Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
19-26 March 2024
2-3 April 2024

Virtual Hearing

Name of Registrant:	Gilvana Da Silva Nogueira
NMC PIN	99I2615E
Part(s) of the register:	Nurse Sub Part 1 RNA Adult Nurse Level 1 30 September 2002
Relevant Location:	England
Type of case:	Lack of competence
Panel members:	John Kelly (Chair, Lay member) Terry Shipperley (Registrant member) Georgina Foster (Lay member)
Legal Assessor:	Robin Leach (Day 1-2) Marian Gilmore (Day 3-4) Laura McGill (Day 5-8) Gillian Hawken (Day 8-12)
Hearings Coordinator:	Hazel Ahmet
Nursing and Midwifery Council:	Represented by Alban Brahimi, Case Presenter Represented by Mary Kyriacou, Case Presenter
Ms Nogueira:	Not present and not represented
Facts proved:	Charges 1, 2, 3, 4, 5, 6, 7.
Fitness to practise:	**Impaired**
Sanction:	**Suspension Order (12 months)**

Interim order: **Interim Suspension Order (18 months)**

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Ms Nogueira was not in attendance and that the Notice of Hearing letter had been sent to Ms Nogueira's registered email address by secure email 13 February 2024.

Mr Brahimi, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the Allegation, the time, date and that the hearing was to be held virtually, including instructions on how to join and, amongst other things, information about Ms Nogueira's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

In the light of all of the information available, the panel was satisfied that Ms Nogueira has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34.

The panel noted that the Rules do not require delivery and that it is the responsibility of any registrant to maintain an effective and up-to-date registered address.

Decision and reasons on proceeding in the absence of Ms Nogueira

The panel next considered whether it should proceed in the absence of Ms Nogueira. It had regard to Rule 21 and heard the submissions of Mr Brahimi who invited the panel to continue in the absence of Ms Nogueira.

Mr Brahimi submitted that there had been no engagement at all by Ms Nogueira with the NMC in relation to these proceedings and, as a consequence, there was no reason to believe that an adjournment would secure her attendance on some future occasion.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised *'with the utmost care and caution'* as referred to in the case of *R* v *Jones (Anthony William)* (No.2) [2002] UKHL 5.

The panel decided to proceed in the absence of Ms Nogueira. In reaching this decision, the panel considered the submissions of Mr Brahimi and the advice of the legal assessor. It had regard to the factors set out in the decision of *R v Jones* and *General Medical Council v Adeogba* [2016] EWCA Civ 162 and to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Ms Nogueira;
- Ms Nogueira has not engaged with the NMC nor responded to any of the emails sent to her about this hearing;
- Ms Nogueira has not provided the NMC with details of how she may be contacted other than her registered email address or postal address;
- There is no reason to suppose that adjourning would secure her attendance at some future date;
- Four witnesses are due to attend to give live evidence,
- Not proceeding may inconvenience the witnesses, their employer(s) and, for those involved in clinical practice, the clients who need their professional services;
- Further delay may have an adverse effect on the ability of witnesses accurately to recall events; and

- There is a strong public interest in the expeditious disposal of the case, which dates back to 2019.

There is some disadvantage to Ms Nogueira in proceeding in her absence. Although the evidence upon which the NMC relies was sent to her at her registered address, she has made no response to the allegations and will not be able to challenge the evidence in person and will not be able to give evidence on her own behalf. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Ms Nogueira's decisions to absent herself from the hearing, waive her rights to attend, and/or be represented, and to not provide evidence or make submissions on her own behalf.

In these circumstances, the panel has decided that it is fair to proceed in the absence of Ms Nogueira. The panel will draw no adverse inference from Ms Nogueira's absence in its findings of fact.

Details of charge

Details of charge

That you failed to demonstrate the standards of knowledge, skill and judgement required to practise without supervision as a Band 5 nurse at Hampshire Hospitals NHS Foundation Trust in that you:

1. While subject to an informal capability process between 17 September 2019 and 11 October 2019 failed to meet the following objectives:

    a. Communication. **[Proved]**
    b. Patient care. **[Proved]**

c. Discharge planning. **[Proved]**

2. While subject to a supervision plan between 12 October 2019 and 17 March 2020 failed to meet the following objectives:

    a. Communication. **[Proved]**
    b. Clinical and/or general patient care. **[Proved]**
    c. Medications practice. **[Proved]**

3. While subject to supervised practice between 23 March 2020 and 14 June 2020 failed to meet the following objectives:

    a. Communication. **[Proved]**
    b. Clinical care. **[Proved]**
    c. Discharging. **[Proved]**
    d. General patient care. **[Proved]**
    e. Medication. **[Proved]**

4. While subject to a formal capability process between 15 June 2020 and 11 January 2021 failed to meet the following objectives:

    a. Communication. **[Proved]**
    b. Clinical care. **[Proved]**
    c. Role modelling behaviour. **[Proved]**
    d. Medicines management. **[Proved]**
    e. Completion of the medicines management booklet by the end of August 2020. **[Proved]**

5. Did not attend for your shift on 28 Oct 2019. **[Proved]**

6. On one or more occasion(s) arrived late for your shift. **[Proved]**

7. On 6 April 2020, spent an unacceptable amount of time writing up a patient's notes. **[Proved]**

AND in light of the above, your fitness to practise is impaired by reason of your lack of competence.

Decision and reasons on application for hearing to be held in private

At the outset of the hearing, Mr Brahimi made a request that this case be held in private on the basis that proper exploration of Ms Nogueira's case involves matters regarding her health. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

The panel determined to go into private session in connection with Ms Nogueira's health as and when such issues are raised in order to protect her privacy.

Background

The charges arose whilst Ms Nogueira was employed by Hampshire Hospitals NHS Trust [the Trust] as a band 5 registered nurse. Ms Nogueira was employed in the Diagnostics and Treatment Centre [DTC]; a unit dealing predominantly with day case patients, booked in for investigative procedures.

It is alleged that In May 2019 following a period of absence from work due to sickness, that Ms Nogueira's behaviour at work became of concern, specifically with regard to her ability to perform her job. [PRIVATE]

[PRIVATE]

Ms Nogueira was placed on a lengthy period of performance management which concluded in January 2021.

Decision and reasons on facts

In reaching its decisions on the facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Mr Brahimi on behalf of the NMC.

The panel drew no adverse inference from the non-attendance of Ms Nogueira.

The panel was aware that the burden of proof rests on the NMC, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that a fact will be proved if a panel is satisfied that it is more likely than not that the incident occurred as alleged.

The panel heard live evidence from the following witnesses called on behalf of the NMC:

- Witness 1: Band 6 Deputy Sister at the DTC.

- Witness 2: Band 7 Sister at the DTC.
- Witness 3: Band 7 Sister at the DTC.
- Witness 4: Band 8 Matron of the DTC.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the witness and documentary evidence provided by the NMC.

