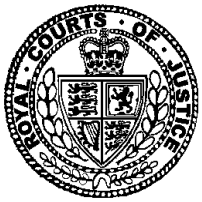

Neutral Citation Number: [2019] EWHC 1181 (Admin)

Case No: CO/3020/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2019

Before :

MRS JUSTICE FARBEY

- -

Between :

The Professional Standards Authority for Health and Social care — **Appellant**

- and –

(1) Nursing and Midwifery Council
(2) Anne Ndlovu — **Respondents**

- -
- -

Alexandra Felix (instructed by **Browne Jacobson LLP**) for the **Appellant**
Shelley Brownlee (instructed by **NMC**) for the **First Respondent**
Darren Snow (instructed by **Royal College of Nursing**) for the **Second Respondent**

Hearing date: 7 February 2019

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Approved Judgment

Mrs Justice Farbey :

Introduction

1. This is an appeal by the Professional Standards Authority for Health and Social Care ("PSA") against a decision of the Nursing and Midwifery Council ("NMC"). A panel of the NMC's Fitness to Practise Committee determined that the second respondent (who is a mental health nurse regulated by the NMC) should be subject to a caution following disciplinary proceedings that arose from her mental health assessment of a person whom I shall call Patient A. Shortly after that assessment, Patient A was found dead.

2. The second respondent (hereafter "the respondent") admitted to the panel that she had failed to ensure that an adequate assessment of Patient A had taken place. She admitted that her failure had contributed to the loss of a material chance to prevent Patient A's death. In addition, the panel found as proved that she had dishonestly provided incorrect information about the assessment, both during the internal investigation which followed and to the Coroner who held an inquest into Patient A's death. The panel determined that the respondent's fitness to practise was impaired by reason of misconduct on the grounds that public confidence in the nursing profession would be undermined in the absence of a finding of impairment. It determined that there was no impairment on public protection grounds. Given the limited basis of its impairment finding, the panel imposed a three-year caution order as opposed to a more serious sanction.

3. The PSA challenges the panel's decision on a number of inter-related grounds. Its principal contention is that, given the respondent's dishonesty, the panel was wrong to conclude that a finding of impairment was not necessary on public protection grounds. Nor is the caution order a sufficient sanction for the protection of the public.

4. The respondent assessed Patient A with another considerably more experienced nurse whom I shall call Registrant C. Her case too was referred to the NMC. The panel heard both cases together. In relation to Registrant C, the panel concluded that her fitness to practise was impaired by reason of her misconduct and imposed a caution order for a period of three years. The PSA lodged an appeal to this court. Both the NMC and Registrant C conceded the appeal. By a consent order dated 26 September 2018, Registrant C's caution was quashed and a six-month suspension order was substituted.

5. The NMC has also conceded the present appeal. Ms Brownlee appeared on its behalf but made no submissions before me. Ms Alexandra Felix appeared before me (but not before the panel) on behalf of the appellant. Mr Darren Snow appeared for the respondent (as he did before the panel).

The Facts

6. The respondent was a mental health nurse at Leicestershire Partnership NHS Trust working in the Crisis Resolution and Home Treatment Team ("CRHT") at the Bradgate Mental Health Unit. On 27 March 2015, Patient A was brought to the Leicester Royal Infirmary by a support worker who had concerns about Patient A's suicidal ideation. Patient A had a longstanding history of mental illness and had received social support

in the community for about 10 years. There had been instances of self-harm and at least one previous suicide attempt.

7. On arrival at the Infirmary, Patient A was seen in Triage. It was noted that Patient A said: "I will kill myself if I am not put somewhere safe". Patient A was referred to the CRHT and assessed in the early hours of 28 March by Registrant C and the respondent.

