

Virtual/hybrid Section 29 Case Meeting

26 April 2022

157-197 Buckingham Palace Road, London SW1W 9SP



Reynaldo Estoque

Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Graham Mockler, Assistant Director of Scrutiny & Quality (Performance), Professional Standards Authority
Jane Carey, Director of Corporate Services, Professional Standards Authority

In attendance

Peter Mant, 39 Essex Chambers, Legal Advisor

Observers

Simon Wiklund, Head of Legal, Professional Standards Authority
Remi Gberbo, Lawyer, Professional Standards Authority
Briony Alcraft, Scrutiny Team Co-ordinator, Professional Standards Authority

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 29 April 2022.

6. The relevant decision

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on 21 February 2022.

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 21 February 2022
- The Authority's Detailed Case Review
- Transcripts of the hearing dated 21 February 2022
- Hearing evidence bundle, including the police report, Magistrate's Sentencing Remarks and Registrant's reflections
- Case Examiners' bundle and decision letter dated 19 October 2021
- Counsel's Note dated 25th April 2022
- The NMC's letter of 14 March 2022
- The NMC's Sanctions Guidance
- The Authority's Section 29 Case Meeting Manual

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

8. Background

- 8.1 This is a case heard at a substantive hearing of the NMC's Fitness to Practise Committee on 21 February 2022. The Registrant is a registered adult nurse. He attended the hearing and was represented by the RCN.
- 8.2 On 17 September 2020 the Registrant met Person A, a 17-year-old boy who attended the same place of worship, by chance in the town centre and had offered to buy him something to eat. They ate together, after which the Registrant invited Person A to his home, where he then asked Person A to sit next to him on the bed and had made comments that made him feel uncomfortable. Person A therefore sat at the electric piano and began playing; the Registrant sat beside him and began to sniff the side of his face before kissing him on the neck. Person A indicated that he was not comfortable with the Registrant's actions. However, the Registrant grabbed Person A's crotch, asking him in Filipino if he wanted to have fun. Person A moved the Registrant's hand away, saying he was "not into that" and that he had to leave as his parents would be worried about him. The Registrant then grabbed Person A's crotch again before they left the property.
- 8.3 Person A declined the Registrant's offer of a lift home in his car. The Registrant insisted on walking Person A to the bus stop, where while waiting for the bus to arrive he asked Person A for a date the following week, which Person A declined.
- 8.4 The Registrant's behaviour was discussed the following day with the church and a report made to the police on 20 September 2020. The Registrant was arrested on 25 September and provided 'no comment' responses at his police interview. On 5 February 2021, he was charged with Indecent Assault contrary to s13(1) of the Sexual Offences Act 1992.
- 8.5 The Registrant pleaded guilty at the Isle of Man Magistrates Court. The Certificate of Conviction confirms that the Registrant was sentenced to a 'Combination Order' comprising a 2-year Probation Order and 120 hours community service and further made subject to Sex Offender Notification Requirements for a period of 2 years. He was directed to pay £1000 compensation and costs of £125.00.
- 8.6 The Panel found that the Registrant's fitness to practise was impaired on public interest grounds only and directed that the registrant be subject to a conditions of practice order for 16 months with no review hearing directed.

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:

The Aggravating Features of the Case

- 9.3 First the Members discussed the Panel's approach to the seriousness of the case. They noted the limited list of aggravating factors provided by the Panel and a failure to consider relevant aggravating features such as the registrant's differing accounts to the police, the victim's age and consequent vulnerability, and the emotional harm caused to him, as evidenced in his personal statement to the Court. The Members also noted the fact that the Registrant continued to pursue the victim, and grabbed his crotch a second time, after the victim had made it clear the Registrant's advances were not wanted.
- 9.4 The Members were concerned to note that the Panel did not identify any of these matters in its list of aggravating factors, which included only a general reference to the conviction being serious "in that it relates to a sexual offence", and that a case involving such serious conduct ought to have been afforded the appropriate consideration. They considered it appeared as though the Panel were minimising the seriousness of the Registrant's conduct and were overly sympathetic towards him, potentially due to his references and detailed reflections. The Members concluded that this approach affected the Panel's assessment of the most appropriate sanction to impose in a case involving serious misconduct.

Failure of the panel to properly understand and/or interpret the Magistrate's sentencing remarks

- 9.5 The Members next discussed the Panel's interpretation of the Magistrate's remarks. They were concerned at the Panel's understanding of these and that they appeared to have misquoted them by stating - "Whilst it considered your conviction to be serious, it had particular regard to the Magistrate's sentencing remarks, in which it was clearly indicated that your behaviour was towards the lower end of the spectrum of sexual offences." The Members noted that in fact the Magistrate's remarks, in determining that the Registrant be subject to notification requirements as a sex offender included the following:
- "You are now described as a sex offender and whilst I take on board the point in terms of offences of this nature are not at the top end of the scale, none the less it is a serious offence involving a vulnerable victim and it is one which I consider justifies making an order under the Criminal Justice Act 2001."
- 9.6 The Members were concerned at this inaccuracy, especially bearing in mind the Panel having stated it had paid "particular regard" to the Magistrate's remarks.
- 9.7 Further, the Members noted that the Panel had reached a view that it did not consider that the Registrant's actions amounted to grooming. The Members discussed the definition of grooming, and questioned this conclusion, given the Magistrate's comments that "There is perhaps an element of grooming in that you purchased food for him and then took him back to your room. He was 17, he is a vulnerable victim and at your age makes the difference between the two of you all the more stark".

