Nursing and Midwifery Council
Fitness to Practise Committee

Substantive Hearing
23 August – 2 September 2021
Virtual Hearing

Name of registrant:	David Marc James
NMC PIN:	87A0029W
Part(s) of the register:	Registered Nurse – Sub Part 1 Mental Health Nursing – 18 March 1990
Area of registered address:	Powys
Type of case:	Misconduct
Panel members:	Debbie Jones (Chair, lay member) Lorna Taylor (Registrant member) Catherine Cooper (Registrant member)
Legal Assessor:	John Moir
Panel Secretary:	Parys Lanlehin-Dobson
Nursing and Midwifery Council:	Represented by Scott Smith, Case Presenter
Mr James:	Not present and unrepresented
Facts proved:	Charges 1b, 1c, 2b, and 2c
Facts not proved:	Charges 1a, 2a, 3, 4, and 5
Fitness to practise:	Impaired
Sanction:	**Striking-off order**
Interim order:	**Interim suspension (18 months)**

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mr James was not in attendance and that the Notice of Hearing letter had been sent to his registered email address on 23 July 2021.

The panel took into account that the Notice of Hearing provided details of the allegation, the time, dates and how to access the virtual hearing and, amongst other things, information about Mr James's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

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

The panel accepted the advice of the legal assessor.

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

Decision and reasons on proceeding in the absence of Mr James

The panel next considered whether it should proceed in the absence of Mr James. It had regard to Rule 21 and heard the submissions of Mr Smith who invited the panel to continue in the absence of Mr James. He submitted that Mr James had voluntarily absented himself.

Mr Smith submitted that there had been no engagement at all by Mr James with the NMC since October 2019 in relation to these proceedings and, as a consequence, there was no reason to believe that an adjournment would secure his attendance on some future occasion.

Mr Smith referred the panel to the registrant's response bundle, dated 18 October 2019 which includes a telephone attendance note, detailing a conversation held between Mr James and the investigating officer at the NMC:

> *"Mr James returned my call. I started by apologising for our lack of contact with him during our investigation. I said that we should have been updating him more regularly than we had been. Mr James said that it didn't matter because he doesn't want to work as a nurse. He has retired and is drawing a pension. Mr James said that we should close the investigation because the police took no action. He just wants to come off the register and is fed up receiving letters every six months to tell him he can't work as a nurse. ….."*

The panel accepted the advice of the legal assessor.

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

The panel has decided to proceed in the absence of Mr James. In reaching this decision, the panel has considered the submissions of Mr Smith, along with the telephone note as referred to by Mr Smith, and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v Jones* and *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mr James;
- Mr James has not engaged with the NMC and has not responded to any of the letters sent to him about this hearing;
- There is no reason to suppose that adjourning would secure his attendance at some future date;
- Witnesses have been put on notice to give live evidence today, and others are due to give evidence during the course of the week;

- Not proceeding may inconvenience the witnesses, their employer(s) and, for those involved in clinical practice, the clients who need their professional services;
- The charges relate to events that occurred in 2017;
- Further delay may have an adverse effect on the ability of witnesses accurately to recall events; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mr James in proceeding in his absence. Although the notice of this hearing along with the evidence upon which the NMC relies will have been sent to Mr James by email, the panel did have concerns that no other attempts were made to contact Mr James, for example by telephone. The panel had borne in mind that proceeding in the absence of Mr James means that he will be unable to challenge the evidence relied upon by the NMC in person and will not be able to give evidence on his own behalf. However, in the panel's judgement, this can, to some extent, be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Mr James decisions to absent himself from the hearing, waive his rights to attend, and/or be represented, and to not provide evidence or make submissions on his own behalf.

