

Nursing and Midwifery Council
Fitness to Practise Committee
Substantive Meeting
13 June 2019

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

Name of registrant:	Mr Gareth Foster
NMC PIN:	08H0023N
Part(s) of the register:	Sub Part 1 RNA: Adult nurse (19 September 2008)
Area of Registered Address:	Northern Ireland
Type of Case:	Misconduct/Conviction
Panel Members:	Hilary Nightingale (Chair, Lay member) Sue O'Sullivan (Registrant member) Jan Bilton (Lay member)
Legal Assessor:	David Marshall
Panel Secretary:	Maya Hussain
Mr Foster:	Not present and not represented
Facts proved:	All
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 the 22 October 2018 were convicted at Ballymena Magistrates' Court of:
 - a) Contravention of Article 7(1) of the Sexual Offences (Northern Ireland) Order 2008
 - b) Contravention of Article 8 of the Sexual Offences (Northern Ireland) Order 2008 and Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983.
- 2) On receiving a summons to answer complaint on or around 6 August 2018 you failed to promptly inform:
 - a) Your employer
 - b) The NMC
- 3) Your actions at charge 2 above showed a lack of integrity in that you knew there was a requirement to inform the NMC and/or your employer of the court summons

And, in light of the above your fitness to practise is impaired by reason of your conviction in respect of charge 1 and misconduct in respect of charges 2 and 3.

Decision on Service of Notice of Meeting

The panel considered whether notice of this meeting has been served in accordance with the relevant legislation. Rules 11A and 34 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (amended) (“the Rules”) provide as follows:

11A.—(1) Where a meeting is to be held the Fitness to Practise Committee shall send notice of the meeting to the registrant no later than 28 days before the date the meeting is to be held.

34.—(1) Any notice of hearing required to be served upon the registrant shall be delivered by sending it by a postal service or other delivery service in which delivery or receipt is recorded to, or by leaving it at—

a) her address in the register; or

b) where this differs from, and it appears to the Council more likely to reach her at, her last known address, the registrant’s last known address.

Written notice of this meeting has been sent to Mr Foster’s registered address by recorded delivery and by first class post on 3 May 2019. Whilst proof of delivery is not a requirement of the Rules, the notice was signed for in the printed name of “FOSTER” on 4 May 2019 at 11.01am. In the notice sent to Mr Foster, he was informed that the meeting will take place on or after 10 June 2019.

The panel accepted the advice of the legal assessor.

In light of all of the information available, the panel was satisfied that Mr Foster had been served with notice of this meeting in accordance with the requirements of Rules 11A and 34. It noted that the rules do not require delivery and that it is the responsibility of any registrant to maintain an effective and up-to-date registered address.

Background

Mr Foster was employed at the Southern Health Social Care Trust (the Trust) from 1 March 2013 as a registered nurse Band 5.

On 6 August 2018, Mr Foster was summoned by the Ballymena Magistrates' Court in Northern Ireland to appear on 13 September 2018 to answer the following charges:

1. ...(withdrawn)
2. On a date between the 1st day of July 2016 and the 4th day of July 2016, other than at 1 above, intentionally touched [Person A], the circumstances being that the touching was sexual, that he did not consent to the touching and you did not reasonably believe that he so consented, contrary to Article 7 (1) of the Sexual Offences (NI) Order 2008 (4209013SB)
3. On a date between the 1st day of July 2016 and the 4th day of July 2016, attempted intentionally to cause [Person A] to engage in an activity, namely masturbation, the circumstances being such that the activity was sexual, that [Person A] did not consent to engaging in the activity and that you did not reasonably believe that [Person A] so consented, contrary to Article 8 of the Sexual Offences (Northern Ireland) Order 2008 and Article 3 (1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 (4209009AT)

On 22 October 2018, Mr Foster pleaded guilty to both charges 2 and 3.

These events occurred when Mr Foster was a volunteer in charge of a treatment unit at a festival. The victim was an 18 year old volunteer.

On 26 November 2018, the court imposed a probation order for 1 year. Mr Foster was placed on the Sex Offenders Register for a period of 5 years and he was ordered to pay other parties compensation of £1000.

Mr Foster informed the Trust of his convictions on 4 December 2018 by speaking to a member of the Human Resources team.

Mr Foster informed the NMC of his convictions by self-referral on 4 December 2018.

Decision on the findings on facts and reasons

Charge 1

On the 22 October 2018 were convicted at Ballymena Magistrates' Court of:

- a) Contravention of Article 7(1) of the Sexual Offences (Northern Ireland) Order 2008
- b) Contravention of Article 8 of the Sexual Offences (Northern Ireland) Order 2008 and Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983.

This charge was found PROVED.

