

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Hearing
Monday 29 April – 3 May 2024**

Nursing and Midwifery Council
2 Stratford Place, Montfichet Road, London, E20 1EJ

Name of Registrant:	Mowbrey Madondile
NMC PIN	99J1416O
Part(s) of the register:	Registered Nurse – Sub Part 1 Adult Nursing – Level 1 (26 October 1999)
Relevant Location:	Oldham
Type of case:	Misconduct
Panel members:	Lucy Watson (Chair, Registrant member) Jillian Claire Rashid (Registrant member) James Carr (Lay member)
Legal Assessor:	John Bassett
Hearings Coordinator:	Sophie Cubillo-Barsi (29 – 30 April 2024) Sherica Dosunmu (1 - 3 May 2024)
Nursing and Midwifery Council:	Represented by Nicola Kay, Case Presenter
Mowbrey Madondile:	Present virtually and unrepresented (29 April – 1 May 2024) Not present and unrepresented (2 – 3 May 2024)
Special Counsel	Natalie Bird (29 April 2024)
Facts proved:	Charges 1 and 2
Fitness to practise:	Impaired
Sanction:	Striking-off order
Interim order:	Interim suspension order (18 months)

Details of charge

That you, a registered nurse:

1) On 15 July 2022:

- a) On one or more occasions, asked to kiss colleague A's stomach
- b) Grabbed colleague A's arm
- c) Kissed colleague A's stomach without consent.

2) Your conduct in charge 1 was sexually motivated in that you were seeking sexual gratification

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

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

Ms Kay on behalf of the Nursing and Midwifery Council (NMC) informed the panel that on 2 February 2024, at a case management hearing, directions were given under Rule 23 of 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules) for special measures to be put in place when Colleague A gave evidence on the basis that she is a vulnerable witness. The measures included a direction that special counsel be appointed to cross examine Colleague A on your behalf. At the case management hearing it was determined that the Rule 19 application should be made at this hearing.

At the outset of the hearing, Ms Kay made a request that the evidence of Colleague A be held in private due to the nature of the charges and on the basis that proper exploration of the case involves reference to [PRIVATE]. The application was made pursuant to Rule 19.

You did not oppose the application.

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 for Colleague A's evidence due to her vulnerability and in order to maintain her privacy.

In the course of your evidence, the panel determined to go into private when you gave evidence relating to your personal circumstances [PRIVATE].

Background

You were working an agency shift on Ward G2 (the Ward) at Royal Oldham Hospital on 15 July 2022.

At approximately 20:30, it is alleged that whilst you and Colleague A were in the ward's break room, you asked Colleague A if you could kiss her stomach after she told you she was pregnant. Colleague A states that she said 'no', but that you asked a second time, in a more coaxing tone. Colleague A states she sternly replied 'no'. However, as she walked past you to leave the room, it is alleged that you grabbed her arm, pulled her towards you and kissed her lower stomach.

Colleague A states she quickly left the room and found the nurse in charge of the night shift, Colleague B, and told her what happened, and said she would escalate the incident to senior staff when she returned on duty. Colleague A reported the incident to Greater Manchester Police (the police) on 21 July 2022, to the NMC on 22 July 2022 and made a statement to the police on 23 July 2022. Colleague A also made a report to Thornbury Nursing Services Agency (the Agency) on or about 19 July 2022. You were arrested and interviewed regarding a possible offence of sexual assault by touching on 7 February 2023 and were released on bail, and subsequently no charges were brought.

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 made by you and Ms Kay on behalf of the NMC.

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. Furthermore, the panel accepted that as the charges you face are serious and the consequences of their being proved may also be serious, it should not find them proved unless there was cogent or compelling evidence to that effect.

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

- Colleague A: Band 6 Charge Nurse on the Ward; and
- Colleague B: Band 5 Staff Nurse on the Ward.

The panel also heard evidence from you under oath.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor who referred the panel to the cases of *Basson v General Medical Council* [2018] EWHC 505 (Admin), *Haris v General Medical Council* [2021] EWCA Civ 763 and *Shabir v General Medical Council* [2023] EWHC 1772 (Admin). He also referred to section 78 of the Sexual Offences Act 2003:

*'... touching ... is sexual if a reasonable person would consider that—
(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or*

(b)because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.'

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

Charge 1

1) On 15 July 2022:

- a) On one or more occasions, asked to kiss colleague A's stomach
- b) Grabbed colleague A's arm
- c) Kissed colleague A's stomach without consent.