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

Details of charge

That you a registered nurse, whilst employed as a Band 5 staff nurse by Powys Teaching Health Board, on 16 May 2017:

1. *Behaved aggressively towards colleague 1, in that you:*

a. *Stood unnecessarily close to colleague 1.*
b. *Pointed at colleague 1.*
c. *Said to colleague 1, 'I've always fucking detested you' or words to that effect.*

2. *Sought to restrain patient 1 using a clinically inappropriate technique in that you restrained patient 1:*

    a. *Without first seeking to employ any distraction techniques.*
    b. *By yourself.*
    c. *Through the use of a hold which was not clinically appropriate in the circumstances.*

3. *Having restrained patient 1, on one or more occasions hit her on the back of the head.*

4. *Pushed patient 1.*

5. *Your actions at charge 4:*

    a. *Were a deliberate attempt to cause patient 1 to fall backwards on to her bed.*
    b. *Were undertaken reckless as to whether patient 1 fell.*

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

[PRIVATE]

Decision and reasons on application to admit telephone evidence

The panel heard an application made by Mr Smith under Rule 31 to allow Witness 7 to give their evidence over the telephone as opposed to joining the virtual hearing via the

video and audio link. Mr Smith informed the panel that Witness 7 was not present at this virtual hearing and explained he was unable to attend via the video and audio link and could only give his evidence over the telephone on day three of the hearing, as he was currently on holiday abroad and did not have a suitable device to accommodate the virtual proceedings.

In the preparation of this hearing, the NMC had indicated to Mr James in the Case Management Form (CMF), dated 25 November 2018, that it was the NMC's intention for Witness 7 to provide live evidence to the panel. Despite knowledge of the nature of the evidence to be given by Witness 7, Mr James made the decision not to attend this hearing. On this basis Mr Smith advanced the argument that there was no lack of fairness to Mr James in allowing Witness 7 to give evidence over the telephone audio only.

The panel accepted the advice of the legal assessor. The panel accepted that, in all the circumstances of this case, it would be fair to hear Witness 7's evidence over the telephone.

Background

The charges arose whilst Mr James was employed as a registered nurse by Powys Teaching Health Board (the Board).

The charges arose following allegations that on 16 May 2017, Mr James physically restrained a female patient during an incident that took place in the foyer adjoining Felindire ward of Bronllys Hospital, a unit which caters for patients with mild to severe mental health problems most of whom have been sectioned under Section 2 or Section 3 of the Mental Health Act. This ward also caters for informal patients also known as patient with mental health problems who have not been sectioned.

It was alleged that Patient 1 was inappropriately restrained and assaulted by Mr James. It is further alleged that, immediately prior to the alleged assault on the Patient 1, Mr

James had verbally abused a female staff member on the unit by shouting and swearing at her.

Decision and reasons on facts

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

The panel has drawn no adverse inference from the non-attendance of Mr James.

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

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

- Colleague 1: At the time of the incident Colleague 1 was employed as a Medical Secretary by the Board. She worked in the same unit as Mr James.

- Witness 2: Witness 2 is a registered nurse. At the time of the incident Witness 2 was setting up and managing a Nurse Bank for the board. Witness 2 also carried out the internal investigation, approximately one year after the incident.

- Witness 3: At the time of the incident Witness 3 worked as the Clinical Services Department Coordinator for the board. Witness 3 worked in the same office as Colleague 1 and Witness 4.

- Witness 4: At the time of the incident Witness 4 worked as one of the three medical secretaries on the unit.

- Witness 5: Witness 5 is a registered Nurse. At the time of the incident Witness 5 worked on the ward.

- Witness 6: At the time of the incident was employed by the Board as a Health Care Support Worker. Witness 6 regularly worked with Mr James on the Ward.

- Witness 7: At the time of the incident Witness 7 was employed by the board as an Occupational Therapist based on Felindire ward. Witness 7 worked with Mr James approximately three to four days per week.

- Witness 8: Witness 8 is a registered nurse. At the time of the incident Witness 8 was employed by the Board and

	worked on the ward as a staff nurse. Witness 8 worked with Mr James three to four times per week.
• Relative 1:	Relative 1 is the Patient 1's father. He received a phone call from Patient 1 around midday on the day of the incident. Patient 1 told Relative 1 that she had been assaulted by Mr James.

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

The panel took into account that four years had passed since the time of the alleged incidents. It noted that this potentially hampered the recollection of all the accounts of the incidents provided by the witnesses and Patient 1. It considered there was limited corroboration in the accounts provided by the witnesses, and in some cases individual witness statements and contemporaneous notes from the time of the incident were inconsistent.

