

Section 29 Case Meeting

17 August 2020

157-197 Buckingham Palace Road, London SW1W 9SP



Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Mark Stobbs, Director of Scrutiny and Quality, Professional Standards Authority
Simon Wiklund, Head of Legal (Senior Solicitor), Professional Standards Authority

In attendance

Christine O'Neill, Solicitor-Advocate, Brodies LLP

Observers

Georgina Devoy, Senior Scrutiny Officer, Professional Standards Authority
Remi Gberbo, lawyer, Professional Standards Authority
Rebecca Senior, Lawyer, Professional Standards Authority
Christine Braithwaite, Director of Standards and Policy, Professional Standards Authority
Steve Wright, Scrutiny Officer, Professional Standards Authority
Peris Dean, Executive Assistant, Professional Standards Authority
Douglas Waddell, Associate, Brodies LLP.

This meeting was held virtually in light of the Covid-19 pandemic. All parties were present via Microsoft Teams.

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 Inner House, Court of Session and the statutory time limit for an appeal would expire on 21 August 2020.

6. The relevant decision

- 6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].
- 6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

7. Documents before the meeting

- 7.1 The following documents were available to the Members:
- Determination of the panel dated [REDACTED]
 - The Authority's Detailed Case Review
 - Transcripts of the hearing

¹ *CRHP v Ruscillo* [2004] EWCA Civ 1356 at paragraphs [69] - [78]

- Counsel's Note dated 17 August 2020
- The NMC's Code
- The NMC's Indicative Sanctions Guidance
- The Authority's Section 29 Case Meeting Manual.

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

8. Background

8.1 The Registrant, a registered nurse, was referred to the NMC in [REDACTED] following her dismissal on [REDACTED] by the Home Manager of a nursing home. The referral related to concerns that she had misappropriated PRN medication (medication prescribed to be taken when needed and not at set times).

8.2 The Registrant was originally employed by the home in [REDACTED] although did not undertake shifts. The home is a 56-bed nursing facility arranged over two floors providing care for elderly residents and those with learning difficulties.

8.3 In [REDACTED] the Registrant, who had secured another nursing role, decided to work at the home on a bank basis although did not undertake shifts. In early [REDACTED], she contacted the home and asked to work on a permanent, full time basis and commenced work on [REDACTED], working a mixture of day and night shifts on both the top and ground floor of the home.

8.4 On [REDACTED], it was identified that 28 Zopiclone tablets were missing for Resident A. The Home Manager commenced an audit of all PRN medication which revealed that Zopiclone, Lorazepam (sleeping tablets), Codeine, Co-Codamol, Dihydrocodeine and Tramadol (Opioid painkillers) medication was missing for a number of residents.

8.5 The Home Manager cross-referenced the dates on which the medication went missing with the staff rota and on [REDACTED] held a staff meeting requesting that whoever was responsible for missing medication to come forward. 112 Tramadol tablets were returned to the home shortly after the meeting.

8.6 The Home Manager undertook further investigation and deduced that the Registrant was the person responsible by process of elimination on the basis that the Registrant was on duty each time that medication went missing, she was one of the two nurses who worked across both floors of the home, medication started going missing around the time that she had recommenced employment at the home and stopped after she was suspended and dismissed and that she was on duty each time medication was returned to the home. Following the Registrant's dismissal, the police were notified although criminal proceedings were not commenced. A referral was also made to the NMC.

8.7 On [REDACTED], the NMC notified the Registrant that the Case Examiners had considered the regulatory concern that the Registrant had misappropriated

medication and concluded that the matter be referred for a fitness to practise hearing on the basis that there was a realistic prospect of a finding of current impairment.

- 8.8 On [REDACTED], the NMC notified the Registrant of its intention to apply to offer no evidence at a virtual hearing to be held on [REDACTED]. The NMC's Fitness to Practise Committee considered and allowed the NMC's application to offer no evidence bringing the case to an end.

9. Applying Section 29 of the 2002 Act

- 9.1 The Members considered all the documents before them and received legal advice.

- 9.2 The Members discussed the following concerns about the decision:

Did the NMC fail to apply its rules properly in failing to formulate charges?

- 9.3 The Members first considered whether the NMC's failure to formulate a charges was a serious procedural irregularity, such that it contributed to the Panel making a decision that was not sufficient to maintain public confidence in the nursing profession and to maintain proper professional standards and conduct for members of that profession.

- 9.4 The Members agreed that the NMC was required to formulate charges and that a failure to do so was a failure to comply with its own rules. The Members agreed that charges should have been included in the Notice of Hearing and that there were clear charges that could have been formulated in light of the available evidence. The Members considered the NMC submission that it was neither necessary nor desirable to formulate a charge in this case was wrong.

- 9.5 The Members noted that the decision as to whether the Registrant had a case to answer and whether the case was then referred to a hearing is one for the NMC's Investigating Committee or its officers (e.g. case examiners). The NMC's Case Examiners concluded that there was a case to answer and referred the matter to the Panel. Pursuant to the NMC's rules, the Panel was bound to consider the allegation referred to it.

- 9.6 The Members also considered that the Panel should have required the NMC to formulate charges. The requirement to formulate charges is mandatory and so fundamental to fitness to practise proceedings that the Panel should not have dispensed with it and it is arguable that the NMC's rules do not allow aspects of hearing procedure to be entirely dispensed with as a form of short cut². The Members noted that there is no express power that enables the NMC to offer no evidence in a case that has been referred to a panel by case examiners and therefore particular care is required in advancing and considering such applications.