This charge is found proved.

In reaching this decision, the panel took into account all of the documentary evidence before it and considered the oral evidence it had heard during the course of the hearing. The panel did not have before it any independent contemporaneous statements in regard to charge 1.

The panel acknowledged that the subsections of charge 1 do not necessarily fall or stand alone. However, in the circumstances of this particular case the panel will be making a decision as to what evidence the panel prefers. Therefore, the panel determined that it would be logical to consider charge 1 collectively.

It is agreed that you had never met either Colleague A or Colleague B before the 15 July 2022. Furthermore, it is common ground that there was no dispute or animosity between you and Colleague A, during the shift on 15 July 2022 from when you started at 16:00. It is also agreed between you and Colleague A that at about 20:30 on 15 July 2022, you briefly spoke to each other in the break room, and that the discussion included references to your food and during it Colleague A told you she was pregnant. It is also agreed that the whole incident took place for a period of approximately five

minutes. However, Colleague A and you gave different accounts of precisely how these discussions arose.

It was Colleague A's evidence that, after she had told you she was pregnant, the matters that are the subject of charge 1 occurred. Colleague A said she was so shocked by the incident that she left the room without saying anything and went to tell Colleague B at the nurses station, which Colleague A and Colleague B said is a 10 second walk from the break room.

In Colleague A's witness statement, which she adopted in her oral evidence, she describes the following:

'When I entered the room, the registrant was sat at the table on the lefthand side of the room eating food. We were the only two people in the room, so I made a comment to the registrant that his food smelt nice in an effort to make polite conversation. The registrant asked me if I had any children and I said no, but I told him I was pregnant. I was happy about my pregnancy and had only just started telling people at work. I wasn't showing at that stage and my work uniform is baggy so I did not look pregnant.

Whilst I was at the back of the room near the window, the registrant asked if he could kiss my stomach. I was shocked and thought that was an odd question so I quickly replied "no". When I was getting my things from the lockers on the right hand side of the room, the registrant again asked me if he could kiss my stomach. This time the registrant's tone was a bit more coaxing and I sternly replied "no".

I put my handbag over my shoulder and walked towards the door. As I walked past, the registrant grabbed my right arm and said "let me kiss your stomach". He pulled me towards him and kissed my lower stomach in between my lower abdomen and my groin area. I wear a nursing dress uniform so the registrant did not make direct contact with my skin.

The registrant did not grab my arm aggressively enough to leave a mark or bruising on my skin, but it was with enough force to pull me towards him. I don't recall trying to get out of his hold as I was frozen in shock. It all happened so quickly, the entire incident lasted less than five minutes.

Initially, I just thought the registrant's request to kiss my stomach was a really strange thing to ask, but when he forced the act on me, it made me feel like his behaviour was sexually motivated.

I was so shocked that I quickly left the room without saying anything. I went and found the nurse in charge of the night shift, [Colleague B], in bay 3 and told her what had happened. I can't remember what [Colleague B] said to me. I left the ward after speaking with [Colleague B] and didn't see the registrant again.'

Colleague A also confirmed the content of the statement she made to the police on 23 July 2022 which was exhibited to her witness statement. In answer to a question from a member of the panel, she stated that she had understood the meaning of the declaration she had signed at the beginning of her police statement and the potential consequences of making a false statement.

Colleague A's evidence that she told Colleague B what happened about 10 seconds after leaving the break room is supported by the evidence of Colleague B, who described:

'I would start each night shift on Ward G2 at 8pm. After handover on 15 July 2022, I was standing near the nursing station. I remember seeing [Colleague A] walking up to the nursing station looking visibly upset. I asked her what happened and she said the registrant had been touching her tummy and had kissed her tummy. I was shocked as I had never come across behaviour like that, I found it very bizarre and odd. I tried to reassure [Colleague A] and make sure that she was ok, but she was visibly in shock. [Colleague A] told me she was going to escalate the incident, so I didn't do anything further. [Colleague A] went home as her shift had ended and I carried on with my shift.'

During her oral evidence, it was apparent that Colleague B was unable to recall certain aspects of the incident. Furthermore, she was incorrect in her recollection that you had also finished your shift at 20:00 on 15 July 2022, when, in fact your shift had overlapped with hers for another eight hours. However, Colleague B told the panel that the first time she had been asked to provide an account of what had happened was when she provided her statement to the NMC on 25 January 2023. The panel considered that given the passage of time between the incident and Colleague B providing a witness statement to the NMC, it was understandable that she was unable to accurately recall details that might be considered peripheral to the central issues in the case.