Mr Brahimi submitted the following:

> *'The Panel has been presented with evidence that supports this Registrant being subject to different forms of competence intervention. This included an informal stage, a supervision plan, supervised practice and then also a formal capability process. It can be taken that at each stage, she demonstrated a lack of competence. This is submitted because she would have not progressed or have been escalated to a further stage, if indeed she showed competence at earlier stages. All stages were closed off unsatisfactorily and this can be concluded by way of her eventually being dismissed on grounds of "sustained underperformance".*
>
> *Within each of these stages, the Panel has heard that she was subject to particular objectives that she was required to meet (before proceeding to another stage). Overall this included communication, clinical care, patient care, role modelling behaviour, medicines management (including a medicines management booklet), discharging and other areas such as punctuality. The Panel has been presented that these remained areas of concern and these are supported by the Performance Improvement Plan(s) (PIP), in particular the review sections in red.*
>
> *In such cases of competence, there is often a question of whether the Registrant understood of what was expected of her. The NMC submit that her English was of*

no such concern, particularly where witnesses described her as speaking "perfect English". [PRIVATE] Rather, the focus should reasonably be as to whether or not she showed the required competence.

Conclusion;

The Panel is reminded that the test in such cases is that of the balance of probabilities. There is no live evidence for the Registrant and an insufficient response is seen in the Registrant's response bundle. Beyond their examination in chief, the NMC witnesses have also been examined by the Panel and it is submitted that tested evidence carries greater weight than statements alone. In this case the Registrant has failed to meet the objectives set out in each of the stages of plans and has failed to demonstrate the required standards of knowledge, skill and judgement to practice without supervision. The NMC submit that the evidence put collectively put forward, support these charges as being found proven in their entirety.'

The panel then considered each of the charges and made the following findings.

Charge 1

1. While subject to an informal capability process between 17 September 2019 and 11 October 2019 failed to meet the following objectives:

a. Communication.
b. Patient care.
c. Discharge planning.

This charge is found proved.

The panel considered charges 1a, 1b, and 1c together. In finding this charge proved, the panel took into account exhibit JW/3, a letter produced on 17 September 2019, which communicated a summary of a meeting which took place between Witness 2 and Ms Nogueira earlier that day. The letter identified three key areas of performance which Ms Nogueira needed to improve, namely communication, patient care and discharge planning. Witness 2 states in her written evidence:

'I told her that I needed to see an improvement in the next three weeks in her communication, patient care and discharge planning.'

Furthermore, the panel took into account an email from Ms 1, who was a Deputy Sister on the DTC, written on 27 September 2019 to Witness 2, in which she explained her concerns with Ms Nogueira's discharge planning. Ms 1 stated;

> *'I went on my break and at this point there were 2 flexi patients to discharge […] [Ms Nogueira] agreed to discharge them'* […] *'30 minutes later, she was still staring at the computer at the log in screen'* […] *'Both patients came to me to complain about the delay in discharge and I discharged them myself'.*

Ms 1 stated that this instance was merely;

> *' […] one minor example from a day strewn with odd behaviours and the inability to have coherent conversations about patient care.'*

The panel noted that Ms Nogueira delayed important patient matters which led to both complaints, and delays. It concluded that there is no evidence of subsequent improvement in Ms Nogueira's practice, even after efforts had been made to create an informal development/supervision plan, [PRIVATE]. Ms 1 states in her email;

‘I have tried to talk to Gil several times and she always says she is feeling fine and doesn’t think there is a problem. However she does frequently repeat herself about there being “too many changes” in a way that makes me question [PRIVATE].’

The panel heard evidence from Witness 2, that during the period of informal capability, between 17 September 2019 and 11 October 2019, Ms Nogueira did not achieve the objectives set for her, all of which were within her role as a Band 5 registered nurse. The panel had regard to a supervision plan dated 11 October 2019 and noted that it was produced as a consequence of Ms Nogueira’s failure to achieve her objectives and her willingness to engage with the informal capability process during the period.

The panel therefore find Charge 1, proved.

Charge 2

2. While subject to a supervision plan between 12 October 2019 and 17 March 2020 failed to meet the following objectives:

a. Communication.
b. Clinical and/or general patient care.
c. Medications practice.

This charge is found proved.

The panel had access to a number of documents, including the supervision plan dated 11 October 2019, five daily supervision records dated between 21 October 2019 and 8 November 2019, and five letters summarising meetings or phone calls with Ms Nogueira between 8 November 2019 and 17 March 2020. The panel also had regard to two emails dated 18 October 2019 and 16 November 2019 sent from Witness 1 to Witness 2 giving examples of Ms Nogueira’s poor performance on those dates.

In the first email, Witness 1 said that Ms Nogueira presented;

> *'no forward thinking, no instigation of care and poor communication'.*

Witness 1 further gave details on how Ms Nogueira failed to provide the correct method of discharge for a patient who was suffering with Chronic Obstructive Pulmonary Disease (COPD) and asthma.

In the second email Witness 1 stated;

> *'Friday she [Ms Nogueira] managed to avoid all discharges, which I did to enable the flow of patients. I know this isn't effective with me doing her work, but no one would go home, and we would not get the patients through in a timely manner […] I was off the ward on my break at 17:30pm and the lung biopsy patient came to the desk and asked Gil to discharge her as she had been waiting a while. She [Ms Nogueira] said to the patient to wait for me to come back from my break and I could do it.'*

Witness 1 added;

> *'She [Ms Nogueira] cannot make decisions, she won't do any work, she will not give medications, patients will not be discharged and essentially the other nurse working with her will do all the work.'*

According to a supervision record dated 21 October 2019, problems were identified with Ms Nogueira's communication in that she failed to hand over salient information to the nurse taking over from her. Ms Nogueira was responsible that day for 4 patients who were due for discharge, and by the end of her shift, the record shows that she had failed to prepare them for discharge. Ms Nogueira needed to be prompted to administer medication to her patients. When handover was over, Ms Nogueira was said to have admitted that

she was not listening to matters relating to the last patient, and as a consequence, certain sections of this handover needed to be repeated.

Furthermore, the panel noted a daily supervision report from 25 October 2019, identified that Ms Nogueira arrived 10 minutes late at the start of the shift, thereby missing the start of the hand-over. On this date, Ms Nogueira also needed to be prompted to ensure her patients were up and washed and that patient observations were taken, National Early Warning Signs (NEWS) charts were recorded correctly, and intravenous drugs given.

The daily supervision record for 28 October 2019 recorded that Ms Nogueira had failed to attend her shift on that day.

The panel noted in the oral evidence of Witness 2, she said that she had attempted to communicate with Ms Nogueira regarding the outcome of a daily supervision on 7 November 2019, however Ms Nogueira became angry and refused to converse.

The panel noted Witness 2's written evidence in which she stated;

> *'I have recorded that a patient was left waiting for an hour and a half for analgesia after requesting it from Gil.'*

Witness 2 further stated that Ms Nogueira was asked to do a bladder washout on a patient but did not do so.

The panel noted that during this period there were some positive comments recorded in the contemporaneous documents, however, there was no consistency. Ms Nogueira was said to have not communicated effectively and expressed anger.

As a consequence of ongoing concerns about Ms Nogueira's capability to perform her role as a Band 5 registered nurse, the Trust decided to invoke special leave under the Trust's Leave Policy which required Ms Nogueira to stay away from work, on full pay, until further

notice. This special leave was reviewed and extended and included a period of annual leave. The purpose of the special leave was for Ms Nogueira to seek medical advice and/or support and to reflect on her performance and development needs. Witnesses confirmed in oral evidence that Ms Nogueira did not use the period of special leave for these purposes, and she maintained that there were no problems with her workplace performance.

