AC-2023-LON-003156

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

AC-2023-LON-003156

BETWEEN:

THE PROFESSIONAL STANDARDS AUTHORITY
FOR HEALTH AND SOCIAL CARE

Appellant

- and –

(1) NURSING AND MIDWIFERY COUNCIL
(2) SPILISIWE ZIVURAWA

Respondents

ORDER BY CONSENT

UPON the Appellant and the First Respondent having agreed to the terms of this Order, in particular that it is just and convenient for the Court to make the Order set out below

AND UPON no party being a child or protected party and the appeal not being an appeal from a decision of the Court of Protection

AND UPON the Second Respondent being a Nurse on the register established and maintained by the First Respondent ('the Register')

AND UPON a panel of the First Respondent's Fitness to Practise Committee ("the Panel") having decided that the fitness to practise of the Second Respondent was impaired by reason of misconduct and imposed an eighteen-month conditions of practice order ('the Decision')

AND UPON the Appellant having lodged an appeal on 23 October 2023 against the Decision pursuant to Section 29 of the National Health Service Reform and Health Care Professions Act 2002 (as amended) ('the 2002 Act')

AND UPON the First Respondent conceding that the appeal should be allowed on the basis of the reasons set out in the schedule

AND UPON the Second Respondent not engaging with the Appellant or the First Respondent in connection with these proceedings

By CONSENT IT IS ORDERED THAT:-

1. The appeal is allowed.

2. The Decision is quashed and substituted with an order that the Second Respondent be suspended from the Register for a period of twelve months with a review taking place before the end of the period of suspension.

3. The First Respondent is to pay the Appellant's reasonable costs of the appeal, to be assessed if not agreed.

4. The Second Respondent has permission to apply to the Court to vary or discharge the order within 28 days of the order and upon giving 14 days' notice to the parties.

_____

For the Appellant

Approved by Judge O' Connor sitting as Deputy High Court Judge on 18/06/2024

BY THE COURT

Samantha Forsyth, Case Preparation and Presentation Lawyer (Counsel)
Nursing and Midwifery Council, Solicitors for the First Respondent

Dated: 3 June 2024

Schedule – statement of reasons

1 **Ground 1**: Having made the findings on facts and impairment it did, the Panel was wrong to conclude, at the sanction stage, that a conditions of practice order was a sufficiently serious sanction to protect the public. The least serious sanction reasonably open to the Panel was to suspend the Second Respondent from practising.

2 **Ground 2**: Alternatively, the Panel erred by:

2.1 at the impairment stage, finding that charges 10(a) and 10(b) did not amount to misconduct;

2.2 at the sanction stage, taking into account the period of time over which the misconduct occurred as both an aggravating and mitigating feature; and/or

2.3 at the sanction stage, failing to have any or any adequate regard to the factor that the facts of charges 6(a)–(c), which it had found proved, amounted to a wrongful deprivation of Patient A's liberty

and, had the Panel not made these errors, individually or cumulatively, the least serious sanction reasonably open to it would have been a suspension order.

3 The First Respondent's Sanctions Guidance ('SG') provides:

"Some possible aggravating features are:

[…]

- a pattern of misconduct over a period of time

[…]

Mitigation can be considered in three categories.

[…]

- Personal mitigation, such as […] the level of support in the workplace.

In regulatory proceedings, where the purpose of sanctions is to protect the public and not to punish nurses, midwives or nursing associates, personal mitigation is usually less relevant than it would be to punishing offenders in the criminal justice system. In some cases, sanctions might have an effect that could be described as being punitive, but this is not their purpose.

[…]

Conditions of practice order

The key consideration for the panel, before making this order, is whether conditions can be put in place that will be sufficient to protect patients or service users, and if necessary, address any concerns about public confidence or proper professional standards and conduct.

Conditions may be appropriate when some or all of the following factors are apparent (this list is not exhaustive):

- no evidence of harmful deep-seated personality or attitudinal problems

- identifiable areas of the nurse, midwife or nursing associate's practice in need of assessment and/or retraining

- […and so on]

[…]

Suspension order

> This order suspends the nurse, midwife or nursing associate's registration for a period of up to one year and may be appropriate in cases where the misconduct isn't fundamentally incompatible with the nurse, midwife or nursing associate continuing to be a registered professional, and our overarching objective may be satisfied by a less severe outcome than permanent removal from the register."