You vehemently deny the allegations and, as is clear from the contents of the Regulatory Concerns Response Form and the Case Management Form, you have been consistent in your denial of the allegations. It is your case that what is alleged in charge 1 did not happen at all.

You said you were booked to work a twilight shift on the Ward from 16:00 to 4:00 by the Agency through NHS Professionals (NHS P). When the night staff arrived at 20:00 you requested to go for your break and went to the rest room to eat your meal. Colleague A came in and commented on your food. You said she told you she could not wait to get home. You asked if she had children at home and said that she replied 'No' but that she was pregnant with her first child. You replied this was good news and that you were happy for her and her partner. You told the panel that at the end of the conversation, Colleague A left the room '*happy*', smiling, told you to enjoy the remainder of your shift and said '*bye*'. You returned to the Ward at the end of your break and worked the rest of the twilight shift as a floating nurse and went home at 4:00. You were booked for a second shift by NHS P on the Ward on 19 July 2022 but when you arrived on the Ward it had been cancelled.

Two weeks later when you were working an agency contract in West Wales you were contacted by the Agency to say that they were stopping your allocation as they had received a complaint about you. This was not explained to you and you thought it must be about patients. You returned home and could not get any more work with the

Agency. You phoned the second agency you work for Day Webster Nursing Agency and they were also unable to give you any work. They said they had been informed by NHS P about a serious incident in which you had sexually harassed someone at work. You were arrested in February 2023 and interviewed by the police but no charges were brought. You were contacted by the NMC and at a hearing in August 2022 you were placed on an interim suspension order. Although this was subsequently lifted by the NMC you have not been able to work as a nurse since the time of the incident.

[PRIVATE].

You told the panel that you would never have touched Colleague A as you were brought up to not *'talk or do any other activities'* when eating, and to wash your hands at the end of a meal. You said you would not have touched Colleague A without washing your hands. You said that you were happy that Colleague A was friendly to you. You said you come from a cultural background and faith where pregnant women should be respected and God is the creator. A pregnant woman is carrying *'another one'* and is seen as fragile and should be cared for. You said that pregnancy is something special, especially a first pregnancy, *'it's something that will be making you happy'*. You said that it is an open break room and *'nobody would have done that'*.

It is common ground that you have never faced misconduct proceedings brought by the NMC before regarding similar or any other allegations.

Before making its decision on the charges, the panel heard submissions from both Ms Kay on behalf of the NMC and from you. It has considered these submissions carefully.

The panel recognises that this is a case where there is no *'middle ground'*. It is not suggested that you kissed or touched Colleague A by accident. Nor is it suggested that you kissed or touched Colleague A in order, for example, to congratulate her on her pregnancy. Always bearing in mind that the burden of proof remains on the NMC throughout, the panel is faced with a stark choice – either Colleague A is lying or you are. If Colleague A has made a serious false allegation against you, it means that either:

- For some reason, almost immediately upon leaving the break room, Colleague A has decided to make the false allegation to Colleague B; or
- For some reason, on or shortly after 15 July 2022 Colleague A and Colleague B have colluded to make the false allegation against you.

In your evidence, you suggested that Colleague A may possibly have made up the allegation because she was '*jealous*' of the money you were earning as an agency nurse. You said that you are in a difficult position working as an agency nurse and as a black man. In many clinical settings the staff do not speak to you and are '*jealous*' about how much you may earn. You also suggested that Colleague B colluded with Colleague A, as Colleague B knew Colleague A and both of them had previously worked together. The panel has noted that neither suggestion was expressly made to either Colleague A or Colleague B, but has also recognised that, save for the assistance of Special Counsel in cross-examining Colleague A, you are unrepresented.

The panel is aware that case law cautions against over-reliance on the demeanour of witnesses when giving evidence. Bearing that caution in mind, the panel found the evidence of Colleague A to be entirely credible and reliable. In particular, it found her evidence on the continuing effect the incident had had upon her to be compelling. When giving evidence, Colleague A was visibly distressed when asked to describe the impact on her. She told the panel that she felt vulnerable, and that her personal space was violated. She said that '*I couldn't go to the restroom on my own, couldn't be alone with the risk of someone coming in. I had to take time off with stress because of this incident and was more vulnerable and did not want to go on the ward again.*'

The panel considered your submission highlighting the delay of Colleague A formally reporting the incident. In fact the period of delay was by no means substantial or significant. Moreover, the panel has had regard to NMC Guidance DMA 7 which adopts the '*CPS Guidance on Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes*'. The panel concluded that there is no specific process followed by victims of sexual offences when reporting crime and that it would be quite understandable for a person who is suffering from shock, to not make an immediate complaint. It noted that

subsequently, Colleague A did report the incident to the police, the Agency and the NMC and on two occasions signed a declaration to tell the truth.

