Panel should also consider the comments of Cox J in Grant at paragraph 101:

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

<u>Public Protection</u>

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

…

23. The NMC submit that Ms Kelly has acted in the past and/or is liable so as to put patients at unwarranted risk of harm. The NMC submit that Ms Kelly's misconduct placed both patients at unwarranted risk of harm.

24. When considering the actions of Ms Kelly, she placed patients at an unwarranted risk of harm in her aesthetics practice when she administered Botox to a total of 18 customers during three visits she had made to ACE Clinic in the Republic of Ireland.

In using medication which per prescribed to other patients, the registrant placed those receiving treatment in her care at an unwarranted risk of harm. [sic]

25. She also placed patient PM at a risk of harm when she administered a flu vaccination to a patient of Mourneside Family Practice. At the time of contacting the Practice to have PM's medical records updated, Ms Kelly was no longer employed by the Practice and therefore should not have been administering routine NHS treatment to patients of the Practice. Likewise, she placed PM at a further risk of harm when she took blood sample from PM when no longer employed by the Practice.

26. The public, quite rightly, expect nurses to provide safe and effective care. Ms Kelly's actions, as set out in the charges, brought the profession into disrepute and had the potential to undermine trust and confidence in the profession. The Panel should consider that nurses occupy a position of privilege and trust in society and are expected at all times to be professional. Patients must be able to trust nurses when they are receiving care, whether that be an aesthetic treatment or care from a medical practice.

When considering the risk of harm to patients, the Panel should consider the possible consequences of the concerns. Nurses must make sure that their conduct at all times justifies their colleagues, patients' and public's trust in the profession. In my submission, Ms Kelly did not do that.

Public Interest

Has in the past brought and/or is liable in the future to bring the medical profession into disrepute

27. Registered professionals, such as Ms Kelly, occupy a position of trust in society to be responsible for the care of patients.

28. The NMC submit that the behaviour found proven in the charges not only brought Ms Kelly's reputation into disrepute, but also that of the wider

profession. This in turn undermined the public's confidence in the profession as a whole. The facts, as set out in the charges, brought the profession into disrepute and had the potential to undermine trust and confidence in the profession.

Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession

29. The Code divides its guidance for nurses into four categories which can be considered as representative of the fundamental principles of nursing care. These are:
a. Prioritise people;
b. Practice effectively;
c. Preserve safety and
d. Promote professionalism and trust

30. It is submitted that the NMC have set out above, how, by identifying the relevant sections of the Code, Ms Kelly has breached fundamental tenets of the profession. Breaches of the Code, amount to a breach of the fundamental tenets of the profession, in the NMC's submission.

31. The public, quite rightly, expect nurses to prioritise patient care and attend to the needs of patients. The public expect the profession to hold the right to practice within a jurisdiction. They also expect that nurses will not try to circumvent regulation by prescribing medication to other patients for use in a different country. Ms Kelly's actions, as set out in the charges, brought the profession into disrepute and had the potential to undermine trust and confidence in the profession.

Has in the past acted dishonestly and/or is liable to act dishonestly in the future?

32. The administration of aesthetic procedures is somewhat a 'hot topic' in terms of regulation in the UK. In seeking to circumvent the regulation in the

Republic of Ireland, by using medication prescribed to other patients, Ms Kelly was acting in a dishonest fashion. In the NMC's submission, Ms Kelly was aware she was not entitled to practice in the Republic of Ireland but chose to do so anyway. In doing so, she was behaving dishonestly.

Remediation, reflection, training, insight and remorse

33. It is submitted that Silber J's guidance on remediation is also of assistance; that when deciding whether fitness to practise is impaired panels should take account of:
• Whether the conduct which led to the charge is easily remediable;
• Whether it has been remedied; and
• Whether it is likely to be

34. The first question is whether the concerns can be addressed. That is, are there steps that the nurse, midwife or nursing associate can take to address the identified problem in their practice?

35. In this case, the registration has provided her reflection on the issues identified. She has clearly reflection on her actions. She has also given evidence to this panel regarding her misconduct.

