

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

**Substantive Hearing
Monday 8 January – Friday 12 January 2024
Tuesday 2 – 5 April 2024 (heard virtually)**

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

Name of Registrant:	Mbongeni Mkhabela
NMC PIN:	99C1218O
Part(s) of the register:	RN1: Adult nurse, level 1 (11 March 1999)
Relevant Location:	Hampshire
Type of case:	Misconduct
Panel members:	Sue Heads (Chair, lay member) Elaine Biscoe (Registrant member) Caroline Friendship (Lay member)
Legal Assessor:	Angus Macpherson
Hearings Coordinator:	Rim Zambour 8 – 12 January 2024 Ruth Bass (2 – 5 April 2024)
Nursing and Midwifery Council:	Represented by Simon Gruchy, Case Presenter
Mr Mkhabela:	Present and represented by Laura Herbert, instructed by the Royal College of Nursing (RCN)
No case to answer (prior to charges being read):	Charge 8
No case to answer:	Charges 7a, 13, 15 (in relation to Charges 7a and 13), 16 (in relation to Charge 7a)
Facts proved by admission:	Charges 5a, 15a (in relation to 5a), 16a, 16c i and 16c ii (in relation to 5a)

Facts proved: Charges 3a, 3b, 4, 5b, 5d, 6a, 6c, 6d, 7c, 7d, 7e, 10, 12, 14, 15 (in relation to 3a, 3b, 4, 5b, 5d, 7c, 7d, 7e, 10, 14), 16 (in relation to 3a, 3b, 4, 5b, 5d, 6a, 6c, 6d, 7c, 7d, 7e), 17 (in relation to 10)

Facts not proved: Charges 1a, 1b, 1c, 1d, 2a, 2b, 2c, 5c, 5e, 6b, 7b, 9a, 9b, 9c, 11, 15 (in relation to 12), 17 (in relation to 12)

Fitness to practise: Impaired

Sanction: **Suspension order (6 months without review)**

Interim order: **None imposed**

Charge 8

At the outset of the hearing Mr Gruchy, on behalf of the Nursing and Midwifery Council (NMC) informed the panel that he was not calling any evidence in support of the NMC's case in relation to Charge 8. The panel therefore determined that it should find that there was no case to answer in relation to Charge 8 in order to make the position completely clear to the parties.

Decision and reasons on application to amend the charges

The panel heard an application made by Mr Gruchy to amend the wording of Charge 11.

The proposed amendment to Charge 11 was to refer to Charge 10 instead of Charge 12. It was submitted by Mr Gruchy that the proposed amendment would more accurately reflect the evidence.

“That you, a registered nurse:

11. On one or more occasions other than at charge ~~12~~**10** above approached Colleague B and:
 - a. Kissed her neck
 - b. Kissed her cheek.

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

Ms Herbert did not oppose this amendment.

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 you 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 more accurately reflect the evidence.

Decision and reasons on application for special measures for Colleagues A and B

Mr Gruchy made an application that when giving oral evidence, special measures be put in place for Colleagues A and B. He submitted that both witnesses have requested these special measures insofar as they would prefer and ask not to be seen by you, as well as not to see you themselves. He suggested that this could be facilitated by way of you attending the hearing by way of audio only during Colleague A and B's live evidence.

Ms Herbert stated that you are happy to do so if the panel thinks it would be fair.

The panel accepted the advice of the legal assessor.

The panel agreed that the special measures be put in place during the live evidence of Colleagues A and B.

Details of charge

That you, a Registered Nurse:

1. On one or more unknown dates did one or more of the following to Colleague A:
 - a. Said words to the effect of: "I will take you to nice places just you and me"
 - b. Talked about their body changing through trauma experienced in childbirth;

- c. Talked about their vagina expanding through childbirth
 - d. Said words to the effect of: “your breast size is perfect for you, the way they are, they will develop more whilst pregnant”;
2. On an unknown date approached Colleague A and:
 - a. Said to them words to the effect of “I can feel for the baby’s head”
 - b. Pushed your hand, down on her trousers, towards the bottom of their stomach;
 - c. Touched her vagina.
3. On or about 15 November 2018 approached Colleague A and:
 - a. Put your arms around her;
 - b. Said words to the effect of “do you want to go into the next bedroom or upstairs, don’t tell me you have changed your mind “.
4. On or about 15 November 2018, on one or more occasions other than at charge 3 above or charges 5 or 6 below, put your arm around Colleague A.
5. On or about 16 November 2018 approached Colleague A and:
 - a. Unzipped her jumper;
 - b. Pulled it down over her left shoulder;
 - c. Slid your hand down her arm, through her jumper;
 - d. Touched her shoulder;
 - e. Pressed your stomach against her back.
6. On or about 16 November 2018, approached Colleague A and:

- a. Put your arm around her waist;
 - b. Kissed her cheek;
 - c. Kissed her neck.
 - d. Said words to the effect of, "I want to take you to South Africa but you would first need a few private one to one sessions with her so she would learn how they do things in South Africa".

7. On one or more occasions on or about 16 November 2018:
 - a. Offered to make Colleague A dinner or buy her a treat
 - b. Winked and/or stuck your tongue out at Colleague A
 - c. Said words to the effect of " you can tell Daddy " to Colleague A
 - d. Said words to the effect of "two service users are on sodium valproate because it gives them a large erection"
 - e. Said words to the effect of "in South Africa they stand pulling their penis as it's a muscle it makes it grow longer" and/or;

9. On one or more occasions on unknown dates approached Colleague B and did one or more of the following:
 - a. Grabbed her hand;
 - b. Said words to the effect of "When am I taking you out for dinner?"
 - c. Said words to the effect of "When are we going out?".

10. On the 19 November 2018 approached Colleague B and:
 - a. put your hands around her waist;
 - b. kissed her neck.

- c. kissed her cheek
- 11. On one or more occasions other than at charge 10 above approached Colleague B and:
 - a. Kissed her neck
 - b. Kissed her cheek.
- 12. On an unknown date:
 - a. Took photographs of Colleague B on your phone
 - b. Sent one or more photographs of Colleague B to their phone
- 13. On an unknown date, put your arm around Colleague D
- 14. On one or more occasions, in the presence of Colleague D
 - a. Brushed up against a female colleague
 - b. Touched a female colleague's bottom
- 15. Your actions at one or more of charges 1- 14 above:
 - a. breached professional boundaries
 - b. were sexually motivated in that you sought sexual gratification and/or to pursue a future sexual relationship
- 16. Your actions at one or more of charges 1-8 amounted to harassment of Colleague A in that:
 - a. Your conduct was unwanted;
 - b. Your conduct related to Colleague A's sex;

- c. Your conduct had the purpose or effect of:
 - i. Violating Colleague A's dignity, and/or
 - ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for Colleague A.

- 17. Your actions at one or more of charges 9-12 amounted to harassment of Colleague B in that:
 - a. Your conduct was unwanted;
 - b. Your conduct related to Colleague B's sex;
 - c. Your conduct had the purpose or effect of:
 - i. Violating Colleague B's dignity, and/or
 - ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for Colleague B.

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

At the outset of the hearing, Ms Herbert submitted that Charge 5a is admitted. She submitted that Charge 12 is accepted in relation to taking one photograph and sending one photograph. She stated that Charges 16a, c, i and ii are also accepted in relation to Charge 5a only.

Background

You first joined the NMC register in 1999 and commenced employment at Nurseplus UK (the Agency) as an agency nurse on 8 November 2017. You were referred to the NMC by the Agency on 20 November 2018.

The allegations occurred at Peach Cottage (the Home) on numerous dates during November 2018. On 22 January 2019, you accepted an Adult Conditional Caution

(ACC) from Hampshire Constabulary following a complaint which was summarised as follows:

'Aggvd reporting that a male colleague has been touching her arm and kissing her neck whilst at work. He has then undone her zip to her top and started touching her shoulder and arm.'

You attended an awareness course in April 2019 as directed by the ACC.