- 9.7 The Members concluded that in failing to formulate a charge and in failing to communicate that to the Registrant in the Notice of Hearing the NMC failed to comply with rule 11(3)(b) of the 2004 Rules. It contradicted the function of the

² PSA v NMC and X [2018] EWHC 70 (Admin) at paragraph [57].

NMC's Case Examiners and in doing so disabled the Panel from properly considering the seriousness and nature of the allegations made against the Registrant.

Did the NMC fail to apply its own guidance by offering no evidence?

- 9.8 The Members next agreed that the NMC should have followed its process in formulating a charge to be considered by the Panel and for the Panel to then to consider the application to offer no evidence in light of the charges. The Members considered that when hearing the NMC's application to offer no evidence, the Panel should have evaluated the evidence before it and considered whether there was sufficient evidence before it to give rise to a case to answer. The Members noted that the NMC case presenter did not point the panel towards the actual evidence that was available when seeking to offer no evidence. However, considering the NMC's guidance on applications to offer no evidence, the Members considered there was at least a proper basis upon which to make the application.
- 9.9 The Members agreed therefore that there was no error in making an application for no case to answer but that the NMC's failure to formulate charges, the way the application to offer no evidence was presented by the NMC and the manner in which the Panel's dealt with the application were likely to have had an impact on the outcome of the case,.

Was the NMC's ultimate failure to present evidence in the case wrong?

- 9.10 The Members considered that in making its application to offer no evidence, the NMC misdirected itself as to the correct interpretation of the case of *AD*³ in the circumstances of this case.
- 9.11 The Members considered this to be a serious procedural irregularity that contributed to the Panel making a decision that brought the case to an end and therefore was not sufficient to maintain public confidence in the nursing profession and to maintain proper professional standards and conduct for members of that profession.
- 9.12 The NMC failed to address the extent to which the evidence available in the case was different from the evidence that had been available in *AD*. The NMC also did not address the factors identified in the *AD* judgment that supported the conclusion that the elimination exercise could not be relied upon in that case.
- 9.13 The Members noted that there were three distinct differences between this case and the case of *AD*. First, the case of *AD* did not involve medication that had to be locked away under key, second, the Registrant in this case has access to both floors of the home where medication went missing and finally, audits at the home showed that when the Registrant was absent from work, no medication went missing but that when she returned, medication was missing.
- 9.14 In *AD* "the case against the appellant was based **entirely** on an elimination exercise". In its written application to offer no evidence the NMC describes the elimination exercise that the Registrant's employer undertook based on medication audits as being "**in essence**, how the home identified the person

³ *AD v NMC* [2014] ScotCS CSIH 90

they say was responsible for all the misappropriation". However, the NMC case presenter did not make any other submission about the nature of the NMC's evidence or draw any aspects of it to the Panel's attention. The Members did not consider that the decision in *AD* established a general rule that evidence of elimination exercises may not provide a sufficient basis for fitness to practise proceedings in the UK.

- 9.15 The Members concluded that the NMC's submissions ignored the additional evidence available from the investigation report from which distinctions with the case of *AD* could be drawn and the NMC's misunderstanding of *AD* made a material contribution both to its decision to apply to offer no evidence and the manner in which the application was advanced.

Did the Panel fail to evaluate the available evidence when considering the application to offer no evidence?

- 9.16 The Members agreed that the Panel, in granting the application to offer no evidence, misdirected itself as to the relevance of *AD* in the circumstances of this case. They concluded that this was a serious procedural irregularity that contributed to the Panel making a decision that was not sufficient to maintain public confidence in the nursing profession and to maintain proper professional standards and conduct for members of that profession.
- 9.17 The Members noted that there was no discussion in the course of the hearing of any specific features of the case against the Registrant that might have indicated the elimination exercise was more probative than in *AD*. The legal advice on the relevance of *AD* was simply that "*it was a useful overview of the approach taken by the Court of Session in assessing the reasonableness or otherwise of what was said to be a circumstantial case*" and that "*the Panel would perhaps derive some benefit from reading that case*". No advice was given as to the distinctions that might be drawn between the circumstances in *AD* and those before the Panel.
- 9.18 The Members further noted that the Panel in its written decision issued on [REDACTED] noted that in *AD* the case was based "entirely on an elimination exercise" and its own view that the case against the Registrant was "very similar". It did not record what led it to that conclusion and what it considered to be the dissimilarities. The Members considered that this created the impression that the Panel had applied the case of *AD* as if it were determinative of whether there was evidence available to the NMC in this case that gave rise to a case to answer.

Conclusion on insufficiency for public protection

- 9.19 The Members concluded that the panel's decision to grant the application to offer no evidence was insufficient for public protection.
- 9.20 In light of their concerns, the Members concluded that the NMC's failure to formulate charges as well as the Panel's failure to require the NMC to formulate charges was a serious procedural irregularity which meant the Members were unable to determine whether the outcome of the case was insufficient.⁴ The

⁴ Ruscillo at paragraph[72]

Members also concluded that the NMC's reliance on the case of *AD* as being determinative of the sufficiency of evidence was wrong and the Panel was wrong to apply the case of *AD* as it did.

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. The Members also considered the possible impact of any appeal on the Registrant and whether there were alternative means available to secure public protection. However, as the case did not proceed past the application to offer no evidence, it was not possible to pursue alternative resolutions other than an appeal.
- 10.3 Taking into account the concerns, 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 Inner House, Court of Session.



Alan Clamp (Chair)

29/03/21

Dated

11. Annex A – Definitions

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

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