

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

**Restoration Hearing
23 November 2022**

Virtual Hearing

Name of Applicant: Mark William Cumming

NMC PIN 90K0187S

Part(s) of the register: Registered Nurse – Learning Disabilities
December 2001

Relevant Location: Glasgow

Panel members: Louise Fox (Chair, Lay member)
Mary Karasu (Registrant member)
Colin Sturgeon (Lay member)

Legal Assessor: Tracy Ayling

Hearings Coordinator: Sophie Cubillo-Barsi

Nursing and Midwifery Council: Represented by Claire Stevenson, Case
Presenter

Mr Cumming: Present and unrepresented

Outcome Application granted with a conditions of practice
order

Determination of application for Restoration to the Register:

This is a hearing of your first application for restoration to the Nursing and Midwifery Council ("NMC") Register. A panel of the Conduct and Competence Committee directed on 20 February 2014 that your name be removed from the register based on its findings with regard to the facts of your case and your impairment. This application is made by you in accordance with Article 33 of the Nursing and Midwifery Order 2001 ("the Order"), as at least five years have now elapsed since the date of the striking-off order.

At this hearing the panel may reject your application or it may grant your application unconditionally. It may grant your application subject to your satisfying the requirements of Article 19(3) and it may make a conditions of practice order.

The panel has considered your application for restoration to the Council's Register.

Background

On 22 August 2012, a panel of the Conduct and Competence Committee ('CCC') considered the following charges, which you made full admissions to:

"That you, whilst working as a registered nurse at the Allander Court Care Home:

1. On Monday 10 January 2011 around 07:45 you failed to follow Four Seasons Health Care medication policy in that you:

- a) Pre-signed the Controlled Drug check prior to the handover of the shift;*
- b) Did not carry out the procedure of two staff to check and sign the Controlled Drug book;*

2. On Sunday 27 February 2011, administered medication, namely a Versatis 5% pain relief patch, to resident A, despite knowing that this medication had not been prescribed to that particular resident;

3. Failed to make a record of the fact that you had administered the medication referred to in 2, above.

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

The CCC decided to impose a four-month suspension order. The order was first reviewed on 18 January 2013 and was extended for a further period of 8 months. The order was again reviewed on 23 August 2013 and extended for a further period of 6 months. On 20 February 2014 the order was reviewed again and at that time, the panel struck you off the register.

You did not attend the substantive order review on 20 February 2014.

The substantive order review panel, determined the following with regard to impairment:

“The panel had regard to the findings of the previous panels and the specific areas of concern identified. The panel accordingly considered therefore, whether Mr Cumming had provided sufficient evidence to demonstrate that he has insight and has remediated the failures that had previously been identified. This panel noted that the three previous panels’ recommendations clearly set out what was expected of Mr Cumming and the evidence he should provide for any reviewing panels when considering the issue of his current fitness to practise. As such, Mr Cumming has now had three opportunities to engage and provide the relevant evidence but has failed to do so.

The panel is of the view that Mr Cumming’s misconduct is remediable. However, as he has again failed to engage with these proceedings this panel has been provided with no evidence as to whether Mr Cumming has demonstrated full insight or whether he has taken any steps to remediate his failings. In all the circumstances therefore, the panel cannot be satisfied that Mr Cumming is fit to return to practise as a Registered Nurse without restriction and that his behaviour would not be repeated. In the absence of any evidence to the contrary the panel has to conclude that Mr Cumming’s fitness to practise remains impaired.”

The substantive panel went on to determine the following with regard to sanction:

“The panel first considered whether to take no action and allow the current suspension order to lapse at expiry. The panel has found that Mr Cumming’s fitness to practise remains impaired. On that basis, and in view of the seriousness of the matters admitted and found proved, the panel determined that to take no action would be inappropriate as it would not be sufficient to protect the public. Furthermore, it would undermine the public interest in upholding confidence in the profession and the NMC as a regulator.

The panel then considered whether to replace the existing order with a caution order. Given that the panel has no evidence to suggest that Mr Cumming has addressed the outstanding concerns of the previous three panels, this panel has determined that such an order would not be appropriate or proportionate as it would allow Mr Cumming to practise unrestricted and would therefore not be sufficient to protect the public. Furthermore, it would not address the wider public interest in upholding confidence in the profession or the NMC as a regulator.

The panel next considered whether to replace the existing order with a conditions of practice order. The panel is mindful that any conditions would have to be relevant, proportionate, workable and measurable. As Mr Cumming has not engaged with these proceedings the panel has no information as to his willingness to respond positively to retraining or comply with any potential conditions of practice. Furthermore, he has not engaged with the preceding review hearings and has not complied with any recommendations previously made, in particular, he has not provided a reflective diary, which in the panel’s view would illustrate insight on his part. In addition, he has not taken the opportunity to undertake some form of medicines management training but instead has claimed to have sought the advice of the NMC which suggests that he has not fully accepted responsibility for his actions and their potential consequences.

