Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
Monday, 8 – Friday, 12 April 2024

Virtual Hearing

Name of Registrant:	**Ejiro Efe Bourdillon**
NMC PIN	13E2939E
Part(s) of the register:	Nurses part of the register Sub part 1 RNMH: Mental health nurse, level 1 (18 January 2014)
Relevant Location:	Middlesborough
Type of case:	Misconduct
Panel members:	Anne Ng (Chair, lay member) Anne Murray (Registrant member) Jane McLeod (Lay member)
Legal Assessor:	Angus Macpherson
Hearings Coordinator:	Franchessca Nyame
Nursing and Midwifery Council:	Represented by Beverley Da Costa, Case Presenter
Mr Bourdillon:	Present and represented by Silas Lee, instructed by the Royal College of Nursing (RCN)
Facts proved:	Charges 1b, 1d, 1e, 1f, 1g, 1h
Facts not proved:	Charges 1a, 1c, 2
Fitness to practise:	Impaired
Sanction:	**Conditions of practice order (12 months)**
Interim order:	**Interim conditions of practice order (18**

months)

Detail of charges

That you, a registered nurse:

1) On 5 July 2021:
   a) Shouted at Colleague A. **[NOT PROVED]**
   b) Grabbed Colleague A by the top of their shirt. **[PROVED]**
   c) Pointed into Colleague A's face. **[NOT PROVED]**
   d) Said:
      i) 'What would you do if you were a man?'
      ii) 'You would fuck everyone, won't you?'
      iii) 'Answer me'

   or said words to that effect to Colleague A. **[PROVED]**

   e) When Colleague A attempted to leave the conversation, physically prevented them from doing so. **[PROVED]**
   f) Said, 'Don't walk past. Don't leave me like this' or said words to that effect to Colleague A. **[PROVED]**
   g) Looked Colleague A up and down. **[PROVED]**
   h) After you had been escorted from the Hospital following Colleague A's complaint, screamed and/or shouted Colleague A's name as they were leaving the Hospital carpark. **[PROVED BY WAY OF ADMISSION]**

2) Your actions at charge 1g were sexually motivated in that you were deriving sexual gratification from looking at Colleague A. **[NOT PROVED]**

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

Facts proved by way of admission

Mr Lee, on your behalf, informed the panel that you made an admission to Charge 1h on the basis that you admit that you shouted rather than screamed.

Mr Lee explained that it is understood by you that Charge 1a relates to the incident inside the unit otherwise it would be a duplication of Charge 1h. He therefore confirmed that you deny Charge 1a on the basis that you admit to shouting in the carpark and not inside the unit. He also clarified your position that you touched the top of Colleague A's shirt rather than grabbed Colleague A by the shirt, thus you did not admit Charge 1b on that basis.

The panel therefore found the Charge 1h proved by way of your admission in accordance with Rule 24(5).

Background

On 24 May 2022, the NMC received a referral from Tees, Esk & Wear Valleys NHS Foundation Trust ('the Trust') raising concerns about you, a registered nurse formerly employed at Roseberry Park Hospital ('the Hospital').

It is alleged that you displayed threatening and intimidating behaviour to Colleague A on 5 July 2021. Colleague A informed the Trust that you grabbed the top of their polo shirt and said, "*What would you do if you were a man?*". It is alleged that Colleague A asked you to let go to which you said, "*answer me*" and repeated your question. You allegedly said, "*tell me… you would go around fucking?*".

Later, Colleague A passed you in an office and you allegedly said "*don't walk past like this, come on don't leave me like this*" whilst looking at Colleague A in a sexual manner. Colleague A reported their concerns to their colleagues who advised them to go to the nurse in charge. Colleague A's partner came to pick them up from work. You are alleged to have shouted Colleague A's name in the carpark.

When questioned, you allegedly informed the Trust that Colleague A was not being honest about what happened. You claimed that you had seen Colleague A's collar flailing and readjusted it. You also acknowledged that you did shout "[Colleague A]*, is that you*" in the carpark as you wanted to discuss the complaint with them.

You were subject to disciplinary proceedings from the Trust.

Decision and reasons on facts

In reaching its decisions on the disputed facts, the panel took into account all the oral and documentary evidence in this case together with the submissions from Ms Da Costa on behalf of the Nursing and Midwifery Council (NMC) and Mr Lee on your behalf.

