

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

**Substantive Hearing
Monday, 6 February 2023 – Monday 13 February 2023**

Monday, 6 February 2023 & Tuesday 7 February 2023

Regus
Forsyth House, Cromac Square, Belfast, BT2 8LA

Wednesday 8 February 2023 – Monday 13 February 2023

Virtual Hearing

Name of Registrant: Melanie Whittaker

NMC PIN 0510191N

Part(s) of the register: Registered Nurse – Sub Part 1
Adult Nursing – Level 1 – September 2005

Relevant Location: Causeway Coast and Glens

Type of case: Misconduct

Panel members: Judith Webb (Chair, Lay member)
Keith Murray (Lay member)
Pauline Esson (Registrant member)

Legal Assessor: Andrew Granville-Stafford

Hearings Coordinator: Daisy Sims

Nursing and Midwifery Council: Represented by Aoife Kennedy, Case Presenter

Miss Whittaker: Not present and not represented at this hearing

Facts proved: 1,2,3

Facts not proved: None

Fitness to practise: Impaired

Sanction:

Striking-off Order

Interim order:

Interim Suspension Order (18 months)

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

At the outset of the hearing, Ms Kennedy made a request that parts of this case be held in private on the basis that proper exploration of Miss Whittaker's case involves reference to her health. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel had sight of an email from Miss Whittaker to the NMC dated 6 February 2023:

'I would ask that the hearing be kept private. In October 2020 my name was printed in Causeway Coast Community news. This caused myself and my family a lot of backlash due to the defamatory remarks. I became the victim of social media due to my name and address being printed. I do not want this happening again.'

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

The panel determined to rule on whether or not to go into private session in connection with Miss Whittaker's health. The panel determined that the public interest outweighs Miss Whittaker's request for this hearing to be heard fully in private. The panel therefore determined to go into private session as and when there is reference to Miss Whittaker's health.

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Miss Whittaker was not in attendance and that the Notice of Hearing letter had been sent to Miss Whittaker's registered email address by secure email on 18 January 2023.

Ms Kennedy informed the panel that the Notice of Hearing was not sent to Miss Whittaker 28 days in advance of this hearing as Rule 11 states, but instead was sent 19 days in advance of the hearing. Ms Kennedy referred the panel to the Notice of Hearing sent to Miss Whittaker which explains that this hearing will be taking place physically in Belfast on Monday 6 February 2023.

Ms Kennedy referred the panel to an email sent by the NMC to Miss Whittaker on 19 November 2022 which outlines that this hearing would be held physically on Monday 6 February, Ms Kennedy explained that this was not a formal notice of hearing.

Ms Kennedy then referred the panel to an email from the NMC to Miss Whittaker sent on 2 February 2023 which explained that this hearing would be held physically on Monday 6 and Tuesday 7 February 2023 to which Miss Whittaker responded:

'I am happy for the hearing to go ahead in my absence [...]

Ms Kennedy submitted that Miss Kennedy has informed the NMC that she waived the notice period in an email to the NMC dated 18 January 2023. Ms Kennedy therefore submitted that although proper service has not been served effectively in light of Rule 11, Miss Whittaker has clearly waived this notice period and is aware of this hearing.

The panel heard and accepted the advice of the legal assessor. In respect of the issue of the registrant waiving the full 28 day notice period, the legal assessor referred the panel to the cases of *Hill v ICAEW* [2013] EWCA Civ 555 and *Dorairaj v BSB* [2018] EWHC 2762.

The panel took into account that the Notice of Hearing provided details of the allegation, the time, dates, the venue of the hearing and that the hearing was to be held virtually from Tuesday 7 February 2023 which also included instructions on how to join and, amongst other things, information about Miss Whittaker's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

The panel also noted that notice of the hearing of this case had previously been sent to Miss Whittaker on 9 February 2022 for a hearing that was due to take place in March 2022 but which was, at Miss Whittaker's request, adjourned.

In the light of all of the information available, the panel was satisfied that whilst Miss Whittaker was not served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34, Miss Whittaker had waived this right and was aware of this hearing taking place.

Decision and reasons on proceeding in the absence of Miss Whittaker

The panel next considered whether it should proceed in the absence of Miss Whittaker. It had regard to Rule 21 and heard the submissions of Ms Kennedy who invited the panel to continue in the absence of Miss Whittaker.

Ms Kennedy submitted that Miss Whittaker had voluntarily absented herself. She took the panel through emails from Miss Whittaker to the NMC on 28 November 2022, 18 January 2023 and 2 February 2023 in which she confirmed that she was content for this hearing to proceed in her absence.

Ms Kennedy informed the panel that the NMC sent a chaser email to Miss Whittaker for her written submissions but the only response to this email was a request from Miss Whittaker that this hearing be held in private.

Ms Kennedy also informed the panel that this matter was due to be heard at a substantive hearing in March 2022, however this was postponed due to Miss Whittaker's request on health grounds.