The panel noted that during this period, Ms Nogueira was unable to work towards the objectives in her supervision plan, as she was not present at work between 3 December 2019 and 23 March 2020.

On her return to work, Ms Nogueira entered a period of supervised practice in order to demonstrate improvement in the objectives previously outlined.

Having had regard to all of the oral, documentary and contemporaneous evidence, the panel found charge 2a, 2b, and 2c proved.

Charge 3

3. While subject to supervised practice between 23 March 2020 and 14 June 2020 failed to meet the following objectives:

a. Communication.
b. Clinical care.
c. Discharging.
d. General patient care.
e. Medication.

This charge is found proved.

The panel noted that Ms Nogueira returned to work on 23 March 2020. Having been assessed by her supervisors and managers as failing to meet the objectives of her supervision plan between 12 October 2019 and 17 March 2020, Ms Nogueira entered a period of supervised practice between 23 March 2020 and 14 June 2020 aimed at improving her competence across skill areas relevant to her role.

The panel had regard to the supervised objectives, JW/15 set for Ms Nogueira to cover the period of supervised practice and set out in a plan (the Plan). The plan included communication, clinical care, discharging, general patient care, and medication management. It set out Ms Nogueira's specific development needs, objectives to be achieved, and the evidence that she may show to demonstrate achievement of these objectives.

The plan and objectives were dated 27 February 2020, as Ms Nogueira was initially due to return to work on that date. However, following her failure to attend two meetings, she did not return to work until 23 March 2020.

The panel considered Witness 2's written and oral evidence, in which she confirmed that Ms Nogueira's period of supervised practice was extended until 11 May 2020 in order to provide her with more time to complete the competencies. This extension of time was also due to the fact that the ward environment had changed due to the COVID-19 Pandemic and Ms Nogueira had returned to work on a phased return, therefore, had reduced hours. The panel further considered Witness 2's evidence, that Ms Nogueira had failed to achieve the objectives required of her, even within the extended time frame provided. Witness 2 stated in her written evidence;

> *'Gil had achieved some of the competencies but not all of them; that she was not fully engaged in meeting her objectives; that she could not work independently; and that she refused to administer medication of all sorts.'* She further submitted that *'Gil had been very argumentative, rude, and difficult to work with'* highlighting that

Ms Nogueira had failed to change a patients dressing and discharge them when required.'

The panel noted the content of three emails sent to Witness 2, each of which gave contemporaneous examples of Ms Nogueira's poor performance in the workplace.

The first email dated 24 May 2020, sent by Ms 2, the Endoscopy Deputy Sister, to Witness 2, described a meeting which took place with Ms Nogueira that day. Ms 2 highlighted the following:

'Further to my email on Friday. I have spoken with Gil. I asked her to come to your office with me, where I gave us both a chair to sit down. Gil refused to sit, even after asking twice if she would kindly take a seat, she told me she would stand. I initiated the conversation by saying that we had unfortunately had a complaint from a patient and I wanted to get to the bottom of it while it was still an informal complaint. I explained which patient it was and what the complaint was. Gil responded by raising her voice and getting angry with the situation. She said it "could be a language barrier" and that "it is fine she will not care for the patient anymore". I agreed with Gil that this would be the first step and that I would take over the patients care.'

She further stated:

'During the conversation Gil became very frustrated, she would not sit down and instead stood over me in my chair, she gets very angry. Although I spoken very calmly and fairly with her, she still continues to talk over me, not listen and repeat herself, getting more and more frustrated. I feel that it is not beneficial to have conversations on my own with her as her mannerisms are quite threatening.'

The second email, also dated 24 May 2020 from Ms 2 to Witness 2, gives a further example of Ms Nogueira failing to administer medications in line with the requirements of the Trust.

The third email dated the 26 May 2020 from Ms 3 [Senior Breast Clinical Nurse Specialist] to Witness 2, describes Ms Nogueira's behaviour during the preceding 6 weeks whilst working alongside her. Ms 3 observed the following;

> *'I have observed inappropriate behavioural outbursts towards her senior colleagues, with threats of leaving the shift and going off sick which then did not amount to anything, and making other members of staff very uncomfortable.*
>
> *I have witnessed a lack of understanding and insight of a patients point of view, with no consideration for the fact that they are not the professional and should not be expected to have all the information or understanding that the nurse has. I had to get involved in this situation as the patient was very upset and annoyed and reported that the nurse 'Gill' got annoyed when he questioned her, as he did not understand. He was worried that he had upset her. I spent time talking through things with this gentleman, I then spoke with Gill and tried to get her to see it from the patients point of view. I then spoke with the gentleman again to advise of what I had gleaned from the situation and was able to clarify things for him. Gill also went and spoke with him to explain things I believe.'*
>
> Finally, the panel considered a file note produced by Witness 3 covering the period between 6 April 2020 and 3 May 2020 giving contemporaneous examples of Ms Nogueira's poor performance. These file notes related to the five areas mentioned within Charge 3. The file note stated*;*
>
> *'Gil […] didn't want to speak to them [patient] and said she didn't know what was going on.'* The file note further made clear that, when given advice on how to administer an injection, Ms Nogueira *'became very animated and argumentative'.*

Consequently, given all of the cogent evidence, detailed contemporaneous documents and consistency between the accounts of witnesses in oral and written evidence, the panel find Charge 3 proved in its entirety.

Charge 4

4. While subject to a formal capability process between 15 June 2020 and 11 January 2021 failed to meet the following objectives:

a. Communication.
b. Clinical care.
c. Role modelling behaviour.
d. Medicines management.
e. Completion of the medicines management booklet by the end of August 2020.

This charge is found proved.

Having been assessed by her supervisors and line managers as failing to achieve the objectives set for her during her period of supervised practice, Ms Nogueira was informed that matters were to be managed under the Trust's management of capability policy. A performance improvement plan dated 28 June 2020 was formulated by Witness 2. This set out Ms Nogueira's developmental needs under headings of communication, leadership and role modelling behaviour, and medicines management. This plan described Ms Nogueira's existing behaviours, objectives to be achieved, and the evidence that Ms Nogueira may wish to demonstrate to indicate achievement of objectives.

The panel took into account 14 Performance Improvement Plan (PIP) reviews carried out by three different senior nurse colleagues, namely, 3 reviews provided by Witness 3, 8 provided by Witness 1, and 3 provided by Witness 4, dated between 24 June 2020 and 27

December 2020. The PIP reviews also included clinical patient care and discharge planning.

The panel considered the PIP review from 27 August 2019, which stated;

> *'Gil is still continually late for shift and requiring a second hand over as misses the majority of this.' […] 'If Gil does not know something she will clearly say she will not do it and that is it.' […] 'Still needs prompting to get her patients up and ready to go home in the mornings so we can create the beds for the elective patients that are coming in that day.'*

With regard to the medicines management handbook, it was stated *'Gil has not completed this and states she does not feel she needs to.'*

The record of the PIP review carried out on 22 December 2020 by Witness 4 noted that;

> *'[Ms Nogueira] remained standing throughout the hour-long meeting'* and told Witness 4 that she *'does not know why she is here [in the meeting]'* and she *'does not understand what the problems are with her'.* The record notes: *'Gil does not think there is any issue with her communication and feels that she does not need to change the way that she communicates with people, and it is their problem if they don't like the way she is.'*

In relation to medicines management, the record indicates that *'there have been reports that Gil would not sign out controlled drugs on the ward when asked.'*

An example of patient care described the doctor requesting that Ms Nogueira undertake a bladder scan, which she failed to do.

