

Section 29 Case Meeting

3 April 2023

16-18 New Bridge Street, Blackfriars, London EC4V 6AG



Julian Alexander Phillip Faulkner

Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority

Graham Mockler, Director of Regulation and Accreditation, Professional Standards Authority

Simon Wiklund, Head of Legal, Professional Standards Authority

In attendance

David Mitchell, Counsel, 39 Essex Chambers

Observers

Kate Fawcett, Senior Scrutiny Officer, Professional Standards Authority

Rachael Martin, Scrutiny Team Coordinator, Professional Standards Authority

This meeting was held remotely.

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 2023.

6. The relevant decision

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on 31 January 2023.

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 31 January 2023
- The Authority's Detailed Case Review
- Transcripts of the hearing dated 23 – 31 January 2023
- Counsel's Note dated 30 March 2023
- Exhibits
- Case Examiner's Master Bundle
- 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 Section 29 Meeting. The

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

Members considered the response having received legal advice and after they reached a conclusion on the sufficiency on the outcome.

8. Background

- 8.1 The Registrant was employed as a Registered Nurse / Mentor at a Nursing Home from 9 July 2019. The incident occurred on or around 28 August 2019. The Registrant was suspended by his employer on 4 September 2019 and resigned on 5 September 2019.
- 8.2 Following the incident, the Nursing Home reported the Registrant to the Disclosure and Barring Service ("DBS"). As of 29 October 2020, the DBS placed the Registrant on both its Child and Adult Barred lists.
- 8.3 The DBS informed the NMC that the Registrant was on its Child and Adult barred lists. Subsequently, on 19 November 2020 the Registrant reported himself to the NMC in respect of the DBS's decision. The DBS's decisions also led to the Registrant resigning from another nursing home where he had worked between September 2019 until October 2020, having been appointed Deputy Manager in August 2020.
- 8.4 The Registrant attended the NMC hearing and was represented by Counsel. The charges against the Registrant concerned the alleged conduct that while working at the Nursing Home on or around 28 August 2019 he: made an audio recording of Patient A on his mobile phone; played the recording of Patient A to one or more of his colleagues and told one or more of his colleagues that he had sent the recording to his mother.
- 8.5 The Registrant denied the charges. The Panel found proved that the Registrant had made a recording of Patient A on his mobile phone and played the recording to one or more of his colleagues.
- 8.6 The Panel found the Registrant impaired solely on public interest grounds and imposed a 6-month suspension order.
- 8.7 During the hearing the Panel was made aware of the Registrant's previous fitness to practice history. The Registrant was removed from the NMC's register on 23 April 2009 following six charges of misconduct being proven relating to incidents in 2006. He was restored to the register in 2017 with his readmission completed in July 2019.

9. Applying Section 29 of the 2002 Act

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

Did the Panel have appropriate regard to the full extent of its findings on impairment at the sanction stage?

- 9.3 The Members considered whether it was reasonably open to the Panel to conclude that a striking off order “*would be disproportionate at this time*” based on the facts it had found proved.
- 9.4 The Members did not consider there to be a striking disjuncture between the findings at impairment and sanction stage in this case. The Members did have other concerns with the sanction decision and the Panel’s finding that the Registrant was not impaired on public protection grounds.
- 9.5 In particular, the Members were concerned that in circumstances where the Panel identified the Registrant as being in denial and demonstrating no insight or remorse, that he had not remedied his misconduct and there remained a risk of repetition, the conclusion that a finding of impairment on the grounds of public impairment was not necessary was wrong. This made it difficult to understand the Panel’s approach to the remaining stages of the hearing.
- 9.6 The Members were therefore also concerned by the Panel’s conclusory statement at the sanction stage regarding striking off being disproportionate and in particular the use of ‘*at this time*’. No further elaboration was offered by the Panel in relation to this comment which given the circumstances of the case, the Members would have expected the Panel to provide.
- 9.7 This failure led the Members to conclude that they were in the position of being unable to determine whether the decision was sufficient for public protection due to the Panel’s lack of reasoning.
- 9.8 The Members were also minded that it was possible that had the Panel set out its reasons clearly, considering this was a single incident of a registrant taking a recording of a patient being abusive towards him, a striking off could have been considered to be disproportionate. However, given the limited reasons given by the Panel at the sanction stage, it was difficult for the Members to see how the Panel reached the conclusions it did.

Consideration of aggravating and mitigating factors

- 9.9 The Members considered whether the Panel fully grappled with the facts of the case. The aggravating factors identified by the Panel were strong and the mitigating factors were generic factors which are seen in many cases. The mitigation was also noted by the Panel itself as being weak. It included positive testimonials submitted which were not recent. The reflective statement was not considered by the Panel to address the relevant issues raised in this case and the relevance of the Registrant’s difficult work environment at the time was not clear to the Members or explained by the Panel.
- 9.10 The Members noted the lack of any explanation as to how any of the mitigating factors were addressed or balanced when the appropriate sanction was identified. Furthermore, the aggravating factors did not appear to have been adequately dealt with by the Panel. The Panel identified aggravating factors but failed to explore how they impacted on the selection of sanction. The Members considered that if the allegations were taken at face value, in another case the outcome might possibly not be perverse. However, the lack of explanation and

possible mismatch of aggravating and mitigating factors and how little particular relevant factors were explored such as attitudinal problems, caused challenges for the Members in considering whether the sanction was sufficient for public protection.