Ms Kennedy submitted that the panel should proceed in the absence of Miss Whittaker as three witnesses are due to attend this hearing and a delay would be inconvenient to them, she also submitted that there is a strong public interest in the expeditious disposal of this case. She submitted that it is fair and proportionate to proceed in the absence of Miss Whittaker.

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 Miss Whittaker. In reaching this decision, the panel has considered the submissions of Ms Kennedy, 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 Miss Whittaker;
- Miss Whittaker has informed the NMC that she has received the Notice of Hearing and confirmed she is content for the hearing to proceed in her absence;
- There is no reason to suppose that adjourning would secure her attendance at some future date;

- Three witnesses are going to attend this hearing and 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 2018;
- 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 Miss Whittaker in proceeding in her absence. Although the evidence upon which the NMC relies will have been sent to her at her registered address, her response to the original substantive hearing that was due to be heard in March 2022 is limited to a half page document. She will not be able to challenge the evidence relied upon by the NMC in person and will not be able to give evidence on her own behalf. However, in the panel's judgement, this can 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 Miss Whittaker's decisions to absent herself from the hearing, waive her rights to attend, and/or be represented, and to not provide evidence or make submissions on her own behalf.

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

Decision and reasons on application to redact evidence

Ms Kennedy submitted an application under Rule 31 to redact some evidence that has been before the panel. She submitted that the test of this application is on relevance and fairness.

Ms Kennedy submitted that the following evidence should be redacted:

- Witness 1's written statement at paragraph 15
- The last sentence of Witness 3's written statement at paragraph 5
- Sentences included in Witness 3's written statement at paragraphs 15 & 17
- All information under '*findings/conclusion*' in Investigating Officers Disciplinary Investigation Report dated 10 September 2019

Ms Kennedy submitted that all of the above material should be redacted and referred the panel to the case of *Enemuwe v NMC* [2016] EWHC 1881. She submitted that the panel is a professional panel and referred it to the NMC Guidance on evidence. She submitted that the panel should put the above evidence out of it's mind when making its decision.

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

The panel considered this application and determined that it is both fair and relevant to redact this information and the panel will not consider this evidence when making its decisions.

Details of charge

That you, a registered nurse, between 28 July 2018 and 31 August 2018:

1. Dispensed medication belonging to Causeway Hospital, as set out at Schedule 1, when there was no clinical need for you to do so;
2. Your actions at charge 1 were dishonest in that you knew you only had permission to dispense the medication referred to where there was a clinical need for you to do so;
3. Failed to properly dispose of the medication referred to at charge 1;

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

Schedule 1

1. 28 July 2018 at 00:18 – 2 co-codamol tablets
2. 28 July 2018 at 01:01 – unknown quantity of unknown medication
3. 28 July 2018 at 03:32 – unknown quantity of unknown medication
4. 28 July 2018 at 05:43 – 2 co-codamol tablets
5. 28 July 2018 at 07:06 – 8 tablets of unknown medication
6. 28 July 2018 at 21:24 – 2 co-codamol tablets
7. 29 July 2018 at 02:28 – 2 boxes (containing 6 tablets each) of medication appearing to be diazepam
8. 29 July 2018 at 05:44 – strip and 2 loose tablets of unknown medication
9. 29 July 2018 at 07:36 – 2 sachets of unknown medication
10. 30 July 2018 at 02:01 – unknown quantity of unknown medication
11. 30 July 2018 at 05:35 – strip of diazepam (containing 14 tablets)
12. 3 August 2018 at 05:06 – strip of diazepam
13. 7 August 2018 at 03:23 – strip of diazepam
14. 7 August 2018 at 07:20 – 6 diazepam and 2 co-codamol tablets
15. 10 August 2018 at 00:17 – strip of diazepam and a yellow box containing an unknown quantity of unknown medication
16. 10 August 2018 at 01:01 – brown box and white box containing unknown quantities of unknown medication
17. 10 August 2018 at 06:29 – strip of diazepam and strip of co-codamol
18. 29 August 2018 at 21:09 – strip of co-codamol
19. 29 August 2018 at 21:50 – unknown quantity of unknown medication
20. 30 August 2018 at 15:38 – unknown quantity of co-codamol and unknown quantity of unknown medication

Decision and reasons on application to amend the charge

The panel heard an application made by Ms Kennedy, on behalf of the NMC, to amend the wording of item 20 of Schedule 1.

The proposed amendment was to amend a typographical error. It was submitted by Ms Kennedy that the proposed amendment would provide clarity and more accurately reflect the evidence by stating the correct date of the CCTV viewed by the panel.