36. It can often be very difficult, if not impossible, to put right the outcome of the clinical failing or behaviour, especially where it has resulted in harm to a patient. In this case, as outlined above, there was a risk of harm to patients and that risk patients were placed at cannot be undone. However, rather than focusing on whether the outcome can be put right, the Panel should assess the conduct that led to the outcome, and consider whether the conduct itself, and the risks it could pose, can be addressed by taking steps, such as completing training courses or supervised practice.

37. The NMC submit in this case the concerns are serious concerns, and it could be said extremely difficult, if not impossible to put right. The concerns fall into the category of conduct which falls so far short of the standards the

public expect that public confidence could be undermined. The NMC would draw the Panel's attention to the guidance set out at FTP-15a where it is stated:

> *"Examples of conduct which may not be possible to address, and where steps such as training courses or supervision at work are unlikely to address the concerns include:*
>
> *- …*
>
> *- dishonesty, particularly if it was serious and sustained over a period of time, or is directly linked to the nurse, midwife or nursing associate's professional practice.*
>
> *- …"*

38. In the NMC's submission, the behaviour of [Ms Kelly] *falls squarely within the conduct which has been identified at FTP 15a and, as such, is difficult to be addressed.*

Insight

39. The Panel are directed to the NMC guidance at FTP-13b where it states: "A nurse, midwife or nursing associate who shows insight will usually be able to: step back from the situation and look at it objectively, recognise what went wrong, accept their role and responsibilities and how they are relevant to what happened, appreciate what could and should have been done differently and understand how to act differently in the future to avoid similar problems happening.

40. In the NMC's submission, Ms Kelly has shown insight into her failings. During the course of her evidence during the last hearings, she said that her practicing in the Republic of Ireland was a "serious error of judgement". She had made admission of her failings, and she has now stepped away from her aesthetics practice entirely. But this does not take away from the seriousness and nature of the charges. The state of mind adopted by Ms Kelly at the time of her actions is of serious concern. She has developed insight, but the NMC submit that the lack of judgement exercised by Ms Kelly at the time of her

actions; in not realising she should not be practicing in the Republic of Ireland and in not realising she should not have been batching ordering medication in a patient's name to use on other patients are serious errors in her judgement as a professional. Considering Ms Kelly's practice outside her aesthetics, she also exercised poor judgement regarding her approach to patient care when administer flu vaccinations and drawing blood from those who were not her patient. Ms Kelly is an experienced nurse with a number of years of practice, she ought to have known her actions fell below the professional standards expected of her.

41. In all the circumstances, it is submitted that the misconduct demonstrated by Ms Kelly necessitates a finding of current impairment in order to sufficiently protect the public, maintain the confidence in the NMC as a regulator and uphold the standard of the profession generally. The public interest calls for a finding of impairment to maintain trust and confidence in the profession and its regulator. A well-informed member of the public would be concerned to find that Ms Kelly was not found to be impaired given the nature of the charges.

42. Baring all factors in mind, it is the NMC's submission that the concerns have not been remediated and the NMC would therefore ask the Panel to find Ms Kelly's fitness to practise currently impaired by reason of his misconduct in respect of all charges.'

On being asked questions by the panel, Ms Lindsay accepted that the panel was likely to find current impairment on public interest grounds only.

Ms Madden informed the panel that you accepted that it is likely to be a finding of misconduct made against you. She provided the following written submissions in relation to impairment:

'<u>Impairment of fitness to practise</u>

…

14. *It is emphasised that the test to be applied is whether the registrant's fitness to practise <u>is impaired</u>. Essentially, the question of impairment looks forward,*

not back, albeit that it must take account of past behaviours. As reiterated in the case of CHRE v (1) NMC (2) Grant [2011] EHWC 927 (Admin), at paragraph 69:

It is clear, notwithstanding the references in those passages to whether fitness to practise "has been" impaired, that the question is always whether ***it is impaired as at the date of the hearing****, looking forward in the manner indicated by Silber J in his judgment.*