The regulatory concerns relate to you allegedly sexually harassing colleagues whilst working at the Home.

Decision and reasons on application to amend Charge 10

Following the oral evidence of Colleague B, the panel heard an application made by Mr Gruchy to amend the wording of Charge 10.

The proposed amendment was to change the wording to start the charge with '*on or about the 19 November 2018...*' It was submitted by Mr Gruchy that the proposed amendment would provide clarity and more accurately reflect the evidence given by Colleague B.

"That you, a registered nurse:

10. On **or about** the 19 November 2018 approached Colleague B and:
 - a. Put your hands around her waist;
 - b. Kissed her neck;
 - c. Kissed her cheek."

The panel heard submissions from Ms Herbert, on your behalf. She opposed the application to amend the charge and submitted that it would be unfair to allow the amendment simply to reflect the oral evidence given.

Ms Herbert referred the panel to the case of *PSA v HCPC & Doree* [2017] EWCA Civ 319 in her contention that once evidence has been presented to the panel, amending the charge retrospectively to find a guilty verdict would be '*a gross breach of fair hearing procedure*'.

Ms Herbert submitted that Charge 11 is separate to Charge 10 and potentially covers other dates not mentioned in Charge 10 and that therefore there is no need to amend the charge.

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 interests of justice. The panel considered that Mr Mkhabela would have been made aware of the nature of the allegations as he would have had sight of the local investigation report which states that the incident allegedly occurred '*last week*', without any specificity as to the date. It determined that the date of the allegation is not a significant element of the charge, and that there has always been consistency in the alleged facts of the allegation if not the date. The panel was satisfied that there would be no injustice caused to Mr Mkhabela by the proposed amendment being allowed.

It was therefore appropriate to allow the amendment, as applied for.

Decision and reasons on application of no case to answer

The panel considered an application from Ms Herbert that there is no case to answer in respect of Charges 5c, 7a, 11, 13 and 15 (in relation to Charge 13 only). This application was made under Rule 24(7) and in respect of Charges 7a and 13, under Rule 24(8).

During deliberations, the panel of its own volition determined to consider whether it should make a finding of no case to answer in relation to Charge 16 insofar as it relates to Charge 7a.

Charge 5c

Ms Herbert submitted that in relation to Charge 5c, the only place it is mentioned that you allegedly slid your hand down Colleague A's shoulder is in her witness statement to the NMC. Ms Herbert stated that this is not mentioned in Colleague A's local statement and that whilst there is some evidence for this charge, it is not corroborated and is of such an inconsistent nature that the matter should go no further. She submitted that this charge falls in between the two limbs of *R v Galbraith* [1981] 1 WLR 1039 and that the panel should find there is no case to answer in respect of this charge.

In relation to this application, Mr Gruchy submitted that it remains a matter for the panel. He stated that in cross-examination, Colleague A stated that saying you put your hand 'through' her top may not have been the correct word to use. However, Mr Gruchy submitted that there is still cogent evidence of you sliding your hand down Colleague A's arm and that the panel should decide to what extent the word 'through' is important to the charge. He stated that the NMC position is that it is wrong to attach a large amount of weight to it. In these circumstances, it was submitted that this charge should be allowed to remain before the panel.

The panel took account of the submissions made and heard and accepted the advice of the legal assessor.

In reaching its decision, the panel has made an initial assessment of all the evidence that had been presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it could find the facts proved and whether you had a case to answer.

In respect of the submission concerning Charge 5c, the panel noted the following written evidence which was presented to it by the NMC. In her witness statement

correctly dated 30 January 2020, but incorrectly bearing the date of 8 March 2020, Colleague A stated:

'I was in the resident's bathroom, which is located downstairs and Sally was at the other end of the Home in the lounge. I had my back towards the bathroom door. The bathroom connects two bedrooms. Lazarus came in from the other bedroom through the bathroom and stood behind me. I was wearing a jumper that had a zip at the back which was about 10 cm in length from the top down. Lazarus unzipped my jumper, pulled it down over my left shoulder and then slid his hand down my arm through the top whilst his other hand was on my shoulder.'

In a police report of Colleague A's complaint made on 20 November 2018, the following is recorded:

'...male walked in. he undid her zip to her top and took her top down over her shoulder and started stroking her shoulder and arm'

In her oral evidence during cross examination, Colleague A stated the following:

*'he came from behind through the bathroom, unzipped my jumper and slid it down;
it slipped off my shoulder; he wasn't rummaging, his skin was on my skin'*

Although she acknowledged that the phrase *'through her jumper'* may have been ill chosen.

The panel considered whether Colleague A's evidence failed to support the allegation that you slid your hand down Colleague A's arm *'through her jumper'*. Given your admission that you unzipped Colleague A's jumper from behind, that in consequence the jumper was coming off Colleague A, and her evidence that your skin was on her skin, and Colleague A's statements set out above, the panel has reached the

conclusion that there is evidence upon which it could find charge 5c proved. It therefore dismisses the application in relation to Charge 5c.

The panel was of the view that there had been sufficient evidence to support the charge at this stage and, as such, it was not prepared, based on the evidence before it, to accede to an application of no case to answer. What weight the panel gives to any evidence remains to be determined at the conclusion of all the evidence.

Charges 7a, 15 and 16 (in respect of Charge 7a)

Ms Herbert submitted in relation to Charge 7a, that there is nothing in Colleague A's witness statement supporting the assertion that you offered to make her dinner or buy her a treat. Further, that during re-examination Colleague A said she did not remember.

Ms Herbert submitted that the evidence for this charge is so tenuous and of an inconsistent nature that the panel should find there is no case to answer in respect of Charge 7a.

Mr Gruchy submitted there is evidence to support that as a matter of fact, you did offer to make Colleague A dinner although this was within the workplace in the communal kitchen. He further submitted that the part of the charge relating to buying Colleague A a treat is prefaced with the word 'or', so the evidence does not fall away because of this part of the charge. In these circumstances, it was submitted that this charge should be allowed to remain before the panel.

The panel took account of the submissions made and heard and accepted the advice of the legal assessor.

In reaching its decision, the panel has made an initial assessment of all the evidence that had been presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it could find the facts proved and whether you had a case to answer.

In respect of paragraph 7a, the panel accepted that the evidence in respect of the allegation that you offered to buy Colleague A a treat was not sufficient for it to find that part of it proved. Although she mentioned that matter in her local witness statement as follows:

'He asked me if he could cook me dinner or buy me a treat, just because he does it ever so often'.

This was not supported in Colleague A's oral evidence as she did not remember it. She did not mention it in her witness statements.

So far as the first part of Charge 7a is concerned, namely that you *'offered to make Colleague A dinner'*, Colleague A stated that you had indeed done so, but in the context of the Health Care Support Workers (HCSW) frequently offering to do so for one another in the staff kitchen or canteen. It is right to observe that this allegation forms the first part of an allegation which amounts to some five parts. The whole of Charge 7 is alleged by Charge 15 to constitute breaches of professional boundaries, and by Charge 16 to constitute harassment. However, the panel noted that the evidence in support of Charge 7 from Colleague A does not clearly suggest that each component part of the allegation took place on the same occasion. That matter is reflected in the stem of the charge which reads:

'On one or more occasions on or about 16 November 2018.'

In consequence the panel considered that it was entitled to consider whether paragraph 7a could constitute sufficient evidence to support a finding of impairment under Rule 24(b) of the Rules. In light of the fact that colleagues at the Home frequently offered to cook dinner for one another, the panel has determined at this stage that you have no case to answer in respect of Charge 7a of the Allegation under Rule 24(8) of the Rules as such offers were commonplace amongst staff.

In the light of this finding, the panel also dismisses Charges 15 and 16 insofar as each of them relates to paragraph 7a of the charges.