The panel acknowledged that Ms Nogueira showed some small improvements at times during this period, however, these were not sustained in the long term. Having regard to

the witness evidence, oral and written, and the extensive contemporaneous records before it, the panel noted that across key competence areas relating directly to Ms Nogueira's role as a Band 5 registered nurse, she consistently failed to achieve and maintain the standards set out as objectives in her performance improvement plan. The evidence shows that Ms Nogueira did not consider herself to be operating below appropriate levels of competence and could see no difficulty with her practice. Throughout this period, Ms Nogueira failed to engage with her line managers, was dismissive of and rude to other staff members and patients and needed prompting to carry out basic nursing tasks.

The panel concluded that, as Ms Nogueira failed to improve in relation to the concerns highlighted in Charge 4, and failed to acknowledge that there was a need to improve, this charge is found proved in its entirety.

Charge 5

f. Did not attend for your shift on 28 Oct 2019.

This charge is found proved.

In reaching this decision, the panel took into account the supervision record dated 28 October 2019, which stated 'Note. Gil did not arrive for her shift today.' Furthermore, this was confirmed by Witness 2 in her oral and written evidence, whereby she also confirmed that Ms Nogueira did not attend work on this date.

Consequently, Charge 5 is found proved.

Charge 6

6. On one or more occasion(s) arrived late for your shift.

This charge is found proved.

In reaching this decision, the panel took into account the oral and written evidence of all four witnesses and contemporaneous documents in this case. The witnesses gave evidence that Ms Nogueira was frequently late and did not offer any explanations for her lateness or make any efforts to improve her performance.

Consequently, Charge 6 is found proved.

Charge 7

7. On 6 April 2020, spent an unacceptable amount of time writing up a patient's notes.

This charge is found proved.

In reaching this decision, the panel noted the written and oral evidence of Witness 3, who was working all shifts with Ms Nogueira between 2 April 2020 and 13 July 2020 in order to provide support and supervision. Witness 3 said in evidence that following a discharge of a patient, Ms Nogueira spent a period of two hours in the treatment room writing the patient's notes. Witness 3 told the panel in oral evidence that the notes should have taken no longer than 10 minutes to complete.

Consequently, the panel found charge 7 proved.

[PRIVATE]

Fitness to practise

Having reached its determination on the facts of this case, the panel moved on to consider whether the facts found proved amount to a lack of competence and, if so, whether Ms Nogueira's fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's ability to practise kindly, safely and professionally.

The panel, in reaching its decision, recognised its statutory duty to protect the public and maintain public confidence in the profession. It bore in mind that there is no burden or standard of proof at this stage, and it therefore exercised its own professional judgement.

The panel adopted a two-stage process in its consideration. First, the panel must determine whether the facts found proved amount to a lack of competence. Secondly, only if the facts found proved amount to a lack of competence, the panel must decide whether, in all the circumstances, Ms Nogueira's fitness to practise is currently impaired as a result of that lack of competence.

The NMC has defined a lack of competence as:

> *'A lack of knowledge, skill or judgment of such a nature that the registrant is unfit to practise safely and effectively in any field in which the registrant claims to be qualified or seeks to practise.'*

Submissions on lack of competence

Mr Brahimi invited the panel to take the view that the facts found proved amount to a lack of competence. The panel had regard to the terms of 'The NMC Code: Professional standards of practice and behaviour for nurses and midwives (2015)' (the Code).

Mr Brahimi submitted that the facts found proved show that Ms Nogueira's competence at the time was below the standard expected of a band 5 registered nurse. He submitted the following:

'Lack of competence

1. It is a matter for the Panel's professional judgement in respect of lack of competence,
however the following authorities may be of assistance:

2. In Calhaem v GMC [2007] EWHC 2006 (Admin) at [39]: Mr Justice Jackson derived
the following five principles from a review of the authorities:

a. (1) Mere negligence does not constitute "misconduct" within the meaning of section 35C(2)(a) of the Medical Act 1983 . Nevertheless, and depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to "misconduct".

b. (2) A single negligent act or omission is less likely to cross the threshold of "misconduct" than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single negligent act or omission, if particularly grave, could be characterised as "misconduct".
c. (3) "Deficient professional performance" within the meaning of 35C(2)(b) is conceptually separate both from negligence and from misconduct. It connotes a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the doctor's work.

d. (4) A single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute "deficient professional performance".

e. (5) It is neither necessary nor appropriate to extend the interpretation of "deficient professional performance" in order to encompass matters which constitute "misconduct".

3. The case of Sadler v General Medical Council [2003] UKPC 59 sets out the purpose
of the assessment of a Panel. Lord Walker of Gestingthorpe, in delivering the judgment
of the Board, said, at [17], that without casting any doubt on the decision in Krippendorf
v General Medical Counsel [2001] 1 WLR 1054, their Lordships felt that the distinction
between competence and performance drawn in that case should not be taken too far:
a. At [17]: 'It is important that any assessment Panel should have proper regard to the complaint or other information which originally set the assessment in motion. But in most cases there is an obvious correlation between competence and performance. Moreover the assessment Panel is concerned, not only with assessing past professional performance, but also with what needs to be done to improve a practitioner's performance, both in the public interest and in the practitioner's own best interests… The purpose of assessment is not to punish a practitioner whose standards of professional performance have been seriously defective, but to improve those standards, if possible, by a process of supervision and retraining, for the protection and benefit of the public. The process of assessment must include forming a view as to the standard of past performance, but if it is to achieve its objectives the process must not be restricted to that sort of backward-looking exercise.'

b. At [62]: 'The professional demands made on a general practitioner are very different from those made on a consultant surgeon. A continuing failure to

organise the efficient management of a general practice may (in a sufficiently bad case) amount to seriously deficient performance, but in the nature of things it must be assessed on very different evidence from that relating to shortcomings of technique in major surgery. It would plainly be contrary to the public interest if a sub-standard surgeon could not be dealt with by the CPP unless and until he had repeatedly made the same error in the course of similar operations. But as a general rule the GMC should not (and their Lordships have no reason to suppose they would) seek to aggregate a number of totally dissimilar incidents and alleged shortcomings in order to make out a case of seriously deficient performance against any practitioner.'

