



Neutral Citation Number: [2024] EWHC 691 (Admin)

Case No: AC-2023-LON-001521

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2024

Before :

MR. JUSTICE SHELDON

Between:

**PROFESSIONAL STANDARDS AUTHORITY
FOR HEALTH AND SOCIAL CARE
- and -
(1) NURSING AND MIDWIFERY COUNCIL
(2) ELIZABETH OGBUANYA OFFIER**

Appellant

Respondents

David Hopkins (instructed by **Browne Jacobson**) for the **Appellant**
Susan Jean (instructed by **Nursing and Midwifery Council**) for the **First Respondent**
The **Second Respondent** did not appear and was not represented.

Hearing dates: 6 March 2024

Approved Judgment

This judgment was handed down remotely at 11.00am on 26 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MR. JUSTICE SHELDON

Mr Justice Sheldon:

1. This is an appeal from a decision (“the Decision”) of a panel of the Fitness to Practice Committee (“the Panel”) of the Nursing and Midwifery Council (“the NMC”) dated 9 March 2023. The Panel decided that Reverend Elizabeth Ogbuanya Offier (“the Registrant”) should be suspended from the register for a period of six months for impairment of her fitness to practise arising from misconduct. The Panel found that the Registrant had dishonestly failed to disclose information to a future employer about the existence of two previous employers and that she was subject to investigation by that previous employer. The Panel also found that the Registrant had dishonestly failed to disclose information to her employer that conditions had been imposed on her by the NMC. The Panel also found that the Registrant had worked one shift for the employer in breach of the condition that she should be supervised by a registered nurse.
2. The appeal is brought by the Professional Standards Authority for Health and Social Care (the “Authority”) under section 29 of the National Health Service Reform and Health Care Professions Act 2002 (“the 2002 Act”) on the grounds that the penalty imposed by the Panel was not sufficient for the protection of the public. The Court is asked to quash the Decision and substitute a striking-off order. The NMC has conceded the appeal.
3. The Registrant does not appear before the Court, although it is clear that she is aware of this appeal. The Registrant has indicated that she is not prepared to consent to being struck off the register. I take that as meaning that she opposes the appeal, albeit she has made no representations as to why the appeal should be dismissed. No application was made for an adjournment, and there was no reason for the Court to consider that re-listing the case would have any impact on the Registrant’s willingness or ability to attend. Furthermore, Counsel for the Authority (David Hopkins) indicated that he would seek to put before the Court the arguments that the Registrant might have put had she attended. In those circumstances, I decided that it would be appropriate to proceed with the appeal in the Registrant’s absence.

Factual Background

4. The Registrant was admitted to the NMC register in March 2004, having worked as a nurse in Nigeria for a number of years. In November 2018, she registered with Pulse Healthcare Limited (“Pulse”) a nursing agency. She worked through Pulse at two Foundation Trusts. On 11 April 2019, the Registrant worked a night shift at a hospital that was part of South Tees Hospital NHS Foundation Trust. During this shift, it was alleged that she signed a patient’s chart with another nurse’s initials to indicate that both she and her colleague had attended to the patient. On 22 and 23 April 2019, the Registrant worked the night shift at North Tees and Hartlepool NHS Foundation Trust, where it is alleged that she failed to give three patients intravenous antibiotic medication and failed to give insulin to two other patients. She is alleged to have signed patient records indicating that she had administered medication when she had not.
5. Pulse investigated these matters and attempted to schedule a meeting with the Registrant to discuss whether she had been in “breach of contract”. The Registrant did not attend on any of the dates that had been suggested. On 4 October 2019, Pulse held a meeting in the Registrant’s absence and terminated its contract with the Registrant. On 11 October 2019, Pulse made a referral to the NMC.

6. In the meantime, on 27 August 2019, the Registrant applied for employment with another agency: First Call Healthcare Agency (First Call). The Registrant was asked in the application form to name all of her previous employers, including any agencies. The Registrant did not disclose that she had worked for Pulse, or Standby Agency – another agency with whom she had been registered. The Registrant confirmed that the information provided was accurate. The Registrant also completed a Qualified Staff Questionnaire. In response to the question whether she had ever been the subject of a disciplinary or investigation by an employer, or had been referred to the NMC, the Registrant answered ‘No’. The Registrant began working with First Call on 15 September 2019, completing a number of shifts at a variety of care and nursing homes.
7. On 7 November 2019, a hearing was held by the NMC Investigating Committee. This was described as a “New Interim Order Hearing”. The Registrant attended this hearing by telephone and was represented by an official from the trade union, UNISON. The committee considered that a *prima facie* case was made out in relation to the administration of medications and imposed an interim conditions of practice order on the Registrant for a period of 18 months (“the Order”).
8. One of the conditions imposed by the committee was that the Registrant should ensure that she was supervised by another registered nurse at any time that she was working. The supervision had to consist of working at all times on the same shift but not always directly observed by another registered nurse. Another condition was that the Registrant had to give a copy of these conditions to any agency with whom she was registered to work. The Registrant did not notify First Call of the conditions. In December 2019, through a routine check of NMC records, First Call discovered that the Registrant was subject to conditions imposed by the NMC. On learning of the conditions imposed by the NMC, First Call examined its records and realised that the Registrant had worked one night shift on 7 December 2019 as the only nurse in charge at a care home.
9. The Registrant explained her behaviour to a manager at First Call in an email, stating that she had “never intended to hide anything as such conditions of practice are all made public by NMC. I am sorry if it has caused inconvenience”. At a meeting with staff from First Call on 16 January 2020, the Registrant explained that she had felt devastated when she received the letter from the NMC and so did not report this to First Call. The Registrant also said that the decisions of the NMC were open for anyone to see.
10. The Registrant was dismissed by First Call and a referral was made to the NMC. Following the referral, the Registrant was subject to an interim suspension order by the NMC which continued in force (through a variety of extensions) until the hearing before the Panel. During this period, the Registrant was in touch with an investigator at the NMC, and on 3 May 2020 she stated that she had not intended to breach the terms of the Order when she worked a night shift alone. The Registrant explained that “I was in such a financial difficulty that I went to do a shift in a Nursing Home where a Senior carer was also on duty. I sincerely apologise for having done this out of financial desperation and I strongly state here that I will never do such a thing again”.
11. A hearing before the Panel took place on 9 March 2023. The Registrant did not appear and was not represented.