Charge 11

Ms Herbert submitted that the evidence provided by Colleague B in respect of Charge 11 was of such an inconsistent nature and was so tenuous that it should not go any further. She stated that during cross-examination, Colleague B referred to 19 November 2018 being the '*only time*' you kissed her neck and cheek. Ms Herbert submitted that there was therefore only one occasion, although Colleague B also said in her re-examination that there may have been '*one or two*'. Ms Herbert stated that Colleague B was therefore inconsistent with the evidence she had just given on the same day. Ms Herbert therefore submitted that at its highest, the panel could not find this charge proved and invited it to find there is no case to answer in respect of Charge 11.

Mr Gruchy submitted that there is cogent and ample evidence of more than one kiss on both the neck and the cheek. He stated that what the panel makes of that evidence in due course is a matter for it.

The panel took account of the submissions made and heard and accepted the advice of the legal assessor.

In reaching its decision, the panel has made an initial assessment of all the evidence that had been presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it could find the facts proved and whether you had a case to answer.

In respect of Charge 11, the panel dismisses your application. Colleague B stated in her oral evidence that you had kissed her neck on one or two occasions, likewise her cheek. That evidence could therefore enable the panel to find both Charges 10b and c which reads:

'On or about the 19 November 2018 [you] approached Colleague B and:

a

b. kissed her neck;

c. kissed her cheek.'

and Charge 11 proved. In fact, Colleague B also stated in her supplementary witness statement dated 6 December 2021 that you had kissed her on the cheek '*on more than one occasion. It was 2 or more separate incidents.'*

The panel was of the view that there had been sufficient evidence to support the charge at this stage and, as such, it was not prepared, based on the evidence before it, to accede to an application of no case to answer. What weight the panel gives to any evidence remains to be determined at the conclusion of all the evidence.

Charges 13 and 15 (in respect of Charge 13)

Ms Herbert stated that this allegation comes from Colleague A's witness statement where it is alleged that you put your arms around Colleague D and that she was upset. Ms Herbert submitted that Colleague D did not support this version of events, and that during her cross-examination she stated that whilst there was a mutual hug, you were never physical with her '*in that way*'. Ms Herbert submitted that even if found proved, there is no element of misconduct as the hug was consensual. Therefore, she submitted that the evidence in relation to this charge within the context of misconduct at its highest, was Colleague A's witness statement which is disputed by Colleague D. Ms Herbert therefore invited the panel to find that there is no case to answer in relation to this charge.

Ms Herbert further submitted that as there is no case to answer in relation to Charge 13, the application is also extended to Charge 15 in respect of Charge 13 only.

Mr Gruchy submitted that as a matter of fact, there is enough evidence that this charge is made out and therefore should be allowed to remain before the panel.

The panel took account of the submissions made and heard and accepted the advice of the legal assessor.

In reaching its decision, the panel has made an initial assessment of all the evidence that had been presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it could find the facts proved and whether you had a case to answer.

In respect of Charge 13, the panel noted Colleague D's evidence that you and she did put your arms around one another in the Home as a gesture of support, by way of a hug and that she was not uncomfortable with this. This was occasioned because of the stress of working there. This was in complete contrast to the evidence of Colleague A in her first witness statement wherein she stated:

'On one occasion [Colleague D] , another support worker at the Home was upset. She told me that she was upset because Lazarus had put his arms around her and said some inappropriate things. I never saw the incident but when I started on shift that day I saw her in tears, which is why I approached her to see if she was okay. [Colleague D] told me that she felt uncomfortable working with Lazarus and reported this to the Home Manager...'

The panel discounted Colleague A's evidence in this regard in the light of the clear evidence from Colleague D. In those circumstances, the panel accepts that whilst Charge 13 is capable of being found proved as a matter of fact, it finds that you have no case to answer in respect of that paragraph because, even if it was proved, it would not amount to sufficient evidence to support a finding of impairment under Rule 24(b) of the Rules.

In summary, the panel finds that you have no case to answer in respect of Charges 7a, 13, 15 (insofar as it relates to paragraph 7a and 13) and 16 (insofar as it relates to Charges 7a). The panel dismisses your application insofar as it relates to Charges 5c and 11.

Decision and reasons on facts

At the outset of the hearing, the panel heard from Ms Herbert, who informed the panel that you made admissions to charges 5a, 12 (in relation to taking one photograph and sending one photograph), 15a (in relation to 5a), 16a, 16c i and 16c ii in relation to Charge 5a.

The panel therefore finds Charges 5a, 12 (in relation to taking one photograph and sending one photograph), 15a (in relation to 5a) 16a, 16c i and 16 c ii in relation to Charge 5a proved in their entirety, by way of your admissions.

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

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

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

- Colleague A: HCSW employed by the Home at the time.
- Colleague B: HCSW employed by the Home at the time.
- Colleague D: HCSW employed by the Home at the time.

The panel also heard evidence from you under oath.

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 both the NMC and Ms Herbert.

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

Charge 1a

“That you, a Registered Nurse:

1. On one or more unknown dates did one or more of the following to Colleague A:
 - a. Said words to the effect of: “I will take you to nice places just you and me”

This charge is found NOT proved.

In reaching this decision, the panel took into account Colleague A’s local incident report, NMC witness statement and live oral evidence.

The panel noted that this incident is not mentioned in any of the contemporaneous documents, and is only found in Colleague A’s NMC witness statement dated 8 March 2020. Further, when Colleague A was asked about this incident during live evidence, they stated that you told them you would take them to South Africa, but before that you would give Colleague A lessons. Colleague A stated that you did not use ‘*those exact words* [as in the charge]’. When asked if you said you would take them to ‘*nice places*’, Colleague A said “No”.

The panel therefore determined that the NMC had not discharged its burden of proving this charge occurred on the balance of probabilities and found this charge not proved.

Charges 1b, 1c and 1d

“That you, a Registered Nurse:

1. On one or more unknown dates did one or more of the following to Colleague A:
 - a. ...
 - b. Talked about their body changing through trauma experienced in childbirth;
 - c. Talked about their vagina expanding through childbirth
 - d. Said words to the effect of: “your breast size is perfect for you, the way they are, they will develop more whilst pregnant”

These charges are found NOT proved.

In reaching this decision, the panel took into account the Hampshire Constabulary Police summary which was sent to the NMC on 20 January 2020, and your oral evidence. The former includes allegations and your acceptance that you ‘*had conversations of a sexual nature*’ with two of your colleagues. You stated that from your perspective, they were ‘*active participants*’.

In light of this, the panel determined that there was broad evidence of some complaint about sexualised conversations in the police summary which was accepted by you. However, the panel noted that the wording in these charges is particular and there is no contemporaneous evidence to support the proposition that the words set out in the charges, or words to that effect were actually used. The panel noted that you denied these charges and you made the observation that Colleague A was not pregnant. Colleague A confirmed this in her oral evidence.

It therefore was not satisfied that the NMC had discharged the burden of proof. The panel therefore found these charges not proved.

Charges 2a, 2b and 2c

“That you, a Registered Nurse:

2. On an unknown date approached Colleague A and:
 - a. Said to them words to the effect of “I can feel for the baby’s head”
 - b. Pushed your hand, down on her trousers, towards the bottom of their stomach;
 - c. Touched her vagina.”

These charges are found NOT proved.

In reaching this decision, the panel took into account Colleague A’s police statement, local incident report, NMC witness statement and their live oral evidence.

The panel noted that these allegations are not in any of the contemporaneous documents, including Colleague A’s police and local incident report. This allegation is only mentioned in Colleague A’s NMC witness statement and was confirmed in their live oral evidence.

You expressly denied this allegation whilst Colleague A maintains that it happened.

The panel was of the view that this is a very serious charge and therefore more cogent evidence is needed for the panel to find this charge proved on the balance of probabilities. It determined that although Colleague A said they had mentioned these allegations to the police and appeared surprised that they were not in the report, there is

no objective evidence before the panel to support either Colleague A's or your version of events.

The panel decided that the NMC had not discharged its burden of proving this charge and the panel therefore found it not proved on the balance of probabilities.