The panel also noted that the ward manager had not been called as a witness in this case and given the circumstances, the panel considered that it she may have been able to provide assistance to the panel in terms of context as to the work culture on the ward and to the working relationships between staff. The ward manager was also noted to have taken statements from the staff involved and Patient 1 at the time of the incidents. An apparent summary of these statements was exhibited by Witness 2.

The panel had no direct evidence from Mr James either oral or written. However it did have sight of his Registrant Response to Regulatory Concerns document, the notes from the internal investigation interview with Witness 2, and Mr James' entries in Patient

1's nursing notes and the Datix, dated 16 May 2017, regarding the alleged incidents. The panel had borne in mind that it was not able to test this evidence and therefore apportioned appropriate weight accordingly.

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

Charge 1

That you a registered nurse, whilst employed as a Band 5 staff nurse by Powys Teaching Health Board, on 16 May 2017:

1. Behaved aggressively towards colleague 1, in that you:

    a. Stood unnecessarily close to colleague 1.
    b. Pointed at colleague 1.
    c. Said to colleague 1, '*I've always fucking detested you'* or words to that effect.

Charge 1(a) is found not proved. Charge 1 (b) and 1(c) are found proved.

In reaching its decision regarding Charge 1a, the panel took into account the oral evidence and the written statements of Colleague 1, in which she stated the following:

> *"He then came right up close within inches to me in an aggressive manner. I currently informed him not to speak to me in that way. He then turned to need the swung back around, facing within close proximity..."*

The panel accepted that Colleague 1's witness statement, the Datix completed at the time and her oral evidence to the panel were broadly consistent.

The panel also had regard to the evidence provided by Witness 3 and Witness 4. Both witnesses provided a description of the office area in which the relevant incident occurred. Both Witnesses describe the office area as a small space, with Mr James

standing in the doorway of the office which is next to Colleague 1's desk, with Colleague 1 also standing in the space between her desk and the doorway. The panel was also provided with a floorplan of the unit foyer and a sketched plan of the office area.

Having regard to the lay out of the office area and its size, the panel formed the view that in these circumstances, it was inevitable that staff in this area were in close proximity of each other, given the limited space available in the room. In their oral evidence, both Witness 3 and 4 told the panel that Mr James had been approximately 1 meter away from Colleague 1.

Taking all the accounts into consideration, the panel determined that it was unlikely that Mr James had stood unnecessarily close to Colleague 1.

The panel therefore found Charge 1(a) not proved.

In reaching its decision on Charge 1(b) and 1(c), the panel had regard to oral evidence and the written statements provided by Colleague1, Witness 3 and Witness 4. In respect of Charge 1(b) the panel assessed all the evidence provided by Colleague 1 and was of the view that Colleague 1's oral evidence was broadly consistent with her documentary evidence. In her written statement dated 5 April 2019, Colleague 1 stated:

> *"..He then turned to leave but swung back around, facing within close proximity, pointing his finger..."*

The above statement was confirmed by a Colleague 1 whilst giving her oral evidence. Neither Witness 3 nor 4 could recall whether Mr James had pointed at Colleague 1 or not. The panel therefore decided that, on the balance of probabilities and given the heated nature of the exchange, it was more likely than not that Mr James pointed his finger at Colleague 1. The panel therefore found charge 1(b) proved.

In respect of charge 1c panel had regard to the oral and documentary evidence of Witness 3, Witness 4 and Colleague 1, which confirmed that Mr James swore at Colleague 1.

The panel also had regard to notes from the internal investigation interview held on 13 July 2018 by the investigating officer (Witness 2) with Mr James. In this interview he stated:

> *"… I was so upset by what she had said so I went back into the medical secretaries office and I said I absolutely detest you I said and I always have I said I didn't say anything about her belittling me in the past or saying things in the past but I said that and I was holding the door and the door may have been slightly open as well, I told her to fuck off as well at the top of my voice. And then I just left and that's when the incident later on then with the patient occurred."*

The panel considered the above to be confirmation from Mr James himself, that he swore at Colleague 1 saying words to the effect of '*I've always fucking detested you'.* The panel therefore found Charge 1(c) proved.