…

Current Impairment- Application to the facts of this case

20. *The context has been illuminated in detail before the panel through the Registrant's oral evidence (page 8-9 of day 4 transcript) and is also referenced within the Registrant's reflective pieces at pages 1-4 of the Registrant's bundle. It is submitted that the Panel could conclude that the decisions of the Registrant were made in a context where her judgement was clouded,* [PRIVATE] *It is clarified however, for the avoidance of any doubt, that the context is not proffered as an excuse for the actions, the Registrant readily accepts that her actions were inexcusable and amount to serious errors of judgement (page 4 of Remediation- Registrant's bundle), the context is simply proffered as a relevant factor for the Panel to take into account.*

21. *It is submitted that the evidence has established that the Registrant is in a very different place at present. She immediately ceased aesthetics practice as soon as she was approached by HRDA in 2019. She has not since worked in this field or undertaken any form of self-employment. She is in a positive work environment at Western Urgent Care and is content and thriving in her current role. There have been no concerns about her practice at all since the referral in 2019.*

22. *The panel could clearly conclude that even where there was at any point misconduct, and related impairment, there is no current impairment, at the date of this hearing.*

23. *The Registrant accepted the allegations at a very early opportunity, within minutes of knowledge of them, directly to HRDA staff when challenged. She has been regretful and remorseful, without hesitation, variation, or vacillation since. The panel could, in all the circumstances, conclude that the misconduct is as per the PSHASC case "such that, seen within the context of an otherwise unblemished record…….. looking forward, (her) fitness to practise is not impaired, despite the misconduct." The panel could conclude, in light of the Registrant's unblemished work record, prior to and since the incidents, positive testimonials and employer support, progression, reflection, and further training, that the Registrant is now in a position whereby her fitness to practice is not impaired. The incidents also occurred some time ago now at this juncture, over 5 years. The panel could consider that "professional standards and public confidence have been upheld by a rigorous regulatory process which resulted in a finding of misconduct."*

24. *It is observed that there was no harm caused to patients, as a result of the Registrant's actions. There are no live concerns about the Registrant's clinical practice. Indeed, all reports on same are overwhelmingly positive. The panel have two testimonials before it, 28th April 22 and 23rd Sept 24, pages 5-8 of the registrant bundle.* [Ms 1] *clearly hopes that the Registrant can continue to work for her and has no concerns about her doing so. It is clear her opinion has not changed on the Registrant in the two years between the two testimonials she has provided, or at all in the time she has known her from 2006.*

25. *The Registrant has worked since the incidents, without incident or issue, for over five now. The Registrant has not been subject to an Interim Order, since 2022. An ICOPO was removed at this time. It is submitted that this is indicative of the fact that the NMC did not consider that the Registrant's practice required to be restricted in the interim in order to protect patients or the public.*

26. *The Registrant feels strongly supported in her current role. She has given evidence about her current role, and how she considers herself currently fit to practice. The Registrant has given evidence about how she would never act in a similar manner in future. You have heard how, now she would, 'say no'. She has explained the lessons that she has learnt. The averment* [sic] *that the Registrant has learnt these lessons, it is submitted, is lent credence by the absence of any single reported incident or issue within her current role. In all the circumstances, it is submitted that it seems highly unlikely that the same or similar situations would ever occur again.*

27. *The Registrant has reflected and ruminated upon her actions for some time. The Panel heard oral evidence in this respect, and some notable examples of her written reflections include:*

    (i) Page 1 of the Registrant's bundle- 'I immediately realised the seriousness of my actions. I cooperated fully with the investigation and held my hands up immediately. I have never returned to working in aesthetics…I made a serious error in judgement and this has and never will happen again.'

    (ii) Page 3- the Registrant confirms she has refamiliarized herself with the code and states 'as a nurse prescriber I should have been able to consistently recognise all the influences on me and apply them to my decision making.'