Charges 3a and 3b

“That you, a Registered Nurse,

3. On or about 15 November 2018 approached Colleague A and:
 - a. Put your arms around her;
 - b. Said words to the effect of “do you want to go into the next bedroom or upstairs, don't tell me you have changed your mind”.”

This charge is found proved.

In reaching this decision, the panel noted Colleague A's contemporaneous local statement which states:

‘...15th November while in a service users bedroom LM put the camera back on then put his arms around me saying 'do you want to go into the next bedroom or upstairs, don't tell me you have changed your mind I went out the room looking for the other support worker' LM said it was for a laugh so the other support worker would hear it through the speaker...’

The panel noted that this was supported by Colleague A's NMC witness statement and her oral evidence.

You denied putting your arms around Colleague A but you told the panel, regarding charge 3b, that you said these words as a joke in order to be overheard by another nurse on the intercom.

The panel preferred the evidence of Colleague A. It was of the view that Colleague A's evidence was consistent and plausible, and therefore found the entire charge proved on the balance of probabilities.

Charge 4

“That you, a Registered Nurse,

4. On or about 15 November 2018, on one or more occasions other than at charge 3 above or charges 5 or 6 below, put your arm around Colleague A.”

This charge is found proved.

In reaching this decision, the panel took into account the contemporaneous incident report, Colleague A's NMC statement and oral evidence, and your oral evidence.

In the incident report, Colleague A stated the following:

[...] every time I stood still that night he kept putting his arm around me so I had to keep moving about and ensure I was not left on my own with him'

In your oral evidence, you said *'I may have given her a hug at some point but it was a mutual hug'*.

The panel further noted that this was not specifically disputed by you within your written statement.

The panel therefore found this charge proved on the balance of probabilities.

Charges 5b and 5d

“That you, a registered nurse,

5. On or about 16 November 2018 approached Colleague A and:
 - a. ...
 - b. Pulled it down over her left shoulder;
 - c. ...
 - d. Touched her shoulder;
 - e.”

These charges are found proved.

In reaching this decision, the panel took into account the incident report, the police report dated 20 January 2020 and the witness statement of Colleague A.

The panel considered the following section of the incident report:

‘as I was putting in some bed blocks LM [you] unzipped the back of my jumper and pulled my jumper down to my shoulders [...]’

The panel also noted the following summary in the police report:

‘Aggvd reporting that a male colleague has been touching her arm and kissing her neck at work. He has then undone her zip to her top and started touching her shoulder and arm’.

and

‘[...] male walked in, he undid her zip to her top and took her top down over her shoulder and started stroking her shoulder and arm’.

Colleague A stated the following in her witness statement:

'I was wearing a jumper that had a zip at the back which was about 10cm in length from the top down. Lazarus unzipped my jumper, pulled it down over my left shoulder and then slip his hand down my arm through the top whilst his other hand was on my shoulder'.

The panel was satisfied that Colleague A had been consistent throughout her evidence that you had unzipped her top.

You admitted to the police in oral evidence that you had unzipped her top and admitted that *'this was a step too far'*. With regard to touching her shoulder, you did not accept that you had pulled her jumper down.

The panel also had regard to the fact that you accepted a conditional caution by Hampshire Police which Ms Herbert, on your behalf, confirmed was for assault.

In light of your partial admission, and the consistency of Colleague A's evidence, the panel preferred the evidence of Colleague A. It therefore found this charge is found proved on the balance of probabilities.

Charges 5c and 5e

"That you, a Registered Nurse,

5. On or about 16 November 2018 approached Colleague A and:
 - a. ...
 - b. ...
 - c. Slid your hand down her arm, through her jumper;
 - d. ...
 - e. Pressed your stomach against her back."

These charges are found NOT proved.

In reaching this decision, the panel took into account the incident report, the police report dated 20 January 2020, the witness statement and oral evidence of Colleague A, and your evidence.

With regard to Charge 5c, the panel determined that ‘through her jumper’ suggests that you put your hand inside Colleague A’s jumper. During live evidence, Colleague A explained that the jumper fell down her arm; therefore the panel determined that you could not have slid your hand down through her jumper.

In relation to Charge 5e, the panel noted that this incident was not mentioned in the police report. It was only mentioned in Colleague A’s NMC witness statement where it states the following:

‘I could feel his stomach on my back and then I grabbed my jumper from the front to pull it out of his hand’.

The panel considered that ‘pressed’ suggested there was a deliberate intention. It accepted that whilst there was a possibility that Colleague A could feel your stomach, there was no evidence that you deliberately ‘pressed’ your stomach against Colleague A’s back. The panel therefore did not find these sub charges proved on the balance of probabilities.

Charges 6a and c

“That you, a Registered Nurse,

6. On or about 16 November 2018, approached Colleague A and:
 - a. Put your arm around her waist;
 - b. ...

- c. Kissed her neck.
- d. ...”

These charges are found proved.

In reaching this decision, the panel took into account the contemporaneous incident report, police report, Colleague A’s NMC witness statement and oral evidence.

In regard to this charge, Colleague A’s incident report states the following:

‘16th November LM followed me into a service user’s room he put his arms around me and kissed the side of my neck. I moved away. LM informed me that he wanted to take me to south Africa but first he would need a few private one to ones [sic] sessions with me so I would learn how they do things in South Africa’ ...’

The panel also considered the police report which states:

‘...asked the male on several occasions not to kiss her or touch her arm or waist and he keeps doing it’.

The panel therefore noted that these allegations were mentioned in the contemporaneous documents. It further noted that the details were maintained in Colleague A’s witness statement and also in her oral evidence.

You denied that you had kissed Colleague A’s neck or put your arm around her waist.

The panel found Colleague A’s evidence to be detailed and consistent. It therefore accepted her evidence and found these charges proved on the balance of probabilities.

Charge 6b

“That you, a Registered Nurse:

6. On or about 16 November 2018, approached Colleague A and:

b. Kissed her cheek;

This charge is found NOT proved.

In reaching this decision, the panel took into account all of the contemporaneous and live evidence.

The panel noted that you denied the allegation.

The panel noted that this allegation was not mentioned in Colleague A's initial incident report and was only subsequently introduced upon making a later statement to the NMC. It therefore found Colleague A's evidence to have been less consistent in this regard.

The panel therefore found this charge not proved on the balance of probabilities.

Charge 6d

"That you, a Registered Nurse:

6. On or about 16 November 2018, approached Colleague A and:

d. Said words to the effect of, "I want to take you to South Africa but you would first need a few private one to one sessions with her so she would learn how they do things in South Africa"

This charge is found proved.

In reaching this decision, the panel took into account Colleague A's incident report, police report, witness statement and her oral evidence. It also considered your oral evidence.

You informed the panel that you did not say you wanted to take Colleague A to South Africa, but that if she ever went there, she would need to know about the crime rate.

Colleague A stated in her witness statement that:

'...on one occasion he said that he would take me to Africa but he would have to have one on one lessons with me on how I need to behave'.

You did not deny that the discussion took place; you accepted that there was a discussion about how to behave in South Africa. However, the panel preferred the evidence of Colleague A which is supported by the documentary evidence of the incident report, police report, witness statement and oral evidence. The panel therefore found this charge proved on the balance of probabilities.

Charge 7b

"That you, a Registered Nurse:

7. On one or more occasions on or about 16 November 2018:

b. Winked and/or stuck your tongue out at Colleague A"

This charge is found NOT proved.

In reaching this decision, the panel took into account of your evidence and Colleague A's witness statement.

You denied the charge stating that this was not something that you would do. Further, Colleague D during oral evidence, stated that while she had seen you behave inappropriately in other ways, she had not seen you wink or stick your tongue out.

The panel also took into consideration Colleague A's NMC witness statement which states:

'I was in the kitchen and Lazarus came in, he looked at me, winked and said 'you can tell daddy' because I was down and upset.'