Nor does the panel accept your contention that you would not have engaged in the alleged conduct because the break room was open to all members of staff and they could have walked in at any time. The incident occurred shortly after the night shift had begun and the day shift had ended. It is likely that those on the night shift would have already left their personal belongings in the break room and would be unlikely to return until much later. Similarly, it is likely that Colleague A was one of the last, if not the last of the day shift to collect their personal belongings from the break room. In other words, the likelihood of any other member of staff entering the break room at the time of the incident was very small.

The panel also considered Colleague B's evidence that Colleague A reported to her what had happened, immediately after the incident, to be compelling. The panel considers that it is able to rely on that part of her evidence when she described the report she received from Colleague A and how Colleague A appeared to her. The panel considered that when Colleague B came to make her statement to the NMC six months later, these matters would have been at the forefront of her mind in contrast to certain details about the rest of the shift. The panel noted specifically *Shabir v GMC* in making that conclusion.

In contrast, the panel considered your evidence to be unconvincing. While you gave your evidence in a clear and direct manner, the panel considered that you were in fact attempting to conceal the truth of what happened.

The panel therefore concluded that the suggestion that, for some unknown reason(s), Colleague A alone or together with Colleague B had made up this serious allegation was simply implausible. Indeed, it considered there was considerable force in Ms Kay's submissions that:

- If Colleague A had decided to make a false sexual allegation against you, it is unlikely she would have chosen to make unusual one such as those you face; and
- If Colleague A and Colleague B had colluded together, it is likely they would have ensured their accounts matched.

The panel therefore concluded on the balance of probabilities, that it was more likely than not that on 15 July 2022, you asked to kiss colleague A's stomach, grabbed colleague A's arm and kissed colleague A's stomach without consent.

Charge 2

2) Your conduct in charge 1 was sexually motivated in that you were seeking sexual gratification

This charge is found proved.

Having found charge 1 proved, the panel went on to consider charge 2. In doing so, the panel recognised that the burden of proving this charge remains on the NMC. Given your denial that you acted as alleged in charge 1, this charge is only capable of proof if the panel is satisfied to the required standard of proof that it can properly infer from the facts that it has found that your conduct was sexually motivated as alleged.

The panel has already found that Colleague A was a truthful and credible witness. The panel had before it the statement she made to the police, dated 23 July 2022 in which she said:

'I just feel really vulnerable, in a place I would usually feel safe. I work in a trusting profession and have done for a while, him doing this to me has ruined it for me.'

The panel also considered Colleague A's NMC witness statement in which she states:

'Initially, I just thought the registrant's request to kiss my stomach was a really strange thing to ask, but when he forced the act on me, it made me feel like his behaviour was sexually motivated.'

When questioned in her oral evidence as to what prompted her to report the incident to the police, Colleague A stated:

"I thought about it all weekend...couldn't forget it...shouldn't have happened to me and it was the right thing to do [report the matter to the police]."

While the panel acknowledges that Colleague A's view on whether your conduct was sexually motivated is not determinative, it does consider that her perception of your motivation is an important consideration. She was the person who experienced your conduct.

The panel has also had regard to the degree of your persistence in order to succeed in kissing Colleague A's stomach despite her refusals. This persistence included grabbing her by the arm. In the panel's view, you displayed a determination to achieve what you wanted to do that is not consistent with there being an '*innocent*' motivation for your conduct.

The panel has had particular regard for the evidence of Colleague A on where you did kiss her. In her statement to the police, she described it as '*on my stomach quite low at the bottom which was quite close to my vaginal area*'. Her demonstration in her evidence of where she was kissed confirmed this position. Colleague B in oral evidence also confirmed the general area. Even though the kiss was through Colleague A's clothing, its position is entirely consistent with you having the alleged sexual motivation for it.

Finally, the panel had regard for the fact that you have consistently denied kissing Colleague A as alleged. In the light of its findings on charge 1, the panel is entitled to and does draw the inference that your consistent denial has been because you know that what you did was not just inappropriate, but also sexually motivated.