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 witness called on behalf of the NMC:

- Witness 1: Colleague A

The panel also received a witness statement from Witness 2 called on behalf of the NMC. Witness 2 conducted the Trust investigation.

The panel reviewed CCTV footage of the incident which took place on 5 July 2021. This was an exhibit to Witness 2's written statement.

The panel also heard evidence from you.

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 both Mr Lee and the NMC.

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

Charge 1a

"That you, a registered nurse, on 5 July 2021:

a) Shouted at Colleague A."

This charge is found NOT proved.

In reaching this decision, the panel took into account the email dated 5 July 2021 sent by Witness 1, investigatory interview notes dated 22 July 2021, Witness 1's written statement dated 25 March 2023, and oral evidence from both you and Witness 1.

In their email, Witness 1 stated that you '*shouted* [their] *name out side the office door'*. This was reiterated in their oral evidence when they said that you shouted loud '*enough for* [them] *to turn around*'. Witness 1 also said in their oral evidence that your shouting was '*not aggressive*'.

The panel noted that both you and Witness 1 accepted that you shouted Witness 1's name but that you did not shout directly '*at'* them. The panel considered the action of shouting '*at*' someone suggests an element of confrontation. The panel therefore determined that your shouting Witness 1's name across the room amounted to a call to obtain their attention.

Accordingly, the panel found this charge to not proved.

Charge 1b

"That you, a registered nurse, on 5 July 2021:

b) Grabbed Colleague A by the top of their shirt."

This charge is found proved.

In reaching this decision, the panel took into consideration all of the documentary evidence, the oral evidence from you and Witness 1, and the CCTV footage dated 5 July 2021.

In the CCTV footage, you can be seen to take hold of Witness 1's collar with both hands quite firmly and for approximately eight seconds.

In your oral evidence, you maintained that you were rearranging Witness 1's collar and simply touched their polo shirt.

As you can be seen to take hold of Witness 1's collar with both hands for an extended period of time, the panel determined that your actions amounted to a grab rather than a simple rearranging of the collar.

Therefore, the panel found this charge proved.

Charge 1c

"That you, a registered nurse, on 5 July 2021:

c) Pointed into Colleague A's face."

This charge is found NOT proved.

In reaching this decision, the panel had regard to the CCTV footage, Witness 1's email, oral evidence and written statement, the investigatory interview notes, and your oral and documentary evidence.

In their email, Witness 1 stated that you were '*pointing* [your] *finger in* [their] *face*'. This was also repeated in their written statement. However, the panel noted that this detail was

not mentioned in the investigatory interview notes, only the allegation that you grabbed the top of their shirt.

The CCTV footage did not allow the panel to see whether or not you pointed into the face of Witness 1.

In light of the inconsistency in Witness 1's evidence, and the absence of any clear picture in the CCTV footage, the panel was not satisfied that it could find this charge proved.

Charge 1d

"That you, a registered nurse, on 5 July 2021:

d) Said:

i. '*What would you do if you were a man?*'
ii. '*You would fuck everyone, won't you?*'
iii. '*Answer me*'

Or said words to that effect to Colleague A"

This charge is found proved.

Whilst the panel determined each limb of this charge separately, it considered them together as the sub-charges arise from the same set of facts.

In reaching this decision, the panel took into account the CCTV footage and oral evidence from you and Witness 1.

In his submissions, Mr Lee said that communication could have been muffled by the masks you and Witness 1 were wearing and so Witness 1 could have misunderstood what you were saying. However, in the CCTV footage, the panel noted that you and Witness 1

were standing face-to-face and very close. Further, in cross examination, Witness 1 said that they could understand you despite the mask.

In your oral evidence, you stated that, following discussions with your wife and reflecting on the incident, you remembered that you and Witness 1 had been talking about family matters from the time when you both arrived in the service users' dining room. The panel rejected your account that you had been discussing family matters before the incident as it has found that you shouted Witness 1's name to catch their attention when they had nearly arrived at the door to the office. Moreover, it noted that your explanation arose from a later reflection following discussions with your wife; it was not advanced in your email dated 5 July 2021, nor in your interview. Further, the CCTV footage shows that you and Witness 1 were stopped at the door for a long time, and therefore it was unlikely that you were engaged in an ongoing casual conversation.