The panel noted that Colleague A had only mentioned you having winked and stuck your tongue out in her later NMC witness statement, and that this had not been mentioned during the earlier investigation process.

The panel was not satisfied that this charge is proved on the balance of probabilities as it is not corroborated nor mentioned at an earlier stage of the investigation. It therefore found this charge not proved.

Charge 7c

"That you, a Registered Nurse:

7. On one or more occasions on or about 16 November 2018:

c. Said words to the effect of "you can tell Daddy" to Colleague A

This charge is found proved.

In reaching this decision, the panel took into account the incident report, Colleague A's witness statement, your evidence and the police report.

The panel considered the incident report in which Colleague A states the following:

'he said 'come on you can tell Daddy'.

In her witness statement, Colleague A stated that you:

'...said 'you can tell daddy' because I was down and upset.'

The panel noted that you denied the allegation. However, the panel preferred the contemporaneous evidence of Colleague A recorded in the incident report. It found that Colleague A had been consistent in her evidence to the panel. It also took into account that Colleague A specifically recalled the use of the word 'daddy' due to [PRIVATE]. The panel therefore found this charge proved on the balance of probabilities.

Charge 7d

"That you, a Registered Nurse:

7. On one or more occasions on or about 16 November 2018:
 - d. Said words to the effect of "two service users are on sodium valproate because it gives them a large erection"

This charge is found proved.

In reaching this decision, the panel took into account the incident report, your statement and the police report.

Colleague A states the following in the local incident report:

'LM informed me that two service users (he named) were on Sodium Valproate because it gives them a large erection that's why they use it, and in South Africa they stand pulling their penis as it's a muscle it makes it grow longer.'

In the police report, the following summary is given:

'At 17.00 hrs he went over to Oak House to give some insulin to a service used. He returned and sat with ... and ... in the lounge who were having food and talking about the effects of medication on the intimate body parts. LM explained that this was because of the medication and explained (as a nurse) that it is normal in the pubic area to have fatty issue and they were all laughing about it.'

The panel considered that your explanation is broadly consistent with your witness statement in which you say the following:

'As nurses were being phased out I was training [Colleague A] and [Ms 1], alongside the other carers, to give medication. I overheard [Colleague A] and [Ms 1] talking about sodium valproate, a medication that was prescribed to some of our residents. I do not recall the exact context of the conversation but I think [Ms 1] said someone was on the medication and said something along the lines of her vagina having become like a bucket. I recall that I then said something along the lines of 'I do not know what it does to women but men who take this medication have enlarged penises'. I was not being vulgar I was talking about medication to someone who was being trained to give medication. I deny the allegation because I did not say that residents took sodium valproate because it gives them a large penis. I said that I have noticed a side effect of taking sodium valproate for men is that they have enlarged penises, I never mentioned anything about an erection.'

During oral evidence you accepted that large erections are not a recognised side effect of the medication, but this was just your own observation.

During her oral evidence, Colleague A categorically denied that the support workers were having a conversation about sodium valproate's effect on women. Despite your explanation to the police as above, the panel did not find your account at all plausible. It preferred the evidence of Colleague A and therefore found this charge proved on the balance of probabilities.

Charge 7e

“That you, a Registered Nurse:

7. On one or more occasions on or about 16 November 2018:
 - e. Said words to the effect of “in South Africa they stand pulling their penis as it’s a muscle it makes it grow longer” and/or;

This charge is found proved.

In reaching this decision, the panel took into account the incident report and your witness statement.

In relation to this charge Colleague A states the following in the incident report:

‘LM informed me that ... in south Africa they stand pulling their penis as it’s a muscle it makes it grow longer’

The panel considered your oral evidence and statement, in which you said that, in the tribes you know in Africa, you were not aware of any having this type of ritual. The panel did not comprehend your evidence as a direct response to the charge.

The panel preferred Colleague A’s evidence in the incident report which was maintained during her oral evidence. It determined that your statement was less than a forthright denial and found this charge proved on the balance of probabilities.

Charge 9a, 9b and 9c

“That you, a Registered Nurse:

9. On one or more occasions on unknown dates approached Colleague B and did one or more of the following:
 - a. Grabbed her hand;
 - b. Said words to the effect of “When am I taking you out for dinner?”
 - c. Said words to the effect of “When are we going out?”.

These charges are found NOT proved.

In reaching this decision, the panel took into account the oral evidence of Colleague B, her witness statement and your evidence.

In relation to Charge 9a, Colleague B stated the following in her witness statement:

‘Following a few months after his employment at the Home, Lazarus’ behaviour towards me started to get inappropriate: he started by grabbing my hand and saying things like ‘when am I taking you out for dinner?’ and ‘when are we going out?’ I would just laugh it off and pull my hand away as I did not know what else to do. I felt uncomfortable but I thought that he was just being friendly and did not want to make a big deal of it.’

During her oral evidence, Colleague B referred to the above in her witness statement and stated that you had done this on a number of occasions.

In your statement and oral evidence, you denied this allegation. You stated that any reference to having dinner may have been an offer to make dinner within the Home, or a reference to occasions when staff took residents out for a meal. You also denied ever having grabbed Colleague B’s hand.

The panel noted that these matters were not specifically referred to in the police statement or the incident report, although there was mention of *‘behaving in an over familiar inappropriate manner towards them’* from the officer in charge. In the absence of any independent evidence to support one version or the other, the panel was not

satisfied that the NMC had discharged its burden of proof. It therefore found these charges not proved.

Charge 10

“That you, a Registered Nurse:

10. On the 19 November 2018 approached Colleague B and:

- a. put your hands around her waist;
- b. kissed her neck
- c. kissed her cheek”

These charges are found proved.

In reaching this decision, the panel took into account the local incident report and the police report.

In the local incident report, Colleague B states that:

‘last week LM grabbed my waist and kissed my neck and my cheek and keeps touching me, he’s always touching me’.

The police report summary states the following:

‘MKHBELA clearly demonstrates overfamiliar behaviour towards younger females that he works with. The incidents described all amount to low level assaults and conversations which are very inappropriate with a sexual content’.

You denied these allegations.

The panel noted that the evidence of Colleague B was contemporaneous and specific. It preferred the evidence of Colleague B and found this charge proved in its entirety on the balance of probabilities.

Charge 11

“That you, a Registered Nurse:

11. On one or more occasions other than at charge 10 above approached Colleague B and:

- a. Kissed her neck
- b. Kissed her cheek.”

This charge is found NOT proved.

In reaching this decision, the panel took into account Colleague B’s evidence and your statement.

The panel concluded that Colleague B’s evidence was non-specific as she could not remember any other incidents. You denied these allegations in your statement.

The panel determined that there was insufficient evidence to find these charges proved on the balance of probabilities.

Charge 12a and 12b

“That you, a Registered Nurse:

12. On an unknown date:

- a. Took photographs of Colleague B on your phone
- b. Sent one or more photographs of Colleague B to their phone”

These charges are found proved.

In reaching this decision, the panel took account of your evidence. It noted that you accept one photograph was taken and sent to Colleague B's phone. It also noted the contextual factors that you stated this photograph was taken at lunch with a resident. You said the following in your written statement:

'I recall one occasion where I took a photo with Colleague B. ... (another support worker) and Colleague B had gone to lunch at the pub in Silchester with a patient. I had attended to give insulin and they asked if I wanted to stay. Colleague B said she'd get me lunch and then I had lunch with them. When the food arrived I took a picture of us with the meal. I said I'd send it over to Colleague B, and I did. There was only one photo and I did not take lots of photos or take them in a covert way and send them to her.'

Further, Colleague B accepted this was at a lunch but the location of the incident was disputed. The panel is content to accept this admission and found this charge proved to that extent.

Charge 14a and 14b

"That you, a Registered Nurse:

14. On one or more occasions, in the presence of Colleague D
 - a. Brushed up against a female colleague
 - b. Touched a female colleague's bottom"

These charges are found proved.

