



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

AC-2023-LON-001623  
AC-2023-LON-001626  
LONDON  
AC-2023-LON-001623

THE PROFESSIONAL STANDARDS AUTHORITY  
FOR HEALTH AND SOCIAL CARE

Appellant

- and -

(1) NURSING AND MIDWIFERY COUNCIL  
(2) TRUDY GEORGINA NELMES  
(3) NICHOLAS ROGER PARRY

Respondents

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ORDER BY CONSENT

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**UPON** the Appellant and First and Second Respondents 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 and Third Respondents being Nurses on the register established and maintained by the First Respondent

**AND UPON** the First Respondent's Fitness to Practise Committee ("the Committee") having begun to hear allegations that the fitness to practise of the Second Respondent and Third Respondent was impaired by reason of misconduct ('the proceedings')

**AND UPON** the Committee, on 29 March 2023, having decided to bring the proceedings to a close holding that it would be an abuse of process to continue the proceedings following the accidental loss of the Committee's private notes ('the decision')

**AND UPON** the Appellant having lodged an appeal on 25 May 2023 against the decision of the Committee pursuant to Section 29 of the National Health Service Reform and Health Care Professions Act 2002 (as amended)

**AND UPON** the First and Second Respondents conceding that the appeal should be allowed on the basis of the reasons set out in schedule 1

**AND UPON** there being no engagement in this appeal by the Third Respondent

**IT IS ORDERED THAT:-**

1. The appeal is allowed.
2. The decision is quashed and the proceedings remitted to the Committee with the directions as set out in schedule 2.
3. The First Respondent is to pay the Appellant's reasonable costs of the appeal, to be assessed if not agreed.



Rosalind Foster  
Hill Dickinson LLP  
For the Appellant



Christopher Scott  
Nursing & Midwifery Council  
For the First Respondent



Rebecca Siegle, RCN Legal Services  
For the Second Respondent

Dated: March 2024

### **Schedule 1 – statement of reasons**

The decision of the Committee was wrong, and insufficient to protect the public, for the following reasons:

#### **A. Erroneous Assessment of the Gravity of the Allegations and the Public Interest in Continuing.**

##### *(1) Erroneous Legal Advice.*

1. The legal advice was that the Committee should “... look at the gravity of the charges and assess them against the fact that Mr Parry appears now to have retired from nursing and in the case of Ms Nelmes, that her career is otherwise faultless, both up to these proceedings and subsequent to them, taking into account that she has been under no restriction of her practice and there appear to be very good references or testimonials...”.

It was said that this was a proper way to assess gravity as the ultimate point of the exercise was to protect the public.

2. This was to confuse the gravity of the allegations with the potential outcome of the case, and to invite the Committee to give summary consideration to issues about the potential disposal of any allegations found proven, at the stage when the Committee had been considering the facts of the case only.

##### *(2) The Committee’s Approach*

3. The Committee expressly adopted the Legal Assessor’s advice. In reaching its decision, and in presumed reliance on that advice, it then:
  - a. Shifted from making an assessment of the gravity of the allegations (and the public interest in them being ventilated and determined) to a summary assessment of how they might eventually be disposed of; and in doing so:
  - b. Ignored material aspects of the allegations, including:

- i. In relation to Ms Nelmes, failing to give consideration to the allegation of dishonesty (or, alternatively, show how it had considered that serious issue in its assessment of material factors);
    - ii. In respect of Mr Parry, failing to make any, or any sufficient evaluation of the gravity of the allegations against him and/or placing weight on his statement of his intention to retire, when this was either irrelevant or a matter of very little relevance. Further or alternatively, it failed to show by its reasons how it had dealt with these issues.
  - c. Wrongly giving weight to a matter that was of either no, or very little relevance, namely the fact that “It has never been alleged that the failings by either registrant led to direct harm being caused to a resident”. It was the potential for harm caused by misconduct or poor care on the part of the Registrants (or either of them) and/or dishonesty on the part of Ms Nelmes which was significant.
4. The overall consequence was that the Committee’s assessment of the public interest in the continuation of the proceedings and determination of the allegations against the Registrants was flawed and failed to give sufficient weight to the interests of, and the protection of, the public and patients.

**B. Legal Advice: Confusion of the two limbs of R v Maxwell.**

5. After the Legal Assessor had run through the issues considered relevant to a ‘Category 2’ case by the Court of Appeal in R v Salt [2015] EWCA Crim 662, the legal advice given continued: “*So a lot of matters for you to take into account but, at the end of the day, it comes back probably to the first of those two limbs that were identified in the case of Maxwell*” .
6. This reflected how the case had been argued before the Committee (argument had concentrated on Category 1 or fairness to the Registrants). But it also confused the first and second limbs of R v Maxwell [2011] 1 WLR 1837 and the issue of a fair trial for the Registrants (Category 1) with the issue of protecting the integrity of the hearings system (Category 2).