Charge 2)

2.*Sought to restrain patient 1 using a clinically inappropriate technique in that you restrained patient 1:*

a. *Without first seeking to employ any distraction techniques.*
b. *By yourself.*
c. *Through the use of a hold which was not clinically appropriate in the circumstances.*

Charge 2a is found not proved. Charges 2b and 2c are found proved.

In reaching its decision in respect of charge 2a, the panel determined that there was limited evidence to support this charge. Patient 1's recollection of events was poor and there were no other direct witnesses at this point. The panel heard evidence from several witnesses who described Patient 1's behaviour, both verbal and physical, as aggressive. In these circumstances the panel could not establish whether distraction

techniques were the appropriate course of action or whether Mr James had or had not sought to use them. Therefore, the panel found Charge 2a not proved.

When considering charge 2b, the panel had regard to the notes from the internal investigation interview with Witness 2 dated 13 July 2018, in which Mr James stated*:*

> *"... I did what I did really to try and look after Patient 1 and protect myself. I didn't feel that anything I did at all even though she was very violent was inappropriate or against the law. …Well I called for help but I felt at the time I made that decision and I'm happy with it now that I made that decision to stop patient one kicking and hitting the doors…"*

The panel also noted that in his Response to Regulatory Concerns document dated 25 November 2018 Mr James altered his position and stated:

> *"I do take responsibility for a poor decision in approaching Patient 1 on my own and realise now that I should only have done so in a life threatening situation only if appropriate"*

The panel heard evidence from several witnesses who stated that it was not appropriate to restrain a patient alone other than in exceptional circumstances.

The panel also considered the oral evidence of Witness 6 who informed the panel that restraining a patient alone would only be justified in a life threatening situation. The panel considered this aspect of Witness 6's oral evidence to be consistent with his witness statement and despite the passage of time hampering his recollection of events he did his best to assist the panel. Taking this and the above evidence into its consideration the panel found charge 2b proved.

In relation to charge 2c, the panel took account of the notes from the internal investigation interview with Witness 2 dated 13 July 2018 in which Mr James stated:

"… I then restrained [Patient 1] *around the stomach area and she was fighting me horrendously and she is a very strong girl and it ended up where I had my arm like this facing the door across her chest but nowhere near any areas that my arms shouldn't be but not in a way they was compressing her chest at all."*

It also considered the oral evidence of Witness 5 and Witness 6 who described seeing Mr James holding Patient 1 around the upper chest/ collar bone area. Witness 5, Witness 6 and Witness 8, provided the panel with descriptions of appropriate restraint techniques, none of which correlate with those described by witnesses of the incident, Patient 1 and Mr James himself. Having considered all the evidence available, the panel find charge 2c proved.

Charge 3

3.Having restrained patient 1, on one or more occasions hit her on the back of the head.

This charge is found not proved.

In reaching this decision the panel had regard to all the evidence before it including the oral evidence of Patient 1, who told the panel that she had no recollection of Mr James hitting her on the back of the head during the incident. Whilst the panel did consider the oral evidence of Patient 1 to be inconsistent with her written statement, the panel did take into consideration Patient 1's health at the time of incident along with the passage of time since then.

The panel considered the evidence of Witness 5 who was the only person that alleged Mr James had hit Patient 1 on the back of the head. It noted that in the most contemporaneous record available (the ward manager's statement summary as exhibited by Witness 2), her description had been that Mr James had pushed Patient 1 at the back of her neck.

In the internal investigation interview with Witness 2, Mr James said the he put his hand "*on the top of* [Patient 1's] *back and sort of pushed gently as she wasn't moving at all*".

The panel determined that the evidence available in respect of this charge is inconsistent and conflicting. The panel therefore concluded that the burden of proof has not been discharged and found this charged not proved.

Charge 4

4. Pushed patient 1.

This charge is found not proved.

In its consideration of this charge the panel noted the lack of detail with regard to timing and location. In the absence of an alternative the panel adopted the common sense approach and used Charge 5 to provide clarity and context for Charge 4.