In reaching this decision, the panel took into account Colleague D's NMC witness statement and her oral evidence.

Colleague D stated the following in her witness statement:

'the registrant would brush up against them on purpose and touch them on their bottoms'.

Colleague D confirmed this in her oral evidence and informed the panel that you would brush up against female colleagues when there was plenty of room. When asked whether you would touch their bottoms, Colleague D said "100%".

You denied that this happened.

Whilst the panel acknowledge that these incidents occurred over five years ago, it was of the view that Colleague D was very clear and balanced in her evidence, noting that she had described you as a "good nurse". Having found Colleague D to be a balanced and fair witness, the panel accepted her version of events and found this charge proved on the balance of probabilities.

Charge 15a

"That you, a Registered Nurse:

15. Your actions at one or more of charges 1- 14 above:
 - a. breached professional boundaries

Charge 15a is found proved in relation to charges 3a, 3b, 4, 5a, 5b, 5d, 6a, 6c, 6d, 7c, 7d, 7e, 10a, 10b, 10c, 14a and 14b.

The panel was satisfied that the conduct found proved in these charges constituted behaviour that was unacceptable. These incidents related to touching and sexualised conversations which took place in a professional setting and were unwanted and

uninvited. It therefore found that your behaviour in each of these incidents amounted to a breach of professional boundaries.

This charge is found NOT proved in relation to charges 12a and 12b.

The panel took into account its findings in relation to charge 12. It did not consider that this conduct was inappropriate in a professional setting. Further it heard evidence that Colleague B knew that the photograph was being taken and there was no evidence before the panel to show that the taking of the photograph was unwanted or uninvited.

Charge 15b

“That you, a Registered Nurse:

15. Your actions at one or more of charges 1- 14 above:
 - a. ...
 - b. were sexually motivated in that you sought sexual gratification and/or to pursue a future sexual relationship”

Charge 15b is found proved in relation to charges 3a, 3b, 4, 5a, 5b, 5d, 6a, 6c, 6d, 7c, 7d, 7e, 10a, 10b, 10c, 14a and 14b.

The panel determined that your actions in these charges could reasonably be considered to be sexually motivated, as they involved unwanted touching and sexualised conversations. The panel considered whether there was an innocent explanation for your actions other than a sexual motivation. It found that no credible explanation had been put forward by you or on your behalf. The panel took into account your admitted behaviour regarding the touching of a colleague and your acknowledgement that you had taken ‘a step too far’ on that one occasion. The panel also noted that you accepted having conversations of a sexual nature with colleagues.

The panel was satisfied on the evidence before it that your actions were sexually motivated in that you sought sexual gratification, albeit low level, and/or to pursue a future sexual relationship.

This charge is found NOT proved in relation to charges 12a and 12b.

Given the panels finding that charge 12 did not amount to a breach of professional boundaries, likewise it did not consider the conduct to be sexually motivated.

Charge 16

“That you, a Registered Nurse:

16. Your actions at one or more of charges 1-8 amounted to harassment of Colleague A in that:

- a. Your conduct was unwanted;
- b. Your conduct related to Colleague A’s sex;
- c. Your conduct had the purpose or effect of:
 - i. Violating Colleague A’s dignity, and/or
 - ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for Colleague A.

This charge is found proved in respect of charge 3a, 3b, 4, 5a, 5b, 5d, 6a, 6c, 6d, 7c, 7d, and 7e.

The panel considered each charge found proved separately in relation to this charge including the evidence for each charge and its findings.

Charges 3a and 3b

The panel concluded that your actions in putting your arms around Colleague A and making a sexualised statement towards her was unwanted based on her witness statement and oral evidence. The panel concluded that your actions related to her sex, as she was female. The panel also determined that your actions violated Colleague A's dignity and created an intimidating, hostile and degrading environment to work in. The panel therefore determined that your actions amounted to harassment.

The panel found Charge 16 proved, in its entirety, on the balance of probabilities in relation to Charges 3a and 3b.

Charge 4

The panel determined that your conduct in putting your arm around Colleague A on one or more occasions was unwanted based on her oral and written evidence. Further, the panel concluded that your conduct related to her sex, as she was female, and finally that your conduct did have the effect of creating an offensive environment as she stated she would try to avoid you. The panel therefore determined that your actions amounted to harassment.

The panel therefore found Charge 16, in its entirety, proved on the balance of probabilities in relation to Charge 4.

Charges 5a, 5b and 5d

The panel noted you admitted charges 16a and 16c in relation to charge 5a.

The panel concluded that your conduct in unzipping Colleague A's jumper, pulling it over her shoulder and touching her shoulder, was unwanted and related to her sex, as she was female. Further, that your conduct violated her dignity and created an offensive environment for her. The panel therefore determined that your actions amounted to harassment.

The panel therefore found Charge 16, in its entirety, proved in relation to Charges 5a, 5b and 5d.

Charges 6a, 6c and 6d

The panel concluded that your conduct in putting your arm around Colleague A's waist, kissing her cheek and making sexualised statements was unwanted based on her oral and written evidence. The panel also determined that your conduct related to her sex as she is female, and that your actions violated her dignity and created an offensive environment for her to work in. The panel therefore determined that your actions amounted to harassment.

The panel therefore found Charge 16 proved in relation to Charges 6a, 6c and 6d.

Charges 7c, 7d and 7e

The panel concluded that your conduct in making sexualised statements to Colleague A was unwanted based on her oral and written evidence. The panel also determined that your conduct related to her sex as she is female, and that your actions violated her dignity and created an offensive environment for her to work in. The panel therefore determined that your actions amounted to harassment.

The panel therefore found Charge 16 proved, in its entirety, in relation to Charges 7c, 7d and 7e.

Charge 17

“That you, a Registered Nurse:

17. Your actions at one or more of charges 9-12 amounted to harassment of Colleague B in that:

- a. Your conduct was unwanted;
- b. Your conduct related to Colleague B's sex;
- c. Your conduct had the purpose or effect of:
 - i. Violating Colleague B's dignity, and/or
 - ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for Colleague B.

This charge is found proved in relation to charge 10.

This charge is found NOT proved in relation to charge 12.

Charge 10

In considering charge 10, the panel had regard to the evidence presented and its findings.

The panel determined that your conduct in putting your hands around Colleague B's waist and kissing her neck and cheek was unwanted and did relate to her sex as she is female. The panel also concluded that your actions infringed her dignity and created a hostile, degrading and offensive environment for her. The panel therefore determined that your actions amounted to harassment.

The panel therefore found Charge 17, in its entirety, proved on the balance of probabilities in relation to Charge 10.

Charge 12

In considering charge 12, the panel had regard to the evidence presented and its findings.

The panel considered the evidence that you took a photo with residents and sent it to Colleague B, but it concluded that there was insufficient evidence to support your actions being unwanted or relating to Colleague B's sex. The panel therefore determined that your actions did not amount to harassment.

The panel therefore did not find Charge 17 proved in relation Charge 12.

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 your fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC considers that the question “*Can the nurse, midwife or nursing associate practise kindly, safely and professionally?*”, should be considered by a panel in determining this issue.

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, your fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct

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

Mr Gruchy identified the following specific, relevant standards where he submitted your actions breached the Code: 1.1, 20.1, 20.2, 20.3, 20.4, 20.5, 20.7 and 20.8. He submitted that the regulatory concern in this case is primarily one of sexual harassment of colleagues whilst in a care home and it has been made out by virtue of the panel’s findings.

In relation to the seriousness of this case, he invited the panel to refer to the NMC's Guidance regarding concerns that are more difficult to put right. He submitted that serious concerns based on public confidence and / or professional standards both highlight harassment and indeed sexual misconduct, whether inside or outside professional practice. He submitted that the Guidance states that sexual misconduct is more likely to suggest a risk of harm to the public and impaired fitness to practise, regardless of where it took place.

Mr Gruchy submitted that, when the panel considers your behaviour in this case, it should take into account the duration, frequency and persistence of your behaviour, and the professional relationship between those involved in that behaviour and the vulnerability of those who were subject to your conduct.