4. In Holton v GMC [2006] EWHC 2960 (Admin) Mr Justice Burnton set the legal test,
namely the standard to be applied was that applicable to the post to which the practitioner had been appointed and the work they were carrying out.

a. At [71]: …Deficiency is to be judged against the standard of his professional work that is reasonably to be expected of the practitioner. Just as the public is entitled to expect a consultant in any area of medical practice to have a higher standard of work than a practitioner of a lower grade, so the public is entitled to expect that the work of a doctor who occupies a post in any specialty is the standard applicable to that post in that specialty. I add that in my view a practitioner who works outside his specialty is liable to be judged by the standard applicable to the level and the speciality in which he works…

b. At [72]: There was no complaint relating to Dr Holton's professional performance in general Paediatrics. The question therefore arises…whether deficiency in part only of a doctor's work can lead to a finding of seriously deficient professional performance. I have no doubt that it can. It is certainly sufficient that that performance is in a significant part of a doctor's work. In the present case, the alleged seriously deficient professional performance was on

any basis in a very substantial part of Dr Holton's work.
c. At [73]: It follows that in my judgment the Panel were right to depart from the standard applied by the Assessors…[T]he Panel had to do their best to identify the standard to be expected of such a practitioner...

5. Mr Justice Burnton concluded that the test is objective [at 74] but that factors external
to and independent of the doctor, such as the pressure of work, any lack of resources,
and professional isolation due to the lack or absence of colleagues, were relevant factors [at 75]. However, the learned Judge also commented that factors such as education, training and personality are irrelevant [at 74] and that professional isolation
due to the practitioner's personality or behaviour is not a factor to be taken into account
[at 75].

Submissions

6. The NMC invite the Panel to take the view that the facts found proved amount to a lack
of competence as the Registrant has failed to demonstrate the standards of knowledge, skill and judgement required to practise without supervision as a Band 5
nurse in the following areas:

a. Communication;
b. Clinical care;
c. Patient care;
d. Medications practice;
e. Discharging;

f. Role modelling behaviour;
g. Completion of medicines management booklet.

7. NMC guidance (Reference FTP-2b) makes clear that "unless it was exceptionally serious, a single clinical incident would not indicate a general lack of competence" on the part of a nurse. Rather there should be evidence to support the following: "Lack of competence would usually involve an unacceptably low standard of professional performance, judged on a fair sample of their work, which could put patients at risk. For instance when a nurse, midwife or nursing associate also demonstrates a lack of knowledge, skill or judgement showing they are incapable of safe and effective practice". In this case there are a wide-ranging set of failed achievements that have occurred over a long period of time, even when she was supervised.

8. In light of the above guidance, the Panel are presented with a Registrant's conduct that has been shown repeated failings that fallen short of what would be expected of a nurse in these circumstances. These failings occurred over a long period of time (2019 to 2021), despite special leave being granted to address any concerns. Failing to achieve objectives around medication is a serious concern, particularly where patients may not receive their required drugs (such as a controlled drug). The Registrant failed to show the correct competence whilst informally observed, partially supervised and entirely supervised. Although training and guidance was provided to the Registrant, there is argument that she refused to accept or acknowledge her mistakes. This presents an attitudinal concern in respect of her practice. Ultimately, her lack of

competence touched on multiple areas of what may be deemed as fundamental requirements in order to practice as a nurse.

9. The NMC say that the following parts of The Code have been breached, but of course
the Panel is able to consider any other parts as it sees fit (note that it is the 2015 version of the Code that applies in this case):

7 Communicate clearly;
8 Work cooperatively;
10 Keep clear and accurate records relevant to your practice;
14 Be open and candid with all service users about all aspects of care and treatment, including when any mistakes or harm have taken place;
19 Be aware of, and reduce as far as possible, any potential for harm associated with your practice;
20 Uphold the reputation of your profession at all times;
21 Uphold your position as a registered nurse, midwife or nursing associate;

10. Overall, the NMC further submits that the Registrant's lack of actions has demonstrated a lack of competence and breached codes above. The public would expect that the profession will have staff that uphold a professional reputation by having the correct knowledge, skill and judgment. The Panel may find that most in breach are that of "7" and "20" above. The Registrant has clearly put into question of
whether she can practice safely if she has failed on numerous occasions to meet objectives. The Registrant has also placed doubt on the effective support that employers offer, giving the impression that they cannot achieve the result that a nurse
corrects their practice, when in fact this cause of issue was down to the lack of competence of this particular Registrant. Overall this will also have an effect on the

public's trust in the medical profession.

11. The NMC therefore invite the Panel to find lack of competence.'

Submissions on impairment

Mr Brahimi submitted the following in relation to impairment:

'Registrant's latest position

12. The Registrant did not attend the substantive hearing or submit sufficient material to
assist the Panel. Therefore, the Panel are not assisted with knowledge of her engagement or conduct post the start of these proceedings. Her lack of engagement
or information as to how she has addressed any outstanding issues will not assist the
Panel when considering impairment.

Impairment

13. Current impairment is not defined in the Nursing and Midwifery Order of the Rules.
However, the NMC as of 27th March 2023, states the following on how to decide on impairment (reference DMA-1):

"The question that will help decide whether a professional's fitness to practise is impaired is: "Can the nurse, midwife or nursing associate practise kindly, safely and professionally?" If the answer to this question is yes, then the likelihood is that the professional's fitness to practise is not impaired".

14. The Panel may be assisted by the questions posed by Dame Janet Smith in her Fifth
Shipman Report, as endorsed by Mrs Justice Cox in the leading case of Council for Healthcare Regulatory Excellence v (1) NMC (2) Grant [2011] EWHC 927 (Admin):

"do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

(i) Has in the past, and/or is liable in the future to act as so as to put a resident or residents at unwarranted risk of harm;
(ii) Has in the past, and/or is she liable in the future to bring the profession into disrepute;
(iii) Has in the past, and/or is she liable in the future to breach one of the fundamental tenets of the profession;
(iv) Has in the past, and/or is she liable in the future to act dishonestly."

15. As further stated at paragraph 74 of Grant, the Panel should:

"consider not only whether the practitioner continues to present a risk to members of
the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined
if a finding of impairment were not made in the particular circumstances.

16. The NMC say that the Registrant is impaired and that the first 3 limbs of Grant are
engaged in this case.

17. The first limb is engaged as a result of the Registrant putting patients in unwarranted
risks of harm. The Panel have accepted the evidence in respect of the charges proven
and it follows that individuals were put at risk of harm where (but not limited to):

a. The Registrant's behaviour had the potential to put patients at risk of harm and this is made more significant where some required particular controlled medication;

b. The Registrant was offered multiple opportunities to address and correct her competence but failed to do so.

18. The second limb is engaged as a result of the Registrant's behaviour, as found proven, plainly brings the profession into disrepute:

a. The Registrant was in band 5 role and in a position of responsibility, where she is supposed to be an example to other nurses. It is unacceptable that any individual engages in such behaviour and repeats it over a period of time. Members of public may lose confidence in whether staff are capable of operating a nurse with the required skill, knowledge and judgment. This could lead to the members of public having fear of attending hospitals where they have serious medical concerns.

19. The third limb is engaged, where the Registrant has plainly breached fundamental
tenets of the profession in numerous areas of the Code of Conduct as referred to above, but in particular:

a. Communicate clearly (7.1 and 7.2);
b. Work cooperatively (8.2 and 8.5);

c. Uphold the reputation of your profession at all times (20.1 and 20.8).

20. As further stated at paragraph 74 of Grant, the Panel should:

"consider not only whether the practitioner continues to present a risk to members of
the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined
if a finding of impairment were not made in the particular circumstances."