The Decision

12. The allegations made against the Registrant, and the summary of the findings was as follows:

“That you, a registered nurse:

1. On 11 April 2019 signed initials of Colleague A on an unknown patient’s medical records [PROVED]

2. Your conduct at Charge 1 above was dishonest because it created the false impression that Colleague A had signed the medical record when you knew she had not [NOT PROVED]

3. On 23 April 2019 failed to;

a. Administer intravenous antibiotic medication to three patients and/or [NOT PROVED]

b. Administer insulin medication to two patients [NOT PROVED]

4. On either 22 April 2019 or 23 April 2019 incorrectly recorded in one or more patient records that you had given intravenous antibiotic medication when you had not [NOT PROVED]

5. Your conduct at Charge 4 above was dishonest because at the time you created the patient record, you knew it contained information which was factually inaccurate [NOT PROVED]

6. On your application for employment at Firstcall Healthcare, signed 27 August 2019, when asked to state your ‘full employment history including agency work’ did not disclose your employment at

a. Pulse Agency and/or [PROVED]

b. Standby Agency [PROVED]

7. On your ‘Qualified Staff Questionnaire’ submitted during your employment at Firstcall Healthcare, when asked if you have ever been subject of a ‘disciplinary or investigation by an employer’, you declared that you had not, when you had been subject to an investigation whilst employed at Pulse Agency [PROVED]

8. Did not inform Firstcall Healthcare Agency that you had been referred to the Nursing & Midwifery Council [PROVED]

9. Following being made subject to an interim conditions of practice order by the Investigating Committee of the Nursing &

Midwifery Council on 07 November 2019, breached said order in one or more of the following ways;

a. Condition 1, in that you worked at ‘Scarborough Court’ on 07 December 2019, when there was no other registered nurse on shift to provide supervision. [PROVED]

b. Condition 6, in that you did not immediately, or at all, provide a copy of your interim conditions of practice order to First call Healthcare Agency [PROVED]

10. Your conduct at Charge 6 and/or Charge 7 and/or Charge 8 and/or Charge 9 above was dishonest because your actions sought to prevent First call Healthcare Agency from learning information about you which may have had an adverse effect on your employment with them. [PROVED]”

13. After making these findings, the Panel considered whether the facts amounted to misconduct and, if so, whether the Registrant’s fitness to practice was impaired. The Panel found that charge 1 did not amount to misconduct. With respect to charges 6a, 6b, 7, 8 and 9b, these were considered by the Panel separately as well as part of a pattern of conduct by the Registrant, particularly when considered alongside charge 10. The Panel found that the Registrant:

“dishonestly withheld information from her employer in an attempt to minimise disclosure about her employment history; dishonestly withheld information from her employer regarding her referral to the NMC and interim conditions of practice order; and dishonestly breached the conditions imposed on her practice by withholding the information about the interim order. The panel took into account that Reverend Offier’s actions in these charges were motivated by the potential adverse personal financial implications and that she prioritised her own need to earn money above her responsibility to be transparent with those employing her”.

The Panel went on to say that it was of the view that:

“honesty and integrity are fundamental to the nursing profession and Reverend Offier has not acted in a manner which upholds the standards and values set out in the Code. The panel determined that Reverend Offier’s actions in each charge did fall significantly short of the standards expected of a registered nurse, thereby damaging the trust that the public places in the profession. It therefore found that charge 6a, charge 6b, charge 7, charge 8 and charge 9b amounted to serious misconduct”.

14. With respect to charge 9a (working on a shift without supervision in breach of the Order), the Panel considered that this was not dishonest as it did not involve the Registrant withholding information. The Panel found that the Registrant’s reason for working in breach of the Order was “motivated by the potential adverse personal

financial implications”. By doing so the Panel decided that the Registrant had put forward her own interests above those of patients within her care, and this amounted to serious misconduct.