    (iii) *Page 4- 'I am devastated to that I made such serious errors of judgement after 30 years of an unblemished record.'*

28. *There are other examples throughout the papers, which the Panel can read in their own time. It is submitted that the content and tenor is overwhelmingly apologetic and full of regret. It is contended that the Registrant has a high degree of insight and remorse. It is submitted that there is no risk of repetition at all. It is submitted that there is no risk to the public from the Registrant's continued practice.*

29. *The Registrant has given evidence about some differences between her previous position and current position. She has given evidence on how supportive her current employer is of her, and how they facilitated her employment with interim conditions until these were deemed no longer necessary. The NMC guidance on impairment includes that areas of context will be important considerations for the panel. These include the following:*

    Two areas of context are directly linked to the reasons why proven events occurred. These are:

    Personal factors relating to the professional
    The professional's working environment and culture

    These areas are important for the Fitness to Practise Committee to consider because they may have adversely affected the professional's ability to practise safely and professionally. ***By the time the Fitness to Practise Committee considers impairment, where these contextual factors no longer exist or they have been appropriately managed, the professional might be able to demonstrate that they are currently able to practise kindly, safely and professionally****.*

30. *It is submitted that the Registrant has proven by way of her oral evidence, and documentation such as testimonials and reflections, that the contextual personal factors relating to that period of time no longer exist, and she has demonstrated that she can currently practice kindly, safely, and professionally.*

31. *It is submitted that, having heard the Registrant's oral evidence, there is no question as to the commitment to nursing on the part of the Registrant. The Registrant spoke in positive terms about her current work and how she feels there. It is submitted that she has demonstrated great progress to her employers and to the panel. It is respectfully submitted these were context-specific decisions, foolish and dishonest, upon which the*

Registrant has reflected and ruminated upon. The Registrant submits, with some force, that nothing similar will ever be repeated.

32. *As aforementioned, the Registrant's management have not raised any concerns about her fitness to practice. This is obviously a matter for the Panel, but it is submitted that the opinions of those working with, and above, the Registrant, with substantial direct experience of her work, should be given significant weight.*

33. *The Registrant has kept her training up to date, and completed training in areas relevant to the allegations, notable examples include:*

Page 10- Controlled Drugs- striking a balance- 6 Sept 2021- 8 hours
Page 13- Consent for Health and Social care- 18th May 2022- 2 hours
Page 14- Non-Medical prescribing update- 13th October 2022- full day course
Page 23- Prescribing update- 13th April 2020- 2 hours
Page 24- Medicines Management- 20th May 2020
Page 30- Non-Medical prescribing update-2nd March 2021- 8 hours
Page 32- Legal and Professional issues for RN- 11th May 2021
Page 43- Remediation 24th May 2021
Page 76- Nurse prescriber update- 11th October 2022

Page 125-134- Exhibit bundle- Personal Development Plan successfully completed by the Registrant.

34. *It is accepted that the panel will unavoidably approach matters of dishonesty with a significant degree of caution and concern, and the seriousness of the Registrant's actions cannot be gainsaid, however it is respectfully submitted that the context, and surrounding circumstances, both before and after, must be factored in. It is suggested that the dishonesty should be seen in the context of an impulsive, foolish decision, taken over a very short period of time, where the Registrant considers that her judgement was clouded by external factors, stresses and pressures.*

She did not give sufficient thought to the dishonest element of her actions and made entirely irrational errors. The Registrant has never done this before and has no pre-existing issues of dishonesty. There are no wider attitudinal concerns. This is an aberrational incident, for which she indicates regret and remorse. It is submitted that the lesson has clearly been learnt, and there is no risk of repetition. It is suggested that the panel must consider the dishonesty element in light of all of this, the wider circumstances and context, and the Registrant's honesty and candour immediately after the incident, which has continued to date since.