REASONS IN SUPPORT OF THE GROUNDS OF APPEAL

Ground 1: The least serious sanction reasonably open to the Panel was to suspend the Second Respondent from practising

4 Of the 20 charges/ sub-charges proved on the facts, the Panel found 14 amounted to misconduct:

4.1 One charge of failure to complete a safeguarding report (charge 13);

4.2 Six charges of failure to treat patients with dignity and/or respect (charges 2(a), 4(a), 4(c) and 6(a)–6(c));

4.3 One charge of lack of integrity (charge 12); and

4.4 Six charges of verbal abuse of patients (charges 1(a)–1(c) and 8(b)–8(d)).

5 As the Panel correctly recognised, all the following aggravating features were present:

5.1 the incidents involved extremely vulnerable patients;

5.2 the concerns are wide-ranging and occurred over a period of several months;

5.3 the findings included a finding of a lack of integrity involving junior colleagues;

5.4 the findings involved an abuse of the Second Respondent's power;

5.5 at least one of the findings involved an attitudinal aspect; and

5.6 there was an aspect of poor and/or inappropriate communication with colleagues and patients.

6 A nurse having been found guilty of misconduct of this level of seriousness plainly raises issues of maintaining public confidence and upholding standards in the profession. Having made the findings it did, including the presence of the aggravating features set out above, the least serious sanction reasonably open to the Panel to maintain public confidence and uphold standards in the profession was to suspend the Second Respondent from practising.

7 As the SG provides: "The key consideration for the panel, before making this order, is whether conditions can be put in place that [1] will be sufficient to protect patients or service users, *and* [2] *if necessary, address any concerns about public confidence or proper professional standards and conduct*" (emphasis and numbering added). A conditions of practice order, which necessarily does not go as far as suspending the Second Respondent from practising, is inadequate, from the public interest perspective, to recognise the seriousness of the misconduct found proved.

8 Further, the Panel did not explain why a conditions of practice order was appropriate despite "at least one of the findings involv[ing] an attitudinal aspect". The SG cites, as the first feature of a case in which a conditions of practice order may be appropriate, that there is "no evidence of harmful deep-seated personality or attitudinal problems".

9 As to the mitigating features the Panel identified:

9.1 As further set out below, the Panel erred by identifying that the "misconduct […] was confined to a period of a few months" as a mitigating feature.

9.2 The second to fourth features identified were relevant, but essentially all amounted to a single feature.

9.3 The fifth feature identified was one of personal mitigation, which, as the SG expressly provides, has less relevance to sanctions in a regulatory context, whose purpose is, primarily, the public interest rather than punishment.

9.4 The final three features ("significant remorse", "some insight" and "willing to take further steps") also overlap. Further, identification of these features in mitigation is in tension with:

9.4.1 the fact that, until they were found proved, the Second Respondent had continued to deny all of the charges which the Panel determined amounted to misconduct; and

9.4.2 the Panel's finding that:

> "Overall, however, the panel considered that you had shown more limited reflection and insight in relation to your specific actions and behaviours at the time. It noted that you had struggled to articulate how you felt at the time, or how this affected your behaviour, why you acted as you did, and how you could identify and take steps to prevent any factors which might risk a recurrence. […] You had also only demonstrated limited understanding of the impact your misconduct had on the patients and colleagues involved, and on public perception of the nursing profession."

10 In any event, while the mitigating features present might lead a panel reasonably to conclude that *strike-off* was not essential, they were insufficient to outweigh the requirement to impose a suspension order given the seriousness of the misconduct.

11 The Decision is insufficient in terms of the public interest (the elements under ss 29(4A)(b) and (c) of the 2002 Act) for the reasons given above.

12 Further, the Decision is insufficient to protect the health, safety and well-being of the public (s 29(4A)(a)). The Conditions of Practice Order that was imposed requires, at condition 3, only that the Second Respondent be indirectly supervised whilst working. Given the Panel's findings, among other things, that

the Second Respondent had shown limited reflection and insight, had abused her power and had displayed poor and/or inappropriate communication with colleagues and patients, that condition is insufficient to safeguard vulnerable patients to whom the Second Respondent provides healthcare.