15. Overall, the Panel concluded that the Registrant’s actions with respect to charges 6 to 10 fell seriously short of the conduct and standards expected of a nurse and amounted to misconduct.
16. With respect to the question of impairment, the Panel considered that patients had not been put at unwarranted risk of harm by the Registrant and were not liable to be put at unwarranted risk of harm in the future. As a result, a finding of impairment on public protection grounds was not necessary. However, the Registrant’s conduct in disregarding the conditions imposed on her by the NMC, her dishonest behaviour, and the prioritisation of her needs above those of the patients in her care had breached “the fundamental tenets of the nursing profession” and had brought the profession’s reputation into disrepute. The Panel was satisfied that confidence in the nursing profession would be undermined if the regulator did not find charges relating to dishonesty “extremely serious”.
17. The Panel considered whether the Registrant had shown any insight into her misconduct. The Panel considered the Registrant’s email of 3 May 2020 (paragraph 10 above) and found that the Registrant had demonstrated “some remorse and limited insight”. The Panel found that the Registrant had not fully addressed all of the concerns about her practice: the Registrant had not demonstrated insight into the wider consequences of her failure to adhere to conditions imposed by the regulator and of her failure to disclose relevant information about her employment history. The Panel considered that the Registrant had not demonstrated a full understanding of how her actions impacted negatively on the reputation of the nursing profession.
18. The Panel found that the Registrant’s misconduct was capable of remediation but observed that it had not received sufficient information to suggest that the Registrant had taken steps to address the specific concerns raised in the case. The Panel stated that it was of the view that “due to the limited insight, remorse and evidence of strengthened practice, there remains a real risk of repetition of the misconduct”. The Panel acknowledged that the misconduct in this case was motivated by the Registrant’s financial circumstances but, as the Panel had not been presented with any information regarding the Registrant’s current circumstances, it could not be satisfied that the Registrant would act differently in similar circumstances in the future.
19. In conclusion, the Panel stated that “public confidence in the profession would be undermined if a finding of impairment” was not made and found that the Registrant’s fitness to practice was impaired.
20. Following this finding of impairment, the Panel went on to consider the question of sanction. The NMC asked for the Registrant to be struck off the register. The Panel decided, however, to make a suspension order for a period of 6 months with a review. In making its decision on sanction, the Panel stated that it had careful regard to the NMC’s Sanctions Guidance, and extracts from the Sanctions Guidance appear in the Decision.

21. I will set out much of the Panel’s reasoning on sanction as it has been subject to robust challenge by the Authority, supported to a large extent by the NMC itself:

“The panel considered the following to be aggravating features:

- Reverend Offier has demonstrated limited insight into the potential consequences of her misconduct.
- A pattern of misconduct (albeit over a relatively short period of time).

The panel considered the following to be mitigating features:

- Early acknowledgment of her failings and an apology, in which Reverend Offier stated ‘I sincerely apologise for having done this out of financial desperation and I strongly state here that I will never do such a thing again.’
- No patient harm.
- Personal financial hardship at the relevant time”.

22. The Panel then went on to consider the various responses available to it, starting with no sanction, and then the varieties of sanction up to and including striking off the register:

“The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, an order that does not restrict Reverend Offier’s practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where ‘the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.’ The panel considered that Reverend Offier’s misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Reverend Offier’s registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel considered that the concerns in this case relate to Reverend Offier behaving dishonestly and disregarding the interim

conditions previously imposed on her practice. It took into account the SG, and determined that conditions could not be formulated as the concerns identified do not relate directly to Reverend Offier's clinical practice, but to her dishonest withholding of information. In these circumstances, the panel was of the view that there are no practical or workable conditions that could be formulated, nor could it be satisfied that Reverend Offier would comply with them. It therefore concluded that a conditions of practice order would not adequately meet the public interest.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG [Sanctions Guidance] states that suspension order may be appropriate where some of the following factors are apparent:

- *A single instance of misconduct but where a lesser sanction is not sufficient;*
- *No evidence of harmful deep-seated personality or attitudinal problems;*
- *No evidence of repetition of behaviour since the incident; and*
- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour.*

Whilst the panel was mindful of its earlier findings that the concerns in this case relate to a pattern of misconduct, it took into account that the misconduct occurred over a relatively short period of time and there has been no repetition of the behaviour since the incident. The panel was of the view that the misconduct in this case reflected attitudinal problems. However, the panel considered that given the limited timeframe in which Reverend Offier's misconduct occurred and the context (personal financial hardship), it was not satisfied that the attitudinal problems associated with Reverend Offier's behaviour were harmful or deep-seated. The panel found that Reverend Offier demonstrated some limited insight before she disengaged (apparently due to ill health). The panel was satisfied that in all the circumstances of this case, the misconduct was not fundamentally incompatible with remaining on the register.

The panel also had regard to the NMC's guidance on 'seriousness' and 'cases involving dishonesty'. The panel noted that not all dishonesty is equally serious and only the more serious type of dishonesty will call into question whether a nurse should be allowed to remain on the NMC Register. In respect of the guidance on serious dishonest conduct, the panel was of the view that none the following were applicable to this case:

- *deliberately breaching the professional duty of candour by covering up when things have gone wrong, especially if it could cause harm to patients;*
- *misuse of power;*
- *vulnerable victims;*
- *personal financial gain from a breach of trust;*
- *direct risk to patients*
- *premeditated systematic or longstanding deception.*

Having regard to the above, the panel did not consider Reverend Offier's dishonesty as the most serious category. Furthermore, Reverend Offier's dishonesty did not result in any actual risk to patients and therefore would generally be regarded as less serious. Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction.

