

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

**Substantive Meeting
Thursday, 18 May 2023 - Friday, 19 May 2023**

Virtual Hearing

Name of Registrant: Richard McLellan

NMC PIN 16I0957S

Part(s) of the register: Nursing – Sub part 1
RNMH: Registered Nurse - Mental Health (3 October 2018)

Relevant Location: Scotland

Type of case: Conviction

Panel members: Melissa D'Mello (Chair, lay member)
Diane Gow (Registrant member)
Andrew Harvey (Lay member)

Legal Assessor: Jayne Salt

Hearings Coordinator: Opeyemi Lawal

Mr McLellan: Not present and unrepresented

Facts proved: Charge 1

Fitness to practise: Impaired

Sanction: **Striking-off order**

Interim order: **Interim suspension order (18 months)**

Decision and reasons on service of Notice of Meeting

The panel noted at the start of this meeting that that the Notice of Meeting had been sent to Mr McLellan's registered email address by secure email on 11 April 2023.

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Meeting provided details of the allegation, the earliest date that the virtual meeting would be held (after 16 May 2023), the opportunity to make written admissions, the actions that the panel could take and its power to make an interim order.

In the light of all of the information available, the panel was satisfied that Mr McLellan has been served with notice of this meeting in accordance with the requirements of Rules 11A and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Details of charge

That you, a registered nurse,

- 1) Were convicted on 17 June 2022 at Edinburgh Sheriff Court of being a person who provided care services to a mentally disordered person c/o Police Service of Scotland who did engage in a sexual activity with or directed towards the said, in that you did place your hand underneath her underwear.

CONTRARY to Section 46(1) and (2)(a) of the Sexual Offences Scotland Act 2009.

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

Background

In November 2019 the Nursing and Midwifery Council ('NMC') received a referral from the Royal Edinburgh Hospital about Mr McLellan, who at that time was employed as a Band 5

mental health nurse. The concern raised was that he had been charged with an offence under the Sexual Offences Scotland Act 2009 relating to an incident which took place in January 2019 where Mr McLellan allegedly engaged in a sexual act with a female mental health inpatient whilst on duty.

The female patient disclosed to another member of staff that she had engaged in a sexual act with Mr McLellan whilst he was providing 1:1 continuous nursing intervention in the capacity of her key worker. This took place in her bedroom in Meadows Ward, which is a 16-bed adult acute mental health admission ward for females aged 16-64.

Panel request for information on appeal against conviction

In several email exchanges between Mr McLellan and his NMC case officer, dated 21 October 2022 and 28 October 2022, Mr McLellan made reference to lodging an appeal for his criminal conviction, in which he stated:

'...Once again, I have no intention of ever returning to nursing, so I see this as an unnecessary action until after the appeal...'

'...OK. We'll [sic] currently the conviction is still in the process of appeal. My lawyers said it should all be over by Christmas...'

On 23 January 2023, Mr McLellan's case officer emailed Mr McLellan asking for an update on his appeal but there was no response.

The panel requested that information in relation to Mr McLellan's appeal be sought from the Scottish Courts & Tribunal Service, by the NMC. The response received dated 18 May 2023 details:

'I can confirm Richard McLellan had an appeal against conviction that was refused at sift.'

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

It determined that requesting and receiving an update on the progress of Mr McLellan's appeal was relevant, fair and appropriate.

Decision and reasons on facts

The charge concerns Mr McLellan's conviction and, having been provided with a copy of the full extract conviction report dated 1 August 2022, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3). This states:

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

In finding the facts proved, the panel found the following:

- On 17 June 2022 Mr McLellan was convicted at Edinburgh Sheriff Court, following a trial for engaging in a sexual activity with a mentally disordered person for who he was providing care.
- On 15 July 2022 Mr McLellan was sentenced to a Community Payback Order comprising of Supervision for a period of 3 years, and 200 hours of unpaid work/activities.
- He was also placed on the 'Sex Offenders Register' (Sexual Offences Act 2003 Certification).

Fitness to practise

Having made its findings on the facts, the panel then considered whether, on the basis of the facts found proved, Mr McLellan's fitness to practise is currently impaired by reason of his conviction. 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.

Representations on impairment

The NMC requires the panel to bear in mind its overarching objective to protect 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. The panel was referred to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin), *Yeong v General Medical Council* [2009] EWHC 1923 (Admin) and *R (on application of Cohen) v General Medical Council* [2008] EWHC 581 (Admin).