7. In turn, elements of the Committee's decision reflected consideration of the first issue when making its decision under Category 2. The issue of fairness should have been considered under Category 1 only.

**C. Failure to Give Proper Weight to the Absence of Misconduct or Abuse of Procedural Rules by the Prosecuting Authority, ie the NMC.**

8. The error made by the NMC in this case, the loss of the Committee's papers, was an "administrative error", albeit one with serious consequences. Despite these consequences, it was of a different order than conduct involving an abuse of power or the flouting of Court or other procedural rules and safeguards. This was a significant consideration, particularly in the context of the fact that 'Category 2' cases will be exceptional (see Lord Thomas CJ in R v Norman [2016] EWCA Crim 1564; [2017] 1 Cr App R 8, cited with approval in R v Ahmed and others [2021] EWCA Crim 927, at para 43).
9. The Committee failed to reflect properly on the fact that it was dealing with a 'lesser failing' that should carry less weight in the balancing exercise, or to acknowledge that the absence of any deliberate decision or misconduct was of real significance.
10. Further or alternatively, its reasoning on these matters was inadequate.

**D. Failure to have regard to the reasons for the delay, to date.**

11. The Committee's reasons disclose that it was influenced by the fact that further delay to the proceedings would be likely to mean that they would have taken some 3-4 years to conclude (it stated).
12. However, it failed to consider, or to weigh in the balance, the fact that none of the earlier delay had been caused by failings on the part of the NMC; earlier delays had been due to the absence, from illness, of Mr Parry (and on one occasion, Ms Nelmes), as well as the difficulties with rescheduling that arose as a result.

13. This was a relevant consideration when assessing the impact of delay, as part of the Committee's balancing exercise.

**E. Undue Weight Given to the Efforts needed to Recreate the Lost Information and Consequential Delay.**

14. The Committee placed a strong emphasis, in its Determination, on the time and effort that would be needed to recreate the information lost.

15. The PSA accepts that this was a relevant factor, given the public interest in the efficient use of tribunal time and resources. But the reasons do not set out:

- a. The Committee's assessment of the additional work it would need to do, given that the lapse of time since hearing witnesses meant that it would have to refresh its memory of the transcripts and statements in any event;
- b. The impact of such work on the timetable. The Committee had already set aside 22 and 23 March, 28 March, 29, 30 and 31 March, plus 2 days in October. It then 'lost' 2 days – or the better part of them – on the decision to continue in the absence of Mr Parry and then making its decision on the abuse of process application. However, it had also 'lost' Mr Parry's participation in the proceedings and the NMC had therefore concluded its case. The reasons do not disclose how the Committee assessed the likely delay. Equally, they do not disclose the justification for its reasons for anticipating that the days remaining would be insufficient to conclude the case, and/or that the probability (it found) that the case would continue into 2024;
- c. The evidential basis of the statement in the Determination that: "Having canvassed the parties' availability, this case would, in all likelihood, continue into 2024".

16. In the circumstances, the weight given to the additional time and/or effort was excessive and unbalanced; further or alternatively, the Committee's reasons for its approach were inadequate.

## **Schedule 2– directions**

1. The proceedings brought by the First Respondent against the Second and Third Respondents to be remitted to the First Respondent's Fitness to Practise Committee as soon as reasonably practicable. The First Respondent will use all reasonable and practical efforts to secure the attendance of as many of the original participants and panel members as reasonably practicable.
  
2. The First Respondent to place before the Committee a copy of the consent order and attached schedules and transcripts of the hearings that have been held in relation to the proceedings against the Second and Third Respondents and the evidence that has been considered at those hearings.
  
3. The Committee to resume its consideration of the allegations against the Second and Third Respondents and, after hearing any relevant submissions from the parties and without prejudice to the outcome of any such decisions, to make any appropriate case management arrangements which may include but are not limited to:
  - a. Directions for the expeditious completion of any witness evidence;
  - b. Directions for hearing all or any remaining parts of the proceedings virtually, if fair to do so;
  - c. Consideration of whether the Second and Third Respondents' cases should be severed from each other to allow the expeditious disposal of the case against either or both.
  
4. The Committee may not hear or consider a renewed application to stay proceedings on the same basis as that which led to the decision of 29 March 2023.