The panel did go on to consider whether a striking-off order would be proportionate but, taking account of all the mitigating factors identified by the panel and the written responses of Reverend Offier, the panel concluded that it would be disproportionate. Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in Reverend Offier's case to impose a striking-off order.

The panel considered that this order is necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standards of behaviour required of a registered nurse.

The panel determined that a suspension order for a period of six months with a review was appropriate in this case to mark the seriousness of the misconduct and give Reverend Offier the opportunity to reengage with the NMC.

At the end of the period of suspension, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order including a striking-off order".

A review hearing was held on 23 August 2023. Once again, the Registrant did not attend, and the hearing proceeded in her absence. No new information was presented at that hearing and, as a result, the NMC stated that it was unable to say whether there had been any progress with regard to the Registrant's fitness to practice. The review panel decided to impose a further period of suspension for a period of 12 months, with a

further review to be held at the end of that period. At that further review, the panel could revoke the order, or replace it with another order including a striking off order.

Grounds of Appeal

23. The Authority appeals on three grounds.

Ground 1: Having made the findings of facts and impairment, the Panel was wrong to conclude, at the sanction stage, that a suspension order was a sufficiently serious sanction to protect the public. The only order reasonably open to the Panel was to strike the Registrant off the register.

Ground 2: Further or alternatively, the Panel erred in its findings in a number of ways and, had the Panel not made those errors, individually or cumulatively, the only sanction reasonably open to it would have been to strike the Registrant off the register.

Ground 3: Alternatively, the Decision was unjust because of a serious procedural or other irregularity in that the Panel failed to give adequate reasons for its conclusion that a striking-off order would be disproportionate.

24. The NMC agrees with the Grounds of Appeal, save that it takes issue with two of the arguments made at Ground 2 as to specific errors made by the Panel.

The Law

25. Section 29 of the 2002 Act provides that where a “relevant decision” (such as the Decision) has been made by the NMC, the Authority may refer the case to the High Court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public: section 29(4), (5).

26. Section 29(4A) provides that consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

“(a) to protect the health, safety and well-being of the public;

(b) to maintain public confidence in the profession concerned;
and

(c) to maintain proper professional standards and conduct for members of that profession.”

27. As the case is treated as an appeal, this Court will allow the appeal where the decision of the disciplinary panel or committee was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings: CPR rule 52.21(3). In the former case, the Court can substitute its own decision for that of the disciplinary panel or committee (section 29(8)(c) of the 2002 Act), or remit the case under section 29(8)(d). In the latter case, the Court can remit with directions as to how to proceed.

28. In his judgment in the very recent case of *Professional Standards Authority for Health and Social Care v (1) Nursing and Midwifery Council and (2) Kadiatu Jalloh* [2023] EWHC 3331 (Admin) at §23, Morris J. reviewed the authorities addressing the question

of sanction¹. I have found this review helpful, and note that the Authority (represented by David Hopkins, of Counsel) agreed with this description of the relevant legal principles:

“(1) The principal purpose of sanctions in disciplinary proceedings is not punishment of the practitioner, but rather maintaining the standards and reputation of the profession as a whole and maintaining public confidence in the integrity of the profession. For this reason, matters of personal mitigation, such as testimonials from fellow professionals and remorse and reform, are of less weight. The reputation of the profession is more important than the fortunes of any individual member: see *Bolton*, supra.

(2) There is a difference between an appeal by a professional/registrant and an appeal by the PSA under section 29. In the latter case the approach of the court is in principle supervisory in nature: *Sastry* §§107 and 108.

(3) In such an appeal, the court should only interfere with the evaluative judgment of a specialist adjudicator if (i) there was an error of principle in carrying out the evaluation; or (ii) it fell outside the bounds of what an adjudicative body could properly and reasonably decide: *Bawa-Garba* at §67 and *Sastry* §108.

(4) In a section 29 appeal specifically, the role of the Court is to consider whether the tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty. The issue is likely to be whether the tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public. Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed: *Ruscillo*, supra.

(5) Where the misconduct relates to professional performance, the expertise of the tribunal is likely to carry greater weight. However, where the misconduct does not relate directly to

¹ *Bolton v Law Society* [1994] 1 WLR 512 at 519B-E; *Council for the Regulation of Healthcare Professionals v GMC and Ruscillo* [2005] 1 WLR 717 at §§71, 73, 76 to 78; *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin) at §§8 to 11; *Khan v General Pharmaceutical Council* [2007] 1 WLR 169 at §36; *GMC v Boateng* [2017] EWHC 3565 (Admin) at §§13, 50 and 53; *GMC v Theodoropoulos* [2017] 1 WLR 4794 at §§34 (v) to (viii), 36 to 38; *GMC v Khetyar* [2018] EWHC 813 (Admin) at §§20 to 22; *GMC v Bawa-Garba* [2018] 1 WLR 1929 at §67; *Sayer v General Osteopathic Council* [2021] EWHC 370 (Admin) at §24 and *Sastry v GMC* [2012] EWCA Civ 623 at §§97-99, 106-108, 113.

professional performance standards, for example, cases of dishonesty or sexual misconduct, the Court is well placed to assess what is needed to protect the public, maintain the reputation of the profession or maintain public confidence in the profession and may attach less weight to the expertise of the tribunal: *Southall* §11, *Khan* §36, *Boateng* §13, *Sastry* §§106, 113. This approach goes beyond sexual misconduct and dishonesty, and extends more generally to matters not related to professional performance; see *Khan* §36. In my judgment, this approach therefore applies in the present case to the findings of assault, as well as to the findings of dishonesty.