8. At the conclusion of their assessment, the two nurses determined that Patient A did not require admission to hospital. After being offered home treatment, Patient A refused to leave and was escorted out of the hospital by security guards. During the assessment, Patient A's telephone number had been obtained but neither the respondent nor Registrant C made a record of it. As a result, the CRHT was not able to contact Patient A by telephone. When a home visit was attempted on 29 March 2015, there was no answer. Later that day, Patient A was found dead on a railway track.

9. The Trust carried out a Serious Incident Investigation ("SII") into the conduct of the assessment. The respondent and Registrant C were interviewed. The respondent was given an opportunity to check the accuracy of the interview record, and she confirmed that the record was an accurate summary in May 2015.

10. In June 2015 the Trust was advised that a Coroner was undertaking an inquest into Patient A's death. On 21 June 2015, the respondent prepared a report for the Coroner.

11. In December 2015, the Trust became aware that Patient A had recorded the mental health assessment on a mobile telephone without the knowledge of either of the nurses. The nurses' records of interview and their reports to the Coroner were checked against the phone recording. The check revealed inconsistencies between (on the one hand) the nurses' accounts to the SII and the Coroner and (on the other hand) the recording.

12. As part of the SII, the Trust reviewed the routine recording of a telephone conversation between the respondent and a second patient (Patient B) which had taken place on 27 March 2015. Concerns were noted about the respondent's interaction with Patient B.

13. The panel heard evidence and submissions in relation to both nurses on 14 days between 30 October 2017 and 24 May 2018. The respondent gave oral evidence and called witnesses who attested to her competence and diligence as a nurse. In answering questions from Mr Snow, she denied that she had been dishonest. She told the panel that she had "done her best" during the SII interview and did not intend to mislead. She had conveyed her recollection of events to the Coroner in a truthful way. The panel listened to the recording of Patient A's assessment and considered the transcript, together with a copy of the respondent's SII interview and her report to the Coroner.

The charges and the panel's findings

14. The charges against the respondent fell into four categories. First, it was alleged that she had failed in seven respects to ensure that an adequate mental health assessment of Patient A was completed. The respondent admitted five of the alleged clinical failings at the outset of her substantive hearing. The panel found that the two others were not proved. The admitted failings included a failure to obtain sufficient information from Patient A to enable a comprehensive risk assessment to be undertaken; and a failure to put in place an adequate plan to manage the risk of suicide after suicidal intent was

identified. The respondent further admitted that her failings had contributed to the loss of a material chance to prevent Patient A's death.

15. Secondly, it was alleged that the respondent had failed to ensure that the documentation of Patient A's mental health assessment adequately reflected the assessment that was carried out and failed to reflect Patient A's presentation. The respondent admitted this charge.

16. In the third group of charges, it was essentially alleged that she had provided incorrect information in the SII interview and in the report to the Coroner. She was alleged to have been dishonest in that she had intended to give a misleading impression of the assessment in the interview and in the report.

17. The panel's decision states that there were at least six instances of the respondent providing incorrect information in the SII interview and at least eight instances of her providing incorrect information to the Coroner. The panel considered the respondent's evidence that she had provided accounts to the SII and to the Coroner in good faith but rejected that account. The panel was satisfied that she knew that the assessment of Patient A was inadequate and was attempting dishonestly to cover this up by giving a misleading impression of the assessment. Even in the face of overwhelming evidence that her accounts were incorrect, she had not been prepared to accept the inconsistencies when giving evidence to the panel. The charges as they related to the SII interview and the report for the Coroner were proved.

18. Finally, there was a charge relating to the telephone call with Patient B. The allegations of misconduct in that charge were admitted. They are not material to the outcome of this appeal and did not play any material part in counsel's submissions. I do not propose to say more about this aspect of the charges.