Relevant considerations

Previous FtP history

- 9.11 The Members considered whether the Panel failed to give adequate consideration to the Registrant's previous FtP history. The Members noted that the Panel did not refer to the details of the charges which led to the Registrant's removal from the NMC's register in 2009 in reaching its decision. Although it did note that, "*It was of the view that this could be indicative of a pattern of behaviour*", this was not explored further.
- 9.12 The Members expected that panels would take previous regulatory findings into account and consider how serious the previous findings were and whether they were similar to the new case. In this case, the misconduct was serious since it resulted in the Registrant being struck off, albeit a long time ago, and the nature of conduct was not dissimilar to the conduct considered at this hearing. The Members would therefore have expected the Panel to have addressed those issues in its decision at the sanction stage which it did not. The Panel noted the previous FtP history as concerning but failed to address it and weigh up the relevance to the misconduct found proved and the appropriate sanction. The Members were concerned at the Panel's omission to explore this further.

DBS sanctions

- 9.13 The Members considered that the Panel should have satisfied itself that the Registrant's inclusion on the DBS lists was in relation to the conduct found proved by the Panel. As a panel of inquiry, it was incumbent upon the Panel to question and consider how the Registrant's inclusion on the lists arose and how it impacted on the Registrant's fitness to practise. At the least, the Members would have expected the Panel to acknowledge the Registrant's inclusion on the DBS lists at the sanction stage.
- 9.14 The Members were concerned by the Panel's failure to engage with the Registrant's inclusion in the DBS lists and ask questions of it.

Insight

- 9.15 The Members considered whether the Panel had proper regard to the fact that the Registrant persisted with his false defense throughout the hearing. The Members acknowledged that the Registrant was entitled to put forward a defence and were minded that there were other factors which also confirmed that the Registrant had no insight and from which the Panel could have formed a view about the Registrant's failure to develop insight.
- 9.16 Given the serious nature of the conduct found proved, insight was critical in this case as well as attitude which the Panel failed to adequately address. The Members considered that the Panel's conclusions regarding the Registrant developing insight seemed unlikely given his track record and their reasons for

reaching such a conclusion were lacking and could be described as unsubstantiated wishful thinking.

Panel's reference to the Sanctions Guidance

- 9.17 The Members considered the Panel's reasons that strike off would be disproportionate to be very brief and, in the Members view, by failing to adequately address and consider the mitigating and aggravating factors the Panel were unable to give cogent reasons regarding the proportionate sanction.
- 9.18 The Members noted that any meaningful reference to the SG was missing at the sanction stage. While general reference was made to the SG at the beginning of the sanction decision, there was a failure to do so when considering the appropriateness of a suspension or strike off. Had the Panel made appropriate reference to the SG it would be easier for the Members and any member of the public reading the decision to understand how the Panel came to the decision it did because it would have had to explain how it departed from the guidance.
- 9.19 The Members considered that this was a case where the factors suggesting a suspension would be appropriate were not met and factors suggesting a striking off, clearly were met. Proper and adequate reference to the SG would have ensured that the Panel realised that suspension was not actually indicated in this case, that striking-off was necessary and that there was a need to explain why the SG was not being followed.
- 9.20 Furthermore, the Panel had made a generalised assertion that striking off would be disproportionate and listed mitigating and aggravating factors without considering them in any depth or clearly indicating the weight that had been given to them. How the aggravating factors translated to the actual decision imposed was therefore not clear as the Panel failed to clearly express its thinking.

Conclusion on insufficiency for public protection

- 9.21 The Members were concerned by the Panel's failure to give adequate consideration to the Registrant's previous FtP history, his inclusion on the DBS lists, his lack of insight and attitudinal problems as well as his unprofessionalism. The Panel went on to omit clearly relevant references from the SG and failed to give clear coherent reasons for its conclusions resulting in the Members lacking confidence that the Panel had failed to fully grapple with the issues in this case. All of these factors meant that the Members could not be satisfied that the outcome was sufficient for public protection. In apparently allowing the Registrant a further chance, the public and profession needed to be able to understand what it was about this case that made the Panel impose a suspension when striking off was indicated in the circumstances and in accordance with the SG.
- 9.22 Due to the lack of reasons overall which gave the impression that the Panel had made many errors in its approach to the case, the Members were unable to determine whether the outcome was sufficient for the protection of the public.

10. Referral to court

- 10.1 Having concluded that the Panel's failings amounted to a serious procedural irregularity, either because the outcome was wrong or could not be understood, the Members moved on to consider whether they should exercise the Authority's discretion to refer this case to the relevant court.
- 10.2 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. The Members also specifically considered the impact of any referral on the Registrant and whether any other means were available to secure public protection.
- 10.3 Taking into account those considerations, along with 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.



Alan Clamp (Chair)

03/05/23

Dated

11. Annex A – Definitions

11.1 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	Julian Alexander Phillip Faulkner
The Regulator	The NMC
NMC	Nursing & Midwifery Council
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 31 January 2023
The Court	The High Court of Justice of England and Wales
The SG	Regulator's Indicative Sanctions Guidance