For the reasons stated above, the panel was satisfied on the balance of probabilities, that it was more likely than not that your conduct in charge 1 was sexually motivated in that you were seeking sexual gratification.

Decisions and reasons on Rule 32

On 1 May 2024, during the course of the hearing the panel announced its decisions taken at facts stage. You and Ms Kay were provided with a written determination with the panel's findings.

After being informed of the panel's findings you became visibly distressed [PRIVATE]. You then disconnected from the hearing while the Chair was in the process of explaining the next steps. The panel allowed a break in order to afford the NMC Hearings Coordinator time to contact you [PRIVATE], and also to enable you to reconnect to the hearing.

The NMC Hearings Coordinator followed with three telephone calls to you during this break. Two of which were unanswered and the final telephone call you answered and provided a brief response. During the telephone call you were informed that the hearing participants [PRIVATE]. The panel was notified that you responded to indicate that you [PRIVATE] you were driving, and so the telephone call ended very quickly. This telephone call was followed shortly by an email requesting that you contact the NMC once you were no longer driving to confirm for certain [PRIVATE]. You were also informed that you would receive a follow up call at 9:00 on 2 May 2024.

On 2 May 2024, the NMC Hearings Coordinator contacted you by telephone at 9:00, but there was no answer. This was followed by an email explaining that the call was made to establish [PRIVATE], and that further calls will be made unless you confirm to the NMC [PRIVATE]. In this email it was also explained that if you confirm that it is your intention to disengage with the hearing process, the NMC will then stop contacting you. There was no response to this email.

The NMC Hearings Coordinator proceeded to contact you again by telephone on three other occasions (09:30, 09:45 and 10:00) and there was no answer. Another member of the NMC hearings department contacted you by telephone on two other occasions but there was no answer. This was followed up with an email explaining that [PRIVATE] if you did not respond to the NMC by 11:00. The NMC did not receive any further response from you [PRIVATE].

You were notified via email by the NMC Hearings Coordinator that the hearing would resume at 11:20 and you could join virtually as you have done from 29 April to 1 May 2024. You did not join the hearing.

The panel accepted the advice of the legal assessor regarding the applicability of Rule 21.

The panel was satisfied that by virtue of your attendance from 29 April to 1 May 2024, notice had been properly served by the NMC and your absence on 2 May 2024 was therefore not a matter to be considered under Rule 21.

However, the panel of its own volition considered whether to adjourn the hearing under Rule 32 in light of your absence.

Ms Kay outlined the circumstances relating to your absence. She submitted that the NMC has made considerable efforts to contact you since your disengagement on 1 May 2024. She invited the panel to proceed in your absence.

Ms Kay highlighted that you have engaged with the hearing process throughout and have not responded to any communication since your disengagement on 1 May 2024. She submitted that as reasonable attempts have been made to secure your attendance and you have not requested further time, there was no reason to believe that an adjournment would secure your attendance on some future occasion.

Ms Kay reminded the panel that the charges in this case arose in 2022 and submitted that there is public interest in the expeditious disposal of this case. She also submitted

that the panel has already found charges 1 and 2 proved, which are very serious in nature and on that basis, it is also in the interest of public protection to proceed today.

Ms Kay also clarified that there is currently no interim order in place.

The panel accepted the advice of the legal assessor who referred the panel to Rule 32, which sets out a number of factors which panels should consider when deciding whether a hearing should be postponed or adjourned. These include the public interest in the expeditious disposal of the case, the potential inconvenience caused to any party, and fairness to the registrant.

The panel decided not to adjourn the hearing under Rule 32. In reaching this decision, the panel has considered the submissions of Ms Kay, the efforts made by the NMC to contact you, and the advice of the legal assessor. It had particular regard to the factors set out in Rule 32 and the overall interests of justice and fairness to all parties. It noted that:

- You previously engaged with these proceedings and have since disengaged without requesting an adjournment;
- After being notified of the panel's findings at facts stage on 1 May 2024, you made comments that suggested that you might not engage further in the hearing;
- The NMC has made reasonable efforts to contact you via numerous telephone calls and emails;
- The charges found proved are of a serious nature and relate to events that occurred in 2022;
- There are public protection concerns in this case; and
- There is a strong public interest in the expeditious disposal of the case.

[PRIVATE]

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 suitability to remain on the register unrestricted. The NMC guidance DMA-1 states *'the question that will help decide whether a professional's fitness to practise is impaired is:*

Can the nurse practise kindly safely and professionally?'