The panel heard evidence from Patient 1, who stated that Mr James had pushed her on to the bed twice. She also stated that she could not recall whether during this time she was verbally and physically abusive towards Mr James. However this account is contradicted by the evidence provided by three other witnesses, all of whom were present in Patient 1's bedroom at the time of the alleged incident.

The panel also took into account the conflicting nature of the accounts provided by the witnesses in their multiple written statements and their oral evidence. The panel accepted that the passage of time could impact on the recollection of the events, and concluded that it was unable to determine whether Mr James had pushed Patient 1 deliberately or whether he unknowingly pushed her whilst defending himself or even fell with her whilst she was hitting out at him during the altercation.

The panel had regard to the legal advice that the standard to which each charge is considered does not change with the seriousness of the charge, however the more serious the charge the more scrutiny it requires. Having already determined that the evidence before it both oral and written evidence is of limited use, due to its inconsistencies and conflicting nature, the panel found that burden of proof had not

been discharged by the NMC in respect of charge 4. The panel therefore found charge 4 not proved.

Charge 5

5. Your actions at charge 4:

a. Were a deliberate attempt to cause patient 1 to fall backwards on to her bed.
b. Were undertaken reckless as to whether patient 1 fell.

Having found charge 4 not proved, this charge cannot be substantiated and is therefore found not proved by default.

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 Mr James' 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 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, Mr James' fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

In coming to its decision, the panel had regard 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.'*

Mr Smith invited the panel to take the view that the facts found proved amount to misconduct. The panel had regard to the terms of 'The Code: Professional standards of practice and behaviour for nurses and midwives 2015' (the Code) in making its decision.

Mr Smith identified the specific, relevant standards where Mr James' actions amounted to misconduct. He identified numerous parts of the Code that he submitted are engaged and have been breached by Mr James.

Mr Smith submitted that Mr James' conduct falls far short of what would be proper in the circumstances, especially when considering what is expected of a senior and experienced professional. He submitted that swearing at a colleague and displaying such aggression in the work place cannot be tolerated.

In relation to the proven charges concerning Patient 1, Mr Smith submitted that again Mr James' conduct falls below the standards expected of a registered nurse. He reminded the panel of the live evidence heard from witnesses who explained what the appropriate course of action would be in such a situation. He reminded the panel of the evidence that described the appropriate types of holds to be used when restraining a patient and that Mr James had a PMVA refresher course a short time before the incident. Mr Smith submitted that the evidence plainly supports a finding of misconduct.

Decision and reasons on misconduct

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Roylance v General Medical Council*

(No 2) [2000] 1 A.C. 311, *Nandi v General Medical Council* [2004] EWHC 2317 (Admin), and *General Medical Council v Meadow* [2007] QB 462 (Admin).

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

In respect of the proven charges the panel determined that, when viewed in the context of the setting and the events of the day, they were serious and that Mr James' conduct in this regard does not align with the standards and behaviour expected of a registered nurse.

The panel determined that the nature of Mr James' misconduct would be considered deplorable by a well-informed member of the public and colleagues in the profession. The panel determined that his actions amounted to the following breaches of the Code:

Prioritise people

You put the interests of people using or needing nursing or midwifery services first. You make their care and safety his main concern and make sure that their dignity is preserved and their needs are recognised, assessed and responded to. You make sure that those receiving care are treated with respect, that their rights are upheld and that any discriminatory attitudes and behaviours towards those receiving care are challenged.

1 Treat people as individuals and uphold their dignity

To achieve this, You must:

***1.1** treat people with kindness, respect and compassion*

***1.2** make sure You deliver the fundamentals of care effectively*

8 *Work co-operatively*

To achieve this, you must:

8.2 *maintain effective communication with colleagues*

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

9 *Share your skills, knowledge and experience for the benefit of people receiving care and your colleagues*

To achieve this, you must:

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

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

To achieve this, you must:

19.1 *take measures to reduce as far as possible, the likelihood of mistakes, near misses, harm and the effect of harm if it takes place*

20 Uphold the reputation of your profession at all times

To achieve this, you must:

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…, bullying or harassment

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

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

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

The panel recognised that breaches of the Code do not automatically result in a finding of misconduct. However the panel determined that the proven charges were serious and did amount to misconduct.