(6) Honesty and integrity are fundamental in relation to qualifications and the system of applying for medical positions. Where a doctor engages in deliberate dishonesty and lacks insight into that dishonesty, erasure may, in practical terms, be inevitable: *Theodoropoulos* §§36, 38.

(7) As regards the sanctions guidance provided by the professional body itself, it is an authoritative steer for tribunals as to what is required to protect the public, even if it does not dictate the outcome; it is an authoritative steer as to the application of the principle of proportionality. If the tribunal departs from the steer given by the Guidance, it must have careful and substantial case-specific justification. A generalised assertion that erasure or striking off would be disproportionate and that the conduct was not incompatible with continued registration will be inadequate and will justify the conclusion that the tribunal has not properly understood the gravity of the case before it: see *Khetyar* §§21 and 22.

(8) Even where guidance directs a tribunal to consider sanctions “from the bottom up” (i.e. starting with the least restrictive), a proper conclusion that suspension is sufficient cannot be reached without careful consideration of the guidance in relation to the more serious sanction of erasure: *Khetyar* §§20.”

29. I was taken by Mr Hopkins, on behalf of the Authority, to two cases in which the Court had substituted a sanction of striking off the register for the suspension that had been ordered by the regulatory panel. The facts of those cases are therefore illustrative of when the regulatory panel’s decision on sanction has been held to be unreasonably lenient.
30. In *Jalloh*, the Fitness to Practice Committee of the NMC found that the nurse in question had deliberately assaulted a vulnerable patient by “thrusting a chair at his head and kicking him in the head”, and had dishonestly failed to disclose information to a future employer that would have led them to know about the assault. Morris J. found that suspension was not sufficient for the protection of the public and substituted a striking off order in its place.

31. In *Professional Standards Authority for Health and Social Care v (1) Nursing and Midwifery Council and (2) Cynthia Chawo-Banda* [2014] EWHC 4677 (Admin), Andrews J considered an appeal from the sanction of suspension in the case of a nurse who had been convicted of two counts of fraud in relation to her practice as a nurse: (i) when applying for employment as a nurse at HMP Bedford in May 2008, the Registrant had ticked the box marked “No” when asked if she was then subject to a fitness to practice investigation. This was untruthful as she was at the time subject to an NMC investigation into incidents going back to August 2007 involving alleged medication recording errors; and (ii) the Registrant had been suspended from practice as a nurse by the NMC from 15 December 2009 but had failed to tell her employer (who she worked for from 26 October 2009) about the suspension until it was discovered through a routine check on 7 July 2010, almost 7 months after the suspension decision had been made. When these matters came before the Conduct and Competence Committee of the NMC, the Committee imposed the sanction of suspension for 12 months. Andrews J noted that there was a positive finding by the Committee that the Registrant lacked insight and remorse, as she continued to assert that she had not been dishonest. Andrews J held that in the circumstances a striking off order was the only appropriate sanction available to the panel.

Discussion

32. The Authority contends that, on the evidence before the Panel, any sanction less than one of striking off was not sufficient for the protection of the public, and so the sanction imposed by the Panel of suspension was one that was not reasonably open to it.
33. Ground 1: *Striking off was the only order reasonably open to the Panel.*

The Authority contends that the Panel’s approach to the question of sanction was fundamentally flawed on a number of grounds. It is argued that:

- i) the Panel’s conclusion that the Registrant’s misconduct was not fundamentally incompatible with remaining on the register was wrong as only two of the four of the factors that the Sanctions Guidance indicates as appropriate for imposing a suspension were engaged, and the Panel should have considered the issue of “fundamental incompatibility” in light of its consideration of the seriousness of the misconduct, rather than in advance of that consideration.
- ii) the Panel wrongly concluded that none of the six types of dishonesty set out in the Sanctions Guidance were applicable, when it should have found that at least two were made out on the facts.
- iii) the Panel failed to take into account that the regulatory concerns about the Registrant did raise fundamental questions about her professionalism; the Panel was wrong to conclude that public confidence could be maintained by a suspension order, and wrong to conclude that anything less than striking off was sufficient to protect patients and members of the public, or maintain professional standards.
- iv) the Panel’s apparent conclusion that the Registrant might develop insight during the six-month period of suspension and take the opportunity to re-engage with

her regulator was unsupported wishful thinking, especially where the hearing took place three years after the incidents in question.