The panel, in reaching its decision, has 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 has 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 Kay referred the panel to the case of *Roylance v General Medical Council (No. 2)* [2000] 1 AC 311, 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.'* She also referred the panel to the case of *R (Remedy UK Ltd) v General Medical Council* [2010] EWHC 1245 (Admin) in respect of defining misconduct.

Ms Kay invited the panel to take the view that the facts proven amount to misconduct. She referred the panel to the terms of *'The Code: Professional standards of practice and behaviour for nurses and midwives 2015'* (the Code) in making its decision.

Ms Kay submitted that asking Colleague A on three occasions to kiss her stomach (two of which were requests after being told no), grabbing Colleague A's arm, pulling her toward you, then kissing her stomach without consent are all behaviours that clearly fall short of the standards expected of a registered nurse. She submitted that these actions were inappropriate and sexually motivated, which is sufficiently serious to amount to misconduct.

Ms Kay submitted that each of the charges taken individually is a serious departure from the expected standards and fell far short of what would be proper conduct. She stated that your actions occurred in the workplace, albeit not on a patient, but towards a colleague and related to your professional practice. She submitted that treating colleagues with respect and dignity is integral to the standards expected of a registered nurse and central to the Code. She submitted that unwanted, unconsented physical touching of an intimate area of a pregnant colleague, for your own sexual gratification, showed lack of respect and dignity for Colleague A.

Ms Kay submitted that in all circumstances of this case, your actions in the charges proved depart from good professional practice and are sufficiently serious to constitute serious misconduct.

Submissions on impairment

Ms Kay moved on to the issue of impairment and addressed the panel on the need to have regard to protecting 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. It also included reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin), *Cohen v General Medical Council* [2008] EWHC 581 (Admin) and *Zygmunt v General Medical Council* [2008] EWHC 2643 (Admin).

Ms Kay submitted that the following questions outlined by Dame Janet Smith in the fifth Shipman report can be answered in the affirmative in respect of this case, in that you:

- *have 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*
- *Have in the past brought and/or is liable in the future to bring the profession into disrepute*
- *Has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the profession;*

Ms Kay submitted that you have caused harm to Colleague A as a result of your actions, not only physically but also emotionally. She submitted that Colleague A was left feeling shocked and uncomfortable. She referred to Colleague A's evidence, in which she has described the impact of your actions on her mental wellbeing, as well as feeling vulnerable at work alone. She submitted that your actions have also affected Colleague A's ability to carry out her role to provide care in a safe and effective manner. She submitted that this behaviour has the potential to interfere with patient care and place patients and the public at risk of harm.

Additionally, Ms Kay submitted that you have breached individual provisions of the Code, which constitutes a breach of fundamental tenets of the nursing profession.

Ms Kay referred the panel to the NMC guidance on impairment (reference: DMA-1), specifically to the section relating to '*context of the error/conduct involved in the concern*'. She stated that in terms of your personal factors, you have described the impact the regulatory proceedings have had on you, [PRIVATE]. She submitted that these personal factors do not provide any context to the misconduct in this case. She stated that the panel has heard in your evidence that you have said in your culture pregnant women are respected. She submitted that such respect ought to include respecting what a pregnant woman says, specifically when Colleague A said no you could not kiss her.

In respect of insight, Ms Kay submitted that there is no evidence of insight before the panel. She submitted that any insight that such actions are wrong in principle is negated by the fact that you carried out the actions charged.

Ms Kay submitted that there is no evidence of reflection or strengthened practice, no evidence that you would not repeat these actions in the future, and you have failed to appreciate the impact of your actions on Colleague A.

In respect of future risk, Ms Kay submitted that the misconduct in this case is attitudinal and very serious in nature. She submitted that the concerns in this case cannot be addressed by taking steps such as completing training courses or supervised practice. She submitted that whilst your actions relate to one incident, the level of persistence demonstrated by you to obtain sexual gratification is highly likely to be repeated, given the absence of insight.

For these reasons, Ms Kay submitted that a finding of impairment is required to maintain public confidence in the profession and to uphold proper professional standards. She submitted that public confidence in the profession and the NMC as its regulator would be undermined if such behaviour was not marked as unacceptable.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments.

Decision and reasons on misconduct

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

The panel was of the view that your actions did fall significantly short of the standards expected of a registered nurse, and that your actions amounted to a breach of the Code. Specifically:

‘1 Treat people as individuals and uphold their dignity

1.1 treat people with kindness, respect and compassion

1.5 respect and uphold people’s human rights

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 ... 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.'

