



AC-2023-LON-000020

AC-2024-LON-000020

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE PROFESSIONAL STANDARDS AUTHORITY
FOR HEALTH AND SOCIAL CARE

Appellant

- and -

(1) NURSING AND MIDWIFERY COUNCIL
(2) DAVID STEPHEN MOFFATT

Respondents

ORDER BY CONSENT

UPON the parties 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 neither party being a child or protected party and the appeal not being an appeal from a decision of the Court of Protection

AND UPON the Second Respondent being a Mental Health Nurse on the register established and maintained by the First Respondent.

AND UPON the First Respondent's Fitness to Practise Committee ("the Committee") having found not proved Charge 2 of the charges set out in Schedule 1 to this order ("Charge 2")

AND UPON the Committee having decided on 17 October 2023 to impose a 4-year caution order on the Second Respondent (“the Sanction Decision”)

AND UPON the Appellant having lodged an appeal on 21 December 2023 against the decision of the Panel pursuant to Section 29 of the National Health Service Reform and Health Care Professions Act 2002 (as amended)

AND UPON the First Respondent conceding that it was a procedural irregularity for Witness 1 to not have been recalled once an email referred to in their oral evidence was obtained (“Ground 2”).

AND UPON the First Respondent also conceding that the Committee failed to recognise the inherent seriousness of the Second Respondent’s misconduct when assessing sanction, which involved the Second Respondent covertly providing medication to residents, where there was no clinical justification, as well as falsifying patient records, and pressuring colleagues to lie on his behalf (“Ground 3”).

AND UPON the Second Respondent having no objection to the appeal being allowed on the basis of the procedural irregularities referred to above and set out in Schedule 2 to this order.

BY CONSENT IT IS ORDERED THAT:-

1. The appeal is allowed.
2. The Committee’s decision that Charge 2 was not proved is quashed, and substituted with a finding that Charge 2 is proved.
3. The Sanction Decision is quashed and substituted with a suspension order of 6 months. This order is to be reviewed before it expires.
4. The First Respondent must place a copy of this order before the Committee reviewing the suspension order.

5. The First Respondent is to pay the Appellant's reasonable costs in the agreed amount of £5,500
6. There be no order as to costs as between the Appellant and Second Respondent

Dated: 30/07/2024

Signed: *HHJ Jarman KC*

BY THE COURT

Schedule 1

1. The charges before the Panel were as follows:

- (1) *On one or more occasion between 1 August 2020 and 30 September 2020, administered and/or delegated the administration of medication by placing it in the food or drink of one or more Resident listed in Schedule A, who did not have a care plan in place for the administration of covert medication. [Proved]*
- (2) *On an unknown date in September 2020, when informed by Colleague A that he was not qualified to take a vaginal swab of a Resident responded with to the effect of “well I am unit manager and what I say goes”. [Not proved]*
- (3) *On 7 September 2020, left medication due to be administered to Resident A unattended without ensuring its administration. [Admitted]*
- (4) *Following the incident in charge 3,*
 - a. *Having been told by Colleague B that she intended to write in an incident report form that you had put the medication down and walked away, said words to the effect of “don’t write that, you will get me sacked”; [Admitted]*
 - b. *Did not record in the incident report form that you had left medication due to be administered to Resident A unattended; [Admitted]*
 - c. *Recorded in the incident report form that you were giving Resident A his medication immediately before the incident, when you were not; [Admitted]*
 - d. *Recorded in the incident form that you had witnessed an incident where Resident A had punched Resident I, when you had not; [Admitted]*
- (5) *Your actions in relation to charge 4, above, were dishonest in that you intended to conceal the facts in relation to charge 3. [Admitted]*
- (6) *On or around 7 September 2020, shouted at Colleague A when he reported your actions in charges 3 and/or 4 to the Deputy Home Manager. [Not proved]*

Schedule 2

Grounds of Appeal (as conceded)

Ground 2

1. The NMC's failure to recall Witness 1 to discuss the e-mail dated 7 August 2020 was a serious procedural irregularity:
 - a. The 7 August 2020 e-mail arose in the course of oral evidence. However, Witness 1 was not questioned on the content of the email.
 - b. That email provided incontrovertible evidence that a complaint had been made by Colleague A, to his union, about being requested to take a vaginal swab, which he was not trained to do. There was no suggestion that such a request had ever been made by anyone other than the Registrant (and no such suggestion was ever put to Witness 1).
 - c. The e-mail contained a serious allegation, which concerned the Registrant pressuring a colleague to undertake an intimate examination of a vulnerable resident, for which they were not trained.
 - d. There was a serious procedural irregularity by failing to recall Witness 1 after the existing of the email arose in the course of oral evidence.

Ground 3

2. The Panel failed to recognise the seriousness of the misconduct, and their conclusion on sanction was wrong.
3. The Panel failed to recognise the inherent seriousness of the misconduct in this case when assessing sanction. This case concerned a nurse covertly providing medication to residents, where there was no clinical justification, as well as falsifying patient records, and pressuring colleagues to lie on his behalf.
4. The Panel failed to consider a number of aggravating factors which were present in this case, namely:

- a. The misconduct in relation to the administration of covert medication occurred over a number of months, on multiple occasions, and;
 - i. It involved pre-mediated deception;
 - ii. There was an abuse of a position of trust;
 - iii. It was a violation of resident's dignity and right to consent; and
 - iv. It was conduct which put residents at risk of suffering harm.
 - b. In respect of the admitted dishonesty,
 - i. Pressure was placed on colleagues not to be truthful;
 - ii. There was a clear attempt to conceal the misconduct; and
 - iii. There was falsification of clinical records in a clear breach of the duty of candour.
5. 6. These factors substantially elevated the seriousness of the misconduct, and were simply ignored by the Panel.
6. 7. The Panel were wrong to find that the misconduct "*is at the lower end of the spectrum of impaired fitness to practise.*" The NMC's sanction guidance makes clear that:
- Honesty is of central importance to a nurse, midwife or nursing associate's practice. Therefore allegations of dishonesty will always be serious and a nurse, midwife or nursing associate who has acted dishonestly will always be at some risk of being removed from the register.*
7. 8. The behaviour of the Registrant should have raised very serious concerns about his compatibility with remaining on the register.
8. Whilst their reasoning is somewhat opaque, the Panel appear to have placed excessive weight on the mitigating factors, which did not diminish the seriousness of the deception of residents, nor the dishonest conduct. Personal

mitigation is of much less importance in regulatory proceedings, particularly in cases concerning professional standards and maintaining public confidence, and the weight afforded should have been limited.

9. The misconduct in this case, involving dishonesty in respect of clinical record keeping, and deception of vulnerable residents, at the very least, required a period of suspension so as to maintain public confidence in the profession. The sanctions guidance was clearly indicative of this. The decision to impose a conditions of practice order, rather than suspension, was irrational and wrong.