- v) the Panel failed to take into account the Sanctions Guidance relating to “Serious concerns which are more difficult to put right”, which specifically refers to the situation of a nurse being responsible for “deliberately . . . giving a false picture of employment history which hides clinical incidents in the past, not telling employers that their right to practise has been restricted or suspended, practising or trying to practise in breach of restrictions or suspension imposed by us”. There was, here, a particular failure on the part of the Panel to give proper weight to the fact that not only had the Registrant acted in contravention of an order of the NMC, but she had deliberately sought to evade a regulatory sanction.
34. I have carefully considered each of these arguments. I agree with argument (ii), but do not accept the other arguments. I consider that many of the criticisms made by the Authority are based on a narrow reading of the Panel’s analysis with respect to sanctions. I consider that the Panel’s analysis needs to be read as a whole and in its proper context, and extracts from the Panel’s reasoning cannot be taken in isolation.
35. The Panel adopted a ladder approach to sanction, starting at the bottom with a consideration as to whether no sanction was merited and then moving upwards through the more severe forms of sanction, reaching at the top the sanction of striking off the register. This is an appropriate approach to take and is positively encouraged by the NMC. It enables the Panel to consider and then determine the most proportionate sanction in the circumstances of the case. When examining the Panel’s reasoning, the fact that the Panel mentions something when looking at sanctions at lower points of the ladder does not mean that it has forgotten that matter, or not had it in mind, when looking at sanctions at the higher points.
36. With respect to the Authority’s argument at (i), the fact that the Panel’s decision with respect to suspension refers to only some of the factors that the Sanctions Guidance indicate may support the sanction of suspension – the Authority contends that only two are referred to – is not in itself an error. The Sanctions Guidance expressly states that the “checklist” of factors about the misconduct is “a guide to help decide whether” a suspension is appropriate or not. The Sanctions Guidance is not saying that all of the factors need to be met.
37. The Authority also criticise the Panel’s analysis by pointing out that the Panel makes a finding that the Registrant’s “misconduct was not fundamentally incompatible with remaining on the register” after looking at the indicators of suspension but before the Panel went on to consider the NMC’s Guidance on “seriousness” and “cases involving dishonesty”. I agree that this would be a valid criticism of the Panel’s reasoning if it had not thought further about the issues relating to “fundamental incompatibility” after considering the issues of “seriousness” and “cases involving dishonesty”. Those matters go to the heart of whether a nurse should remain on the register. It seems to me, however, that the Panel did consider the issues relating to “fundamental incompatibility” after looking at the issues of “seriousness” and “cases involving dishonesty”. After it had analysed the issue of “dishonesty” in some detail, the Panel stated that the suspension order was “necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standards of behaviour required of a registered nurse”. It is implicit

in this finding that the Panel was saying that a sanction could be applied to the Registrant that was compatible with her remaining on the register: that it was not necessary, even in light of her “dishonesty”, for a striking off order to be made.

38. With respect to the Authority’s arguments at (ii), I agree that the Panel fell into error by finding that none of the six forms of dishonesty that are most likely to call into question whether a nurse should be allowed to remain on the register were met. It is not possible to understand why the Panel reached this conclusion as no reasoning is provided. Nevertheless, in my judgment, it was simply not open to the Panel to find that none of the six forms of dishonesty were present in the Registrant’s case.
39. The Panel must be taken to have found that the Registrant had not committed “personal financial gain from a breach of trust”. This finding is wrong. The Registrant deceived First Call in a number of ways: first, by not informing First Call – as her future employer – of two employment agencies with which she had been engaged, and of the fact that she was under disciplinary investigation by one of them; second, by not informing First Call of the fact that she was subject to interim conditions of practice; and third, by taking a shift where she was the only nurse on duty, knowing that she had to be supervised by another registered nurse. Each of these matters resulted in the Registrant obtaining “personal financial gain”: she obtained work (and therefore remuneration) through First Call, including the one shift when she was unsupervised. I also consider that this “personal financial gain” arose from “a breach of trust”. The reference in the Sanctions Guidance to “a breach of trust” is clearly not intended to apply to an equitable notion of a trust, but to what the reasonable reader (including a nurse who is subject to the regulatory regime) would understand that phrase to mean. In my judgment, the reasonable reader would understand that this would include the breach of the relationship of “trust” that should exist in an employment relationship; as well as the “trust” that applies to a candidate for employment insofar as that requires them to answer the future employer’s questions truthfully so that the future employer can assess whether the candidate should be engaged.
40. I also consider that the Panel was wrong to find that the Registrant had not committed “premeditated, systematic or longstanding deception”. The failure to state on her application form with First Call the details of Pulse and one other employment agency, and the failure to state in the Qualified Staff Questionnaire that she was the subject of investigation, must have been matters that the Registrant had thought about when she completed those documents. It seems to me, from the evidence that was before the Panel and from the Panel’s own findings, that these omissions by the Registrant were part of a plan to deceive First Call, so that the difficulties with Pulse would not be found out and impact on her obtaining employment with First Call. To that extent, therefore, the deception was clearly “premeditated” or “systematic”. This failure was then compounded by the Registrant’s failure to inform First Call about the conditions of practice order imposed by the NMC, which culminated in the occasion when the Registrant worked a shift without being supervised in breach of the order. That deception was, in my judgment, clearly “systematic”, and the Panel’s conclusion to the contrary was clearly wrong.
41. The effect of the Panel’s failure to find that the Registrant’s dishonesty did fall within two of the categories of misconduct that may call into question her remaining on the register meant that the Panel was unable to consider properly whether her misconduct

was fundamentally incompatible with her remaining on the register. If the Panel had not made these errors, it may have reached a different conclusion on sanction.