Ground 2: Alternatively, had the Panel not made material errors in its findings, the least serious sanction reasonably open to it would have been a suspension order

13 Alternatively, if the court finds that the Conditions of Practice Order was an order reasonably open to the Panel on the findings it made, the Panel's findings at the misconduct/ impairment and sanction stages were wrong in three material ways and, had the Panel not made those errors, the least serious sanction reasonably open to it would have been a suspension order. The Panel erred as follows.

14 **First**, the Panel was wrong to find that the Second Respondent's actions under charges 10(a) and 10(b) did not amount to misconduct. Her actions fell seriously short of what would be proper in the circumstances for the following reasons.

15 At the hearing, the unchallenged evidence of Miriam Garnett, Clinical Lead Nurse for Elysium Healthcare Ltd was that:

15.1 the Ward Manager, a senior nurse, was present from Monday to Friday from 09.00 to 17.00;

15.2 the Second Respondent was employed as a Charge Nurse, a senior role, one level down from the Ward Manager; and

15.3 in that role she was expected to deputise for the Ward Manager in their absence.

16 The shifts on which it was alleged the Second Respondent had slept whilst on duty were night shifts. It follows that, at the material times, the Second Respondent was the senior nurse present and was acting as deputy for the Ward Manager. As the Panel correctly found, "[the Second Respondent was] the only registered nurse on shift".

17 Fundamentally, the Panel was wrong to find that, for a nurse who was the Charge Nurse and the only registered nurse on shift, the Second Respondent's actions in sleeping whilst on duty (charge 10(a)) and encouraging a colleague to do the same (charge 10(b)) did not amount to misconduct, even if such actions occurred only once.

18 Further, it is implicit in the Panel's findings of fact that it found the Second Respondent's actions had occurred on more than one occasion. Under charge 10(a), the Panel did not expressly make a finding as to the number of occasions on which the Second Respondent slept whilst on duty. However, the Panel stated, in respect of charge 10(b) that it "found Colleague 1's evidence credible and accepted it". Colleague 1's evidence in respect of charge 10(a) included that "[the Second Respondent] would regularly suggest that I go and sleep on the sofa in the communal lounge and I would see her doing the same".

19 In reaching the decision that the Second Respondent's actions in this regard did not amount to misconduct, the Panel stated:

> "The panel understood from the evidence that in the context of this Hospital, it was not unusual, and indeed appears to have been part of the culture, for staff on 12 hour shifts to take naps during their breaks. The panel noted that this is clearly behaviour which has the potential to raise safety issues if it is not properly managed to ensure that patients are not left unattended. […] However, in the circumstances and context of this particular setting, the panel determined that, whilst this behaviour was a departure from the standards expected of a registered nurse, it was not a sufficiently serious departure to amount to misconduct."

20 This reasoning was perverse and wrong. As the Charge Nurse, deputising for the Ward Manager, the Second Respondent was the individual who should have "properly managed" the "culture" of staff taking naps during their breaks. The Panel had found proved that the Second Respondent had slept on duty, outside her breaks, and encouraged a colleague to do the same. Those actions plainly amounted to misconduct.

21 **Second**, having correctly identified that “the concerns […] occurred over a period of several months” as an aggravating feature, the Panel then erred by identifying that “The misconduct […] was confined to a period of a few months” as a mitigating feature. Logically, the period of time over which the misconduct occurred cannot be both an aggravating and mitigating feature. In any event, the SG make clear that “a pattern of misconduct over a period of time” is an aggravating feature. The only reasonable conclusion the Panel should have reached is that there was such a pattern of misconduct over a period of time and this was an aggravating feature.

22 **Third**, the Panel erred in that it failed to have any or any adequate regard to the factor that the facts of charges 6(a)–(c), which it had found proved, amounted, prima facie, to a wrongful deprivation of Patient A’s liberty and a breach of his Article 5 rights. In the context of the Second Respondent’s practice as the Charge Nurse on a mental health ward whose patients were either detained under the Mental Health Act 1983 or subject to Deprivation of Liberty Safeguards under the Mental Capacity Act 2005 this was a significant aggravating feature of the case, but one which the Panel, in error, did not take into account.

23 Had the Panel not made the foregoing errors, individually or cumulatively, the least serious sanction reasonably open to it would have been a suspension order.