Submissions on impairment

Having made a decision on misconduct, the panel went on to hear submissions on impairment.

Before making his submissions, Mr Smith provided the panel with an impairment bundle, which included the witness statement of the former investigation manager for this case (Witness 9).

Mr Smith 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. This included reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin), *Cohen* v *General Medical Council* [2008] EWHC 581 (Admin) and *Cheatle* v *General Medical Council* [2009] EWHC 645 (Admin).

Mr Smith submitted that the tests set out in the case of *Grant* were engaged in this case, with regard to past behaviour. He submitted that Mr James' conduct placed Patient 1 at risk of physical and psychological harm, and that Patient 1 suffered actual

harm. Mr Smith submitted that Mr James' actions towards Patient 1 and Colleague 1 brought the profession into disrepute. He submitted that the public and other professionals would not expect a senior registered nurse to behave in such a way to Colleague 1 and would expect Mr James to have abided by the PMVA training and use the appropriate techniques in restraining a vulnerable individual. In respect of the above Mr Smith submitted that a finding of impairment is necessary on the grounds of both public protection and public interest in order to maintain public confidence in the profession.

With regard to future risk, Mr Smith referred the panel to the impairment bundle in which Witness 9 stated:

> *"On 18 October 2019 I received a phone call from Mr James. Mr James was returning my call after I had phoned and left a message on his voicemail. I had tried to contact Mr James previous day because he had spoken inappropriately to* [Ms 1], *an Administrator in the NMC's Case Preparation Team. During the conversation with* [Ms 1]*, Mr James had spoken in a threatening manner.*
>
> [Ms 1], *had recorded that Mr James swore at her and said that should the NMC contact him again, he would "kill someone".*
>
> *"During my telephone conversation with Mr James on 18 October 2019 I started by apologising for the NMC's lack of contact with him during our investigation. I attempted to explain to Mr James why an investigation must proceed even where we are told that the registrant no longer wishes to practice. Mr James was not prepared to discuss the matter, he suggested that the investigation was a waste of money and was looking to end the call. I expressed my concern at how Mr James had spoken to an NMC staff member the previous day. Mr James told me that he had not sworn at* [Ms 1], *and said that he had told her that if he was contacted by letter again he would "come down there and personally shove it up someone's arse". I explained to Mr James that this was not an acceptable way to speak with an NMC staff member and he ended the call by telling me to "piss off".*

Mr Smith submitted that the above is clear indication that Mr James experiences difficulty in managing his emotions and anger. Mr Smith told the panel that to date, the only insight that Mr James has demonstrated was in the Regulatory Concerns Response Form, where Mr James stated that he should not have attempted to restrain Patient 1 alone. Mr Smith submitted that Mr James' behaviour and conduct are attitudinal issues, difficult to remediate, and there is nothing that could be put in place to prevent a repeat of the concerns. He therefore invited the panel to find that Mr James' fitness to practise is currently impaired.

Decision and reasons on impairment

The panel next went on to decide if as a result of Mr James' misconduct, his fitness to practise is currently impaired.

The panel accepted the advice of the legal assessor.

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) *...'*

The panel considered the factors set out in the case of *Grant* and it determined that the first three limbs are engaged. In reaching this decision the panel took into account Mr James' lack of insight and apparent disregard for the severity of his misconduct. It noted that Mr James has not shown any willingness to remediate the concerns and in engage with his regulator. The panel had regard to the Impairment Bundle and Witness 9's statement. The panel also had regard to Witness 2's statement where she described Mr James' tone as unnecessarily aggressive and him having a confrontational manner, during a telephone conversation on 26 June 2018 to arrange a meeting with him.

The panel accepted that the protracted nature of the investigatory and regulatory processes in this case may have been frustrating and difficult for Mr James. Nevertheless the panel formed the view that Mr James' attitude towards professionals and colleagues is unacceptable and the statements of Witness 2 and Witness 9 indicates a pattern of behaviour which has continued over time.