- 9.8 The Members queried whether these inaccuracies reflected a fundamental misunderstanding, or lack of appreciation by the Panel of the gravity of the Registrant's conduct, and whether, in turn, this led to an insufficient sanction being imposed.
- 9.9 In addition, the Members considered whether the Panel placed inappropriate weight on the fact that the Registrant received a community sentence rather than a custodial sentence. They noted that sanctions guidance makes clear that "the sentence passed by the criminal court isn't necessarily a reliable guide to how seriously the conviction affects the nurse, midwife or nursing associate's fitness to practise".

Were the panel justified in making a finding of no impairment on public protection grounds?

- 9.10 The Members bore in mind that deference would be due to a Panel on matters of insight and risk of repetition, despite the fact that the Registrant chose not to give oral evidence to demonstrate his insight. However, the Members queried whether there were factors which could be said to undermine the Panel's analysis of these aspects. They took into account that the Registrant is yet to complete the part of his sentence aimed at rehabilitation, and that the Probation service letter included an important qualification: "should [he] maintain his current level of motivation to stay out of trouble".
- 9.11 Secondly, the Members considered the Registrant's account of events leading to the conviction was not consistent with the sentencing remarks. They noted that the Registrant's account states or implies that he touched the complainant only once and stopped as soon as the complainant reacted negatively. His reflections acknowledge the seriousness of the conviction and the impact on the complainant generally, but the Members considered that the acknowledgment was based on an incomplete account. The Members did not consider that this discrepancy was addressed in the Panel's decision, which states only that it "did not find you to have minimised the behaviour which led to your conviction".
- 9.12 Thirdly, the Members noted that the Panel said that the Registrant could continue practising "with the imposition of appropriate safeguards in place". They considered the reference to safeguards suggests an on-going risk to the public, although were conscious that other parts of the determination indicate no such risk.
- 9.13 The Members therefore considered the Panel's decision on public protection to have been contradictory, inconsistent and unreliable and that it led to a decision on sanction that was equally difficult to comprehend.

Failure properly to apply and/or give adequate reasons for departure from the NMC's Sanctions Guidance

- 9.14 The Members had regard to the NMC's sanctions guidance, specifically the section on considering sanctions for serious cases. They noted the statements that very often in cases of this kind the only appropriate sanction is removal from the register and that very clear and careful reasons are required for the imposition of a lesser sanction. They also noted a failure of the Legal Advisor to

direct the Panel to Sanctions Guidance or the guidance regarding sexual misconduct which includes the following:

"Sexual misconduct will be particularly serious if the nurse, midwife or nursing associate has abused a special position of trust they hold as a registered caring professional. It will also be particularly serious if they have to register as a sex offender. The level of risk to patients will be an important factor, but the panel should also consider that generally, sexual misconduct will be likely to seriously undermine public trust in nurses, midwives and nursing associates."

- 9.15 The Members considered this to be a case involving serious sexual misconduct. It is also a case in which it had been submitted by the NMC that a striking-off order was the only sanction capable of maintaining confidence in the nursing profession and that temporary removal would not be sufficient to address outstanding public interest concerns and that serious damage would be caused to the reputation of the nursing profession should a lesser sanction than striking-off be imposed. The Members, therefore, considered there was a duty of the Panel to explain fully the reasons for its decision to depart from the published guidance, to which the Panel had stated it had careful regard. Instead, the Members considered the Panel had made generalised statements about striking-off being "wholly disproportionate" and that the circumstances "plainly justified" a different course. The Members did not believe this in any way gave sufficient explanation as to why striking-off was not appropriate in this case, notwithstanding that the Registrant's conviction involved indecent assault of a minor.
- 9.16 The Members noted that the guidance on suspension includes a checklist of factors which indicate that suspension may be appropriate, including lack of evidence of harmful deep-seated attitudinal problems; lack of repetition; insight and no significant risk of repetition. The Members considered that this jumped out as being a more appropriate sanction and were bewildered by the Panel's reasoning that suspension would also be disproportionate.
- 9.17 The Members noted further that the Panel had commented that the guidance was outweighed by the positive evidence received in this case. They considered this a curious comment given guidance is not something to be 'weighed'. However, they bore in mind also that the Panel had at this point referred to evidence of personal remediation and insight which was not a relevant consideration in imposing conditions as opposed to suspension. The Members noted that, in respect of convictions, the guidance states that personal mitigation of the nurse is less likely to be useful to a fitness to practise Committee making a sanction decision than it would be to a criminal court. It also says that: "In general, the rule is that a nurse... should not be permitted to start practising again until they have completed a sentence for a serious offence".
- 9.18 The Members therefore concluded that the panel failed to give adequate reasons for departing from the Sanctions Guidance, resulting in a decision that was difficult to fathom.