The panel determined that your body language suggested a more confrontational interaction rather than a casual conversation. Witness 1 can be seen to back or turn away from you during this interaction which would be highly unusual in any casual conversation about your families.

In all of the evidence provided by Witness 1, they were consistent in their recounting of this conversation.

The panel therefore found this charge proved.

Charge 1e

"That you, a registered nurse, on 5 July 2021:

e) When Colleague A attempted to leave the conversation, physically prevented them from doing so."

This charge is found proved.

In reaching this decision, the panel considered the CCTV footage.

In the CCTV footage, you are shown to be using your hand to turn Witness 1 away from the door, and later you can be seen to use your body to stop them leaving the room by positioning yourself between them and the door.

It is Witness 1's evidence that the conversation at Charge 1d was happening during this time.

As the panel found that the conversation referenced in Charge 1d took place and was not about family matters, it determined that Witness 1 was trying to leave the dining room and therefore must have been trying to leave the conversation and that you were physically preventing them from doing so.

As such, the panel found this charge proved.

Charge 1f

"That you, a registered nurse, on 5 July 2021:

f) Said, 'Don't walk past. Don't leave me like this' or said words to that effect to Colleague A."

This charge is found proved.

In reaching this decision, the panel took into account Witness 1's email, written statement and oral evidence, the investigatory interview notes, and your documentary and oral evidence.

The panel noted that the sentences in Charge 1f, or words to that effect, were mentioned in all of the evidence provided by Witness 1. This includes the almost contemporaneous email dated 5 July 2021. The panel noted that both Witness 1 and you accepted that you were together in the office at a point after the initial encounter, and that therefore there was an opportunity for you to speak further to Witness 1. The panel considered that Witness 1's evidence was consistent and determined their evidence in relation to this charge to be reliable.

Therefore, the panel found this charge proved.

Charge 1g

"That you, a registered nurse, on 5 July 2021:

g) Looked Colleague A up and down."

This charge is found proved.

In reaching this decision, the panel had regard to Witness 1's email, written statement and oral evidence, the investigatory interview notes, and your documentary and oral evidence.

The panel noted that that both you and Witness 1 accepted that you were in the office together with nobody else present. The panel also noted that Witness 1 has been consistent in that their allegation you looked them up and down has been mentioned in all of the evidence they provided, including the email written a few hours after the incident.

In your oral evidence, you did nothing more than deny the allegation.

The panel determined Witness 1's evidence in relation to this charge to be reliable.

Therefore, the panel found this charge proved.

Charge 2

> "Your actions at charge 1g were sexually motivated in that you were deriving sexual gratification from looking at Colleague A."

This charge is found NOT proved.

In reaching this decision, the panel took into consideration Witness 1's email, their oral evidence, and the investigatory interview notes, and your documentary and oral evidence.

The panel was referred to the case of *Arunkalaivanan v General Medical Council* [2014] EWHC 873 (Admin) in which Amanda Yip QC states:

> '*First the tribunal or a panel should consider whether objective or primary facts could be reasonably be considered to be sexually motivated. Then if so, after consideration of whether there is an innocent explanation for what physically happened and after considering the character evidence in relation to the* [nurse], *the panel must come to terms with whether the* [nurse] *has been proved as being sexually motivated*.'

The panel sought further legal advice regarding the above charge. It was referred to the case of *Sait v The General Medical Council* [2018] EWHC 3160 (Admin) Mostyn J which provides:

> '*In Arunkalaivanan…Miss Amanda Yip QC…explained at [55] that Tribunals should be careful not to equate inappropriate conduct with sexually motivated conduct and should address the important question as to whether there could be any other explanation for inappropriate conduct. In my previous decision in this case at [26] I explained, however, that the key indispensable ingredient of motivation relates to the individual's state of mind*.'

In their oral evidence and the investigatory interview notes, Witness 1 said that you looked them up and down in a '*sexual way*'. However, the panel noted that in their email Witness 1 did not allege that they thought your actions were sexually motivated, they simply said they made them '*uneasy*' and '*upset*'. The panel also noted that, in their written statement, Witness 1 described that your actions made them feel '*uncomfortable*'. In cross examination, they agreed that there could be alternative (innocent) explanations which might also make them feel uncomfortable, and they stated that, at the time, they thought you were "*joking around like men do'*.