35. *The Registrant has made admissions from essentially the earliest opportunity and co-operated with the NMC in the course of their investigations. The Registrant has fully engaged with the hearing, and been pragmatic in the decisions she has taken, such as accepting the facts alleged and accepting misconduct could be found by the panel. It is submitted that she should be given a significant degree of credit for her approach.*

36. *It is submitted that the Registrant's perceived level of insight and remorse should not be questioned as a result of the raising of the issue of dishonesty in relation to charge 2 at today's hearing and asking for the Panel to determine an application to vacate her plea. The Registrant has always held her hands up to the allegations and has been candid and consistent with her explanations. The Registrant accepts her actions were wrongful and apologises. She did not try to detract from them in her oral evidence, it is respectfully submitted.*

37. *…*

38. *It is respectfully submitted that, in light of all of the above, the panel could properly find that the personal component of fitness to practise is not engaged in this case. It is submitted that there would be no risk to the public should the Registrant be permitted to continue practicing unrestricted.*

39. *The panel need to also consider whether the public component of impairment is engaged by the admitted facts. The panel will have to address the question of whether, given the nature of the allegations and the facts admitted, public confidence in the profession would be undermined if there were to be no finding of impairment.*

40. *It is respectfully suggested that whilst these incidents must be considered serious matters prima facie, the panel has to consider all of the aforementioned, including the overall circumstances and context. The panel must take into account the fact that no harm to patients was caused and the low risk nature of the work undertaken, the context to the actions, the Registrant's relative inexperience in matters relating to the legalities around aesthetics practice in the Republic of Ireland (notwithstanding she fully accepts she should have properly informed herself prior to embarking on a career in this area),* [PRIVATE]*.The panel should also consider the history of the matter, including how the Registrant responded to the allegations, and the recent history of the Registrant's unblemished work since the incidents, which is overwhelmingly positive.*

41. *The panel will have to address the question of whether, given the nature of the allegation and the facts found proved, public confidence in the profession would be undermined if there were to be no finding of impairment. The Registrant herself alluded to this in oral evidence, she is conscious of the public perception, and she clearly described that her patients and colleagues would be shocked by her actions. This is a matter of judgement for the Panel.*

42. *Finally, the Registrant's circumstances continue to evolve in a positive way. She instructs that she continues to work solely for* [PRIVATE]*, she is happy in her role there, working 12-16 hours per week. The Registrant's Manager is supportive of her. The Registrant feels much more confident at this juncture and is intensely motivated to continue to be a successful*

nurse. [PRIVATE]. The Registrant is trying to move on with his career and learn from the very difficult experience which she has put herself through.'

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Roylance v General Medical Council* (No 2) [2000] 1 A.C. 311, *Nandi v General Medical Council* [2004] EWHC 2317 (Admin), *Cohen v GMC* [2008] EWHC 581 (Admin). and *General Medical Council v Meadow* [2007] QB 462 (Admin).

Decision and reasons on misconduct

In coming to its decision, the panel had regard to the case of *Roylance* 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.'*

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 your actions did fall significantly short of the standards expected of a registered nurse, and that your actions amounted to breaches of the Code. Specifically:

*'**18.1** prescribe, advise on, or provide medicines or treatment, including repeat prescriptions (only if you are suitably qualified) if you have enough knowledge of that person's health and are satisfied that the medicines or treatment serve that person's health needs*

***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, treating people fairly and without discrimination, bullying or harassment*

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. However, the panel was of the view, when considering the charges admitted and found proved in respect of charges 1 to 6, your actions individually and collectively amounted to serious misconduct. It noted that you have admitted to working as a nurse outside your jurisdiction and scope of practice, the ordering of extra prescribed supplies in the name of other patients' names and using these orders for other patients. The panel also noted that you had admitted three charges of dishonesty.

In respect of charge 8 the panel noted that both you and the NMC's expert witness regarded Botox as a low risk procedure. Further, it had seen documentary evidence that you did have a precautionary measure in place as you had the emergency drug Hyaluronidase. You stated during your evidence that you had carried out a risk assessment. You also stated:

'Sorry, yes, and I'm I did not have adrenaline. It was not one of the drugs that we were recommended to have when we did our training. I did look at the safety profile of using anti-wrinkle injections and to date there have not been any or to this date. There have not been any confirmed cases of anaphylaxis. I did realise and I did think about the safety of patients because in my practise I do prioritise patients safety at all time' .

The panel was also not made aware by the NMC of any specific breach of procedure or process. The panel determined that your actions in respect of charge 8 were not so serious as to amount to misconduct.