The Fleischmann Principle

- 9.19 Next the Members looked at whether the Panel had failed to have proper regard to the principles set out in *Fleischmann*² and whether it had been inadequately advised on these principles by the Legal Assessor. The principles state:
- “I am satisfied that, as a general principle, where a practitioner has been convicted of a serious criminal offence or offences he should not be permitted to resume his practice until he has satisfactorily completed his sentence. Only circumstances which plainly justify a different course should permit otherwise. Such circumstances could arise in connection with a period of disqualification from driving or time allowed by the court for the payment of a fine. The rationale for the principle is not that it can serve to punish the practitioner whilst serving his sentence, but that good standing in a profession must be earned if the reputation of the profession is to be maintained.”³
- 9.20 Whilst the Members noted that the principles set out in *Fleischmann* could be interpreted on a case by case basis, they noted that In *Oboukofe*⁴, the Judge stated that important parts of Newman J’s judgment in *Fleischmann* related to a sex offender’s treatment programme rather than a sex offenders register notification requirement, which the Members considered to be “highly material” to sanction despite the focus in *Fleischmann* being on the treatment programme. Further, the Members noted that the Registrant was not only subject to a sexual offenders register notification requirement but was also yet to complete the rehabilitative part of his sentence.
- 9.21 The Members queried whether the Panel had vaguely acknowledged the principle in imposing conditions for a sixteen-month period. However, the Members did not consider this to be demonstrative of having wholly understood the principle, which had been adequately explained by the Legal Advisor.
- 9.22 They therefore concluded that given the offence was also a serious one, the general principle in *Fleischmann* applied and that the Panel failed to give adequate reasons for departing from it.
- 9.23 In addition, the Members noted the Panel’s statement that the conviction was not so serious as to be incompatible with on-going registration. However, the Members felt that in reaching this decision before considering the *Fleischmann* principle, the Panel appeared to have decided that striking-off was not required before considering the significance of the criminal sanction. The Members noted further that the Panel did not directly address the significance of the criminal sanction on public confidence and the reputation of the profession (although noted that the outstanding sentence was listed among the aggravating factors).

² *CRHP v GDC & Fleischmann* [2005] EWHC 87

³ The Members noted that this passage was misquoted in the Panel’s determination, but the errors were not material.

⁴ *Oboukofe v GMC* [2014] EWHC 408 (Admin)

Inappropriate use of conditions to address impairment on public interest grounds/The sanction decision

- 9.24 The Members referred again to the NMC's Sanctions Guidance and the reference to conditions being relevant, proportionate workable and measurable in order to achieve their aim of public protection. The Members, however noted that the Panel found impairment solely on public interest grounds and could not see how the conditions imposed, which restrict the Registrant to working with his current employer only and impose standard supervision and information sharing requirements, are relevant to the public confidence concerns arising from the Registrant's ability to practice, having been convicted for a sexual offence in relation to a minor and the on-going requirement to register as a sex offender. Further, the Members were concerned that none of the conditions actually 'restrict' the registrant's practice, or have any link to the actual misconduct found.
- 9.25 In addition, the Members noted that the Legal Advisor made no reference to the Sex Offenders Notification requirement and did not direct the Panel to consider the Magistrate's comment regarding the preventative nature of the Probation Order. The Members considered this was highly relevant to the Panel's assessment of the public interest.
- 9.26 The Members therefore concluded that the Panel had reached a wholly inappropriate decision on sanction, bearing in mind the finding of no impairment on public protection grounds and the need for conditions to service a practical purpose.

The weight attached to personal mitigation

- 9.27 The Members next considered whether the Panel had placed undue weight on personal mitigation. They noted that all of the mitigating factors identified by the Panel were personal to the Registrant and that none of them related to the inherent seriousness of the criminal conduct. They also considered the Registrant's level of insight and evidence of previous good character to be weak, especially bearing in mind the Registrant's different description of events minimising his actions.
- 9.28 They therefore concluded that the Panel failed to pay due regard to the Sanctions Guidance and the overriding importance of maintaining public confidence by placing excessive weight on personal mitigation.

Conclusion on insufficiency for public protection

- 9.29 The Members concluded that the panel's decision as outlined above is insufficient for public protection.

10. Referral to court

- 10.1 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.

- 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.
- 10.3 The Members also took account of the factors listed in the NMC's letter to the Authority raising its concerns about the sufficiency of the outcome. They noted there was a considerable overlap with the concerns set out by the NMC, and that this reinforced the Members' decision that the outcome is insufficient for public protection and to uphold public confidence in the profession.
- 10.4 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.

A handwritten signature in blue ink that reads "Alan Clamp". The signature is written in a cursive style with a small dash at the end.

26/07/22

Alan Clamp (Chair)

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 Practice Committee of the of the Nursing and Midwifery Council
The Registrant	Reynaldo Estoque
The Regulator	The Nursing and Midwifery Council
Regulator's abbreviation	The 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 21 February 2022
The Court	The High Court of Justice of England and Wales