The panel were provided with a copy of two certificates of conviction both dated 14 February 2019 by the Northern Ireland Magistrates Courts and Tribunals Service. The panel finds that the facts are found proved in accordance with Rule 31 (2) and (3) of the Rules which state:

- “(2) Where a registrant has been convicted of a criminal offence—
- (a) a copy of the certificate of conviction, certified by a competent officer of a Court in the United Kingdom (or, in Scotland, an extract conviction) shall be conclusive proof of the conviction; and
 - (b) the findings of fact upon which the conviction is based shall be admissible as proof of those facts.
- (3) The only evidence which may be adduced by the registrant in rebuttal of a conviction certified or extracted in accordance with paragraph (2)(a) is evidence for the purpose of proving that she is not the person referred to in the certificate or extract.”

Charge 2a

On receiving a summons to answer complaint on or around 6 August 2018 you failed to promptly inform:

Your employer

This charge was found PROVED.

The panel first considered the Trust's "Statement of Main Terms and Conditions of Employment". Section 28 entitled "Criminal Convictions" stated that:

"Under the Rehabilitation of Offenders (Exceptions) Order 1979 you, as an employee of the Health Service must disclose to the Trust any criminal convictions which you have or have ever had on your record. For the purposes of the above order, criminal convictions are never considered spent.

You are therefore required to immediately notify your manager if you are charged or convicted of any criminal offence.

Consideration will then be given to the relevance of any conviction to the duties of the post and the appropriateness of disciplinary action.

If you fail to disclose a conviction you will be subject to a disciplinary action which may lead to dismissal."

Mr Foster signed the "Statement of Main Terms and Conditions of Employment" on 4 April 2013 which is indicative of his awareness and duty to inform his employer of any charges or convictions against him.

Secondly, the panel considered the document entitled "Summons to Defendant to Answer Complaint" dated 6 August 2018. It included the charges Mr Foster was facing.

The panel then went on to consider Ms 1's statement. Ms 1 is currently employed by the Trust as a Human Resources (HR) and Attendance Officer. She stated:

"On 4 December 2018 Gareth Foster attended the office, Hill Building, at approx. 9.30am and advised a colleague at the door that he needed to speak to myself or [a senior HR Advisor] urgently and that the matter was private.

I took Gareth Foster to a private room near reception. This is when Gareth Foster advised me of his conviction.

Gareth Foster said that he was convicted of sexual assault, that he would be on probation for a year and would be on the sex offenders register for five years.

This was the first time the Trust had been notified of the conviction"

The panel was of the view, that Mr Foster had knowledge of the summons containing the charges since at least August 2018 and failed to promptly inform his employer. Mr Foster did not inform his employer until December 2018 and therefore, based on the evidence it had before it, the panel found this charge proved.

Charge 2b

On receiving a summons to answer complaint on or around 6 August 2018 you failed to promptly inform:

The NMC

This charge was found PROVED.

The panel first considered the document entitled "Summons to Defendant to Answer Complaint" dated 6 August 2018. It included the charges Mr Foster was facing.

The panel then went on to consider Ms 2's statement. Ms 2 is currently employed by the Nursing and Midwifery Council (NMC) as a Data Processing Officer. She stated that Mr Foster's:

“...self-referral was received via the new referrals inbox on 4 December 2018 and was logged on 5 December 2018. I generated and posted an acknowledgement letter confirming the receipt of the referral which was sent to Gareth Foster via first class post on the same day, 5 December 2018.”

The panel then considered Mr Foster's duty to cooperate with his regulator. It had sight of The Code: Professional standards of practice and behaviour for nurses and midwives (2015) specifically:

23.2 tell both us and any employers as soon as you can about any caution or charge against you, or if you have received a conditional discharge in relation to, or have been found guilty of, a criminal offence (other than a protected caution or conviction)

The panel was satisfied that Mr Foster, as a professional practising nurse, had a duty to cooperate with the NMC. Mr Foster had knowledge of the summons containing the charges since at least August 2018 and failed to promptly inform the NMC. Mr Foster did not inform the NMC until December 2018 and therefore, based on the evidence it had before it, the panel found this charge proved.

Charge 3

Your actions at charge 2 above showed a lack of integrity in that you knew there was a requirement to inform the NMC and/or your employer of the court summons.

This charge was found PROVED.

The panel considered Mr Foster's role as a registered nurse at the time of the conviction. Mr Foster is expected to be fully aware of his terms and conditions of

employment at the Trust and the Code. The panel had documentary evidence in the form of the “Court Summons of Complaint dated 6 August 2018” before it indicating that Mr Foster knew of the charges he was facing in August 2018. It was of the view that his delay in informing both his employer and his regulator promptly, knowing the serious nature of the convictions, demonstrated a lack of integrity. The panel considered that Mr Foster had breached the standards expected of registered nurses as well as the expectations of the public. It therefore found this charge proved.