21. The NMC submit that there is a serious departure from the standards expected of a
nurse and that the behaviour is incompatible with ongoing registration. The Panel should consider impairment on the following grounds:

22. Public protection

a. While the NMC's case is not that an individual came to harm, the Registrant has demonstrated a real risk of harm with her lack of competence in key areas of practice. It is paramount that a nurse is able to provide correct clinical and general patient care. Beyond this, if the nurse does not have the correct knowledge as to medicines management then this will undoubtedly lead to errors. It is noted that the nurse refused to engage in controlled drug procedures and this presents a real risk to patients if they are delayed or not administered their required drugs. Taking into account the other areas of concern, including communication, discharging, role modelling behaviour and completing medicines booklets, these not only add to a real risk of harm argument but also points towards a real risk of repetition. In respect of the latter, the Registrant was subject to escalating stages of opportunity to demonstrate knowledge and failed to do so. The number of issues took place over different

periods of time despite the intervention of different members of staff. These points support that there are grounds for public protection in finding impairment.

23. Otherwise in the public interest

a. A member of public would be deeply concerned to learn that the medical profession continues to allow a nurse to be on the register where they have failed on multiple occasions to demonstrate the correct knowledge, skill and judgment required of a band 5 nurse. It can be argued that they would feel unsafe and ultimately would lose confidence in the medical profession where a nurse has failed to address a number of areas, despite multiple opportunities to address them. Now that the case has reached the substantive hearing stage, the nurse has not attended and has not provided any material to prove that she has addressed these concerns, and therefore – it would be concerning to the public as to why she would be allowed to continue her practice. As a result of the Registrant's lack of competence, the NMC submit that the confidence and integrity of the medical profession has been challenged and evidently been put into disrepute.

24. As such the NMC invite the Panel to find that the Registrant is currently impaired.'

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments in relation to lack of competence. These included: *Calhaem v GMC [2007] EWHC 2006 (Admin) Holton v GMC [2006] EWHC 2960 (Admin)* and the NMC guidance, in relation to Lack of Competence, in particular section *FTP-2b*.

The legal assessor reminded the panel that lack of competency needs to be assessed using a three-stage process:

- Is there evidence that Ms Nogueira was made aware of the issues around her competence?
- Is there evidence that she was given the opportunity to improve?
- Is there evidence of further assessment?

In relation to Impairment, the Legal Assessor referred the Panel to the relevant guidance and authorities which included*: Council for Healthcare Regulatory Excellence v (1) NMC (2) Grant [2011] EWHC 927 (Admin; Cohen v General Medical Council[2008] EWHC 581 (Admin).*

Decision and reasons on lack of competence

When determining whether the facts found proved amount to a lack of competence, the panel had regard to the Code. The panel determined that the following standards from the Code, were breached:

1.1 *Treat people with kindness, respect and compassion*

1.2 *Make sure you deliver the fundamentals of care effectively*

1.4 *Make sure that any treatment, assistance or care for which you are responsible is delivered without undue delay*

6.2 *Maintain the knowledge and skills you need for safe and effective practice*

7 *Communicate clearly*

8.2 *Maintain effective communication with colleagues*

8.3 *Keep colleagues informed when you are sharing the care of individuals with other health and care professionals and staff*

8.5 *Work with colleagues to preserve the safety of those receiving care*

9.2 *Gather and reflect on feedback from a variety of sources, using it to improve your practice and performance*

9.3 *Deal with differences of professional opinion with colleagues by discussion and informed debate, respecting their views and opinions and behaving in a professional way at all times*

10.1 *Complete records at the time or as soon as possible after an event, recording if the notes are written some time after the event*

13 *Recognise and work within the limits of your competence*

13.2 *Make a timely referral to another practitioner when any action, care or treatment is required*

13.3 *Ask for help from a suitably qualified and experienced professional to carry out any action or procedure that is beyond the limits of your competence*

14 *Be open and candid with all service users about all aspects of care and treatment, including when any mistakes or harm have taken place*

19 *Be aware of, and reduce as far as possible, any potential for harm associated with your practice*

20 *Uphold the reputation of your profession at all times*

20.1 *Keep to and uphold the standards and values set out in the Code*

20.2 *Act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment*

20.3 *Be aware at all times of how your behaviour can affect and influence the behaviour of other people*

20.5 *Treat people in a way that does not take advantage of their vulnerability or cause them upset or distress*

20.8 *Act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to*

22.1 *Keep to any reasonable requests so we can oversee the registration process*

22.3 *Keep your knowledge and skills up to date, taking part in appropriate and regular learning and professional development activities that aim to maintain and develop your competence and improve your performance*

24.1 *Never allow someone's complaint to affect the care that is provided to them'*

The panel bore in mind, when reaching its decision, that Ms Nogueira should be judged by the standards of the reasonable average band 5 registered nurse and not by any higher or more demanding standard.

The panel considered the NMC guidance, in particular section ***FTP-2b***;

> *'Lack of competence would usually involve an unacceptably low standard of professional performance, judged on a fair sample of their work, which could put patients at risk. For instance when a nurse, midwife or nursing associate also demonstrates a lack of knowledge, skill or judgement showing they are incapable of safe and effective practice.*
>
> *Unless it was exceptionally serious, a single clinical incident would not indicate a general lack of competence on the part of a nurse, midwife or nursing associate.'*

In considering Ms Nogueira's competence, the panel took into account whether Ms Nogueira was made aware of the concerns about her practice, was given an opportunity to improve, and whether further assessment of her practice was undertaken.

The panel determined that Ms Nogueira was fully aware of the concerns throughout the four phases of performance improvement that she was subject to between June 2019 and January 2021. The panel noted that although Ms Nogueira was given every opportunity to improve, was subject to supervised practice, and provided a period of special leave, there was limited improvement, and none was sustained.

The panel noted that Ms Nogueira was subject to four separate periods of professional development which ranged from informal development planning to a formalised capability process under the Trust's policy which took place between May/June 2019 and January 2021. This included ongoing assessment and review of Ms Nogueira's progress. The panel therefore considered that this lengthy period of opportunity given to Ms Nogueira, to develop herself professionally, is a fair representation of her work as a band 5 registered nurse.

The panel considered the fact that there were a number of senior registered nurses involved in setting objectives and assessing Ms Nogueira's performance against the objectives given to her during this 18-month period. The panel also noted that advice had been sought from the occupational health department and the human resources department to support the development plans. The panel concluded that Ms Nogueira consistently failed to meet the required objectives, across the four periods.

The panel considered the oral and written witness evidence in this case, alongside the extensive contemporaneous evidence, which shows that Ms Nogueira was continually made aware of the areas of practice in which she lacked competence. Evidence further showed that Ms Nogueira, throughout this period, consistently refused to engage in any meaningful way in the process of improvement whilst denying she had any problems relating to her practice.

The panel noted that the development plans formulated during the four periods of professional development were aimed at providing Ms Nogueira with as much opportunity as possible to improve, to the extent that the plans all included the type of evidence which she may wish to show in order to indicate she was achieving her objectives.