The panel bore in mind the advice and considered that there could be an innocent explanation for you looking Witness 1 up and down. Witness 1 described you in their written statement as a *'practical joker*' and they confirmed in their oral evidence that you were '*a funny guy*'. In your oral evidence, you confirmed that you '*had a laugh with staff most of the time*'. The panel considered that your actions at Charge 1g could have been done in a joking manner.

The panel was reminded that the more serious an allegation is, the more cogent evidence there must be to find it proved. It was also mindful that, although behaviour may be inappropriate, that does not mean it amounts to sexual motivation.

Taking into account that the panel considered that there is an alternative innocent explanation for your conduct, and bearing in mind the way you generally interacted with staff, the panel was not satisfied that it had sufficient cogent evidence to establish that your looking Witness 1 up and down was sexually motivated in that you were deriving sexual gratification from looking at them.

As such, the panel found this charge not proved.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether your 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. Further, 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 misconduct. Secondly, only if the facts found proved amount to misconduct, the panel must decide whether, in all the circumstances, your fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

Ms Da Costa submitted that your conduct in the charges that have been found proved fell short of what would have been proper in the circumstances and breached section 20 of 'The Code: Professional standards of practice and behaviour for nurses and midwives (2015' (the Code), specifically sections 20.5 and 20.8.

Ms Da Costa submitted that you failed to treat people in a way that does not take advantage of their vulnerability or cause them upset or distress, in particular Witness 1 who gave evidence that they were upset and distressed by your actions.

In relation to section 20.8, Ms Da Costa submitted that you failed to act as a role model of professional behaviour for students and qualified nurses, midwives and nursing associates to aspire to.

Ms Da Costa stated that, overall, your behaviour was inappropriate and did not uphold the standards and values that have been set out in the Code. She therefore submitted that your actions amounted to misconduct.

Mr Lee made reference to the case of *Nandi v General Medical Council* [2004] EWHC 2317 (Admin). He stated that serious professional misconduct must be given its proper weight and that there must be a distinction made between simple professional misconduct and the more serious kind that attracts a finding of misconduct in regulatory proceedings.

Mr Lee acknowledged that you accepted that you overstepped professional boundaries and, in effect, breached sections of the Code. However, he said that it would be for the panel to decide whether or not your actions cross the line into serious professional misconduct.

Submissions on impairment

Ms Da Costa moved on to the issue of impairment and addressed the panel on the need to have regard to the protection of the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body.

Ms Da Costa said that the NMC has had sight of a number of training certificates provided by you, however, it is the NMC's position that you remain currently impaired.

Ms Da Costa submitted that your conduct involved a serious departure from the expected standards of a registered nurse and put Witness 1 at potential risk of harm. In their evidence, Witness 1 stated that they felt that you might potentially hit or strike them.

Witness 1 also said that your actions made them feel very uncomfortable, and it could be seen on the CCTV footage that they attempted to leave the conversation but, on at least two occasions, you prevented them from doing so.

Ms Da Costa made reference to the test set out in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin) and made the following submissions.

She submitted that you in the past have acted and are liable in the future to act so as to put patient(s) at unwarranted risk of harm given how you made Witness 1, a subordinate colleague, feel. She further submitted that your conduct breached the Code and you failed to ensure that professional boundaries were maintained. She therefore submitted that in the past you have brought, and are liable in the future to bring, the nursing profession into disrepute. She added that for the reasons stated previously, you have breached and are also liable in the future to breach one of the fundamental tenets of the nursing profession due to the unprofessional behaviour and conduct you exhibited.

Ms Da Costa further submitted that, at this time, you have demonstrated insufficient insight into your misconduct and its effects on Witness 1 as a subordinate and as a colleague with whom you were working. She acknowledged that you have undertaken training that relates specifically to professional boundaries. However, she submitted that this needs further work and that there remains at a risk of harm and a risk of repetition.

Ms Da Costa therefore submitted that your fitness to practise is currently impaired on both public protection and public interest grounds.

The panel heard live evidence from you that the incident occurred in the context of cultural differences between you and Witness 1, namely that, when you are familiar with people, you talk and touch them without asking for permission. However, in the case of Witness 1, you understand how, with the difference in culture, they could view your actions as inappropriate and offensive, and had you known this, you would have apologised straight

away. You said, in the future, you will strive at all costs to make sure that you maintain professional boundaries.