Decision on misconduct

Having reached its findings on the facts, the panel noted that it was not required to consider the issue of misconduct in relation to charge 1a and 1b, because those charges are capable of impairing fitness to practice in themselves.

The panel went on to consider whether the charges 2 and 3 found proved amount to misconduct. The panel had regard to the terms of the Code. It specifically referred to:

20.1 keep to and uphold the standards and values set out in the Code

23.2 tell both us and any employers as soon as you can about any caution or charge against you, or if you have received a conditional discharge in relation to, or have been found guilty of, a criminal offence (other than a protected caution or conviction)

In relation to charge 2, the panel concluded that Mr Foster’s actions, by failing to promptly inform his employer and the NMC about his criminal charges (as in the summons to answer complaint) fell seriously short of the conduct and standards expected of a nurse. The panel was of the view that members of the nursing profession would consider Mr Foster’s failure to do this promptly as deplorable. For these reasons, the panel concluded that charge 2 amounted to misconduct.

In relation to charge 3, the panel was of the view that Mr Foster’s conduct went against the fundamental tenets of the nursing profession. It considered that the regulator, public and patients have expectations and put trust in nurses to demonstrate a high standard

of integrity, particularly in relation to these matters concerning convictions of such a serious nature. The panel found that charge 3 amounted to serious misconduct.

Decision on impairment

The panel first considered whether Mr Foster's fitness to practise is currently impaired by reason of his convictions. The NMC has defined fitness to practise as a registrant's suitability to remain on the register unrestricted.

The panel had regard to all the evidence and to its findings at the facts stage. It accepted the advice of the legal assessor.

The panel exercised its own independent judgment in deciding the issues before it, bearing in mind that there was no burden or standard of proof at this stage. It bore in mind the guidelines outlined in the case of CHRE v Nursing and Midwifery Council and Grant, [2011] EWHC 927 (Admin) and found the first three limbs engaged.

Mrs Justice Cox went on to say in Paragraph 76:

I would also add the following observations in this case having heard submissions, principally from Ms McDonald, as to the helpful and comprehensive approach to determining this issue formulated by Dame Janet Smith in her Fifth Report from Shipman, referred to above. At paragraph 25.67 she identified the following as an appropriate test for panels considering impairment of a doctor's fitness to practise, but in my view the test would be equally applicable to other practitioners governed by different regulatory schemes.

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. ...

The matters for which Mr Foster was convicted are extremely serious. Mr Foster as a registered nurse has a duty to adhere to his professional Code and to uphold the reputation of his profession at all times. The public have a right to expect that a registered nurse will maintain high standards of conduct and behaviour and will act with integrity at all times. Registered nurses occupy a privileged position of trust and the panel has no doubt that the particular sexual nature of Mr Foster's criminal offences will have had an adverse impact on the reputation of the nursing profession and will have seriously undermined the public's confidence in the nursing profession and the NMC as regulator.

Throughout its deliberations, the panel has kept at the forefront of its mind the public interest and has concluded that Mr Foster's convictions are so serious as to have gravely undermined the public's confidence in the standards and behaviour expected of a registered nurse.

The panel considered whether Mr Foster's failings are easily remediable; whether they have been remedied and whether they are likely to be repeated. The panel considered that some types of failing are more easily remedied than others, and that failings involving deep-seated attitudinal problems, such as convictions of a sexual nature, as in this case, are less easy to remediate than failings which involved clinical errors or incompetence.

The panel had received no evidence which might enable it to conclude that Mr Foster had demonstrated any insight, remorse or remediation in relation to the convictions he has received. In these circumstances, the panel concluded that Mr Foster was liable to repeat failings of the kind which led to his conviction.

The panel also considered whether, in any event, 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 circumstances of this case. In light of the serious sexual nature of the convictions, the panel was in no doubt that it would.

The panel considered the nature of the convictions and the context in which they occurred. Sexual convictions can seriously undermine a nurse's trustworthiness as a registered nurse. The potential for risk to vulnerable patients is a concern bearing in mind the NMC's overarching principle to protect the public.

In all the circumstances, the panel concluded that Mr Foster's fitness to practise is impaired by reason of his convictions on public interest and public protection grounds.

The panel then went on to consider the misconduct in this case. The panel had no evidence before it from Mr Foster demonstrating any regret or insight for his failure to promptly inform the NMC and his employer about his "Court Summons of Complaint dated 6 August 2018" nor his lack of integrity. The panel has no evidence of remorse before it indicating that Mr Foster is aware that he has breached fundamental tenets of the profession.

