

# Section 29 Case Meeting

16 July 2020

157-197 Buckingham Palace Road, London SW1W 9SP



## ***Members present***

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority  
Kisha Punchihewa, Head of Legal (Senior Solicitor), Professional Standards Authority  
Mark Stobbs, Director of Scrutiny & Quality, Professional Standards Authority

## ***In attendance***

Fenella Morris, Counsel, 39 Essex Street Chambers

## ***Observers***

Michael Humphreys, Scrutiny Manager, Professional Standards Authority  
Rachael Martin, Scrutiny Team Coordinator, Professional Standards Authority  
Rebecca Senior, Lawyer, Professional Standards Authority  
Remi Gberbo, Lawyer, 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*<sup>1</sup>).

#### 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 17 July 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]
- Determination of the panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcript of the hearing dated [REDACTED]
- Counsel's Note dated 16 July 2020
- Exhibits
- CE Masters
- The NMC Order 2001
- NMC answers to PSA questions on Covid-19 reviews
- The NMC's Indicative Sanctions Guidance

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<sup>1</sup> CRHP v Ruscillo [2004] EWCA Civ 1356

- 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 s.29 Meeting. The Members considered the response having received legal advice and after they reached a conclusion on the sufficiency on the outcome.

## 8. Background

8.1 The Members were considering the outcome of a substantive review decision to revoke a 12-month suspension order and replace it with a caution order for the remainder of the order (10-month).

8.2 At the substantive hearing in [REDACTED], the registrant was found to have falsified timesheets over 10 months from [REDACTED]. The registrant dishonestly falsified her timesheets by claiming for work she had not done on three occasions: on one occasion she claimed for work that had already been paid for; on seven occasions she claimed a payment rate she was not entitled to; on eight occasions she authorised her shift records when she was not permitted to; on eight occasions she released payments to be made to herself when she knew she should not, these actions were to cover up her deception; on two occasions she queried timesheets that had already been approved in order to claim a higher payment rate and breached the duty of candour by not being honest during her employer's investigation and implicating colleagues.

8.3 The registrant maintained her denials of any wrongdoing through the Trust investigation and unsuccessfully appealed her dismissal by the [REDACTED]. It was only at the substantive hearing that she admitted her dishonesty. The panel found that there was a low risk of repetition based on the registrant's insight and remorse and her addressing financial circumstances and therefore no impairment on public protection grounds. The panel found current impairment on public interest grounds and imposed a 12-month suspension order without a review.

8.4 The NMC and registrant jointly applied for the review hearing and the NMC has since advised the Authority that the case was selected for review given the impairment finding and sanction were solely on public interest grounds, as part of its response to Covid-19. The NMC submitted that the context of Covid-19 meant the public interest had changed since the substantive hearing. At the review hearing the registrant's representative did not contest continuing impairment but referred to a reference from the registrant's employer asking for the NMC to overturn the suspension to allow her to return to work with Covid-19 patients and suggested a two-year caution could replace the suspension.

8.5 At the review the panel decided to revoke the suspension immediately and replace it with a caution order having effect for the remainder of the original period of suspension (approximately ten months). The panel did not consider that the period of suspension already completed was sufficient to address the public interest. The panel stated that the public interest would now be best

served at a time of national crisis by returning a competent nurse to unrestricted practice.

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:

*What were the panels powers, and did they have the power to impose a caution for less than 12 months since the rules provide that this is the minimum period?*

9.3 The review hearing was carried out under Article 30(2) and (4) of the NMC Order. The powers available to reviewing panels are different depending on whether it is an 'on application' review or a 'standard' review required to be carried out before expiry of the sanction (Article 30(1) only). The NMC guidance on review hearings refers to the possibility that in exceptional cases, an Article 30(1) review panel might decide to use the powers in Article 30(4) to allow amendments to sanction to be made immediately by treating the review as an Article 30(2) 'on application' review. However, the NMC guidance does not generally address how various powers in Article 30(4) may be used in combination to substitute or amend sanctions.

9.4 There appeared to be a contradiction between the provisions at article 29 which sets out that the minimum term for a caution is twelve months. However, it also appeared from article 30 that, if a different sanction were imposed from the one imposed by the previous panel, the length of it could not extend beyond the expiry of the previous sanction. Thus, it appeared that the panel had imposed a sanction to extend for less than twelve months (thus potentially breaching article 29) though possibly complying with article 30.

9.5 The Members noted that conflicting arguments were adopted by the legal assessor and the NMC's representative, who suggested that it might be possible to extend the period of suspension on review and reduce that to a caution to cover the appropriate length. They also noted that there had been previous cases where panels had imposed sanctions for longer than the duration of the original suspension.

9.6 The panel had taken the legal assessor's advice that any sanction imposed should be for the remainder of the suspension order as this was the length of time for which the caution was imposed.

9.7 The Members noted that the powers of the panel were unclear and that generally the courts would be likely to interpret them in the way most favourable to the registrant.

*Was the caution order imposed sufficient to address the public interest?*

9.8 The Members considered the findings of the substantive panel serious and were mindful that at the sanction stage the panel were weighing up between a suspension and striking off order. However, they were also mindful of the

circumstances in which this case was being reviewed and the current health pandemic and NMC's drive to support the emergency situation. With that in mind the Members considered that there could be grounds in which a caution order would address the public interest in allowing a registrant to return to practise given that there were no public protection concerns regarding her practice at the substantive hearing.