Mr Lee referred the panel to your Staff Assessment Form dated 5 April 2024 which states:

> '*Ejiro currently works full time hours Thoburn ward. Thoburn is a busy 22 bed mixed acute ward and Ejiro has managed this with no problem. Ejiro is proactive in dealing with any issues that arise throughout his shift and completes all necessary documentation*.'

Mr Lee submitted that your fitness to practise is not currently impaired. He stated that, in fairness to you, it would be wrong to conclude that you put patient(s) at risk of unwarranted harm in the past, or that you are liable to do so in future as there has not been any evidence of that happening in this case.

Mr Lee challenged that you have breached a fundamental tenet of the nursing profession given that this was a one-off incident between colleagues where one of them described it as a practical joke gone wrong.

Mr Lee also said that you have not in the past brought, and are not liable in the future to bring, the nursing profession into disrepute for the following reasons:

- This was a one-off incident between colleagues who had an otherwise good working relationship.
- The matter was dealt with locally, and you went through a disciplinary procedure and were dismissed. As such, the panel can look at those wider circumstances, see how seriously it was treated locally and take that into account.
- You admitted that you overstepped professional boundaries and offered, not directly but through the panel, an apology to Witness 1 for what you did.

Mr Lee made reference to the case of *Ronald Jack Cohen v General Medical Council* [2008] EWHC 581 (Admin) and the factors set out in the case. He submitted that your conduct is of a type which is remediable by way of reflection, training, and insight. He added that you have not demonstrated any deep-seated attitudinal issues. In relation to whether your conduct has been remedied, Mr Lee drew the panel's attention to your oral evidence at this stage and the training you have undertaken. He also highlighted that, due to the lapse of time, you have had time to write reflective pieces. Mr Lee invited the panel to take this all into consideration when determining whether or not your conduct is likely to be repeated.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Nandi, Roylance v General Medical Council (No. 2)* [2000] 1 AC 311, *The Queen (on the application of Remedy UK Limited) v. General Medical Council* [2010] EWHC 1245 (Admin), and *Walker v. BSB, 19 September 2013, unreported*.

Decision and reasons on misconduct

In coming to its decision, the panel had regard to all the authorities to which it was referred, including the case of *Roylance* which defines misconduct as a *'word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.'*

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of the Code.

Charges 1b, 1d and 1e

The panel considered these sub-charges together as they arose during the same event.

The panel determined that your actions here amounted to a breach of the Code. Specifically:

> *'**20 Uphold the reputation of your profession at all times***
> *To achieve this, you must:*
> *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.'*

However, the panel appreciated that breaches of the Code do not automatically result in a finding of misconduct.

The panel noted that you accepted that you breached professional boundaries. At the time of the incident, you were a senior nurse whilst Witness 1 was a Healthcare Assistant and you showed them no respect. The panel determined that, although Witness 1 was a Healthcare Assistant and therefore not subject to the Code, you still had a duty, as a senior member of staff, to be a role model to junior colleagues.

The panel considered your actions to have been unprofessional, unprovoked and unpleasant, particularly the inappropriate language you used with Witness 1 and the grabbing of their collar.

As such, the panel found that your actions fell significantly short of the standards expected of a registered nurse and amounted to serious misconduct.

Charges 1f and 1g

The panel considered these sub-charges together as they arose during the same event.

The panel concluded that your behaviour here was not sufficiently serious to meet the threshold of serious misconduct and therefore found that it did not amount to serious misconduct.

Charge 1h

The panel concluded that your behaviour here was not sufficiently serious to meet the threshold of serious misconduct and therefore found that it did not amount to serious misconduct.

Decision and reasons on impairment

The panel went on to decide if, as a result of the misconduct, your fitness to practise is currently impaired.

In coming to its decision, the panel had regard to the Fitness to Practise Library, 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 maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust,

nurses must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

In this regard the panel considered the judgment of Mrs Justice Cox in the case of *Grant* in reaching its decision. In paragraph 74, she said:

> *'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally 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.'*

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/ fitness to practise is impaired in the sense that S/He:*
>
> 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) *has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

The panel considered the above test and, given that none of the charges relate to dishonesty, was satisfied that the fourth limb was not relevant.