19. The panel concluded that both the conduct of the assessment and the respondent's subsequent dishonesty amounted to serious misconduct. It then considered whether, on the basis of that serious misconduct, her fitness to practise was currently impaired. In determining that question, the panel accepted that the respondent had learned a great deal from incidents which were by then three years old. It noted the comprehensive performance reports and references which spoke about the respondent's good character, high standard of practice and other professional strengths. The references provided to the panel came from a range of highly experienced clinical professionals. The respondent's current line manager, in his written and oral evidence, had said that her record-keeping had been of a good quality and that she recognised her duty to provide comprehensive assessments of patients. He had no reason to doubt her integrity and honesty over the period he had been working with her: he would have been aware of any concerns as to honesty because they would have been raised with him by other members of his well-functioning team. Another senior mental health nurse, who worked closely with the respondent, gave a similarly strong reference.

20. In the light of this and other evidence before it, the panel concluded that the respondent had demonstrated an "extremely good level of insight" into her clinical failures, which had been remediated. There was a low risk of those clinical errors being repeated.

21. Given that the clinical errors had been remediated, the panel concluded that a finding of current impairment was not necessary on public protection grounds. Nevertheless,

the panel took into consideration that there had been two serious incidents of dishonesty such that, in the panel's judgment, public confidence in the nursing profession would be undermined unless a finding of current impairment was made on the grounds of public interest. On that basis, the panel concluded that the respondent's fitness to practise was impaired.

22. As I have already indicated, the panel imposed a three-year caution order. The decision states:

> "Having looked at the totality of the findings on the evidence, the panel determined that a caution order for a period of 3 years would be the appropriate and proportionate response. It would mark not only the importance of maintaining public confidence in the profession, but also mark the seriousness of the misconduct found proved. Furthermore, it would send the public and the profession a clear message about the standards required of a registered nurse".

23. In reaching this decision, the panel stated that it had regard to the NMC guidance on sanctions and on dishonesty.

Legal framework

The High Court's jurisdiction

24. The PSA may refer a decision of the NMC to the High Court if it considers that the decision is not sufficient for the protection of the public (section 29(4) of the National Health Service Reform and Health Care Professions Act 2002). The protection of the public includes not only matters relating to the health, safety and well-being of the public but also the maintenance of public confidence in those who are registered with the NMC and the maintenance of proper professional standards and conduct of nurses (section 29(4A) of the 2002 Act).

25. The court will treat any such reference as an appeal against the relevant decision (section 29(7) of the 2002 Act). The proceedings will be governed by CPR Part 52. The court's consideration is therefore limited to a review of the decision and is not a rehearing (CPR 52.21(1)). An appeal will be allowed if the panel's decision is "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings" (CPR 52.2(3)).

26. A decision which relates to a regulatory sanction is a multi-factorial, evaluative decision based on a mixture of fact and law. As such, there is limited scope for an appellate court to overturn the decision. The court will be reluctant to interfere unless there has been an error of principle in carrying out the evaluation or the evaluation was wrong in the sense of falling outside the boundaries of what the regulatory body could decide (*Bawa-Garba v The General Medical Council and others* [2018] EWCA Civ 1879, [2019] 1 WLR 1929, paras 61-67). The court will place weight on the panel's expertise which will have been brought to bear in evaluating how best the needs of the public should be protected (*Council for the Regulation of Health Care Professionals v General Medical Council and Ruscillo* [2004] EWCA Civ 1356, [2005] 1 WLR 717, para 78).

27. On conventional principles, the court's reluctance to interfere with a regulator's decision is likely to be higher when issues of technical competence or clinical practice arise and

lower where the case concerns behavioural issues such as dishonesty (*Council for Healthcare Regulatory Excellence v NMC and Grant* [2011] EWHC 927 (Admin), para 63) The court will not defer to the panel's judgment more than is warranted by the circumstances (*Ghosh v General Medical Council* [2001] UKPC 29, [2001] 1 WLR 1915, para 34).

Nursing and Midwifery Order 2001

28. Under article 3(4) of the Nursing and Midwifery Order 2001, the over-arching objective of the NMC (including its Fitness to Practise panels) is the protection of the public. Under article 3(4A), the pursuit of the over-arching objective involves the pursuit of the following objectives—

> "(a) to protect, promote and maintain the health, safety and wellbeing of the public;
>
> (b) to promote and maintain public confidence in the professions regulated under this Order; and
>
> (c) to promote and maintain proper professional standards and conduct for members of those professions".

