Neutral Citation Number: [2024] EWHC 1109 (Admin)

Case No: AC-2023-LON-002574

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2024

Before :

MRS JUSTICE HILL DBE

- -

Between :

MARY CASCIOLI	**Appellant**
- and -	
NURSING AND MIDWIFERY COUNCIL	**Respondent**

- -
- -

Tagbo Ilozue (instructed by **the Royal College of Nursing Legal Services**) for the **Appellant**
Helen Guest (instructed by **the Nursing and Midwifery Council)** for the **Respondent**

Hearing date: 26 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 10 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Hill DBE:

1: Introduction

1. This is an appeal under Articles 29(9) and Article 38(1) of the Nursing and Midwifery Order 2001 ("the 2001 Order") against various decisions made by a Panel of the

Respondent's Fitness to Practise Committee ("the Panel") dated 31 July 2023 and 4 August 2023. The Appellant appeals the Panel's findings that she had been dishonest, their decision that her fitness to practise was impaired, and the sanction they imposed, namely striking her name from the register maintained by the Respondent. The Appellant seeks an order quashing the Panel's decision and remitting the matter for reconsideration by a differently constituted Panel.

2: The factual background

2. Between 22 July 2013 and 1 March 2016 the Appellant worked as a band 5 nurse at the John Radcliffe Hospital, run by Oxford University Hospitals NHS Trust. Concerns were raised about her competence in relation to work she did between 6 September 2014 and 11 March 2015 and a referral was made to the Respondent (case reference 051552/2015). On 16 December 2016, following a hearing before a Panel of the Respondent's Conduct and Competence Committee, a Conditions of Practice Order ("COPO") was imposed on the Appellant.

3. Condition 9 of the COPO provided as follows:

> "9. You must immediately inform the following parties that you are subject to a conditions of practice order under the NMC's fitness to practise procedures, and disclose the conditions listed at 1 to 8 above, to them:
>
> a. Any organisation or person employing, contracting with, or using you to undertake nursing work.
>
> b. Any agency you are registered with or apply to be registered with (at the time of application).
>
> c. Any prospective nursing employer (at the time of application).
>
> d. Any educational establishment at which you are undertaking a course of study connected with nursing or midwifery, or any such establishment to which you apply to take such a course (at the time of application)."

4. Between March and June 2018 the Appellant made eight job applications to University College London Hospital ("UCLH"). Concerns were raised that in breach of Condition 9, she had dishonestly failed to disclose her COPO, NMC "PIN" reference number and previous employment history in one or more of the eight applications.

5. On 25 June 2018 a further referral was made to the Respondent (case reference 067618/2018). On 10 December 2018 the Appellant was made aware that these new allegations had been referred to the Respondent's Case Examiners. On 27 June 2019 the Respondent's Case Examiners found a case to answer. On 3 July 2019 the Appellant was informed of this and sent the bundle of evidence on which the Respondent relied.

6. In the meantime, between 18 May and 26 October 2019 the Appellant made 33 applications to Nottingham University Hospitals NHS Trust ("NUH") and attended a series of interviews. Concerns were raised that she had again dishonestly breached the COPO by not declaring it in accordance with its terms. A third referral (case reference 075570/2019) was made to the Respondent in relation to the Appellant. On 27 May

2021 the Case Examiners found a case to answer in relation to these allegations. It is this referral which led to the Panel decisions that are the subject of this appeal.

7. The hearing in case 067618/2018 to consider the charges relating to the Appellant's UCLH applications duly took place. The charges were found proved. On 10 June 2021 an order was made suspending the Appellant from the register for 12 months.

8. On 1-2 August 2022 the suspension order in case 067618/2018 was reviewed. The Appellant's fitness to practise was found no longer to be impaired in relation to these charges. The suspension order was allowed to lapse on its expiry on 9 September 2022.

9. The hearing of the charges in case 075570/2019 took place over 11 days from 9 to 16 September 2022 and 31 July to 4 August 2023.

10. A fourth referral (case reference (094667/2023) has been made about the Appellant, raising further competency concerns. These are currently being investigated.