In respect of charge 9, the panel appreciated that the tasks such as giving flu vaccinations and taking blood samples from patients were difficult during the covid pandemic. It noted that you were being kind albeit that you were acting outside your

scope of practice as you were no longer working at the surgery. It considered however that you were clinically competent to carry out these tasks. The panel noted that you knew the patient and you had also spoken to the surgery informing them of your actions. It considered that you were attempting to do the right thing and that you did not try to hide what you had done. The panel did not consider that your actions in charge 9 were so serious as to amount to misconduct.

The panel found that your actions in respect of charges 1 to 6 did fall seriously short of the conduct and standards expected of a registered nurse and amounted to misconduct.

Decision and reasons on impairment

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

In coming to its decision, the panel had regard to the Fitness to Practise Library, updated on 27 March 2023, which states:

> *'The question that will help decide whether a professional's fitness to practise is impaired is:*
> *"Can the nurse, midwife or nursing associate practise kindly, safely and professionally?"*
> *If the answer to this question is yes, then the likelihood is that the professional's fitness to practise is not impaired.'*

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. 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) …*
>
> *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.'*

The panel finds that limb a is not engaged, as no actual harm was caused to patients and patients were not put at unwarranted risk of harm as a result of your actions.

However, the panel finds that limbs b, c and d are engaged in your case. Your misconduct had breached the fundamental tenets of the nursing profession and therefore 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 considered that you had made admissions from the outset when the concerns were first raised. It also considered that you have demonstrated an understanding of why what you did was wrong and how this impacted negatively on patients, colleagues and the nursing profession. The panel also considered that you have shown genuine remorse for your actions, and you have acknowledged that your conduct was not acceptable. You told the panel as a result of what happened you no longer work in aesthetics. You explained that in future you would not trust what someone tells you and that you would check if you were able to legally practise in another jurisdiction.

The panel noted that dishonesty is said to be difficult to remediate, but it was of the view that your behaviour was not attitudinal, and the panel noted your oral and written evidence that you would not put yourself in a similar position in the future. It noted there was some financial gain, but it was of the view that this was not the reason for the dishonesty. You had just started doing aesthetics when this incident arose. The panel was satisfied that the misconduct in this case is capable of being addressed.

Therefore, the panel carefully considered the evidence before it in determining whether or not you have taken sufficient steps to strengthen your practice. The panel took into account you have provided a number of in-depth reflective statements addressing the concerns and have provided positive testimonials from your current employer who supports you in your clinical role and has no concerns about your practice. You have continued to work without restrictions since 2022 with no further concerns being raised. You have undertaken relevant training in the following:

- Controlled Drugs- striking a balance- 6 Sept 2021- 8 hours,
- Consent for Health and Social care- 18th May 2022- 2 hours

- Non-Medical prescribing update- 13th October 2022- full day course,
- Prescribing update- 13th April 2020- 2 hours,
- Medicines Management- 20th May 2020,
- Non-Medical prescribing update-2nd March 2021- 8 hours,
- Legal and Professional issues for RN- 11th May 2021,
- Remediation 24th May 2021.
- Nurse prescriber update- 11th October 2022.

It also noted that you have successfully completed a comprehensive Personal Development Plan.

The panel considered that impairment is a forward-thinking exercise and took into account the case of *Cohen.* The panel is of the view that the risk of repetition in this case is very low. It considered that it is highly unlikely that you will breach fundamental tenets of the profession, bring the profession into disrepute or act dishonestly in the future. The panel determined that a finding of impairment is not necessary on the grounds of public protection.

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

The panel determined that a finding of impairment on public interest grounds is required. It was of the view that given the seriousness of the misconduct, a well-informed member of the public would be concerned that a registered nurse who has acted dishonestly and worked outside the scope of their practice was not found to be currently impaired.

The panel determined, given the seriousness of your misconduct, that public confidence in the profession would be undermined if a finding of impairment were not

made in this case and therefore finds your fitness to practise is currently impaired on the grounds of public interest only.

Sanction

The panel has considered this case very carefully and has decided to make a suspension order for a period of three 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 accepted the advice of the legal assessor.