Mr Gruchy submitted that it is the NMC's position that your actions in this case amount to misconduct on the ground of public protection and is also otherwise in the public interest. He submitted that your actions go well beyond overstepping professional boundaries as found in the latter charges the NMC put before the panel.

Ms Herbert, on your behalf, made reference to the case of *Nandi v GMC* 2004 EWHC 2317, that for misconduct to be considered as serious, the conduct would need to be regarded as '*deplorable*'. She submitted that it is a matter for the panel and she makes no specific submissions save in relation to Charge 12. She submitted that given the panel's decision in relation to charge 12, your actions would not amount to misconduct.

Submissions on impairment

Mr Gruchy 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 to maintain public confidence in the profession and in the NMC as a regulatory body. This included reference to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin) (*Grant*).

Mr Gruchy referred to your reflective piece (undated) provided at this stage of the hearing. He submitted that as late as December 2023 you undertook training in relation to issues within your practice and professionalism. He submitted that during the hearing you continued to deny facts that the panel has now found proved, and if charges were not denied, you referred to them as some form of a joke. He submitted that the panel may consider this to be an attempt to minimise your behaviour.

Mr Gruchy submitted that you suggested that you no longer present a current risk because of the work / training you have been doing. He submitted that your continued denials in relation to some charges undermine any perception that the panel may have, that you have achieved or will try to achieve insight and remediation as set out in your reflective piece.

Mr Gruchy submitted that it is the NMC's position that your reflective piece does not assist in dealing with the current risk you present. He submitted that there remains a current risk not only towards the well-being of the public, but also in relation to the promotion of public confidence and professional standards for a nurse. He submitted that your fitness to practise remains impaired both on public protection and public interest grounds.

Ms Herbert referred the panel to the five propositions in the commentary in the case of *Sayer v General Osteopathic Council* [2021] EWHC 370 (Admin):

- '1. Insight is concerned with future risk of repetition. To this extent, it is to be distinguished from remorse for the past conduct.*
- 2. Denial of misconduct is not a reason to increase sanction*
- 3. It is wrong to equate maintenance of innocence with a lack of insight*
- 4. However attitude to the underlying allegation is properly to be taken into account when weighing up insight*

5. The assessment of the extent of insight is a matter for the tribunal, weighing all the evidence and having heard the registrant. The Court should be slow to interfere.'

Ms Herbert referred the panel to the test the NMC sets out, which poses the question, can the nurse practise '*...kindly safely and professionally...*'. She submitted that there are three areas of context of importance to be considered, two are about why these incidents occurred and the third is about the learning, insight and the steps you have taken to strengthen your practice. She submitted that a relevant factor is your attitude towards the misconduct. She further submitted that by her not making any submissions, in relation to misconduct, the panel should understand that you accept that the matters found proved amount to misconduct.

In relation to your misconduct being remediable, she submitted that you have accepted a number of allegations and recognised your behaviour, importantly in relation to the undoing of the zip and the inappropriate comments. She submitted that these allegations occurred within a relatively short period of time. She told the panel that you have been a registered nurse since 1999 and continued to practise until 2022 without issue. She submitted therefore, that there is no deep-seated attitudinal risk or attitudinal problem. She submitted that despite the findings that the conduct found proved was sexually motivated, the panel had determined that this was at the lower end of the scale.

Ms Herbert submitted that your behaviour has been remedied and is unlikely to be repeated. She submitted that you have reflected on your previous behaviour and have undertaken courses on professional boundaries which are wider in scope than just in relation to the charges you have admitted. She submitted that the courses you have undertaken are relevant to all of the charges found proved.

Ms Herbert referred the panel to your references. She submitted that you were a respected nurse capable of maintaining professional boundaries. In relation to Colleague A, she submitted that you undertook a victim awareness course in 2019. She

submitted that you recognise the impact your behaviour would have had on the victim and their family, as well as the broader picture of those actions. She submitted that it has been a lesson to you that your actions have brought you into contact with the Police.

Ms Herbert told the panel of the personal factors that affected you at the end 2018. [PRIVATE]. She submitted that given the timeframe of the allegations these are relevant factors to take into consideration.

Ms Herbert submitted that you understand the gravity of the charges found proved and you have shown insight and understanding. She submitted that it is unlikely to be repeated as you have not done anything like this before or since, nor will you repeat it again. She submitted that this process has been a lesson to you in terms of public interest.

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; *Remedy v General Medical Council* [2010] EWHC 1245 (Admin); *Sayer*; *R (on the application of Cohen) v GMC* 2008 EWHC 581 (admin) (*Cohen*) and *CHRE v NMC and Grant* 2011 EWHC 927 (*Grant*).

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 your actions did fall significantly short of the standards expected of a registered nurse, and that your actions amounted to a breach of the Code. Specifically:

'1 Treat people as individuals and uphold their dignity

To achieve this, you must:

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

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

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

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

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 your actions did amount to a breach of promoting professional and trust, as required by the Code, which states:

'Promote professionalism and trust

You uphold the reputation of your profession at all times. You should display a personal commitment to the standards of practice and behaviour set out in the Code. You should be a model of integrity and leadership for others to aspire to. This should lead to trust and confidence in the profession from patients, people receiving care, other healthcare professionals and the public.'

The panel took into account the fact that you were a nurse in a position of seniority, who exhibited conduct which amounted to harassment of junior colleagues. The panel therefore found that your actions, in relation to the charges found proved, 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, your fitness to practise is currently impaired.

In coming to its decision, the panel had regard to the Fitness to Practise Library, updated on 27 March 2023, which states:

‘The question that will help decide whether a professional’s fitness to practise is impaired is:

“Can the nurse, midwife or nursing associate practise kindly, safely and professionally?”

If the answer to this question is yes, then the likelihood is that the professional’s fitness to practise is not 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.

In this regard the panel considered the judgment of Mrs Justice Cox in the case of *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 found that limbs b and c of the test were engaged; finding that you had breached fundamental tenets of the nursing profession, namely, to promote professionalism and trust, and that your conduct in this regard had brought the profession into disrepute.

Regarding insight, the panel had regard to your written reflective piece and noted in particular the following:

'...I shouldn't have joked that way whether to [Ms 1] or Colleague A or anybody, it's grossly wrong it has the potential to violate other's emotional boundaries causing stress, mistrust and anxiety.

I feel very bad and sad my words and actions Colleague A and B feel harassed at work.

...Colleague A didn't do anything that made me to behave in an unprofessional manner, I personally take full accountability of my actions. I fallen short of standard required as a person and as a nurse. I appreciate how unprofessional words and actions are unwelcomed and inappropriate and have made Colleague A feel disrespected, undermined and vulnerable to be with a nurse who made such comments.

I have learnt that professional boundaries if maintained promote healthy relationships based on mutual respect and trust, it also promotes a therapeutic environment where patients and staff feel supported emotionally and physically.

Professional boundaries reduce the risk of carrying out unethical behaviour.

It is important to respect colleagues' personal space or wishes as it makes them feel safe and respected and minimises the risk of misunderstandings and allegations. Furthermore I understand Crossing boundaries can make one feel harassed and bullied.

From lessons learnt as a nurse I'll never engage in any discussion other than patient/ resident care as boundary crossing and violation is very broad and it's not about me how I feel and said or done. It is about how my words and actions are received or perceived by the other person.'

The panel noted, that in your reflective piece, you accepted that you crossed professional boundaries. It was satisfied that you have demonstrated a good level of insight. You accepted and demonstrated an understanding of how your conduct was inappropriate, unprofessional and how it had impacted your colleagues. The panel also found that you had shown a good level of personal insight, recognising how your personal circumstances may have affected your judgment during this period, but without seeking to make excuses for your behaviour. However, the panel noted that your reflection did not show an awareness of the relative vulnerability of your colleagues in that they were junior to you, nor the impact of your actions on the reputation of nursing profession.