The panel considered the objectives that were set out by Ms Nogueira's supervisors and managers in the various plans which were prepared between May/June 2019 and January 2021. The panel found a consistent approach across all of the senior registered nurses

involved in setting and monitoring these objectives. It also had regard to Ms Nogueira's job description, and to the management report prepared by Witness 4 in January 2021, which overviewed the entire four periods of professional development.

The panel noted Section 6 of the Management Report, in which Ms Nogueira's lack of competence and failure to achieve objectives are related directly back to the relevant aspects of her job description, as follows:

> *'To support the team in the delivery of the service, this includes:*
>
> *• High standards of Professional Practice to ensure quality and safety of patient care, experience and the patient journey;*
> *• Developing own clinical practice, knowledge, skills and experience;*
> *• Acting as a good role model;*
> *• Supporting the team in ensuring that clinical services are delivered to a high quality of care and that all compliance requirements such as CQC and contractual requirements are achieved;*
> *• To undertake the comprehensive assessment of patients using investigative and analytical skills where factors may be conflicting, requiring analysis and interpretation skills and the comparison of a range of options to achieve effective treatment or discharge planning check;*
> *• To develop clinically reasoned treatment, action and discharge plans and to undertake and evaluate treatment'*

The panel had regard to the body of evidence introduced at stage 1 of the hearing, the areas of the Code breached by Ms Nogueira, her failure to demonstrate and sustain meaningful achievement of objectives and her refusal to engage in the process. The panel concluded that Ms Nogueira's practice is below the standard that is expected of a band 5 registered nurse in her role.

In all the circumstances, the panel determined that Ms Nogueira lacked competence.

Decision and reasons on impairment

The panel next went on to decide if as a result of the lack of competence, Ms Nogueira's fitness to practise is currently impaired.

In coming to its decision, the panel had regard to the Fitness to Practise Library, DMA-1, updated on 27 March 2023, which states:

> *'The question that will help decide whether a professional's fitness to practise is impaired is:*
> *"Can the nurse, midwife or nursing associate practise kindly, safely and professionally?"*
> *If the answer to this question is yes, then the likelihood is that the professional's fitness to practise is not impaired.'*

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

The panel bore in mind that this was a competence case, nevertheless, had regard to the judgment of Mrs Justice Cox in the case of *CHRE v NMC and Grant*.

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's test which reads as follows:

> *'Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her/their fitness to practise is impaired in the sense that S/He/They:*

a) *has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*

b) *has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*

c) *has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or;*

d) *[…]*

The panel found that patients were put at risk as a result of Ms Nogueira's lack of competence. The extent of Ms Nogueira's failure to achieve the required standards of competence and her attitude towards attempts to help her do so, including her conduct towards other staff members and patients brought the profession into disrepute. It was satisfied that confidence in the nursing profession would be undermined if its regulator did not find that Ms Nogueira's practice is currently impaired.

The panel determined that throughout the development process between June 2019 and January 2021, Ms Nogueira failed to demonstrate any insight into her professional shortcomings nor any willingness to strengthen her practice. Indeed, her behaviour was such that she actively resisted engaging in the process and demonstrated a poor attitude towards those seeking to help her.

The panel considered that, although remediation is possible in this case, it has seen no evidence of Ms Nogueira developing her insight or strengthening her practice during the intervening period. The panel were of the view that, if Ms Nogueira were to practise unrestricted, her conduct would be highly likely to be repeated.

Consequently, as to the future and having regard to the risk of repetition, the panel determined that the first three limbs of the Grant test are engaged.

The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health safety and well-being of the public and patients, and to uphold/protect the wider public interest, which includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

The panel determined that, in this case, a finding of impairment on public interest grounds is also required. It concluded that a well-informed member of the public would expect a registered nurse who has presented no evidence of remorse, insight or improvement, and facing such allegations relating to a lack of competence, to have their practise found to be impaired.

The panel determined that Ms Nogueira is unable at this stage to practice kindly, safely, or professionally.

Having regard to all of the above, the panel was satisfied that Ms Nogueira's fitness to practise is currently impaired.

Submissions on sanction

Mr Brahimi informed the panel that in the Notice of Hearing, dated 13 February 2024, the NMC had advised Ms Nogueira that it would seek the imposition of a 12-month suspension order given that it found Ms Nogueira's fitness to practise currently impaired.

Mr Brahimi submitted the following:

‘1. The Panel have now reached a stage of finding a lack of competence in respect of the Registrant’s behaviour and have concluded that fitness to practice is currently impaired. The Panel should therefore consider what sanction is appropriate to address:

a. The proven charges (in their entirety) regarding a lack of competence.

2. The Panel should first take into account relevant factors before deciding on sanction, as set out by the NMC Fitness to Practice Library guidance SAN-1:

3. Proportionality

a. Finding a fair balance between Registrant’s rights and the overarching objective of public protection;

b. To not go further than it needs to, the Panel should think about what action it needs to take to tackle the reasons why the Registrant is not currently fit to practise;

c. The Panel should consider whether the sanction with the least impact on the nurse practise would be enough to achieve public protection, looking at the reasons why the nurse isn’t currently fit to practise and any aggravating or mitigating features.

4. Aggravating features

a. Band 5 position of responsibility;
b. Multiple examples in a lack of competence;
c. Significant period of time lacking competence;
d. Required the involved of several members of stuff and stages;

e. Refusal to accept help to address possible underlying issues;
f. Further observations:

i. No improvement despite extensive support;
ii. Lack of engagement in regulatory process (these proceedings);
iii. Issue relate to basic fundamentals of nursing.

5. Mitigating features

a. First and only referral to the NMC;
b. Registrant has been qualified since 30th September 2002;
c. Covid-19 was a major impact throughout this period.

6. Previous interim order and their effect on sanctions

a. Subject to an ISO since 15th September 2021 (extended twice by HC).

7. Previous fitness to practice history

a. None.

Sanctions available

8. NMC submit that taking no action and a caution order are not suitable options for this case due to the number and variety of concerns. Guidance is found at SAN-3a and 3b.

a. Taking no action: this would not be an appropriate course of action as the regulatory concern of lack of competence is serious when considering the multitude of failing. The public protection and public interest elements in this case are such that taking no action would not be the appropriate response;

b. Caution Order: similarly, a Caution Order is also not suitable as this is a sanction aimed at concerns that are at the lower end of the spectrum. In this case the concern involved multiple instances of lack of competency. Given the concerns, a more effective sanction is required.

9. With regards to a conditions of practice order (COPO), the NMC submit that this option does not adequately address and reflect upon the number of breaches in this case. NMC guidance is found at reference SAN-3c.

a. It is always difficult to formulate or consider such conditions that effectively deal with lack of competence where there is an attitudinal problem regarding participation and acceptance of mistakes.

b. The level of concern in this case would require a higher level of sanction than a COPO. The guidelines refer to "When conditions of practice are appropriate" and the Panel may find that these conditions are not met – in particular taking into account "no evidence of general incompetence".

c. Measurable, workable and appropriate conditions could be put into place to address instances such as clinical failures, however, a COPO would not suitably address this situation given that effectively, the Registrant has already had these chances through various forms of internal intervention. The Registrant failed to meet her objectives over a significant period of time.

d. Despite there being identifiable areas of practice that the Registrant needs to work on she has not indicated that she would adhere to conditions and given the communication issues there does appear to be some underlying attitudinal issues that need to be addressed.