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. In assessing whether the charges amounted to misconduct, the panel considered the charges individually and cumulatively as well as the circumstances of the case as a whole.

The panel noted that in charge 1 you asked to kiss Colleague A's stomach, grabbed her arm and kissed her stomach without her consent. It considered that your actions caused significant harm to Colleague A, where she has indicated in evidence that it has had a lasting impact on her emotional health and wellbeing and she no longer feels safe at work. The panel regarded your actions as inappropriate and intimidating, as you advanced unwelcomed forceful behaviour towards Colleague A demonstrating a failure to treat her with dignity and respect. It was of the view that acting with care and respect towards colleagues are integral to the standards expected of a registered nurse.

The panel considered your actions in charge 1 in conjunction with its findings in charge 2, in that your actions were sexually motivated and you sought sexual gratification. It had regard to the NMC guidance on sexual misconduct (reference: FTP-3). It found your actions in charge 1 compounded by a breach of sexual boundaries, which failed to protect your colleague from harm. It determined that individually and cumulatively, your actions would be considered deplorable by fellow practitioners, thereby damaging the trust that the public places in the profession.

The panel therefore concluded that your actions proved in charges 1 and 2 did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, your fitness to practise is currently 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. 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 *CHRE v NMC and 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.'*

Taking into account all of the evidence adduced in this matter, the panel was not satisfied that your actions placed patients at unwarranted risk of harm in the past. It bore in mind that that whilst your actions did have an impact on Colleague A, this did not directly impact on any patient. However, it did note that your actions did have the potential to put patients at risk in the future, if you were to act in a similar manner towards a patient. The panel concluded that the lack of reflection shown increased such a risk. On this basis, the panel determined that limb 'a' of the 'test' was engaged.

The panel determined that limbs (b) and (c) in the above 'test' were also engaged in this case. It found that your misconduct had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute.

The panel next went on to consider the matter of insight. The panel noted that whilst you stated your respect for pregnant women and how they should be treated, it was not presented with evidence of insight or remorse. It noted that it had not received any evidence to suggest that you have demonstrated an understanding of how your actions put Colleague A at a risk of harm/actual harm, how this impacted negatively on her, and

on the reputation of the nursing profession. The panel therefore determined that you have demonstrated a significant lack of insight and remorse.

The panel was of the view that the misconduct in this case evidenced behaviour that is inherently more difficult to put right, since it raises concerns about attitudinal issues and could not be put right by training courses. The panel considered the evidence before it and concluded that it has not received any information to suggest that you have taken any steps to address the specific concerns raised about your actions. You have not provided a reflection on the consequences of your conduct or testimonials attesting to your previous conduct at work.

The panel was of the view that due to the lack of insight, remorse and evidence of strengthened practice, there remains a high risk of repetition. The panel considered that your actions set out in the charges found proved demonstrated a serious breach of professional boundaries, which resulted in lasting negative psychological impact on Colleague A. It noted that your actions have the potential to put patients at risk of harm in the future if you were to act in a similar manner towards a patient. On the basis of all the information before it, the panel decided that there is a risk to the public if you were allowed to practise without restriction. The panel therefore determined that a finding of current impairment on public protection grounds is necessary.

The panel bore in mind that the overarching objectives of the NMC; to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This 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 concluded that a member of the public would be outraged by the nature of this behaviour by a registered nurse. Public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds your fitness to practise impaired on the grounds of public interest.

Having regard to all of the above, the panel was not satisfied that you were able to practise kindly, safely and/or professionally and therefore your fitness to practise is currently impaired.

Sanction

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike you off the register. As a result of this order the NMC register will show that you have been struck off the register.

In reaching this decision, the panel has 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. It took account of submissions from Ms Kay. The panel received no further evidence from anyone at this stage.

The panel accepted the advice of the legal assessor.

Submissions on sanction

Ms Kay informed the panel that the NMC was seeking the imposition of a striking-off order as your conduct is incompatible with remaining on the register.

Ms Kay outlined the aggravating factors she identified in this case:

- Breach of a position of trust;
- Harm caused to Colleague A;
- Vulnerability of Colleague A;
- Force used in pursuit of sexual gratification; and
- Significant lack of insight

Ms Kay also outlined the possible mitigating factor she identified in this case:

- No previous disciplinary history.

Ms Kay submitted that making no order or imposing a caution order would be inadequate given the seriousness of this case.