Submissions on sanction

Ms Lindsay submitted that the NMC are seeking the imposition of a suspension order. She said that a suspension order would be appropriate in balancing the public interest and your own interest.

Ms Lindsay took the panel through the available sanctions. She submitted that taking no action would not be appropriate given the seriousness of the misconduct and nor would it satisfy the public interest.

Ms Lindsay submitted that a caution order would not be in the public interest, nor would it be sufficient to mark the seriousness of the misconduct in this case. She submitted that it was the NMC's view that it would be insufficient to maintain the high standards in the profession or the trust placed by the public in the profession given the circumstances of the case. Ms Lindsay submitted that your misconduct was not at the lower end of the spectrum and a caution order would be inappropriate given the seriousness of the misconduct which the panel acknowledged in its determination.

Ms Lindsay submitted that the panel is only looking at the public interest relating to the concerns. A conditions of practice order would not be appropriate in this case,

there were no concerns regarding your clinical practice. She submitted that the imposition of a conditions of practice order would not satisfy the public interest in this case.

Ms Lindsay submitted that a suspension order would be the most appropriate sanction given the nature of the concerns. She submitted that a period of six months would be sufficient to mark the seriousness of the charges and maintain public confidence in the profession with the temporary removal from the register.

Further, Ms Lindsay submitted that a striking–off order is not necessary given your remediation and the level of insight that has been shown by you. She submitted that in this case the lesser sanction of a suspension order would be sufficient.

The panel also considered Ms Madden's submissions. Ms Madden submitted that the panel should look to impose the least restrictive sanction which should address the public interest concerns.

Ms Madden informed the panel that there have been no previous regulatory concerns and that the incidents are highly unlikely to be repeated. The misconduct was limited to 2019, and similar behaviour has not occurred since. She submitted that no risk of harm was caused to any patients.

Ms Madden highlighted the following mitigating features:

- You admitted the facts at the earliest opportunity within minutes of you being approached by the regulatory body in Southern Ireland
- You have engaged with the NMC in the proceedings giving frank and honest evidence to this panel and making appropriate admissions
- The NMC has acknowledged that you have demonstrated insight, Ms Madden submitted that this is at a high level
- Your level of insight is further reflected in the revocation of the interim conditions of practice order in 2022
- You have addressed the concerns through a high level of training, a comprehensive PDP, and several detailed reflections

- [PRIVATE]
- No other regulatory concerns, regulatory proceedings or history of complaints about your clinical or any other conduct in your 38 years of practise.
- You have also indicated regret and remorse and sworn under oath that such conduct would not happen again.

Ms Madden submitted that you accept that your behaviour was unacceptable and recognise the gravity of the matters before the panel in relation to the dishonesty elements. She submitted that this appears to be a brief instance of aberrational dishonesty which is entirely out of character. Ms Madden submitted that you did not think of the dishonest element of your actions. You have indicated your regret and remorse and, the panel has determined that this was genuine.

Ms Madden submitted that a caution order would meet the justice of the matter. She submitted that you have worked for almost six years since the incident, without any issues and you have received only positive reports. She submitted that there is no risk of repetition. Further, it was submitted that you have worked for three years with no interim order, there is no risk to the public and that your misconduct is at the lower end of the spectrum and that a caution order can be imposed to mark the seriousness of the behaviour.

Ms Madden highlighted to the panel your financial obligations and asked the panel to consider this when approaching the issue of proportionality when considering what order it wishes to impose. She submitted that if you were to face a suspension or striking-off order, you would lose your employment which would have a devastating impact on you and your family.

Ms Madden submitted that you pose no current risk to the public and that an ordinary member of the public with full knowledge of everything that the panel has knowledge of now, might have sympathy for the you, and would not necessarily be concerned if you were permitted to continue practising.

Ms Madden submitted that in light of all the circumstance, that the panel should consider the lesser sanction when considering what sanction it should impose.

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 no aggravating features.