The panel also considered the factors set out in the case of *Cohen* and determined that the misconduct was of such a nature that can be addressed.

The panel noted that you have undertaken relevant training and that you have done some reflection. It acknowledged that, although you denied many of the allegations, you still put in the effort to build self-awareness and develop some insight. However, the panel considered the insight you have demonstrated to be limited, and it was of the view that there is insufficient evidence before it to suggest that any material change has been made.

The panel recognised that you have made some attempts to address the concerns, but it determined that more evidence is required to demonstrate that your attitude and behaviours have changed so as to ensure that the misconduct is not repeated. This might include conversations with your line manager or taking part in a mentorship programme.

The panel considered that it would have been assisted if you had provided more testimonials from your current employer and colleagues which indicated that they are aware you are currently subject to NMC proceedings; current practice examples of how you have handled similar situations; an understanding of why what you did was wrong and how this impacted negatively on the reputation of the nursing profession.

The panel determined that there is a real risk of repetition based on your limited insight and failure to fully address the concerns. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel determined that a finding of impairment on public interest grounds is also justified as public confidence in the profession and the NMC as a regulator would be undermined if a finding of impairment were not made in this case due to your conduct, having breached professional boundaries and its effect on a junior colleague. The panel therefore concluded that your fitness to practise is impaired on the grounds of public interest.

Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired.

Sanction

The panel considered this case very carefully and decided to make a conditions of practice order for a period of 12 months. The effect of this order is that your name on the NMC register will show that you are subject to a conditions of practice order and anyone who enquires about your registration will be informed of this order.

In reaching this decision, the panel had regard to all the evidence that has been adduced in this case, and had careful regard to the Sanctions Guidance (SG) published by the NMC.

Submissions on sanction

Ms Da Costa submitted that the NMC takes the view that a striking-off order is the only appropriate sanction in this case.

Ms Da Costa drew the panel's attention to the case of *Sawati v General Medical Council* [2022] EWHC 283 (Admin), in particular the following passages:

> '…*The second route is 'not telling the truth to the Tribunal'. How a professional responds to formal proceedings may be relevant to an overall assessment of their*

professionalism: putting the public's interests ahead of their own, integrity and candour, and other important considerations may be engaged, as well as insight and remediability. Lying to Tribunals and putting forward disingenuous or meretricious defences cannot be expected to be consequence-free…

…In short, before a Tribunal can be sure of making fair use of a rejected defence to aggravate sanctions imposed on a doctor, it needs to remind itself of Lord Hoffmann's starting place that doctors are properly and fairly entitled to defend themselves, and may then find it helpful to think about four things:

i) how far state of mind or dishonesty was a primary rather than second-order allegation to begin with (noting the dangers of charging traps) – or not an allegation at all,
ii) what if anything the doctor was positively denying other than their own dishonesty or state of knowledge;
iii) how far 'lack of insight' is evidenced by anything other than the rejected defence and
iv) *the nature and quality of the defence, identifying clearly any respect in which it was itself a deception, a lie or a counter-allegation of others' dishonesty*.'

Ms Da Costa referred the panel back to its decision on facts for Charge 1d, specifically:

'*In your oral evidence, you stated that, following discussions with your wife and reflecting on the incident, you remembered that you and Witness 1 had been talking about family matters from the time when you both arrived in the service users' dining room. The panel rejected your account that you had been discussing family matters before the incident as it has found that you shouted Witness 1's name to catch their attention when they had nearly arrived at the door to the office. Moreover…*'

Ms Da Costa informed the panel that it is the last two factors which are of particular relevance. She submitted that the defence itself was disingenuous and is therefore an aggravating features with regard to sanction. The matters found proved involved the grabbing of the collar of a junior colleague using both hands as seen on CCTV which, in a criminal context, would amount to an assault. She further submitted that the rejected defence shows a lack of insight which is another aggravating feature.

Ms Da Costa submitted that the need to protect the public and meet the public interest is heightened in this case because you advanced a defence which not only was rejected but which appears to be one that was not true.

Mr Lee responded to Ms Da Costa's submissions on *Sawati* and stated the basic issue raised in the *Sawati* case is that, in order to have a fair hearing, professionals have to be entitled to defend themselves without having to fear that their very defence will then be used against them at a later stage in the proceedings.