42. With respect to the Authority's arguments at (iii), this is essentially an argument that no reasonable panel could have reached the conclusion that it did. I will deal with this point later in this judgment, as there is an overlap with Ground 2. Ground 2 contends that the Panel made a number of errors and that if those errors had not been made the Panel could not have reached any conclusion other than striking the Registrant off the register. It seems to me that it is more sensible to consider the question of unreasonableness in the round, after I have considered the various alleged errors at Ground 2.
43. With respect to the Authority's arguments at (iv), I do not consider that it was wrong for the Panel to assume that the Registrant might show further insight into her wrongdoing given that she had not done so in the period of three years since her suspension. I also do not consider that the Panel was wrong to state that a suspension order with a review was appropriate to give the Registrant an opportunity to reengage with the NMC. These were matters for the Panel's evaluative judgment with which this Court should be slow to interfere. At the time of the hearing before it, the Panel simply did not know what the Registrant's level of insight was, as she had ceased engaging with the NMC for some time. Nevertheless, it was not unreasonable for the Panel to consider that the Registrant might engage going forwards given its finding, when considering the issue of impairment, that in the absence of further information it could not be satisfied that the Registrant would act differently in similar circumstances in the future. The Panel could, in my judgment, reasonably conclude that the Registrant might respond to this finding by engaging and attempting to provide some insight into her misconduct so as to influence the decision that would be taken on the review at the end of the period of suspension.
44. With respect to the Authority's arguments at (v), it is clear when looking at the Panel's decision on sanctions as a whole that it was well aware of the essential nature of the Registrant's wrongdoing as it had set this out when considering whether to place conditions of practice on the Registrant's registration. At that point, the Panel explained that the concerns in the case related to the Registrant "behaving dishonestly and disregarding the interim conditions previously imposed on her practice", and that the concerns did not relate to her clinical practice but to the Registrant's "dishonest withholding of information". The Panel cannot have forgotten these matters when it considered the appropriateness of imposing a suspension on the Registrant, even though they were not specifically mentioned at that point in the Panel's discussion. Reading the Decision in its totality, therefore, it is clear that the Panel was well aware that the core of the concerns with the Registrant was that she had not complied with the regulator's orders and had acted dishonestly so as to prevent her employer from finding out information about her which it ought to have been told.

Ground 2: material errors in the Panel's findings

45. The Authority contends that the Panel made a number of material errors in its findings. First, it is contended that the Panel was wrong to conclude that the Registrant's actions in working a shift while unsupervised on 7 December 2019 were not dishonest. I agree. If the Panel found that the Registrant had put her own interests before that of her patients, it must have found that she knew she had to be supervised when working the

shift; and in the light of that knowledge, working the shift unsupervised was objectively dishonest by the standards of ordinary decent people.

46. Second, it is contended that the Panel was wrong to conclude that the Registrant's actions did not present a risk to patient safety or present any public protection issues, and so a finding on public protection grounds was not necessary. It is argued by Mr Hopkins, on behalf of the Authority, that a nurse who practises in deliberate disregard of regulatory conditions which have been placed on her practice plainly presents public protection issues. I agree. Public protection issues might arise indirectly where a nurse practices in deliberate disregard of regulatory conditions. The regulatory conditions on the Registrant were imposed for a purpose – there was a case to answer for her approach to the recording of medications – and if the Registrant was not subject to supervision there would clearly be a risk that she would make an improper recording which could impact on patient safety.
47. The Authority contends that the Panel failed to identify as aggravating factors the Registrant's disregard for the interim order or the Registrant's admitted financial motivation for disregarding the interim order. The NMC, represented before me by Susan Jean of Counsel, contended that these matters should have been regarded by the Panel as making the case more serious, but they did not need to be identified specifically as aggravating features and so the Decision was not wrong for these reasons. I agree with Ms Jean's submission.
48. I have explained above that if the Decision is read in its proper context the Panel did, in fact, take into account the Registrant's deliberate breach of the NMC's order, and so this matter was dealt with elsewhere in the Decision, and so did not need to be made again as an aggravating feature of the case.
49. I have also explained that the Panel erred by not finding that the Registrant's motivation of personal financial gain should have been acknowledged in considering whether one of the more serious forms of dishonesty was present, and so this finding should have been made by the Panel. Had the Panel made that finding it would not have been necessary for the Panel to include this factor again as an aggravating feature of the case.
50. The Authority contends that the Panel was wrong to take into account that there had been no repetition of the behaviour since the incident. This was said to be irrelevant as the Registrant had been suspended from practice in the meantime. I disagree. One of the specific findings of misconduct made by the Panel was that the Registrant had breached an order in the past. As a result, it was entirely relevant whether she had repeated this behaviour by breaching the suspension order that had been imposed on her pending the hearing by the Panel. The Panel found that the Registrant had not.
51. The Authority contends that the Panel was wrong to find that the Registrant's attitudinal problems were not harmful or deep-seated. I disagree. The Panel explained its reasoning as being that the misconduct occurred over a limited time-frame and took place in a particular context: the Registrant's personal financial hardship. That is an evaluative judgment that the Panel was entitled to make on the evidence, and this Court should not interfere with it unless it was unreasonable to make that judgment. It is not unreasonable. A short-lived pattern of conduct, occurring in a particular context, does not indicate attitudinal problems that are fixed and difficult to remediate.