3: The charges against the Appellant

11. The charges against the Appellant in case 075570/2019 were as follows:

> "That you, a registered nurse
>
> Charge 1. Between 18 May 2019 and 26 October 2019 breached condition 9(c) of your NMC Conditions of Practice Order (COPO), in that when you made thirty three applications for employment at Nottingham University Hospitals NHS Trust as set out in schedule 1, you,
>
> a) Did not immediately inform Nottingham University Hospitals NHS Trust that you are subject to a COPO under the NMC's fitness to practise procedures,
>
> b) Did not disclose the conditions listed in the COPO to Nottingham University Hospitals NHS Trust.
>
> Charge 2. Your actions as set out in charges 1(a) and 1(b) were dishonest in that you deliberately sought to mislead Nottingham University Hospitals NHS Trust by not informing them that you are subject to a COPO and not disclosing the conditions listed within the order.
>
> Charge 3. On one or more of the following dates, during a job interview with Nottingham University Hospitals NHS Trust, you did not provide information about your COPO until directly asked within the interview and/or at the end of the interview: 6 June 2019, 3 September 2019, 5 September 2019, 17 September 2019, 9 October 2019, 17 October 2019, 18 October 2019, 8 November 2019, 12 November 2019, 18 November 2019 [and] 21 November 2019.
>
> Charge 4. Your actions as set out in charge 3 were dishonest in that you deliberately sought to mislead Nottingham University Hospitals NHS Trust by not providing information about your COPO until directly asked within the interview and / or at the end of the interview".

4: Proceedings before the Panel

12. The Appellant attended the hearing and was represented by counsel.

13. The Panel heard evidence from Witness 1, the Practice Development lead at NUH at the material time, called by the Respondent.

14. On the second day of the hearing, Monday 12 September 2022, the Appellant served a report from Witness 2, an expert witness, dated 30 June 2022. Witness 2 had been instructed by the Royal College of Nursing ("the RCN") to prepare a report on the Appellant's medical conditions.

15. Witness 2 explained at [2] of his report that he had been instructed on the basis that the Appellant considered one of her medical conditions "the proximal cause" of the errors she had made in applying for the various roles.

16. There was legal argument about whether the report should be taken into account by the Panel. In due course the Respondent elected not to apply to adjourn proceedings to obtain its own expert evidence and arrangements were made to enable Witness 2 to give evidence before the Panel by telephone.

17. Finally the Appellant gave evidence before the Panel. Her case, in summary, was that she had not disclosed the COPO on the application forms, but had provided it during the interviews, and that this was consistent with the requirements of the COPO. She denied any dishonesty.

18. The Panel adjourned proceedings. They resumed on 31 July 2023. They handed down their decision that they had found all the charges against the Appellant proved.

19. The Panel proceeded to consider the issues of misconduct, impairment and sanction. The Appellant provided a bundle containing a reflective statement, testimonials, previous employment and character references, training certificates and a recent nursing job application form submitted on 27 June 2023. She gave evidence again. The Panel determined that the Appellant's actions amounted to misconduct; that her fitness to practise was impaired; and that a striking off order was appropriate.

5: The relevant law

(i): The statutory framework

20. The Respondent's functions in respect of allegations of misconduct against registered nurses and midwives are governed by the 2001 Order. Its overarching objective in exercising its functions is the protection of the public: Article 3(4). The pursuit of this overarching objective involves the pursuit of the following objectives: (i) the protection, promotion and maintenance of the health, safety and wellbeing of the public; (ii) the promotion and maintenance of public confidence in the professions; and (iii) the promotion and maintenance of proper standards and conduct among members of the professions: Article 3(4A).

21. Proceedings before the Panel are governed by the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 ("the Rules"). Under Part 4 of the Rules, the Panel must consider any allegation which has been referred by the Respondent's Registrar or Case

Examiners. Where an allegation is considered well founded, the Panel must proceed to make one of a number of prescribed orders, which by Article 29(5)(a)–(d) of the 2001 Order include a striking off order, a suspension order, a conditions of practice order and a caution order.

