

Section 29 Case Meeting

01 April 2021

157-197 Buckingham Palace Road, London SW1W 9SP



Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Kisha Punchihewa, Head of Legal, Senior Solicitor, Professional Standards Authority
Rebecca Senior, Senior Legal Reviewer, Professional Standards Authority

In attendance

Peter Mant of counsel, 39 Essex Chambers

Observers

Georgina Devoy, Senior Scrutiny Officer, Professional Standards Authority

This meeting was held virtually in light of the current pandemic.

1. Definitions

1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

2. Purpose of this note

2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's panel, and the Authority's decision whether or not to refer the case to the court under Section 29 of the Act.

3. The Authority's powers of referral under Section 29 of the Act

3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.

3.2 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

- to protect the health, safety and well-being of the public
- to maintain public confidence in the profession concerned, and
- to maintain proper professional standards and conduct for members of that profession.

3.3 This will also involve consideration of whether the panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*¹).

4. Conflicts of interest

4.1 The Members did not have any conflicts of interest.

5. Jurisdiction

5.1 The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and Wales and the statutory time limit for an appeal would expire on 6 April 2021.

6. The relevant decision

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].

6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

7. Documents before the meeting

7.1 The following documents were available to the Members:

- Determination of the panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing and hearing bundle
- Counsel's Note dated 30 March 2021
- The NMC's Code
- The NMC's Indicative Sanctions Guidance
- The Authority's Section 29 Case Meeting Manual

7.2 The Members and the Legal Advisor were provided with a copy of a response from the NMC to the Authority's Notification of s.29 Meeting.

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

8. Background

- 8.1 The Registrant worked in [REDACTED] which is part of [REDACTED] [REDACTED] ('the Trust') as a permanent Band 5 nurse between April -August 2018. He then left this role and re-joined as a Bank nurse in Ward F1, the paediatric unit at [REDACTED] in September 2018.
- 8.2 The matters referred were that the Registrant had dishonestly informed colleagues that he had been signed off by the Trust as competent to administer IV drugs, and undertake venepuncture and cannulation ('the procedures') in relation to children when this was not the case. Concerns were also raised that he had carried out the procedures when not competent and had failed to follow instructions from senior colleagues in relation to carrying out and recording patient observations and monitoring. When confronted about these matters, the Registrant denied any wrongdoing. He offered various false and inconsistent accounts to his employer.
- 8.3 The Registrant had previously undertaken the Trust's preceptorship programme. This compulsory programme was designed to support nurses throughout the first year of employment. It included amongst other things a course designed to support the development of practical skills in all areas of nursing and a two-day IV course. The IV course included a theory based section relating to the practical and legal aspects of IV treatment and infection control and was taught by the nursing practice development and pharmaceutical teams. After this two examinations were held: one regarding calculations required for IV administration and the other on the theory regarding IV administration. For the calculation test, the pass mark was 12/14 and for the multiple-choice theory test, the pass mark was 35/37. The Registrant attended the IV course on 17-18 May 2018. He was not permitted to progress to practise on the ward as he failed both exams, having attained 10/14 on his calculations paper and 27/37 on his theory paper. After the exam, a member of the Practice Development Team met with him and explained that as a result of not having passed the exam, he could not progress to the next stage. The Registrant was due to re-sit the course on 17-18 July 2018, but he resigned before taking the course. He re-joined the Trust as a bank nurse in September 2018.
- 8.4 The Registrant admitted most of the allegations including some of the allegations of dishonesty and admitted that his fitness to practise was impaired.
- 8.5 The Panel found that the Registrant's fitness to practise was impaired on both public protection and public interest grounds and imposed a conditions of practice order for 18 months.

Applying Section 29 of the 2002 Act

- 8.6 The Members considered all the documents before them and received legal advice.
- 8.7 The Members discussed the following concerns about the decision:

Did the panel fail to properly characterise the overall seriousness of the misconduct?