Mr Lee highlighted that *Sawati* was a case involving charges of dishonesty in contrast to your case. He said that factors one and two in *Sawati* were the most important. In this case, no allegations were proved in relation to your state of mind. He said that the character of your defence was one of denial rather than dishonesty. In any event, the panel made no findings of dishonesty against you.

In relation to the third factor, Mr Lee highlighted that the panel did not find a complete lack of insight, only that you demonstrated limited insight. He stated that you acknowledged prior to this hearing what you needed to do to address the concerns identified. He added that the panel did not identify your rejected defence as being evidence of a lack of insight but rather a disagreement about factual matters.

With regard to the fourth and last factor, Mr Lee submitted that your defence was not of a pernicious nature or quality. He highlighted that your defence is that the incident did not

happen in the way set out in the charges; it was not that Witness 1 was being dishonest in raising the concerns which led to these proceedings as part of a campaign against you.

Mr Lee then went on to give his submissions on sanction. He submitted that a mitigating feature in this case is that it was a one-off incident.

Mr Lee stated that it is accepted that a sanction must be imposed in order to protect the public and meet the public interest. He submitted that a conditions of practice order is likely to be the appropriate one in the circumstances. However, he informed the panel that there are some practicalities to bear in mind:

- You are currently working for an agency and so certain conditions might simply be unworkable in an agency environment
- At the moment, you often work night shifts and staffing can be more limited on a night shift, particularly with senior staff
- You have been looking for more permanent positions but have found so far that, once you declare your upcoming NMC proceedings, you do not hear back

Mr Lee suggested some requirements the panel could impose which are more reliant on your action instead of other members of staff's involvement, and that are not so onerous in an agency environment.

Mr Lee submitted that a suspension or striking-off order would not be proportionate as you have begun to address the concerns, albeit you need to do more.

The panel accepted the advice of the legal assessor.

Following the legal advice, Mr Lee made specific reference to certain paragraphs in the judgment of *Sawati.* He referred to the risk of oppression for registrants having to defend their own defence to allegations. He said that it was too much to expect a registrant to undergo a Damascene conversion following a finding of fact. Referring to the case of

Sayer v General Osteopathic Council [2021] EWHC 370 (Admin), the judge in *Sawati* had indicated that denial was not a reason to increase sanction. Referring to the case of *Misra v General Medical Council* [2003] UKPC 7, the judge had indicated that a clear finding of blatant dishonesty was required.

Decision and reasons on sanction

Having found your 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 considered whether it should regard your defence to the allegations of fact, which it did not accept, as an aggravating feature of the case. It bore in mind that the primary allegations which were proved did not allege dishonesty or indeed any state of mind and that it made no findings that the defence which you mounted was dishonest or a lie. It accepted that your defence did not reflect sufficient insight into how your behaviour was offensive; indeed the panel considered that, at the time, you were surprised that your behaviour was called out by the Trust at all. Nevertheless, you did not seek to apportion blame for that behaviour on Witness 1. It considered that your denial of your behaviour is likely to have been occasioned by a disbelief that you could have behaved in the way alleged. In these circumstances it did not consider that it should regard the defence to the charges which were found proved as an aggravating feature.

The panel took into account the following aggravating features:

- Abuse of your position of seniority

The panel also took into account the following mitigating features:

- This was an isolated incident in an otherwise unblemished career
- You have developing insight
- You are currently practising as a registered nurse and have received a satisfactory Staff Assessment

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 your 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 your misconduct 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 your 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 into account the SG, 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;*

- *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 determined that it would be possible to formulate appropriate and workable conditions which would address the failings highlighted in this case.

The panel had regard to the fact that the incident happened a long time ago, and that you otherwise have had an unblemished career as a registered nurse. The panel was of the view that it was in the public interest that, with appropriate safeguards, you should be able to continue to practise as a nurse.

Balancing all of these factors, the panel determined that that the appropriate and proportionate sanction is that of a conditions of practice order.

The panel was of the view that to impose a suspension order or a striking-off order would be disproportionate and would not be a reasonable response in the circumstances of your case. It noted that none of the factors which indicate the seriousness of a case set out in NMC guidance ‘FTP-3: How we determine seriousness’ apply in your case. The panel reached the conclusion that your case does not meet a threshold of seriousness which warrants the imposition a suspension order.