In all the circumstances, the panel has determined that a conditions of practice order would not be appropriate or workable in these circumstances. Furthermore, a conditions of practice order would not be sufficient to protect the public nor

would it serve the wider public interest in upholding confidence in the profession or the NMC as a regulator. The panel then considered whether to extend the period of the suspension order. The panel noted the reasons given by the three previous panels for imposing a suspension order and twice extending the period of that order. Mr Cumming has now been given three opportunities to engage with this process to demonstrate insight into his misconduct and how he would address the issue of remediation but has failed to do so each time.

The panel noted that the original panel was of the view that Mr Cumming's misconduct was remediable. However, as he had taken no steps to remediate his omissions and behaviour, the panel has determined that there remains a risk of repetition which gives rise to a risk of harm to the public. The panel is of the view that Mr Cumming has failed to fully accept the seriousness of his misconduct and the impact it could have had on his colleagues and the patients in his care. The panel did agree with the original panel that Mr Cumming's misconduct was remediable but it has been provided with no evidence to suggest that Mr Cumming has demonstrated sufficient insight or has remediated his misconduct and addressed the concerns of the previous panels.

The panel was satisfied that an extension of the suspension order would sufficiently protect the public. However, it was concerned as to whether it would adequately address the public interest in this case. Mr Cumming was the Deputy Manager at the time of the matters found proved and therefore in a position of responsibility as well as being a role model to other staff. The panel carefully considered the circumstances of the case but noted that despite an opportunity of almost 18 months Mr Cumming has not produced any of the evidence requested, including importantly, a reflective diary, the production of which would be a matter entirely within his control. Even if he was having difficulty obtaining a relevant and appropriate medicines management course, there is no reason given or otherwise brought to the panel's attention and to the attention of previous panels, as to why a reflective diary could not have been produced. The absence of engagement by Mr Cumming to the extent of continuously failing to respond to the recommendations of the previous panels, in particular, in

respect of the failure to produce the reflective diary, leads this panel to conclude that Mr Cumming has not demonstrated sufficient insight into his failings. Importantly, the impact of his failings on residents and junior colleagues for whom he was responsible. It also demonstrates, in the panel's view, an unwillingness to accept full responsibility for his conduct despite his early admission to the charges.

Therefore, the panel is satisfied that a striking-off order is the only appropriate and proportionate order that will be sufficient to protect the public and the public interest by maintaining public confidence in the profession and the NMC as a regulator.”

Submissions and evidence

The panel took into account the documentary evidence, which included the contents of application for restoration which you submitted to the NMC, including three written references.

The panel had regard to the submissions of Ms Stevenson on behalf of the NMC, and those made by you. You also gave oral evidence.

Ms Stevenson, on behalf of the NMC, outlined the background of the case and the facts that led to the striking-off order. She referred this panel to the previous panel's decision which resulted in your removal from the NMC's register. Ms Stevenson referred the panel to the test set out in Article 33(5) of the Order.

You provided evidence under affirmation. You confirmed that you are not currently subject to any criminal proceedings. You told the panel that you have spent a large amount of time working in care homes, doing 'nearly every job apart from nursing'. You are currently employed at Flemington Care Home ('the Home') as a 'health and wellbeing coordinator'. The Home has 87 residents.

You stated that you have a good relationship with residents, staff and relatives and you have been asked by management to work as a Health Care Assistant ('HCA') 'once or

twice' a month. You told the panel that you realise restrictions may be placed on your practice, such as a period of supervised practice, should you be permitted back onto the register and that you would be willing to comply with those restrictions.

When questioned you told the panel that when you work as a Health Care assistant ('HCA') it is your responsibility to assist the nurses by maintaining the personal hygiene of residents, washing and dressing the residents and supporting with nutrition and hydration. You also organise activities for the residents in your role as a health and wellbeing coordinator. You told the panel that you try and keep yourself up to date with changes in nursing practice with e-learning and relevant training within the Home, working with the Home's training coordinator.

You told the panel that you did not engage with the NMC when you were suspended because [PRIVATE] you had a lot going on in your personal life. [PRIVATE] You told the panel that you are applying to the NMC register after being encouraged to do so by your colleagues and that you feel you have a 'lot left in you' which would be useful in nursing practice. You stated that, should you be permitted to do so, you would like to work as a nurse with elderly patients and explained that the Home has a nursing post available for you. You said you were not planning on returning to a management role to avoid too much stress.

You told the panel that you are very apologetic for your past behaviour. You explained to the panel that you work in a very supportive environment which has allowed you to look after both your physical and mental wellbeing. You stated that you have matured and gained insight into your previous failings and how your behaviour has had a 'very negative' impact upon colleagues and the reputation of the nursing profession. You also told the panel you recognise it was very dangerous to give a patient medication which had not been prescribed as there was a risk of drug interaction. You now realise the importance of engaging with your regulator.

When referred to the references you provided, you confirmed that all three referees are registered nurses.

The panel accepted the advice of the legal assessor.