- 8.8 The Members were concerned that the panel had characterised the Registrant's dishonesty to be at the lower end of the scale and had come to the conclusion that the dishonesty was not for personal gain.
- 8.9 In challenging this assessment by the panel, the Members noted that the panel had failed to give due consideration to the context of the Registrant's dishonesty – which was that he had sought to undermine a training regime that was put in place to ensure that nurses receive appropriate training so as not to put patients, in this case vulnerable patients (children), at risk of harm. The Members considered that the system of training and qualifications which was in place which the Registrant sought to circumvent were fundamental to ensuring patient safety and maintaining public confidence in nurses. The Members also considered that the dishonesty could not be described as a one off and was compounded by further lies when he was questioned by his employer which made the dishonesty more serious.
- 8.10 The Members considered that the dishonesty in this case undermined standards and public confidence and were concerned that the panel had treated the dishonesty as though it was incidental to the concerns surrounding his clinical competency so far as it related to the relevant procedures
- 8.11 Turning to their conclusion that this conduct was not for personal gain, the Members agreed that this conclusion was difficult to support. By dishonestly holding himself out to have relevant training and qualifications, he would have been able to obtain roles that would otherwise have not been available to him: thus, there was the element of personal gain.
- 8.12 Finally, in reaching the view that the panel had minimised the seriousness of the dishonesty, the Members noted the guidance provided by the relevant case law and the NMC's sanctions guidance. The latter stated dishonesty involving professional duties was likely to be viewed more seriously.
- 8.13 If the panel did consider this to be at the lower end of the scale, the Members did not consider the panel to have given appropriate reasons for departing from the guidance and case law.

Did the panel fail to address and/or adequately analyse the Registrant's responses to his employer and his attitude?

- 8.14 The Members were concerned with the varying and inconsistent accounts the Registrant gave to his employer. This included
- Stating that a Ward Manager had informed him that it was fine for him to carry out IV, cannulation and venepuncture. The Members were concerned by this response as the Registrant could have implicated another professional in his dishonest conduct.
 - Submitting a photograph of the course booklet as evidence that he had passed the course and was qualified to undertake the procedures. However, the photographs did not include the pages that would have made clear that the registrant had not passed the course.

- Maintaining that he had previously carried out IV in a care home when evidence suggested this would not be carried out in such an environment.
 - False explanations provided to his employer about why he had not attended a shift.
- 8.15 The Members also noted that the evidence the Registrant gave to the panel was unclear. At times he appeared to accept that he knew he was not meant to carry out the procedures, then would change his account to stating that he had not been told he could not carry out the procedures.
- 8.16 In light of these concerns the Members discussed whether the panel failed to take into account the above when assessing the Registrant's attitude and whether the attitudinal issues were deep seated. The Members further considered that there was little evidence that the panel had taken this information into account when assessing the overall gravity of the misconduct.
- 8.17 The Members also considered whether these matters ought to have been reflected in the NMC's charges and to what extent the failure to do so may constitute under charging.
- 8.18 The Members also raised concerns that the panel may have dismissed the Registrant's attitude when considering the aggravating factors of the case.

Are conditions sufficient to address the conduct and concerns identified by the panel?


- 8.19 The Members did not have a principled objection to the imposition of conditions in cases where dishonesty has been found.
- 8.20 However in the particular circumstances of this case, the Members were concerned that given the seriousness of the dishonesty in this case which included the response of the registrant to the local investigation (i) conditions were not a reasonable sanction to address the seriousness of the conduct and (ii) would not prevent the Registrant from repeating his misconduct particularly where issues are attitudinal in nature and thus harder to remedy.
- 8.21 The Members noted that the panel had found that there was a risk of the Registrant repeating such conduct and did not consider that he had demonstrated sufficient insight into his misconduct. Referring to the NMC's sanctions guidance the Members noted that the factors listed for a conditions of practice order were not all relevant in this case.
- 8.22 The Members questioned whether the conditions were appropriate to maintain confidence in the profession, satisfy the public interest and send out the appropriate message to fellow professionals.

Conclusion on insufficiency for public protection

- 8.23 The Members concluded that the panel's decision to impose a conditions of practice order was insufficient for public protection for the reasons listed above.

9. Referral to court

- 9.1 Having concluded that the panel's determination was insufficient for public protection, the Members moved on to consider whether they should exercise the Authority's discretion to refer this case to the relevant court.
- 9.2 In considering the exercise of the Authority's discretion, the Members received legal advice as to the prospects of success and took into account the need to use the Authority's resources proportionately and in the public interest.
- 9.3 Taking into account those considerations, along with the above concerns as well as the advice on the prospects of success, the Members agreed that the Authority should exercise its power under Section 29 and refer this case to the High Court of Justice of England and Wales.



4 May 2021

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Alan Clamp (Chair)

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Dated

10. Annex A – Definitions

10.1 In this note the following definitions and abbreviations will apply:

The Authority	The Professional Standards Authority for Health and Social Care
The Panel	A Fitness to Practise Committee of the NMC
The Registrant	[REDACTED]
The Regulator	Nursing and Midwifery Council
Regulator’s abbreviation	NMC
The Act	The National Health Service Reform and Health Care Professions Act 2002 as amended
The Members	The Authority as constituted for this Section 29 case meeting
The Determination	The Determination of the Panel sitting on [REDACTED]
The Court	The High Court of Justice of England and Wales
The Code	Regulator’s Code of Practise
The ISG	Regulator’s Indicative Sanctions Guidance