22. Articles 29(9) and 38 of the 2001 Order allow a registrant to appeal against an order made by the Panel. By virtue of Article 38(3), the Court may (a) dismiss the appeal; (b) allow the appeal and quash the decision appealed against; (c) substitute for the decision appealed against any other decision the Fitness to Practise Committee or the Council, as the case may be, could have made, or (d) remit the case to the Fitness to Practise Committee or the Council, as the case may be, to be disposed of in accordance with the directions of the Court.

23. CPR.52.21(3) applies. This provides that the appeal court will allow an appeal where the decision of the lower court was "(a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings of the lower court."

(ii): Key general principles

24. The jurisdiction of the court is appellate, not supervisory; and the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the tribunal: *Sastry and Okpara v General Medical Council* [2021] EWCA Civ 623 at [102](ii) and (iii), per Nicola Davies LJ.

25. The circumstances in which the appeal court will interfere with primary findings of fact have been formulated in a number of different ways, as summarised in *Shabir v General Medical Council* [2023] EWHC 1772 (Admin) at [14]. These include findings "plainly wrong or so out of tune with the evidence properly read as to be unreasonable": *Casey v General Medical Council* [2011] NIQB 95 at [6], per Girvan LJ and *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at [21](7), per Warby J (as he then was); and circumstances where there is "no evidence to support a…finding of fact or the trial judge's finding was one which no reasonable judge could have reached": *Perry v Raleys Solicitors* [2019] UKSC 5, per Lord Briggs.

26. Decisions as to the weight to be attached to particular parts of the evidence are pre-eminently a matter for the fact finder and ought not to be disturbed on appeal unless the decision is one that no reasonable tribunal could have reached: *Martin v Solicitors Regulation Authority* [2020] EWHC 3525 (Admin) at [54].

27. The appellate court is entitled to exercise its own primary judgement on whether the evidence supports the findings made, but the court will not interfere with a decision unless persuaded it was wrong. In relation to findings which reflect a professional judgement concerning standards of professional practice and conduct, the court will exercise distinctly secondary judgement and give special place to the judgement of the professional body as the specialist tribunal entrusted with the maintenance of the standard of the profession: see, for example, the Court of Appeal authorities cited in *Cheatle v General Medical Council* [2009] EWHC 645 at [12]-[15] by Cranston J. However, the appellate court will not defer to the judgement of the tribunal more than is warranted by the circumstances: *Sastry* at [102](iv).

28. As to the issue of impairment, in *CHRE v NMC and Grant* [2011] EWHC 927 (Admin) at [74], Cox J held that Panels "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". At [76], she referred to Dame Janet Smith's test as set out in the Fifth Report from The Shipman Enquiry, namely:

> "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".

29. In *Yeong v General Medical Council* [2009] EWHC 1923 (Admin) at [50], Sales J (as he then was) observed the following:

> "Where a medical practitioner violates such a fundamental rule governing the doctor/patient relationship as the rule prohibiting a doctor from engaging in a sexual relationship with a patient, his fitness to practise may be impaired if the public is left with the impression that no steps have been taken by the GMC to bring forcibly to his attention the profound unacceptability of his behaviour and the importance of the rule he has violated. The public may then, as a result of his misconduct and the absence of any regulatory action taken in respect of it, not have the confidence in engaging with him which is the necessary foundation of the doctor/patient relationship. The public's confidence in engaging with him and with other medical practitioners may be undermined if there is a sense that such misconduct may be engaged in with impunity."

30. As to sanction, the appellate court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate. In the latter event, the appellate court should substitute some other penalty or remit the case to the Tribunal for reconsideration: *Sastry* at [102](v) and (vi).

31. It is important to avoid "narrow textual analysis when considering the reasoning of any tribunal, especially one not composed of professional judges"; and to read a decision of this kind "fairly, and as a whole, to assess the sufficiency of its reasoning": see, for example, *General Medical Council v Saeed* [2020] EWHC 830 (Admin) at [75] and *General Medical Council v Awan* [2020] EWHC 1553 (Admin) at [26].