Ms Kay submitted that a conditions of practice order would not be appropriate as the concerns do not relate to clinical issues that can be addressed by way of training or support.

Ms Kay submitted that a suspension order would not be proportionate as the factors apparent in this case involved unwanted, unconsented physical touching of an intimate part of the body of a pregnant colleague. She referred to the SG in relation to suspension orders (*SAN-3d*). She submitted that with reference to the SG, the case is such that a temporary removal from the register would be insufficient and it would not maintain professional standards. She submitted that whilst the matters in this case relate to a single incident, there was a degree of persistence and determination in your actions. Further she submitted that there is evidence of harmful attitudinal problems and in light of your lack of insight, remorse or evidence of strengthened practice, there is a high risk of repetition.

Ms Kay referred to the SG in relation to striking-off orders (*SAN-3e*). She submitted that your conduct raises fundamental questions about your professionalism, and a striking-off order is the only appropriate sanction given the level of risk identified and to maintain public confidence in the profession.

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 has borne 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:

- Abuse of a position of trust, which involved persistence and force towards a vulnerable pregnant colleague;
- Lack of insight into failings; and
- Conduct which has caused harm to a colleague.

The panel did not identify any mitigating factors in this case. In making this decision the panel acknowledged your evidence that [PRIVATE]. However, it did not consider this a mitigating factor given the serious nature of the charges in this case.

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. 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 was of the view that there are no practical or workable conditions that could be formulated, given the nature and seriousness of the charges in this case. The misconduct identified in this case relates to sexual misconduct and did not concern issues with your clinical practice, it was therefore not something that can be addressed through retraining. Furthermore, the panel considered that the concerns in this matter involved a serious breach of professional boundaries, with a level of harassment and persistence that is reflective of

deep-seated attitudinal problems. It concluded that the placing of conditions on your registration would not adequately protect the public or satisfy the public interest.

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;*
- ...
-

The panel considered that whilst the concerns in this case relate to a single incident, this involved a persistent request to Colleague A (three times) before you forcefully proceeded with your actions without her consent. It took the view that your actions reflected attitudinal problems. The panel acknowledged that it has not been presented with any evidence of repetition of similar behaviour since the referral. However, it noted that you have indicated that you have not worked in a clinical setting since shortly after the referral. The panel also took into account that it had no evidence of insight and no evidence of remorse, therefore it found a consequent risk of repetition.

The conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel noted that the serious breach of the fundamental tenets of the profession evidenced by your actions is fundamentally incompatible with you remaining on the register. In this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, in looking at a striking-off order, the panel took note of the following paragraphs of the SG:

- *Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?*
- *Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?*
- *Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?*

The panel noted that you have demonstrated a no insight into your misconduct and no remorse regarding the impact of your misconduct on Colleague A and the wider profession. Additionally, it noted that there was no evidence to demonstrate that you have strengthened your practice in respect of the specific concerns in this matter.

The panel considered that the misconduct in this case related to a serious failure to adhere to professional and personal boundaries, which involved kissing an intimate area of a vulnerable colleague who was pregnant after being told not to. It noted that your actions impacted on the wellbeing of Colleague A and present a risk of harm to patients if you were to act in a similar manner in the future. The panel found that you have not demonstrated that you can be trusted as a registered nurse to maintain professional boundaries and a safe working environment, which raises fundamental questions about your professionalism. It reached the conclusion that public confidence in the profession would not be maintained if you remained on the register. Taking account of the SG and the guidance on serious cases, the panel concluded that in your case nothing less than a striking-off order would maintain professional standards, keep the public protected and address the public interest.

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the effect of your actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct himself, the panel has concluded that nothing short of this would be sufficient in this case.

The panel determined that this order was necessary to mark the importance of maintaining public confidence in the profession, and to declare to the public and the profession the standards of behaviour required of a registered nurse.

This will be confirmed to you in writing.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period or the conclusion of an appeal, the panel has considered whether an interim order, until the striking-off order takes effect, 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 is in your own interests.

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

Submissions on interim order

The panel took account of the submissions made by Ms Kay. She submitted that an interim order should be made on the grounds that it is necessary for the protection of the public and it is otherwise in the public interest. She invited the panel to impose an interim suspension order for a period of 18 months for the reasons stated in the panel's findings.

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 to allow time for any possible appeal.

If no appeal is made, then the interim suspension order will be replaced by the substantive striking-off order 28 days after you are sent the decision of this hearing in writing.

That concludes this determination.