“Schedule 1

1. 28 July 2018 at 00:18 – 2 co-codamol tablets
2. 28 July 2018 at 01:01 – unknown quantity of unknown medication
3. 28 July 2018 at 03:32 – unknown quantity of unknown medication
4. 28 July 2018 at 05:43 – 2 co-codamol tablets
5. 28 July 2018 at 07:06 – 8 tablets of unknown medication
6. 28 July 2018 at 21:24 – 2 co-codamol tablets
7. 29 July 2018 at 02:28 – 2 boxes (containing 6 tablets each) of medication appearing to be diazepam
8. 29 July 2018 at 05:44 – strip and 2 loose tablets of unknown medication
9. 29 July 2018 at 07:36 – 2 sachets of unknown medication
10. 30 July 2018 at 02:01 – unknown quantity of unknown medication
11. 30 July 2018 at 05:35 – strip of diazepam (containing 14 tablets)
12. 3 August 2018 at 05:06 – strip of diazepam
13. 7 August 2018 at 03:23 – strip of diazepam
14. 7 August 2018 at 07:20 – 6 diazepam and 2 co-codamol tablets
15. 10 August 2018 at 00:17 – strip of diazepam and a yellow box containing an unknown quantity of unknown medication
16. 10 August 2018 at 01:01 – brown box and white box containing unknown quantities of unknown medication
17. 10 August 2018 at 06:29 – strip of diazepam and strip of co-codamol
18. 29 August 2018 at 21:09 – strip of co-codamol
19. 29 August 2018 at 21:50 – unknown quantity of unknown medication
20. ~~30~~ **29** August 2018 at 15:38 – unknown quantity of co-codamol and unknown quantity of unknown medication”

The panel accepted the advice of the legal assessor and had regard to Rule 28 of ‘Nursing and Midwifery Council (Fitness to Practise) Rules 2004’, as amended (the Rules).

The panel was of the view that such an amendment, as applied for, was in the interest of justice. The panel was satisfied that there would be no prejudice to Miss Whittaker and no injustice would be caused to either party by the proposed amendment being allowed. It was therefore appropriate to allow the amendment, as applied for, to ensure clarity and accuracy.

Decision and reasons on application to admit further evidence from Witness 2

The panel heard an application made by Ms Kennedy under Rule 31 to allow the full Trust Policy on Medicines Administration, parts of which are already before the panel, into evidence. Ms Kennedy submitted that it is both fair and relevant to admit this evidence as there is a reference in the section of this Trust Policy that is before the panel that refers to another section of this policy. Ms Kennedy submitted that admitting the full document would provide clarity to the panel.

The panel heard and accepted the legal assessor's advice on the issues it should take into consideration in respect of this application. This included that Rule 31 provides that, so far as it is 'fair and relevant', a panel may accept evidence in a range of forms and circumstances, whether or not it is admissible in civil proceedings.

The panel gave the application in regard to this evidence serious consideration. The panel noted that parts of this document had already been before it and determined that the full document would provide further clarity.

In these circumstances, the panel came to the view that it would be fair and relevant to admit the full Trust Policy document into evidence.

Background

The NMC received a referral regarding Miss Whittaker's fitness to practise on 25 October 2018. The referral came from the Police Service of Northern Ireland. At the time of the concerns raised in the referral, Miss Whittaker was working as a Band 5 Registered Bank Nurse at Causeway Hospital ('the Hospital') in the Emergency Department ('the ED').

It was identified in June 2018 that there had been an abnormally high usage of Diazepam in the Hospital ED. Senior staff were notified and a covert camera was installed to monitor the drug cupboard on 19 June 2018.

Monitoring was carried out between 19 June 2018 and 25 September 2018 and this highlighted that on 26 occasions, 612 tablets were unaccounted for. Rotas were checked and it was identified that Miss Whittaker was on duty for 21 of the 26 identified occasions.

Miss Whittaker was interviewed by Witness 3 on 30 July 2019 in relation to these allegations.

Decision and reasons on facts

In reaching its decisions on the disputed facts, the panel took into account all the oral and documentary evidence and CCTV footage in this case together with the submissions made by Ms Kennedy.

The panel has drawn no adverse inference from the non-attendance of Miss Whittaker.

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:

- Witness 1: Former Lead Pharmacist in
Emergency Medicine and
Unscheduled Care at the Hospital

- Witness 2: Former Interim Lead Nurse Band 8A
for the Hospital & its sister Hospital

- Witness 3: Former Lead Nurse for Surgery at
the Hospital

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

Charge 1

'Dispensed medication belonging to Causeway Hospital, as set out at Schedule 1, when there was no clinical need for you to do so;'

This charge is found proved in respect of items 1-14 and 17-19 in Schedule 1.

In reaching this decision, the panel took into account both wide angle and close up CCTV footage of Miss Whittaker entering the locked drug cupboard on all of the dates in Schedule 1 together with the oral evidence provided by Witnesses 1,2 and 3 and the supplementary exhibits provided by Witness 1, 2 and 3.

The panel noted that Witness 1 confirmed that the investigation from the Trust included viewing information gathered by key cards specifically designated to individual employees in the Emergency Department which gathered information on who accessed the locked drug cupboard and at what times. Witness 1 explained to the panel that these key cards were specific to each user. Witness 1 further informed the panel that they were able to zoom in and slow down the CCTV footage viewed by the panel, and it was due to this that Witness 1 was able to determine which specific drugs were being taken from the cupboard.