The panel had regard to the case of *Cohen* and considered whether the misconduct in this case is capable of being addressed. It carefully considered the evidence before it in determining whether or not you had taken steps to remedy your practice. The panel took into account the professional boundaries courses undertaken by you in August 2020 and December 2023, and the learning demonstrated in your reflective piece regarding *'the importance of maintenance of public boundaries and the importance of the perception of the other party. It also highlighted the importance of boundaries in reference to the type of relationship in the workplace, for example between nurses and HCA and to be professional.'* It found that you were able to express an understanding of what you had learnt from the course. The panel noted that you had not worked as a nurse since undertaking the professional boundaries course in December 2023. However, it was satisfied from the reflection provided by you, that you had shown how you would change your work practices going forward. It noted in particular, the following passage from your reflective piece, which states:

'I'll discuss house rules in every handover or meeting to reinforce professional boundaries awareness. I'll exercise professional judgment in every situation during my practice. I'll avoid over-engagement with colleagues at work and seek to maintain therapeutic relationships as per the Continuum of Professional Behaviour.'

The panel also had regard to the numerous positive testimonials provided by previous colleagues who had worked with you following the incidents. It noted that the testimonials attested to your good working practices, and stated that you had showed clear professional boundaries, and that there had been no concerns regarding your behaviour. The panel however, noted that you have not worked as nurse since August 2022.

Having regard to your evidence at this stage, the panel was of the view that the fitness to practise process had served as a salutary experience for you. Having found you to have demonstrated a good level of insight, and taken steps to remediate your practice, the panel found that the risk of repetition in this case was low. It therefore determined that a finding of impairment on the grounds of public protection was not necessary.

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

The panel determined that a finding of impairment on public interest grounds is required. The panel found that the nature of your misconduct was sexually motivated and amounted to harassment and fell far below the standards expected of a registered nurse. The panel determined that a finding on public interest ground was necessary to mark the unacceptability of your behaviour and to uphold the standards of the nursing profession.

The panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore finds your fitness to practise impaired on the grounds of public interest.

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

Sanction

The panel has considered this case very carefully and has decided to make a suspension order for a period of 6 months without review. The effect of this order is that the NMC register will show that your registration has been suspended.

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) and the guidance 'Considering Sanctions for Serious Cases' dated February 2024 published by the NMC. The panel accepted the advice of the legal assessor.

Submissions on sanction

Mr Gruchy invited the panel to make a striking off order, despite the panel's findings on insight and public protection. He asked the panel to consider the impact of sexual harassment and the serious concerns on the profession, and how this could affect confidence in the profession and professional standards. He submitted that your conduct was in direct conflict with the Code. He further submitted that this was not a case which would meet the public concern if you were not removed from the register and referred the panel to the NMC guidance on serious misconduct and its reference to sexual misconduct.

Ms Herbert, in her submissions, referred to the NMC guidance on the seriousness of misconduct. This requires the duration of the misconduct and the vulnerability of anyone affected by it to be taken into consideration. She submitted that this is not a case where there was cruelty, exploitation or predatory behaviour, and further that Colleagues A and B were not particularly vulnerable. She also reminded the panel that the Home in question was a health care assistant led care home. Ms Herbert further submitted that the duration of your misconduct was not significant, and that this should be taken into account as mitigation. Ms Herbert submitted that your conversation was not appropriate, but that the Home had a culture of "loose chat", and that was part of the context of what happened.

Ms Herbert submitted that the serious charges found proved in relation to sexual misconduct did not involve the touching of intimate body parts, and those factors made it less serious than other cases. The events took place in 2018, and you worked for a period of 4 years after without issue or complaints, which demonstrates you are able to work safely. Further, you worked well in a career spanning 20 years, and have been described as a really good nurse. Ms Herbert reminded the panel of the significant personal issues you faced at the time of the incidents, and the professional boundaries and victim impact course you attended, which she submitted were appropriate.

Ms Herbert submitted that the panel should find that a caution order is the appropriate sanction. She submitted that there was no reason for your practice to be restricted and that a long caution order would mark your behaviour as unacceptable and make clear that it must not happen again.

Ms Herbert submitted that a conditions of practice order would not be workable as this was a public interest matter. She further submitted that a short suspension order would mark the unacceptability of the behaviour in this case, and that a strike off order would not be proportionate or necessary. She submitted that there was no evidence of personal deep-seated attitude or personality traits, and that although your conduct is not acceptable, it could be marked by a lesser sanction.

Decision and reasons on sanction

Having found your 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 feature:

- You were in a position of seniority.

The panel took into account the following mitigating features:

- You have demonstrated a good level of insight
- Your previous good character; this was an isolated period in a long career and there is no evidence of repetition
- Your personal circumstances at the time
- The informal atmosphere within the Home
- There are no concerns regarding your clinical practice.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness. 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. 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 your misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the sexual misconduct and harassment identified. The panel determined that a caution order was not sufficient to mark your misconduct as unacceptable, or to mark the public interest concern.

The panel next considered whether placing conditions of practice on your registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the fact that the misconduct did not relate to your clinical practice but related to your behaviour. The panel was of the view that there were no practical or workable conditions that could be formulated, given the nature of the charges in this case.

Furthermore, the panel concluded that the placing of conditions on your registration would not adequately address the seriousness of this case.

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 panel was satisfied that in this case, although it was not a single instance of misconduct, the misconduct occurred over a relatively short period of time. The panel took into account the level of insight you have demonstrated and was satisfied that there are no deep-seated personality or attitudinal problems. The panel noted your engagement throughout the hearing and the acceptance of the facts found proved. There has been no evidence of repetition of the behaviour in the years since the incidents before you stopped working in August 2022. Further, the panel found there was a low of risk of repetition. The panel had regard to the sexual misconduct and harassment identified in this case. It was of the view that although this was wholly unacceptable behaviour, you had undertaken appropriate courses and demonstrated a good level of insight into your behaviour. In all the circumstances, the panel was satisfied that the misconduct in this case was not fundamentally incompatible with you remaining on the register.

The panel did go on to consider whether a striking-off order would be proportionate but, taking account of all the information before it, and of the mitigation provided into account, the panel concluded that it would be disproportionate. Whilst the panel

acknowledges that a suspension may have a punitive effect, it would be unduly punitive in your case to impose a striking-off order.

Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction.

The panel noted the hardship such an order may inevitably cause you. However, this is outweighed by the public interest in this case.

The panel considered that this order is 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.

The panel determined that a suspension order for a period of 6 months, was appropriate in this case to mark the seriousness of the misconduct.

Having found that your fitness to practise is currently impaired, the panel bore in mind that it determined there were no public protection concerns arising from its decision. In this respect it found your fitness to practise impaired on the grounds of public interest alone.

In accordance with Article 29 (8A) of the Order the panel may exercise its discretionary power and determine that a review of the substantive order is not necessary.

The panel determined that it made the suspension order having found your fitness to practise currently impaired in the public interest. The panel was satisfied that the suspension order will satisfy the public interest in this case and will maintain public confidence in the nursing profession as well as the NMC as the regulator. Further, the suspension order will declare and uphold proper professional standards. Accordingly, this suspension order will expire, without review, 6 months from the date upon which it becomes effective.

This will be confirmed to you in writing.

Interim order

As the suspension 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 your own interests until the suspension sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

Mr Gruchy invited the panel to consider whether an interim suspension order should be imposed to cover any appeal up to 18 months.

Ms Herbert made no submissions in this regard.

Decision and reasons on interim order

The panel determined that an interim order was not necessary in this case, in view of its finding that there were no public protection concerns and that impairment was made on public interest grounds alone. The panel was satisfied that its substantive decision, to impose a suspension order, sufficiently marked the public interest in this case and that an interim order in the public interest was not necessary.

If no appeal is made, then the suspension order will take effect 28 days after you have been sent the decision of this hearing in writing.

That concludes this determination.