Having regard to the matters it identified, the panel determined that a conditions of practice order will be an adequate measure to protect the public and mark the importance of maintaining public confidence in the profession, and declaring and upholding proper standards.

The panel determined that the following conditions are appropriate and proportionate in this case:

For the purposes of these conditions, ‘employment’ and ‘work’ mean any paid or unpaid post in a nursing, midwifery or nursing associate role. Also, ‘course of study’ and ‘course’ mean any course of educational study connected to nursing, midwifery or nursing associates.

1. You must keep a reflective practice profile of at least one in-depth reflection per month on interactions with team members during the course of your nursing practice. The profile will detail:
    - Descriptions of your self-management in relation to your interactions with colleagues,
    - Identification of what you have learned, and what you may do differently.

    You must send your case officer a copy of the profile before any NMC review.

2. You must create a personal development plan (PDP). Your PDP must address your management of professional boundaries and communication with colleagues, and take account of your learning from your reflective practice profile. You must:
    - Send your NMC case officer a copy of your PDP within three months, and an up-to-date version of your PDP prior to any NMC review.
    - Share your PDP and reflective practice profile with a registered nurse of the same Band or above where you are working.

3. You must meet every month with a registered nurse of the same Band or above where you are working to discuss your progress towards achieving the aims set out in your PDP. You must:

- Send your NMC case officer a report from a registered nurse of the same Band or above assessing your progress prior to any NMC review.

4. You must keep the NMC informed about anywhere you are working by:
   a) Telling your case officer within seven days of accepting or leaving any employment.
   b) Giving your case officer your employer's contact details.

5. You must keep the NMC informed about anywhere you are studying by:
   a) Telling your case officer within seven days of accepting any course of study.
   b) Giving your case officer the name and contact details of the organisation offering that course of study.

6. You must immediately give a copy of these conditions to:
   a) Any organisation or person you work for.
   b) Any agency you apply to or are registered with for work.
   c) Any employers you apply to for work (at the time of application).
   d) Any establishment you apply to (at the time of application), or with which you are already enrolled, for a course of study.
   e) Any current or prospective patients or clients you intend to see or care for on a private basis when you are working in a self-employed capacity

7. You must tell your case officer, within seven days of your becoming aware of:
    a) Any clinical incident you are involved in.
    b) Any investigation started against you.
    c) Any disciplinary proceedings taken against you.

8. You must allow your case officer to share, as necessary, details about your performance, your compliance with and / or progress under these conditions with:
    a) Any current or future employer.
    b) Any educational establishment.
    c) Any other person(s) involved in your retraining and/or supervision required by these conditions

The period of this order is for 12 months to enable you to further develop your insight and embed appropriate attitudes and behaviours in your practice.

Before the order expires, a panel will hold a review hearing to see how well you have complied with the order. At the review hearing the panel may revoke the order or any condition of it, it may confirm the order or vary any condition of it, or it may replace the order for another order.

Any future panel reviewing this case would be assisted by:

- Evidence of professional development, including training certificates,
- Testimonials from a line manager or supervisor that detail your current work practices,
- A reflective statement including your understanding of the impact of your misconduct on the reputation of the nursing profession.

This will be confirmed to you in writing.

Interim order

As the conditions of practice order cannot take effect until the end of the 28-day appeal period, the panel considered whether an interim order is required in this case. The panel bore in mind that 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 your own interests until the conditions of practice sanction takes effect.

Submissions on interim order

Ms Da Costa invited the panel to impose an interim order to cover the appeal period if any appeal is made. She submitted that an interim order is necessary to protect the public. She requested that the panel impose an interim conditions of practice order in the same terms as the substantive conditions of practice order to cover the appeal period.

Mr Lee did not oppose the application.

The panel accepted the advice of the legal assessor.

Decision and reasons on interim order

The panel was satisfied that an interim order is necessary to protect the public and otherwise in the public interest. The panel had regard to the seriousness of the charges and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order. It determined that to not impose an interim order would be inconsistent with its earlier findings.

The panel therefore made an interim conditions of practice order for a period of 18 months to cover the length of time that any appeal proceedings might take.