29. This over-arching function informs the approach that a Fitness to Practise panel will take when considering an allegation that a registrant's fitness to practise is impaired by reason of misconduct (article 22(1)(a)(i) of the Order). Public protection must be the panel's overriding concern.

30. Where a health professional violates a fundamental rule of conduct, efforts made by the practitioner to remediate the problem and to reduce the risk of recurrence of such misconduct may be of far less significance than in other cases, such as those involving clinical errors or incompetence (*Yeong v General Medical Council* [2009] EWHC 1923 (Admin), [2010] 1 WLR 548, para 51). In *Parkinson v NMC* [2010] EWHC 1898 (Admin), para 18, Mitting J observed that a nurse found to have acted dishonestly is always going to be at severe risk of having his or her name erased from the register. That general observation is a reminder of the importance of the public interest in nurses telling the truth about what they do. The appropriate sanction for dishonesty will nevertheless fall for consideration on the facts of each case and cannot be a foregone conclusion (*Bawa-Garba*, para 85).

NMC Code and guidance

31. The NMC has issued a Code which sets down the professional standards for nurses. The version of the Code in force at the material time states: "The people in your care must be able to trust you with their health and wellbeing". Nurses must "be open and honest, act with integrity and uphold the reputation of [the nursing] profession".

32. There is also separate guidance on dishonesty. The guidance specifies that honesty, integrity and trustworthiness are "the bedrock" of any nurse's professional practice. Not all dishonesty is equally serious but deliberate dishonesty to conceal clinical issues, particularly those causing harm to patients, is likely to call into question whether a nurse should be allowed to remain on the register.

The Parties' submissions

33. On behalf of the PSA, Ms Felix submitted that the panel was wrong to conclude that a finding of impairment was not needed on public protection grounds. The respondent's serious clinical failings had given rise to the grave consequence of a missed opportunity to prevent the death of a vulnerable patient. The context of the respondent's dishonesty could hardly have been more serious. She had misled the SII and the Coroner which amounted to a grave breach of trust. The three-year caution order was not sufficient for the protection of public and the panel had failed to provide adequate reasons for imposing such an order.

34. On behalf of the respondent, Mr Snow accepted that the dishonesty findings in this case were very serious but submitted that the panel had directed itself properly in law and had applied the correct legal principles to the facts which it had found. He emphasised – both in his detailed skeleton argument and orally - that each case turns on its fact. The decision to impose a caution order was unassailable on the evidence before the panel. In determining where the public interest lay, the panel had considered the strong evidence of subsequent good clinical practice. The clinical misconduct was committed in the context of the respondent's first ever nightshift crisis assessment, in which she had properly and understandably relied on Registrant C's much greater experience.

35. Mr Snow submitted that, by the time of the hearing before the panel, the respondent had been working at a high level as a mental health nurse for some time. There had been no further concerns regarding clinical practice or honesty. There was no reason to believe that there was any likelihood of repetition of dishonesty in the future. The evidence before the panel demonstrated the respondent's full remediation.

36. In relation to the caution order, Mr Snow emphasised the panel's view that suspension would deprive the public of the services of a valued and experienced nurse. A caution order marked the seriousness of the respondent's conduct and was based upon an appropriate assessment of impairment on public interest grounds. A reading of the decision as a whole showed that the panel had provided adequate reasons for its determination.

Analysis and conclusions

37. In my judgment, the panel's decision was plainly flawed. The panel found that the mental health assessment which the respondent had undertaken was "wholly inadequate" and fell "seriously short" of the standards expected of a registered nurse. The respondent's clinical failings contributed to the loss of a material chance to prevent Patient A's death. Ms Felix was correct to emphasise the gravity of the respondent's misconduct. When the Trust investigated this serious situation, the respondent was dishonest. She would have been able to cover up her dishonesty but for Patient A's recording.