52. The Authority quite rightly did not pursue an argument that the Panel wrongly identified the Registrant's personal financial hardship as a mitigating factor: this is precisely one of the factors that the Sanctions Guidance specifies could be a mitigating factor.
53. In my judgment, therefore, a number of the Authority's arguments at Ground 2 are correct. If the Panel had not made these errors, it might have reached a different outcome on sanction.

Unreasonableness of sanction

54. In the instant case, the Registrant had lied to her future employer about her work history, had failed to inform her employer that she was subject to conditions, and on one occasion she had worked a shift in breach of the condition that she should be supervised by a nurse. These are matters which were not only dishonest but also damage the reputation of, and impact negatively on public confidence in, the profession. The Sanctions Guidance of the NMC does not state, however, that every case of this kind must lead to striking off the nurse from the register. That is obviously correct; otherwise, this would unlawfully fetter the regulatory panel's discretion.
55. It is necessary, therefore, to look at the particular circumstances of the case in front of the regulatory panel to determine whether striking off was the only sanction available. The most serious of cases may fall within the category of cases where striking off is the only outcome. There will be other cases which, although serious, are more marginal and there is a range of options available to the regulatory panel as to what the sanction should be.
56. The circumstances that may need to be looked at would include the nature of the order that had been breached. Although it is obviously important that all orders are adhered to so as to support the proper operation of the regulatory regime, some orders are more significant than others in terms of public and patient protection, as well as maintaining public confidence in the profession.
57. There is, in my judgment, a clear difference in substance between a condition that a nurse should be the subject of supervision as in this case, and an order suspending a nurse from working at all as a nurse (c.f. *Chawo-Banda*), or working at a level or grade that she not be engaged in (c.f. *General Medical Council v Dr Anthony Donadio* [2021] EWHC 562 (Admin), where a doctor was subject to an order that he must work at a level lower than that of Consultant, but he continued to do so on a number of occasions after being notified of that order). The latter cases are far more serious in terms of what the order of the regulatory panel is seeking to achieve or to prevent from happening.
58. The circumstances that may need to be looked at would also include how many times the nurse has acted in contravention of the order and for how long. This would enable the regulatory panel to reflect on the attitude and insight that the nurse has towards the significance of the regulatory regime. It would also enable the regulatory panel to consider the broader impact on public confidence in the regulatory regime: the more frequent the contraventions, and the longer the contraventions last for, the more that the regulatory regime as a whole is undermined. In my judgment, there is a clear difference between a nurse working for nearly seven months in contravention of an order that she should not be working at all as a nurse (c.f. *Chawo-Banda*) and, as here, a nurse working on one shift in contravention of an order that she should only work when supervised,

and for a period of less than two months without informing her employer that she was subject to conditions.

59. Other relevant factors may be the particular Registrant's circumstances, her past history, and her approach to the misconduct once it had been discovered: asking whether there was remorse, and insight into the nature and impact of the wrongdoing. The particular context in which the misconduct occurred would also be relevant, as this would go to questions of the likelihood of the misconduct recurring in the future.
60. In the instant case, there was no suggestion that the Registrant who had enjoyed a lengthy career had engaged in similar misconduct in the past. There was evidence of remorse and some limited insight (unlike the circumstances of *Chawo-Banda* and *Donadio*). There were particular financial circumstances that appear to have driven the Registrant to at least some of the misconduct. The likelihood of a repeat of the Registrant's behaviour was not a foregone conclusion.
61. Against this background, and taking into account the findings made by the Panel which are not challenged by the Authority, and the findings that the Panel should have made had it not made the errors identified above, I do not consider that the conclusion reached by the Panel that the Registrant should be suspended was one that no reasonable fitness to practice committee could have reached. Although the Registrant's misconduct was serious and could justify the most serious sanction available to the regulatory panel so as to maintain public confidence in the profession, her misconduct – and the circumstances surrounding the misconduct -- was not so serious that striking off was the only option available.

Ground 3

62. The Authority's Ground 3 is that the Panel failed to give adequate reasons that striking off was disproportionate. I do not need to reach a final view on this ground, as I have already found that the Panel made a number of errors and so its decision was wrong. As I will shortly explain, the matter will need to be remitted in any event to consider the question of the appropriate sanction, and so there would be no point in directing that the Panel provide further reasons for its finding on striking off.

Disposal

63. I do not consider that striking the Registrant off the register was the only option reasonably available to the Panel, even if the Panel had not made the errors that I have identified above. In the circumstances, I do not substitute the sanction of striking off for that of suspension.
64. I also cannot say that the six month suspension ordered by the Panel was the only option that was reasonably available either, so that remittal would serve no useful purpose. It seems to me that both sanctions -- suspension or striking off -- would have been available to the Panel had it not made the various errors that I have identified above.
65. Accordingly, I will allow the appeal but remit the decision so that the question of sanction can be looked at in light of the findings that the Panel made, but also the findings that the Panel should have made. I shall consider further submissions from the

parties as to the appropriate form of the order for remittal and on any other consequential matter.