The legal assessor referred the panel to the test provided in Article 33(5) of the Order. Firstly, you must satisfy the panel that you satisfy the requirements of Article 9(2)(a) (approved qualification and prescribed education, training and experience) and Article 9(2)(b) (capable of safe practice). Secondly, you must satisfy the panel whether, having regard in particular to the circumstances which led to the making of the striking-off order in 2014, you are a “fit and proper person to practise as a registered nurse”. The legal assessor advised the panel that it is for you to satisfy the panel of these matters and it is for the panel to use its own independent judgment as to whether it is so satisfied. She also referred the panel to the case of *General Medical Council v Chandra* [2018] EWCA Civ 1898 and [2019] EWCA Civ 236.

Decision on the application for restoration

The panel has considered your application for restoration to the NMC register very carefully. It has decided to allow the application with a conditions of practice order subject to your successful completion of a return to practice course.

In reaching its decision the panel recognised its statutory duty to protect the public as well as maintain public confidence in the reputation of the profession, which includes the declaring and upholding of proper professional standards. The panel bore in mind that the burden was upon you to satisfy it that you are a fit and proper person who is able to practise safely and effectively as a nurse.

The panel determined, as had the previous panels, that the facts found proved at the substantive hearing were remediable and were not fundamentally incompatible with you remaining on the register.

The panel was encouraged by your oral evidence today. You were able to demonstrate sufficient insight into your previous failings and expressed remorse for your behaviour. You also explained to the panel how you would manage the impact of stress at work and how you have benefited from management support. Further, you provided detailed

evidence regarding your past employment and your current employment at the Home, where you have now been asked to work as an HCA for a couple of days a month.

The panel noted the positive testimonials before it from your current colleagues including Ms 1, who states:

“Mark is presently employed within the Care Home as Activity co-ordinator and has proved to be reliable and versatile, willing to competently help in other Departments and assist fellow colleagues. He has an even temperament and has proven to be especially good with adults with additional complex needs with whom he has built up an excellent rapport and enabled them to maintain their choice and independence. He ensures residents are treated with respect and dignity.”

Further, Ms 2 states:

“During the almost 4 years that I have worked with Mark, he is an outstanding person to work with. A hard working person that ensures that he delivers the best on any endeavors he uptakes. He is a versatile individual that takes on any role he is given. During his time as a Kitchen Staff he ensures all meals provided to the residents are in good quality. He worked well as part of the team.

As an Activity Coordinator he ensures that the residents are well entertained, boosting their morale and ensures their safety. He had made an impact with the residents' mood and their everyday lives.

As a colleague he is a good asset in the team. He works well with everybody and has contributed his knowledge and skills with the team. He works within his competence in his given roles.” [sic]

The panel accepted your evidence that you have completed some training in an attempt to keep up with developments within the nursing profession. Whilst there are gaps in your remediation, the panel determined that the outstanding remediation could be

addressed within a Return to Practice Programme ('RTPP'). This coupled with a conditions of practice order will support your return to practice after 10 years, by ensuring your learning is embedded into your practice.

The panel accordingly directs the Registrar under Article 33(7) and in accordance with Article 33(6) of the Order, to restore your name to the register subject to you fulfilling the specific conditions of practice as to additional education, training and experience as the Council has specified under Article 19(3) of the Order. For this to happen, the panel directs that you must successfully complete and pass a RTPP and pay the prescribed fee.

Upon restoration of your name to the Register your registration will be subject to a conditions of practice order in the following terms:

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

1. You must limit your nursing practice to one substantive employer.
2. You must meet with your line manager and/or mentor every two weeks for the first two months of employment and then monthly meetings thereafter to discuss your competency in medicines management and record keeping.
3. You must send a copy of a report from your line manager and/or mentor detailing your progress in relation to competency in medicines management and record keeping to the NMC before any review hearing.
4. You must keep us informed about anywhere you are working by:

- a) Telling your case officer within seven days of accepting or leaving any employment.
 - b) Giving your case officer your employer's contact details.
5. You must keep us informed about anywhere you are studying by:
- a) Telling your case officer within seven days of accepting any course of study.
 - b) Giving your case officer the name and contact details of the organisation offering that course of study.
6. You must immediately give a copy of these conditions to:
- a) Any organisation or person you work for.
 - b) Any employers you apply to for work (at the time of application).
 - c) Any establishment you apply to (at the time of application), or with which you are already enrolled, for a course of study.
7. You must tell your case officer, within seven days of your becoming aware of:
- a) Any clinical incident you are involved in.
 - b) Any investigation started against you.
 - c) Any disciplinary proceedings taken against you.
8. You must allow your case officer to share, as necessary, details about your performance, your compliance with and / or progress under these conditions with:
- a) Any current or future employer.
 - b) Any educational establishment.

- c) Any other person(s) involved in your retraining and/or supervision required by these conditions

The period of this conditions of practice order is six months. The conditions of practice order will begin once you have successfully completed a RTPP and started work as a registered nurse. The panel determined that six months would be sufficient to demonstrate you can practice safely and effectively.

This order will be reviewed before its expiry. At the review hearing the panel may revoke the order or any condition of it, it may confirm the order or vary any condition of it, or it may replace the order for another order.

You can apply for the order to be reviewed before the expiration of the order if you consider that it is appropriate in the circumstances.

This decision will be confirmed to you in writing.

That concludes this determination.