Witness 1 explained the layout of the Emergency Department to the panel, they also explained the layout of the drug cupboard. Witness 1 explained that the drawers in this cupboard were labelled in ascending alphabetical order with each drawer being separated

into smaller sections which medications were kept in. He stated that the medications were kept in alphabetical order but due to the volume of some of the medications, this would not always correlate with the alphabetically labelled drawer.

Witness 1 informed the panel of what they would expect to have seen when a registered nurse dispensed medication from the drug cupboard. He explained that registered nurses are given a 'flimsy' for each patient which contains information gathered from their time in the Emergency department. Witness 1 explained that this flimsy would be an A3 piece of paper that is folded in half to form a booklet which would include medical notes and any medicines prescribed and administered to the patient. The flimsy had spaces for the nurses to write about these prescriptions and sign once they have administered this medication. Witness 1 informed the panel that once this flimsy was placed in a tray on the nurses station it would mean that the patient in question had been discharged from the Emergency department.

The panel determined that the evidence provided by Witness 1 was credible and reliable. It noted that their oral evidence correlated to both their NMC witness statement and their police statement taken near the time of the incidents. It noted that Witness 1 is a Lead Pharmacist and had expert knowledge of how medications were stored and managed in this emergency department.

The panel noted that when there was a clinical need for medications to be dispensed, a registered nurse would access the drug cupboard using their individual key card, take the patient's flimsy to the medication cupboard in order to cross reference the medications, pop medications into a medications cup, place any unused medication back into the drug cupboard, ask another registered nurse to second check the medications and then go to a patient to administer this medication. It noted the evidence provided by Witness 2 in their notes of a meeting dated 2 February 2019:

'The normal practice for administering medication in ED is as follows-

Nurse takes flimsy with prescription on it to drug cupboard

Prescription checked on flimsy

Drug checked with 2 nurses, and dispensed into a medicine cup

Taken to patient and patient details checked, and drug administered to patient’.

The panel noted the CCTV footage it had sight of that is not part of Schedule 1. It noted that on 2 August 2018 the CCTV footage shows Miss Whittaker dispensing of medication in the correct manner as she was seen to take the flimsy to the drug cupboard and properly cross check all the medications with that on the flimsy to then dispense into a medications cup. Miss Whittaker was then seen going back in the same direction to that in which she came.

The panel then considered each allegation in Schedule 1 individually.

The panel took account of the CCTV footage provided from 28 July 2019 at 00:18 where it has been alleged that Miss Whittaker dispensed 2 co-codamol tablets without clinical need. It noted Witness 1’s police statement in relation to this date and time:

‘On CCTV footage dated 28th July 2018, at 00:18 hours, I observed Melanie Whittaker pop co-codamol tablets into her hand and open and look inside a diazepam box’.

The panel noted that Miss Whittaker did have a flimsy at this time, however it determined that Miss Whittaker was not properly cross referencing the medications with this flimsy in the way that would be expected. The panel also noted that at this time Miss Whittaker popped the medications directly into her hand. The panel took into account the evidence of Witness 1 who stated that he could see the packaging of this medication and identified it as co-codamol. The panel therefore determined that, on the balance of probabilities, Miss Whittaker dispensed medication on 28 July 2018 at 00:18 without a clinical need to do so.

In relation to 28 July 2018 at 1:01 the panel determined that, on the balance of probabilities, Miss Whittaker dispensed an unknown quantity of an unknown medication without a clinical need to do so as she was seen on CCTV without a flimsy, walking away from the drug cupboard with a strip of medication, and walking in a different direction to that which she came from.

In relation to 28 July 2018 at 03:32 the panel determined that, on the balance of probabilities, Miss Whittaker dispensed an unknown quantity of an unknown medication without a clinical need to do so as she was seen accessing the drug cupboard without a flimsy, and then putting a medications box into the general waste bin from which she then walked towards the ambulance entrance rather than back to the cubicles which she came from.

In relation to 28 July 2018 at 5:43 the panel determined that, on the balance of probabilities, Miss Whittaker dispensed 2 co-codamol tablets without a clinical need to do so as she did not have a flimsy when opening the drug cupboard and she then popped medication into her hand.

In relation to 28 July 2018 at 7:06 the panel determined that, on the balance of probabilities, Miss Whittaker dispensed 8 tablets of an unknown medication without a clinical need to do so as she was seen opening the drug cupboard and taking a strip of medication out of drawer E. Witness 1 and Witness 3 were able to zoom in on this footage and stated that it was 8 tablets that were dispensed.

In reaching this decision the panel noted Miss Whittaker's response to this allegation in her local interview on 30 July 2019 conducted by Witness 3 where Miss Whittaker was asked '*you don't seem to be coming from a patient or dealing with a Doctor?*' to which Miss Whittaker responded '*I don't know what I took. I could have went down to the trolley bay and was dealing with a patient down there*'. However, the panel was not satisfied with this statement from Miss Whittaker as Witness 3 explained that patients in the trolley bay would not be requiring this amount of medication.