10. The NMC submit the Registrant's actions do warrant a suspension order (SO) and this would be a sufficient sanction. Suspension guidance is found at reference SAN-3d, and includes some of the following (but not limited to):

a. "Key things to weigh up before imposing this order include:
• whether the seriousness of the case require temporary removal from the register?

b. "Use the checklist below as a guide to help decide whether it's appropriate or not. This list is not exhaustive:
• a single instance of misconduct but where a lesser sanction is not sufficient"

c. The seriousness of the regulatory concerns does warrant a temporary removal from the Register; however, the Registrant's actions are not isolated but in fact a pattern of lack of competence where she initially refused help and then went on to fail objectives as help was offered.

d. A suspension order will address the concerns in this case and proportionately provide for an appropriate response to such serious charges. The NMC guidance in relation to suspension states that in cases where the only issue relates to the nurse's lack of competence a suspension would be appropriate if there is a risk to patient safety if the Registrant was allowed to continue to practise even with conditions.

i. Going forward, if the Registrant were to start engaging and provide insight and reflection in relation to the allegations, it may be that a future reviewing panel could find that concerns can be addressed through conditions but without a willingness to adhere to conditions and reflection from the Registrant, the appropriate sanction remains as a suspension. A suspension period would provide the Registrant with time to reflect and express a willingness to engage with the NMC, as well as giving an assurance that she wants to move forward to work towards returning to safe practice. The Registrant's only update is: "Our member is not working at the

moment but has been offered a job with Spire Healthcare at Clare Park, the former employer is North Hampshire Hospital".

11. The NMC submit that a striking-off order is not appropriate in this case. The Panel may be assisted by guidance provided at reference SAN-3e. Such an order is not possible due to the Registrant being impaired by lack of competence only.

Sanction request:

12. The concerns in this case may be described as being attitudinal in nature. For all the reasons previously argued, the NMC submit that the appropriate sanction is a:

12-month Suspension Order

13. The NMC have sought to assist the Panel by going through each of the possible sanctions and when weighing the evidence against the set guidance, it is justified that there be a suspension order. Lack of competence is difficult to remediate when presented in multiple areas. There is a limited response and the Panel may be of the view that she should have provided significant, up-to-date and persuasive material showing that she has recognised her errors and corrected them. This sanction would reflect that the conduct of the Registrant has been properly addressed and maintain trust with the public that the NMC do take such allegations seriously and will take swift and appropriate action.

14. The NMC respect that the Panel is entirely at liberty to proceed as they deem most suitable for this case.

Interim order under Rule 24 (14) to cover possible appeal

15. Should the Panel make an order as to sanction beyond that of a caution, the NMC would invite that there be an interim order for a period of 18 months. The type of interim order requested is the same as the request for sanction above, unless the request was for a striking-off order, in which case a suspension order would be the next appropriate alternative to cover an appeal period. The Panel will appreciate that the decision on sanction will not take effect until at least 28 days. The period of 18 months would therefore be sufficient should an appeal be lodged by the Registrant. The request and grounds argued for why an interim order is required would be the same as those previously presented at the impairment stage. Having no interim order would not be reflective of a finding that a sanction is required, beyond a caution.'

The panel heard and accepted the advice of the legal assessor.

Decision and reasons on sanction

Having found Ms Nogueira's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. The panel bore in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel took into account the following aggravating features:

- The charges found proved in this case do not relate to a single incident;
- The concerns in this case were continuous for a long period of time;
- Ms Nogueira was given ample opportunity to improve her practice but did not do so;
- Ms Nogueira's lack of competence had ramifications for the workload and responsibilities of a number of members of staff, matrons and sisters on the ward;

- Ms Nogueira's lack of insight throughout this entire process within the Trust, and subsequently with the NMC;
- Patients were put at risk of harm due to the actions of Ms Nogueira;
- Ms Nogueira showed attitudinal problems which impacted her work colleagues.

The panel also took into account the following mitigating features:

- Ms Nogueira was practising for a period of 17 years without any concerns raised against her practice.

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, and the public protection issues identified, an order that does not restrict Ms Nogueira'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 Ms Nogueira's lack of competence 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 Ms Nogueira'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 took account of the Sanctions Guidance, in terms of the features that may make a conditions of practice order appropriate, in particular:

- *No evidence of harmful deep-seated personality or attitudinal problems;*

- *Identifiable areas of the nurse or midwife's practice in need of assessment and/or retraining;*
- *No evidence of general incompetence;*
- *Potential and willingness to respond positively to retraining;*
- *The nurse or midwife has insight into any health problems and is prepared to agree to abide by conditions on medical condition, treatment and supervision;*
- *Patients will not be put in danger either directly or indirectly as a result of the conditions;*
- *The conditions will protect patients during the period they are in force; and*
- *Conditions can be created that can be monitored and assessed.*

The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case. The panel highlighted that Ms Nogueira was under a level of observation and supervision for a long period of time, and yet her practice did not improve. The panel noted that given her attitude over four periods of professional development from May 2019 to January 2021, it would be unlikely that Ms Nogueira would engage and comply with conditions if they were to be placed on her practice. Consequently, the panel concluded that the placing of conditions on Ms Nogueira's registration would not adequately address the seriousness of this case and would not protect the public.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG 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;*

- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour;*
- *In cases where the only issue relates to the nurse or midwife's health, there is a risk to patient safety if they were allowed to continue to practise even with conditions; and*
- *In cases where the only issue relates to the nurse or midwife's lack of competence, there is a risk to patient safety if they were allowed to continue to practise even with conditions.*

The panel was satisfied that in this case, Ms Nogueira's lack of competence was not fundamentally incompatible with remaining on the register. The panel noted that some of the above features are not present in this case.

Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction.

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 standard required of a registered nurse. The panel noted the attitudinal concerns in Ms Nogueira's case and determined that a suspension order would be appropriate by giving Ms Nogueira time to reflect on her behaviour towards colleagues and patients.

The panel determined that a suspension order for a period of 12-months was appropriate in this case to mark the scope of Ms Nogueira's lack of competence. The panel was mindful that Ms Nogueira has been on an interim suspension order since 2021 but determined that given the level of her lack of competence, a suspension order for a further period of 12-months, remains appropriate so as to afford her time to reflect and begin the necessary remediation.

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.

Any future panel reviewing this case would be assisted by:

- Evidence of insight and remorse by Ms Nogueira into her failings;
- Evidence that Ms Nogueira has refreshed her professional knowledge and completed reading surrounding the concerns raised against her;
- Any other evidence of strengthened practice that Ms Nogueira may wish to submit to the panel.

Interim order

As the suspension order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in Ms Nogueira's own interests until the suspension sanction takes effect.

The panel heard and accepted the advice of the legal assessor.

The panel took account of the submissions made by Mr Brahimi, as inserted above.

Decision and reasons on interim order

The panel was satisfied that an interim order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. The panel therefore imposed an interim suspension order for a period of 18 months.

If no appeal is made, then the interim suspension order will be replaced by the substantive suspension order 28 days after Ms Nogueira is sent the decision of this hearing in writing.

This will be confirmed to Ms Nogueira in writing.

That concludes this determination.