The NMC submitted that Mr McLellan's conviction is in relation to a serious offence of a sexual nature which is likely to cause physical, emotional and psychological harm to the victim. When considering the level of future risk, it is important for the panel to review the full circumstances of the case. Mr McLellan has not provided the NMC with a reflective piece and has not demonstrated any remorse. Therefore, he may be liable in the future to bring the nursing profession into disrepute should the incident be repeated. Mr McLellan has breached fundamental tenets of the profession by the very nature of his conviction. Registered professionals occupy a position of trust and must act in a manner which promotes integrity at all times.

Mr McLellan was subject to the provisions of The Code: Professional standards of practice and behaviour for nurses and midwives (2015) ('the Code'). The Code divides its guidance for nurses into four categories which can be considered as representative of the fundamental principles of nursing care.

The NMC submitted that on the basis of the charges being found proved, it is submitted, that the following parts of the Code have been breached in this case

1.1 treat people with kindness, respect and compassion;

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

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

20.6 stay objective and have clear professional boundaries at all times with people in your care, their families and carers;

20.8 act as a role model of professional behaviour for students and newly qualified nurses to aspire to.

The NMC submitted that there are no apparent steps for Mr McLellan to take to address the identified problems as there was a lack of full insight. Training cannot remediate the situation as there are no identified issues with his clinical practice.

The NMC submitted that Mr McLellan has displayed no insight. Mr McLellan has not provided any evidence of strengthened practice, in the form of a reflective statement addressing how his actions are likely to have impacted patients, the wider public or the profession; nor evidence of relevant training/education, testimonials etc. Furthermore, Mr McLellan has not shown any remorse or regret following his conviction, as he has not engaged with the NMC's fitness to practise proceedings, save to send an email in which he maintains his innocence, and advises that he intends to lodge an appeal, against "this horrible accusation."

The NMC submitted there is a continuing risk to the public due to Mr McLellan's lack of insight, remorse and regret. It also considers that there is a public interest in a finding of impairment being made in this case to declare and uphold proper standards of conduct and behaviour. Mr McLellan's conduct engages the public interest because of his serious abuse of a position of trust.

The NMC further submitted that the conduct was very serious because of Mr McLellan's behaviour towards a vulnerable patient, which was a significant departure from the standards expected of a registered nurse.

The NMC invited the panel to find Mr McLellan's fitness to practise impaired by reason of his conviction.

The panel accepted the advice of the legal assessor which included reference to *the Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin) and *R (on application of Cohen) v General Medical Council* [2008] EWHC 581 (Admin).

Decision and reasons on impairment

The panel next went on to decide if, as a result of his conviction, Mr McLellan'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. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

The panel determined that the following parts of the Code have been breached in this case:

1.1 treat people with kindness, respect and compassion;

1.2 make sure you deliver the fundamentals of care effectively

1.5 respect and uphold people's human rights

3.1 pay special attention to promoting wellbeing...

3.4 act as an advocate for the vulnerable...

17.1 take all reasonable steps to protect people who are vulnerable or at risk from harm, neglect or abuse

17.3 have knowledge of and keep to the relevant laws and policies about protecting and caring for vulnerable people

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

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

20.4 keep to the laws of the country in which you are practising

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

20.6 stay objective and have clear professional boundaries at all times with people in your care, their families and carers;

20.8 act as a role model of professional behaviour for students and newly qualified nurses to aspire to.

In reaching its decision, the panel considered the judgment of Mrs Justice Cox in the case of *CHRE v NMC and Grant*. 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/their fitness to practise is impaired in the sense that S/He/They:

- 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 determined that limbs a, b and c were engaged both in the past and looking towards the future.

The panel finds that a patient was put at risk which could have caused physical, psychological and emotional harm as a result of Mr McLellan's conduct. Mr McLellan's conduct has breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute.

In its consideration of whether Mr McLellan's conduct can be remediated, the panel took into account that the concerns do not relate to his clinical practice but instead relate to attitudinal concerns, which may be harder to remediate.

The panel noted Mr McLellan's comments in his email exchanges with the NMC, namely, that he 'Will absolutely fight this horrible accusation' and that he wants 'his name to be cleared'.