The panel determined that on 28 July 2018 at 21:24 it is more likely than not that Miss Whittaker dispensed 2 co-codamol tablets without a clinical need to do so. It noted that Miss Whittaker was not carrying a flimsy and it is clear from the close-up CCTV footage that Miss Whittaker pops medication into her hand and then proceeded to stay by the cupboard talking to another nurse. The panel noted that best practice would have been to place this medication into a medication cup and that Miss Whittaker showed no signs of urgency to administer this medication or to update a flimsy.

The panel also determined that on 29 July 2018 at 02:28, it is more likely than not that Miss Whittaker dispensed two boxes, containing six tablets each, of medication appearing to be diazepam without a clinical need to do so. The panel noted Witness 1's oral evidence that this medication would never be taken out in this quantity due to its addictive nature and its street value. Witness 1 informed the panel that this risk is managed in the Emergency Department by having a maximum of six tablets being prescribed to one patient to take home and that this was in a different box to that used for administration in the Emergency Department. The panel also noted that there was no flimsy with Miss Whittaker on the CCTV footage.

The panel determined that on 29 July 2018 at 05:44 it is more likely than not that Miss Whittaker dispensed a strip and two loose tablets of unknown medication without a clinical need to do so. The panel noted that the close-up CCTV footage shows Miss Whittaker taking a medication out of drawer C at the top of the cupboard, pop this medication into her hand from the blister packaging and then returning this blister packaging to a bottom drawer of the medication cupboard. The panel were concerned that Miss Whittaker was seen wearing a hoodie in this clip and determined that she would not be wearing this whilst providing clinical care if she was working at the time. It therefore determined that it is more likely than not that Miss Whittaker was not treating a patient at this time and so there would have been no clinical need to dispense medication.

The panel determined that on 29 July 2018 at 07:36 it is more likely than not that Miss Whittaker dispensed two sachets of unknown medication without a clinical need to do so. The panel noted that the CCTV shows Miss Whittaker going to the medication cupboard without a flimsy and taking two sachets out of the cupboard, she then walked to the nurses' station and went onto a computer. The panel noted the oral evidence of Witness 1 who explained that nurses would only add information about patients onto a flimsy which would later be scanned and uploaded onto Symphony. Witness 1 further explained that Nurses do not make computer entries and stated that whatever Miss Whittaker was looking at was not linked to the medications. He further said that the nurse would go straight to the patient with the medications.

The panel determined that on 30 July 2018 at 02:01 it is more likely than not that Miss Whittaker dispensed an unknown quantity of an unknown medication without a clinical need to do so. The panel noted the close-up CCTV footage that shows Miss Whittaker approaching the medication cupboard with a flimsy in hand but without a medication cup, she then goes into three separate drawers to collect a number of items without ever referring back to the flimsy. The panel also noted the wide-angle CCTV footage that shows Miss Whittaker going to the medication cupboard from a patient area and then speaks to another nurse for quite some time whilst having this medication in her hand and then goes back to the patient area. The panel determined that this is not what would have been done if there was a clinical need from a patient to dispense this medication.

The panel determined that on 30 July 2018 at 05:35 it is more likely than not that Miss Whittaker dispensed a strip of diazepam (containing 14 tablets) without a clinical need to do so. The panel viewed the CCTV footage and noted that Miss Whittaker was wearing a hoodie and approaches the medication cupboard from the back of the department. The close-up CCTV footage showed Miss Whittaker taking one strip of medication out of a drawer and then reaching into another drawer and taking a strip of medication out of a box. Miss Whittaker did not have a flimsy or a medication cup. The panel noted its previous finding that it is unlikely that Miss Whittaker would have been providing direct clinical care at the time if she was wearing a hoodie. The panel also noted the oral

evidence of Witness 1 and Witness 3 who explained that diazepam is a medication that needs to be checked by another nurse, and there was no evidence of Miss Whittaker doing this.

The panel determined that on 3 August 2018 at 05:06, it is more likely than not that Miss Whittaker dispensed a strip of diazepam without a clinical need to do so. The panel noted the CCTV footage shows Miss Whittaker with a flimsy in her hand which she then checked against the medication and referred to it whilst looking through the medications. The panel also noted Miss Whittaker's response to viewing this medication:

'I'm taking strips out of the cupboard. If I'm working in the trolley bay and need medication and they are not in the trolley bay I take them out of the main cupboard and replace them in the trolley bay'

The panel considered the evidence provided by Witness 1 who stated that regular counts of this medication were carried out at this time, and they explained that if this medication was left in the medicine trolley located in the trolley bay, it would have been picked up and put back in the medication cupboard by the pharmacy technicians. The panel also considered the oral evidence of Witness 1, Witness 2 and Witness 3 who all stated that there would have been no clinical need to take this medication. The panel also noted that the witnesses explained that the trolley Miss Whittaker was referring to was a lockable trolley with a physical key that was kept by the nurse in charge on shift. The panel did not have any information before it to suggest that Miss Whittaker had access to this key and so determined that her explanation was implausible.