(iii): "Rejected defences" of dishonesty

32. In *Sawati General Medical Council* [2022] EWHC 283 (Admin), Collins Rice J gave detailed consideration to the issue of "rejected defences" of dishonesty. The challenge in such case was pithily distilled by her at [75] as "how a professional can have a *fair* chance before a Tribunal to resist allegations, particularly of dishonesty, without finding the resistance itself *unfairly* counting against them if they are unsuccessful". At [81]-[108], she reviewed the case law in detail, from which she identified certain factors, as follows:

> "109. In short, before a Tribunal can be sure of making *fair* use of a rejected defence to aggravate sanctions imposed on a doctor, it needs to remind itself of Lord Hoffmann's starting place that doctors are properly and fairly *entitled* to defend themselves, and may then find it helpful to think about four things: (i) how far state of mind or dishonesty was a primary rather than second-order allegation to begin with (noting the dangers of charging traps) – or not an allegation at all, (ii) what if anything the doctor was positively denying other than their own dishonesty or state of knowledge; (iii) how far 'lack of insight' is evidenced by anything other than the rejected defence and (iv) the nature and quality of the defence, identifying clearly any respect in which it was itself a deception, a lie or a counter-allegation of others' dishonesty.
>
> 110. These are all evaluative matters. Tribunals need to make up their own minds about them, and their relevance and weight, on the facts they have found. But they do need to direct their minds to the tension of principles which is engaged, and check they are being fair to both the doctor and the public. They need to think about what they are doing before they use a doctor's defence against them, to bring the analysis back down to its simplest essence".

(iv): Taking into account matters outside those charged

33. In *Kearsey v Nursing and Midwifery Council* [2016] EWHC 1603 (Admin), Ouseley J considered the issue of taking into account matters outside the charges. At [25], he accepted the "general proposition" that "particulars which are not charged cannot be relied on in relation to the allegation of misconduct". However at [38] he held that evidence about such other matters could be admissible to impairment or sanction, if it was relevant and fair to do so, depending on the circumstances.

6: The Appellant's grounds of appeal

34. The Appellant advanced fifteen grounds of appeal, some of which had several sub-grounds. The grounds related to three areas: (1) the Panel's findings that the Appellant had been dishonest; (2) their finding that her fitness to practise was impaired; and (3) their finding on sanction.

6.1: Grounds relating to the finding of dishonesty

35. The Panel's factual findings were set out over a carefully structured, detailed decision that ran to some 14 pages. They set out the background and explained why they found

each of the charges proved. There was inevitably a certain amount of inter-relationship between the evidence on the different charges. I remind myself of the need to read the decision "as a whole": see [31] above.

Ground 1: The Panel placed improper weight on irrelevant or unreliable evidence

(i): Witness 1's evidence about the recruitment fair

36. Witness 1 gave evidence about a conversation she had had with the Appellant at a recruitment fair approximately six months prior to the submission of the first of the application forms that were the subject of the charges. This was relevant because it was part of the Appellant's case that she had disclosed the COPO during this conversation and had expected Witness 1 to keep a record of it for use in further applications.

37. Witness 1 accepted that the Appellant had told her orally about the COPO at the recruitment fair. However in her witness statement she said that she thought the Appellant was trying to "minimize" [sic] the kind of support she would need and said she would "just really need to meet with her line manager every six weeks". In her oral evidence Witness 1 said that it felt like the COPO was "trying to be brushed aside" by the Appellant rather than it being "part of the process". She added that this was a concern to her because "if someone is not going to accept their terms of practice and take them seriously, then that is an alarm bell for me".

38. In considering the evidence on this issue in the context of charge 1a) the Panel concluded that whether or not the Appellant told Witness 1 about the COPO in the recruitment fair conversation was "not relevant" given that it was many months in advance of the job applications. The Appellant argued under this ground that once the Panel had concluded that the conversation was irrelevant, it had wrongly gone on to place weight on Witness 1's evidence as to her perception of the conversation: either the conversation was relevant, or it was irrelevant, and thus should have been disregarded entirely.