The panel therefore concluded that a risk of repetition of Mr Foster's misconduct remains and there was a risk that he could in the future breach fundamental tenets of the profession and bring the profession into disrepute.

Accordingly, the panel concluded that Mr Foster's fitness to practise is currently impaired by his reason of his misconduct on grounds of public protection and public interest.

Decision on sanction and reasons

In reaching this decision, the panel had regard to all the evidence which was before it and to its previous decisions at the facts and impairment stages. The panel accepted the advice of the legal assessor. The panel bore in mind that any sanction imposed must be reasonable, appropriate and proportionate, and although not intended to be punitive in its effect, may have such consequences.

The panel had careful regard to the Sanctions Guidance (“SG”) published by the NMC. It recognised that the decision on sanction was a matter for the panel exercising its own independent judgement.

The panel first considered the aggravating and mitigating factors in this case.

The panel considered that the aggravating factors were that:

- this sexual nature of the convictions which included a vulnerable victim;
- Mr Foster has made no expression of insight, remorse or regret; and
- Mr Foster’s actions abused his position of trust.

There were no mitigating features before the panel 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 convictions and misconduct is extremely serious, and there remains a risk of repetition. The panel decided that to take no further action would not satisfy the public interest in declaring and upholding proper professional standards, nor would it maintain public confidence in the profession and in the NMC as its regulator.

For the same reasons the panel concluded that a caution order would not be a sufficient or appropriate sanction in this case. This case could not be regarded as being at the lower end of the spectrum of impaired fitness to practise. A caution order would not restrict Mr Foster’s ability to practise as a nurse. The panel considered that a caution order would be insufficient to mark the seriousness of the conviction and misconduct and would not protect the public nor satisfy the public interest.

The panel next considered whether imposing conditions of practice on Mr Foster's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be relevant, proportionate, measurable and workable. Mr Foster has been convicted of extremely serious criminal charges involving a vulnerable victim, is currently serving his sentence and is on the sex offenders register. The misconduct in this case relates to attitudinal issues rather than clinical. The panel has therefore concluded that there are no conditions of practice that could be formulated to address the particularly grave nature of Mr Foster's behaviour. Nor would conditions of practice address the risk of repetition in this case, or be sufficient to mark the seriousness of this case or satisfy the public interest concerns.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The facts underlying the conviction in this case amounted to a significant departure from the standards expected of a registered nurse and had the potential for severe consequences for patient safety. The misconduct in this case relates to breaching fundamental tenets of the nursing profession and Mr Foster's lack of integrity demonstrates serious attitudinal concerns.

Nurses occupy a position of privilege and trust in society and are expected to adhere to their Code at all times. They must ensure their conduct justifies the trust the public places in both them and the nursing profession. The panel is satisfied that Mr Foster has breached fundamental tenets of the nursing profession, namely to act with integrity and uphold the reputation of the nursing profession.

For these reasons the panel has concluded that temporary removal from the register would not be an appropriate sanction given the serious nature of Mr Foster's criminal convictions and misconduct. Such behaviour is fundamentally incompatible with ongoing registration as a nurse.

The panel has therefore concluded that a suspension order is not a sufficient sanction to address the wider public interest considerations in maintaining public confidence in

the nursing profession or the NMC as a regulator and in the declaring and upholding of proper standards of conduct and behaviour.

The panel noted that there was no evidence before the panel that Mr Foster takes any personal responsibility for his behaviour. The panel found that Mr Foster's actions could have caused harm to the vulnerable person involved and his continuing lack of insight means that he may cause harm to others in the future. In the panel's view, his attitude demonstrates a lack of insight and there remains a real risk of repetition of his misconduct.

Balancing all of these factors, the panel has determined that the only appropriate and proportionate sanction in the particular circumstances of this case is a striking-off order. The panel has concluded that this order is necessary to mark the importance of maintaining public confidence in the profession and declaring and upholding of proper standards of conduct and behaviour. Furthermore, this will send to the public and the profession a clear message about the standards of conduct and behaviour required of a registered nurse.

The panel therefore, directs that Mr Foster's name be removed from the NMC Register. Anyone who enquires about Mr Foster's registration will be advised of this. Mr Foster will be informed of this decision in writing and will have 28 days from the date when written notice of the result of this hearing is deemed to have been served upon him in which to exercise his right of appeal.

Determination on interim order

The panel accepted the advice of the legal assessor.

The panel was satisfied that an interim suspension order is necessary for the protection of the public and is in the wider 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. To do otherwise would be incompatible with its earlier findings.

The reasons for the interim suspension order will be the same as those detailed in the substantive order.

The period of this order is for 18 months to allow for the possibility of an appeal to be made and determined.

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

That concludes this determination.