The panel determined that on 7 August 2018 at 03:23 it is more likely than not that Miss Whittaker dispensed a strip of diazepam without a clinical need to do so. The panel noted its previous sighting of the CCTV from 2 August 2018 where Miss Whittaker was seen dispensing medication with a clinical need to do so and following the correct procedure. The panel compared this footage against that from 7 August 2018 at 09:23 and determined that Miss Whittaker did not follow the correct procedure and so did not have a

clinical need to dispense this medication. It noted that Miss Whittaker is seen with a flimsy, however she did not refer to it when dispensing medication and was also seen dispensing this medication directly into her hand. The wide-angle CCTV footage from this date and time also shows Miss Whittaker going to the medication cupboard from the triage room. Witness 1 explained to the panel that diazepam would not usually be administered in triage as this would need to be prescribed by a doctor and a patient in triage would most likely have not been assessed by a doctor yet.

The panel determined that it is more likely than not that on 7 August 2018 at 07:20, Miss Whittaker dispensed 6 diazepam and 2 co-codamol tablets without a clinical need to do so. The panel viewed the CCTV footage and saw Miss Whittaker popping several tablets out of one strip of medication and then popping some medication from another strip. The panel relied upon the evidence of Witness 1 who was able to use their pharmaceutical knowledge in conjunction with the ability to zoom in and slow down the CCTV footage and Witness 1 explained that the first medication was diazepam and the second was co-codamol. Witness 1 explained to the panel that there would never be a clinical need to dispense this amount of medication at one time.

The panel determined that on 10 August 2018 at 00:17 it is likely that Miss Whittaker had a clinical need to dispense a strip of diazepam and a yellow box containing an unknown quantity of unknown medication. The panel noted that the CCTV footage shows Miss Whittaker with a pen in her hand and a doctor passing her a flimsy which she then studies and writes on before going to the cupboard with the flimsy and taking out the medication. The panel determined that Miss Whittaker was following the correct procedure at this time and appeared to have a clinical justification to dispense this medication.

The panel also determined that on 10 August 2018 at 01:01 it is likely that Miss Whittaker had a clinical need to dispense medication. The panel viewed the CCTV footage that shows Miss Whittaker writing notes and putting a flimsy in the discharge tray, she is then seen going back to another flimsy and takes this with her to the medication cupboard which she then uses to cross check the medications she is dispensing.

The panel determined that on 10 August 2018 at 06:29, it is more likely than not that Miss Whittaker dispensed a strip of diazepam and a strip of co-codamol without a clinical need to do so. The panel viewed the CCTV footage that showed Miss Whittaker entering the drug cupboard with no flimsy, she is then seen taking a strip of medication and folding it in half and then getting another strip of medication from another drawer. Whilst the panel did not have sight of the wide-angle CCTV footage, it determined that the folding of a medication strip in half was not procedure and suggestive that Miss Whittaker had no clinical need to dispense this medication. The panel also considered the evidence of Witness 1 who explained that a strip of co-codamol would be too much to be administered to a patient which further shows the lack of clinical need to dispense this amount of medication.

The panel determined that on 29 August 2018 at 21:09 it is more likely than not that Miss Whittaker dispensed a strip of diazepam and a strip of co-codamol without a clinical need to do so. The panel noted that although Miss Whittaker is not seen with a flimsy on CCTV and there is a long delay between dispensing the medication from the cupboard and Miss Whittaker leaving this area. The panel noted that as Miss Whittaker leaves the bench that she was writing notes on, she does not appear to have the medication in her hand which suggests she has put it in a pocket.

The panel determined that on 29 August 2018 at 21:50 it is more likely than not that Miss Whittaker dispensed an unknown quantity of an unknown medication without a clinical need to do so. The panel viewed the CCTV footage and noted that it appears that Miss Whittaker may have placed some medication into a pocket. The panel noted that she was folding a flimsy and that she was having discussions with a doctor, however, the panel was not satisfied that there was a clinical need to dispense this medication as it determined that it is suspicious that Miss Whittaker appears to place this medication in her pocket. The panel considered the evidence of Witness 3 in their table in the after column '*strip in (R) hand, puts into pocket.*' It considered that this evidence together with the police statement of Witness 1 in which he states that this footage shows that Miss Whittaker

'appears to have placed it in her pocket', is satisfactory to determine that it is likely that Miss Whittaker did place this medication into her pocket.

The panel determined that on 29 August 2018 at 15:38 it is likely that Miss Whittaker had a clinical need to dispense. The panel did not have sight of any close-up CCTV footage on this date and time but did have sight of the wide-angle CCTV. The panel determined that it did not have sufficient evidence to determine, even on the balance of probabilities, that Miss Whittaker dispensed medication without having a clinical need to do so.