The panel took into account the following mitigating features:

- You made early admissions and engaged with the investigation
- You have consistently shown genuine remorse and have been apologetic about your actions
- You have demonstrated good insight into your actions
- You have provided two positive testimonials from your current employer
- There is strong evidence of you strengthening your practice
- You have completed a comprehensive Personal Development Plan
- There has been no reoccurrence of any of the concerns since the incident and the panel noted that the interim conditions of practice order was no longer considered necessary and revoked in 2022
- [PRIVATE]

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the misconduct in this 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 misconduct in this case, working outside your jurisdiction as a registered nurse, 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 seriousness of the misconduct 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, appropriate and proportionate response. The panel is mindful that any conditions imposed must be relevant, proportionate, measurable and workable.

The panel noted that you had complied with the previous interim conditions of practice order. This was evidenced by your training and comprehensive Personal Development Plan. However, the panel is of the view that there are no practical or workable conditions that could be formulated, given that impairment was found on public interest grounds only.

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 spent considerable time in making its decision. It noted that you had good insight into your misconduct and had addressed the concerns when initially raised in 2019. It also noted that whilst in 2019 you were made subject to an interim conditions of practice order, this was revoked in 2022. The panel took the view however, that the seriousness of your working outside your jurisdiction and scope of practice in Southern Ireland together with the other dishonesty charges was very serious. In the circumstances the panel could not be satisfied that a lesser sanction would be appropriate and proportionate to address the public interest concerns in this case.

The panel was satisfied, however, due to the amount of remediation and insight you have shown that the misconduct was not fundamentally incompatible with you remaining on the register.

The panel considered whether a striking-off order would be proportionate but, taking into account all of the information before it, including your extensive mitigation, the panel concluded that a striking-off order would be disproportionate. Whilst the panel acknowledges that a suspension order may have a punitive effect, it would be unduly punitive in your case to impose a striking-off order.

Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction.

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 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.

The panel determined that a suspension order for a period of three months was appropriate in this case to mark the seriousness of the misconduct.

Having found that your fitness to practise is currently impaired on public interest grounds only, the panel has borne in mind that there are no public protection concerns arising from its decision.

In accordance with Article 29 (8A) of the Order the panel may exercise its discretionary power and determine that a review of the substantive order is not necessary.

The panel determined that as you do not present a risk to the public and the substantive suspension order has been made on public interest grounds only, a review of the order before expiry is not necessary. The panel was satisfied that a three month substantive suspension order without a review will satisfy the public interest in this case and will maintain public confidence in the profession as well as the NMC as the regulator. Further, such an order will declare and uphold proper professional standards.

Accordingly, the current substantive suspension order will expire, without review at the end of its period.

This will be confirmed to you in writing.

Interim order

As the substantive 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 Ms Lindsay. She submitted that given the findings of the panel that an interim suspension order is necessary on the

grounds of public interest. She submitted that given the seriousness of the case and the previous findings by the panel, the public would be concerned if you were allowed to practice without restriction.

Ms Lindsay conceded that an interim order on public interest grounds alone is a high bar. However, she submitted that the interim suspension order should be imposed to cover the appeal period before the substantive order comes into effect.

She submitted that the interim suspension order should be imposed for a period of 18 months to cover the appeal period as the substantive order would not take effect until after 28 days.

Ms Madden made no representations on your behalf.

The panel heard and accepted the advice from the legal accessor. She referred the panel to the cases of *Shiekh v General Dental Council* [2009] EWHC 186 and *NMC v Persand* [2023] EWHC 3356.

Decision and reasons on interim order

The panel was mindful that you were subject to an interim conditions of practice order in 2019, but this was subsequently revoked in 2022. You have not been subject to an interim order since and have been working unrestricted with no concerns about your practice. The panel concluded that, based on the evidence before it, an interim order on the grounds of public protection is not necessary.

The panel is aware that the threshold for an interim order to be imposed solely on the ground that it is otherwise in the public interest is high. In the particular circumstances of this case, taking into consideration the legal advice, the panel determined that the high threshold has not been met. The panel has therefore decided that it is not necessary to impose an interim order to cover the appeal period.

If no appeal is made, the substantive suspension order will take effect 28 days after you are sent the decision of this hearing in writing.

That concludes this determination.