38. The purpose of the Trust's investigation was to learn lessons from Patient A's death so that steps could be taken to avert similar problems in the future. It was therefore critical (and ought to have been obvious) that those giving evidence to the investigation should be candid. Anything other than candour would undermine the purpose of the investigation.

39. The panel did not set out in its decision each and every instance of the respondent's dishonesty to the SII. It did not need to do so. It recorded how, in her interview record, the respondent stated that Patient A did not want to tell the nurses anything when they were asking him questions. The panel however concluded that Patient A responded reasonably to questions. The implication is that the respondent sought to blame Patient A for the failure of the assessment – knowing that Patient A was no longer alive to contradict her account. Furthermore, the respondent said in interview that Patient A seemed in agreement with the idea of home treatment. The panel found that this was not correct: Patient A did not at any point agree to home treatment. It cannot reasonably be said that these two instances of dishonesty are anything other than serious.

40. Mr Snow emphasised the respondent's inexperience at the time and her strong clinical remediation. He pointed to the lack of evidence of any further dishonesty. However, as the panel noted in its decision, the respondent's remediation did not extend to facing up to her dishonesty at the hearing. Public protection requires nurses to be honest. As the dishonesty guidance says, honesty is the bedrock of the profession. Given the panel's concerns about the respondent's failure to take responsibility for serious dishonesty, the respondent's fitness to practise should in my judgment have been regarded as impaired on public protection grounds. The panel was wrong in principle to take a different view.

41. The respondent was again dishonest in her report to the Coroner. The panel does not set out every instance of dishonesty but it seems that the respondent carried over the same account as in the SII (at any rate, the instances of dishonesty set out in the panel's decision are similar). In my judgment, public protection is engaged for the same reasons as it was engaged in relation to the SII. Dishonesty to a Coroner runs the risk of prejudicing an inquest which is flatly against the public interest. The respondent failed to appreciate the consequences of her dishonesty or its serious nature.

42. It follows that the panel sanctioned the respondent on an inadequate assessment of the extent of her impairment and imposed a sanction which cannot reasonably reflect the seriousness of her misconduct. I have made due allowance for the expertise of the panel in determining questions of public protection and in imposing an appropriate sanction. However, in this case, the central issues do not relate to questions of primary fact or matters of clinical expertise. I have reached the conclusion that the panel's decision to impose a caution order was outside the boundaries of what it could reasonably determine.

43. The respondent was dishonest on two different occasions to conceal her clinical failings, which is bound to aggravate the seriousness of her misconduct. There was discussion before me about the lack of clarity in one passage of the panel's decision as to whether or not the panel regarded the respondent's dishonesty as falling at the higher end of the spectrum. A focus on that passage is a distraction: it is plain from reading the decision as a whole that the panel regarded the respondent's dishonesty as serious. The dishonesty guidance makes clear that a nurse who is dishonest to conceal clinical failings is likely to receive a severe sanction.

44. The caution order must therefore be quashed. I am asked by Ms Felix to remit the case to a differently constituted panel. Mr Snow said that the respondent would be content for me to reconsider the question of sanction for myself straightaway, as the respondent

wanted some finality, but he submitted that I should not impose a sanction in excess of the six-month suspension imposed on Registrant C.

45. On the one hand, it would be expeditious for the court to reconsider the sanction whereas remittal will inevitably lead to some further delay and to further costs. On the other hand, I have little information about why it was agreed that Registrant C should receive a six-month suspension as opposed to a more serious sanction. I have reached the conclusion that the appropriate course is for me to remit the case so that a Fitness to Practise panel can reach a decision about the appropriate sanction on all the relevant evidence including any argument about parity with Registrant C.

46. For these reasons, the appeal is allowed to the extent that I have set out above. Counsel should endeavour to agree an order with suggested case management directions for the new hearing.