Whilst the panel did not find elements 15,16 and 20 of Schedule 1 proved, it determined that the 17 remaining items in Schedule 1 is sufficient to determine that it is more likely than not that Miss Whittaker dispensed medication belonging to Causeway Hospital, as set out at Schedule 1, when there was no clinical need to do so.

Charge 2

'Your actions at charge 1 were dishonest in that you knew you only had permission to dispense the medication referred to where there was a clinical need for you to do so;'

This charge is found proved.

In reaching this decision, the panel took into account the oral and written evidence provided by Witness 1,2 and 3.

The panel also took into account the CCTV footage of Miss Whittaker on 2 August 2018 where she is seen adhering to the correct procedures in dispensing medication. The panel determined that it has seen Miss Whittaker adhering to the proper procedure and dispensing medication with a clinical need, it is evident that she is both aware and capable of dispensing medication correctly.

The panel noted its findings at charge 1 that 17 out of the 20 items in Schedule 1 have been found proved. It determined from this that these actions were not a one-off, but were repeated regularly over a period of time.

The panel determined that any reasonable person, with this information, would state that the behaviour shown by Miss Whittaker was not reasonable.

The panel noted that Miss Whittaker was employed by the Hospital as a Bank Nurse and so may not have been aware of the specific procedures at the Hospital. However, it noted the rota provided to it and determined that Miss Whittaker was regularly employed in the Emergency Department of the Hospital and so she would have been familiar with the procedures. The panel also noted that a registered nurse would be knowledgeable of the administration and dispensing of medication as it is a fundamental basic of nursing practice.

The panel also considered the oral evidence of Witness 2 who explained that normal practice in this department is that nurses have medications checked as it reduces the risk of patients missing medications or repeating doses.

The panel therefore determined that due to the actions found proved in charge 1, together with Miss Whittaker's experience as a registered nurse in this department and the panel having sight of Miss Whittaker correctly following the medications dispensing procedure on 2 August 2018, it is more likely than not that Miss Whittaker's actions were dishonest in that she knew she only had permission to dispense the medication referred to where there was a clinical need to do so. Deliberately removing medication from a drug cupboard when there was no clinical need to do so would be regarded as dishonest by the standards of ordinary and decent people.

Charge 3

'Failed to properly dispose of the medication referred to at charge 1'

This charge is found proved.

The panel first considered whether Miss Whittaker had a duty to dispose of the medication referred to at charge 1. It determined that registered nurses have a duty to properly dispose of medications. It also noted that Miss Whittaker would have been specifically aware of this duty as it is stated in the *Medicines Code – Policy for Prescribing, Supply, Administration, Storage and Disposal of Medicines*.

The panel considered the evidence provided by Witness 1 who explained that there was a large discrepancy in medication that was unaccounted for over this period. Witness 1 explained to the panel that any medication that was left on the trolley or in the Emergency Department would have been picked up and counted by the pharmacy technicians. Witness 3 explained to the panel that if medication were refused by a patient this would have to be recorded and the medications would have to be disposed of. The panel noted that there is no evidence before it to suggest that this occurred.

Therefore, the panel determined, based on its findings at charge 1, that on the dates items that have been found proved, it follows that Miss Whittaker did not properly dispose of medication.

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 Miss Whittaker's 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, Miss Whittaker's fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct and impairment

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.*'

Ms Kennedy 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.

Ms Kennedy identified the specific, relevant standards where Miss Whittaker's actions amounted to misconduct.

Ms Kennedy moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. This included reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant*

[2011] EWHC 927 (Admin) and *Cohen v GMC* [2008] EWHC 581. Ms Kennedy took the panel through the Grant test and submitted that all four limbs of this test are engaged.

Ms Kennedy submitted that the conduct shown by Miss Whittaker has not been remediated and is likely to be repeated. She submitted that dishonesty concerns are difficult to put right and this combined with the lack of insight provided by Miss Whittaker leads to a significant risk of repetition of these actions.

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).

Decision and reasons on misconduct

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

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

'10 Keep clear and accurate records relevant to your practice

This applies to the records that are relevant to your scope of practice. It includes but is not limited to patient records.

To achieve this, you must:

*10.1 complete records at the time or as soon as possible after an event,
recording if the notes are written some time after the event*

*10.2 identify any risks or problems that have arisen and the steps taken to
deal with them, so that colleagues who use the records have all the
information they need*

18 Advice on, prescribe, supply, dispense or administer medicines within the limits of your training and competence, the law, our guidance and other relevant policies, guidance and regulations

To achieve this, you must:

18.1 prescribe, advise on, or provide medicines or treatment, including repeat prescriptions (only if you are suitably qualified) if you have enough knowledge of that person's health and are satisfied that the medicines or treatment serve that person's health needs

18.4 take all steps to keep medicines stored securely

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 honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment'

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel was of the view that it has found 17 separate occasions where Miss Whittaker dispensed medication without a clinical need to do so. It determined that Miss Whittaker was an accountable individual in the Emergency Department by having access to the secure drugs cupboard and she abused this position. The panel also determined that the behaviour she has shown is very serious as the panel has been informed that diazepam is a highly addictive substance with a street value and so the fact that this medication had not been disposed of properly is highly concerning.