The panel also considered the charges found proved in relation to Patient 1 and the significant impact of Mr James' misconduct on her [PRIVATE]. The panel noted that Mr

James was the nurse in charge at the time of the incident and that he had newly qualified junior staff nurses working under his direction. The panel also accepted Mr Smith's submissions in regard to the PMVA training.

For these reasons the panel considered there to be a high risk of repetition of the facts found proved in this case.

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

The panel bore in mind 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 the charges found proved are serious and public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds Mr James' fitness to practise impaired on the grounds of public interest.

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

Sanction

The panel has considered this case carefully and has decided to make a striking-off order. It directs the registrar to strike Mr James off the register. The effect of this order is that the NMC register will show that Mr James has 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. The panel accepted the advice of the legal assessor.

Submissions on sanction

Mr Smith set out the NMC's position with regard to the aggravating and mitigating features in this case. He informed the panel that the NMC were seeking the imposition of a striking-off order as no lesser order would protect the public, mark the seriousness of the departure from expected standards or uphold the reputation of the profession.

Mr Smith submitted that Mr James' misconduct was serious and caused Patient 1 actual harm. He submitted that Mr James has shown *"utter contempt"* for the regulator and the fitness to practise process. He highlighted the significant attitudinal issues that Mr James had demonstrated. Mr Smith submitted that Mr James lack of insight, remorse, reflection and remedial steps means the only appropriate sanction to impose is a striking–off order.

Decision and reasons on sanction

Having found Mr James' 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:

- Conduct which caused actual physical and psychological harm to a vulnerable patient, disregarding Patient 1's pre-existing conditions
- Mr James' lack of insight into his failings
- A pattern of aggressive, threatening and confrontational behaviour over a considerable period of time
- Attitudinal issues compounded by apparent contempt for his professional regulator and its staff.

The panel also took into account the following mitigating features:

- Early acceptance that Mr James swore at Colleague 1
- Acceptance that Mr James restrained Patient 1 alone and in an inappropriate manner.

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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 and would offer no protection to the public.

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 Mr James' 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 Mr James' misconduct was not at the lower end of the spectrum and that a caution order 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 impose a caution order.

The panel next considered whether placing conditions of practice on Mr James' registration would be a sufficient and appropriate response. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case. The attitudinal misconduct identified in this case was not something that can be addressed through retraining. The panel noted that despite the recent refresher PMVA training at the time, Mr James disregarded expected standards of patient restraint. The panel was therefore not satisfied that further training would address the concerns. In considering Mr James' communication with the NMC, the panel was of the view that it was highly improbable that he would even be willing to engage with any conditions. Furthermore, Mr James' has chosen not to engage with

these proceedings and has indicated that he no longer wishes to practise, thereby making any conditions unworkable.

Having considered all the above the panel concluded that the placing of conditions on Mr James' registration would not be the appropriate sanction to adequately address the seriousness of this case and would not protect the public.

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

The conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel determined that the breach of the fundamental tenets of the profession evidenced by Mr James' actions is fundamentally incompatible with his name remaining on the register. The panel also took account of Mr James' lack of insight and his non engagement with these proceedings. It determined that the facts proved in this case, the risk of repetition already identified and Mr James' subsequent behaviour towards the NMC indicate deep-rooted attitudinal issues.

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?*

Mr James' actions were significant departures from the standards expected of a registered nurse, and are fundamentally incompatible with him remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Mr James' actions were serious and to allow him to continue to practise would undermine public confidence in the profession and in the NMC as a regulatory body.

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 Mr James' 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 considered that this order was necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standards of behaviour required of a registered nurse.

This will be confirmed to Mr James in writing.

Submissions on interim order

The panel took account of the submissions made by Mr Smith. He submitted that, due to the panel making a striking-off order, an interim order was required to protect the public and the public interest. Mr Smith invited the panel to make an interim suspension order for a period of 18 months.

Decision and reasons on interim order

The panel accepted the advice of the legal assessor.

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 cover the 28 days during which an appeal can be lodged and, if an appeal is lodged, the time necessary for that appeal to be determined.

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

That concludes this determination.