Regarding insight, the panel determined that Mr McLellan has not demonstrated any insight. There is no evidence to suggest that Mr McLellan has made admissions or apologies. Mr McLellan has not demonstrated any remorse or understanding of why what he did was wrong nor how this impacted negatively on his colleagues, his employers, the wider public and the reputation of the nursing profession. Nor was there any evidence of Mr McLellan's self-awareness regarding the impact his conduct is likely to have had on a vulnerable patient with acute mental ill health, or their engagement with other health care providers in the future.

There was no information before the panel relating to, for example, self-reflection, training or testimonials to evidence that Mr McLellan has taken any steps to strengthen his practice. Specifically, there was no evidence before the panel of Mr McLellan undertaking

additional training on maintaining sexual boundaries between health professionals and patients. Accordingly, the panel determined that Mr McLellan has not remediated his practice.

The panel is of the view that there is a risk of repetition based on the absence of any insight and the lack of evidence relating to Mr McLellan strengthening his practice. 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 are 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, which 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 was required as it considered that the public would be appalled by the concerns in this case and public confidence in the profession would be undermined if a finding of current impairment was not made.

Having regard to all of the above, the panel was satisfied that Mr McLellan's fitness to practise is currently impaired on both public protection and public interest grounds.

Sanction

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

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.

Representations on sanction

The NMC invited the panel to impose a striking-off order.

The NMC submitted that aggravating features in the case, include the fact that Mr McLellan's conduct was in the course of employment as a registered nurse and which put a vulnerable patient at risk of suffering both emotional and physical harm. This was also, an abuse of a position of trust which resulted in being placed on the sex offenders register. There is also a lack of insight in respect of the impact on the victim.

The NMC submitted that mitigating features in this case are that there were no concerns about Mr McLellan's general clinical practice.

The NMC submitted that the sanctions guidance on sexual misconduct is relevant here. It notes that concerns will be particularly serious if the nurse has abused a special position of trust they hold as a registered caring professional. It also goes on to say that the level of risk to patients will be an important factor, but a panel of the Fitness to Practise Committee ('FtPC') should also consider that generally, sexual misconduct will be likely to seriously undermine public trust in nurses.

Decision and reasons on sanction

Having found Mr McLellan'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 NMC sanction guidance for cases involving sexual misconduct and cases involving criminal convictions, in particular:

'...Sexual misconduct will be particularly serious if the nurse, midwife or nursing associate has abused a special position of trust they hold as a registered caring professional. It will also be particularly serious if they have to register as a sex offender. The level of risk to patients will be an important factor, but the panel should also consider that generally, sexual misconduct will be likely to seriously undermine public trust in nurses, midwives and nursing associates...'

'...In general, the rule is that a nurse, midwife or nursing associate should not be permitted to start practising again until they have completed a sentence for a serious offence...'

The panel noted that Mr McLellan was sentenced to a community payback order which includes supervision for three years commencing in July 2022 which is therefore still current.

The panel took into account the following aggravating features:

- Abuse of position and violation of trust
- Patient was vulnerable
- Mr McLellan's conduct put the patient at risk of physical, psychological and emotional harm, both in the shorter and longer term
- Mr McLellan was the patient's key worker
- Incident occurred while on duty in a hospital setting in the patient's bedroom
- The incident was likely to undermine the patient's confidence in health professionals more widely
- Demonstrated no insight
- Mr McLellan is now placed on Sex Offenders Register.

The panel considered whether there are any mitigating features but determined that there are none that apply to 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 Mr McLellan'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 this case was not at the lower end of the spectrum and 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 McLellan's 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 charge in this case. The concerns identified in this case were not issues that can be addressed through retraining. Furthermore, the panel concluded that the placing of conditions on Mr McLellan 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 very significant departure from the standards expected of a registered nurse. The panel determined that Mr McLellan's actions were indicative of harmful, deep-seated attitudinal problems. The panel concluded that the serious breach of the fundamental tenets of the profession evidenced

by Mr McLellan's actions is fundamentally incompatible with Mr McLellan remaining on the register.

The panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, when considering 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 McLellan's actions were very 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 McLellan's actions were serious and to allow him to continue practising 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, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the matters it identified, in particular the effect of Mr McLellan's actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct themselves, the panel has concluded that nothing short of this would be sufficient in this case.

The panel considered that this order was necessary to maintain 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.

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 Mr McLellan's own interests until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Representations on interim order

The panel took account of the representations made by the NMC that an interim suspension order should be imposed to cover the appeal period and it is necessary for the protection of the public and otherwise in the public interest.

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.

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

This will be confirmed to Mr McLellan in writing.

That concludes this determination.