The panel found that Miss Whittaker's actions did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, Miss Whittaker's fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must be honest and open and act with integrity. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

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

'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's "test" which reads as follows:

'Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her/ fitness to practise is impaired in the sense that S/He:

- a) *has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
- b) *has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
- c) *has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
- d) *has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

The panel finds that patients were put at risk and could have been caused physical and emotional harm as a result of Miss Whittaker's misconduct as these actions could have affected patients access to the medication they required. Miss Whittaker's misconduct had breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute. It was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charges relating to dishonesty extremely serious.

Regarding insight, the panel considered that there is no evidence of insight provided by Miss Whittaker nor any evidence of her strengthening practice.

The panel is also of the view that there is a risk of repetition. It noted the evidence provided of Miss Whittaker dispensing medication in accordance with the Hospital's policy and so it is clear that on the 17 occasions found proved, Miss Whittaker disregarded this policy. The panel determined that this together with the lack of insight shown by Miss Whittaker amounts to a serious risk of repetition of these actions. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC; to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

The panel determined that a finding of impairment on public interest grounds is required because an informed member of the public would be appalled to learn that a registered nurse who has been seen to dispense medication without clinical justification and not properly dispose of the medication on 17 occasions was not to have a finding of impairment made on their practise.

Having regard to all of the above, the panel was satisfied that Miss Whittaker's fitness to practise is currently impaired.

Sanction

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Miss Whittaker off the register. The effect of this order is that the NMC register will show that Miss Whittaker 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

Ms Kennedy informed the panel that in the Notice of Hearing, dated 18 January 2023, the NMC had advised Miss Whittaker that it would seek the imposition of a striking-off order if it found Miss Whittaker's fitness to practise currently impaired.

Ms Kennedy submitted that there are no mitigating features in this case and submitted that the following aggravating features are present:

- The concerns relate to a pattern of dishonest behaviour which was repeated on 17 occasions and relate to a considerable amount of medications being dispensed over a prolonged period
- The abuse of Miss Whittaker's position as a registered nurse in accessing medications without clinical justification
- Miss Whittaker's lack of insight into her behaviour
- Concerns about Miss Whittaker's attitude
- The risk of patient harm

Ms Kennedy submitted that a striking-off order is necessary and proportionate. She stated that there has been no meaningful engagement from Miss Whittaker, nor has she provided any reflections. She submitted that the panel has identified serious public protection concerns in risks to patients and a risk of repetition. Ms Kennedy therefore submitted that the repeated dishonesty in the nature found proved is fundamentally incompatible with Miss Whittaker remaining on the register and if Miss Whittaker were to remain on the register this would undermine public confidence in the profession.

Decision and reasons on sanction

Having found Miss Whittaker's 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:

- An abuse of a position of trust
- The risk of patient harm
- The pattern of repeated behaviour over a period of time
- No meaningful engagement with the NMC
- No insight provided by Miss Whittaker

The panel also determined that there are no mitigating features present in this case.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Miss Whittaker's 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 Miss Whittaker's 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 Miss Whittaker's registration would be a sufficient and appropriate response. The panel is of the view that there are no practical, measurable or workable conditions that could be formulated, given the nature of the charges in this case. The misconduct identified in this case was not

something that can be addressed through retraining. Furthermore, the panel concluded that the placing of conditions on Miss Whittaker's registration would not 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 SG states that suspension order may be appropriate where some of the following factors are apparent:

- *A single instance of misconduct but where a lesser sanction is not sufficient;*
- *No evidence of harmful deep-seated personality or attitudinal problems;*
- *No evidence of repetition of behaviour since the incident;*
- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour;*

The conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel noted that the serious breach of the fundamental tenets of the profession evidenced by Miss Whittaker's actions is fundamentally incompatible with Miss Whittaker remaining on the register.

The panel determined that this was not a single instance of misconduct and there is evidence of an attitudinal problem due to the repeated behaviour in this case. It also determined that Miss Whittaker has displayed no insight and so 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?*

Miss Whittaker's actions were significant departures from the standards expected of a registered nurse and are fundamentally incompatible with her remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Miss Whittaker's actions were serious and to allow her to continue practising would not protect the public and 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 Miss Whittaker's actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct herself, 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 standard of behaviour required of a registered nurse.

This will be confirmed to Miss Whittaker in writing.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in Miss Whittaker's own

interests until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

The panel took account of the submissions made by Ms Kennedy. She submitted that an interim suspension order is appropriate and proportionate for 18 months in order to adequately protect the public during the appeal period.

Decision and reasons on interim order

The panel was satisfied that an interim order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. The panel therefore imposed an interim suspension order for a period of 18 months due to adequately protect the public during the appeal period.

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

That conclude this determination.