- 9.9 However, in this case the Members considered that the seriousness of the misconduct warranted a longer period of caution order than that imposed to fully reflect the substantive panel's findings and the registrant had only served 2-months of the suspension order originally imposed.
- 9.10 Further, the Members considered the panel's reasons for replacing the suspension order with a caution at the sanction stage insufficient. A fuller explanation on how a 10-month caution in place of a 10-month suspension (remaining duration of the original order) would have provided confidence that the panel was approaching the decision making as required by the overarching objectives and not with a view to finding a way to allow this registrant to return to practice.

***Did the panel have sufficient information as to the impact of Covid-19 to enable it rationally to conclude that the public interest was served by allowing the registrant to return to practice?***

- 9.11 The Members noted the circumstances in which this case was reviewed and the date of the review hearing. At the time of the review hearing, [REDACTED], the pandemic was considered to have peaked in the UK, temporary registers were not being heavily relied on and the NHS was coping with the situation. However, the Members also noted that there were no concerns regarding the registrant's clinical practice at the substantive hearing and she was willing to return to practise to help with the pandemic and had the full support of her employer.
- 9.12 Furthermore, the panel had before two references one from Deputy Chief Nurse at [REDACTED] which state that if the suspension were 'overturned' it is planned that the registrant would work in the Emergency Admissions Unit, dealing with Covid-19 patients. The Members also noted that the panel were able to take judicial notice of the current health crisis in the UK.
- 9.13 The Members were satisfied that the panel had sufficient information on which to reach a conclusion that the public interest would best be served by allowing the registrant to return to unrestricted practise.

***Did the panel properly consider the public interest and in particular the impact on public confidence of allowing the registrant to return to practice?***

- 9.14 The Members concluded that it was difficult to determine whether the panel had in fact weighed up the public interest factors properly – upholding professional standards and maintaining. Whilst the Members agreed with the panel's description of the registrant as a 'competent nurse' they were minded that she was a competent nurse whose misconduct had a negative impact on public confidence. The Members therefore considered that the panel should have provided more clarity in their reasons for now imposing a non-restrictive

sanction and how this was adequate in terms of addressing public confidence and interest. The Members also considered that the panel could have gone further in their reasoning and explained the limitations on them in imposing a caution for any longer than the 10-months imposed given their interpretation of Article 30 (5). The Members considered that this would have provided further context in which the panel came to the decision to impose the caution for 10-months.

### **Conclusion on insufficiency for public protection**

- 9.15 The Members concluded that the panel's decision to replace a 10-month suspension order with a 10-month caution order was insufficient to maintain public interest.
- 9.16 The Members were concerned at the lack of reasoning in relation to the panel's interpretation of the NMC Order which determined the length of sanction imposed. They were further concerned by the panel's inconsistent interpretation of the NMC Order with two other review cases held in similar circumstances at which the panels imposed sanctions for longer than the remaining order.
- 9.17 The Members were also concerned that the panel did not give full reasons for their decision to reduce the sanction from a suspension order to the non-restrictive sanction of a caution order and how this upheld the public interest and public confidence given that the previous panel had seriously considered it as engaging its powers to remove the registrant from the register. The Members felt that the 10-month caution order after the short period of suspension did not fully address the seriousness of the original misconduct.
- 9.18 The Members were mindful of the ambiguity in the wording of the NMC Order and the panel's powers at the review hearing as well as the various interpretations put to the panel from the legal assessor and registrant's representative. In the circumstances the Members felt that the panel should have provided a fuller explanation of their interpretation of the Order and what their preference would have been and how this restricted them in terms of the duration of the order imposed.

## **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 considered that it was possible to see how the panel came to interpret the NMC Rules as they did and why they felt they could not impose the caution for longer than 10-months. Whilst the Members did not consider the 10-month caution order adequately addressed the seriousness of the original findings and the panel's reasoning for imposing a caution order and the duration of the order lacking in clarity, considered that there were arguments as to why it

was not appropriate to refer the matter to court in the context of the present pandemic.

- 10.4 Taking into account those considerations, along with advice on the prospects of success, the Members agreed that the Authority should not exercise its power under Section 29 and refer this case to the High Court of Justice of England and Wales.



**Alan Clamp (Chair)**

**10/08/20**

**Dated**

11. **Annex A – Definitions**

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

<b>The Authority</b>	The Professional Standards Authority for Health and Social Care
<b>The Panel</b>	A Fitness to Practise Committee of the Nursing & Midwifery Council
<b>The Registrant</b>	[REDACTED]
<b>The Regulator</b>	Nursing & Midwifery Council
<b>NMC</b>	Nursing & Midwifery Council
<b>The Act</b>	The National Health Service Reform and Health Care Professions Act 2002 as amended
<b>The Members</b>	The Authority as constituted for this Section 29 case meeting
<b>The Determination</b>	The Determination of the Panel sitting on [REDACTED]
<b>The Court</b>	The High Court of Justice of England and Wales
<b>The SG</b>	Regulator’s Indicative Sanctions Guidance