39. I cannot accept this argument for the following reasons.

40. First, when looked at in its full context I am not satisfied that the Panel concluded that the entirety of the conversation was not relevant.

41. The Panel summarised the Appellant's evidence about giving a copy of the COPO in the form of the letters from her RCN representative to Witness 1 on the day of the event. The Panel then held as follows:

> "From the evidence of Witness 1, she was told about the conditions by you verbally and had the document, but on her own account, did not have time to read it due to being preoccupied with running the recruitment event. Witness 1 had no role in any specific application process. Witness 1 stated that "*recruitment days are very busy days and* as *recruitment lead, we probably had about 100 people, so I was leading the day and making sure everything flowed and people were looked after, I had noticed that there was a situation where clearly Ms Cascioli was distressed. We went off and we sat down and I tried to give her some time and understand what the issues were. I cannot remember the document*

because I did not have time to go through a *document on that day…*". The Panel noted that Witness 1 was not the recruiting manager on that event and had not been the person on the Panel interviewing. Witness 1 was coordinating the recruitment event. The Panel therefore determined that it was unreasonable to suggest that the Matron and Witness 1 had the responsibility to do anything with your COPO information many months prior to you submitting your job applications.

The Panel further considered the evidence of Witness 1 which states: "*I had previously talked with Mary about support she would need from future employers but I didn't know it was because of NMC mandated Substantive Conditions of Practice Order ("Conditions")*". Witness 1 stated that the recruitment fair was busy, she knew you and you gave her the letter. However, she was not aware of the COPO, but merely knew that you needed "some kind of support". The Panel heard you minimised the requirements of your COPO, and Witness 1 was not made aware about the specifics of it. Whether or not Witness 1 was told about the COPO, it was not relevant as this was made six months in advance of the job applications".

42. Accordingly, the Panel rejected the suggestion that it was reasonable for the Appellant to have expected Witness 1 to retain any information provided about the COPO at the recruitment fair for the purposes of future applications. In my judgment this is what the Panel meant when they said that the conversation was "not relevant", ie. that whether or not the Appellant had disclosed the COPO during the conversation had no relevance to whether she should have, later, disclosed it on each of the application forms. I do not understand the Panel to be saying that Witness 1's perception of the conversation was not relevant to any of the issues they had to decide.

43. <u>Second</u>, it is not clear that the Panel did in fact take the evidence about the Appellant appearing to "minimise" the COPO into account in finding her dishonest under charges 2 and 4.

44. The only specific mention of this evidence in their decision is in the passage set out at [41] above, which was in the context of charge 1a). This appears to be no more than a narration of the evidence. It did not feature in the Panel's reasons for finding charge 1a) proved. Charge 1a) was, after all, focussed on the factual question of whether or not the Appellant's practice of disclosing the COPO "in the middle of the interview or at the end of the interview" constituted "immediately informing" NUH of the COPO for the purposes of Condition 9c), rather than on the Appellant's state of mind.

45. <u>Third</u>, even if the Panel did in fact take the evidence about the Appellant appearing to "minimise" the COPO on charges 2 and 4, I do not consider that approach one that no reasonable tribunal could have taken: whether or not the Appellant gave the impression of "minimising" the COPO was potentially relevant to how and when she disclosed its terms and her state of mind in doing so.

46. <u>Fourth</u>, while the Panel did explicitly take into account Witness 1's evidence that it appeared that the COPO was being "brushed aside" by the Appellant in the context of upholding charge 3, which contributed to their conclusion under charge 4 that the Appellant had been dishonest, again I do not consider that this was unreasonable:

whether or not the Appellant appeared to be "brushing aside" the requirements of the COPO was potentially relevant to how and when she disclosed its terms and her state of mind in doing so.

(ii): Witness 2

47. The Appellant argued that the Panel had acted unreasonably in describing Witness 2 as "your own witness" and a witness "called on your behalf". It was argued that as an expert witness, Witness 2 had a duty to give independent and objective evidence to the Panel: accordingly, who he was instructed by was irrelevant.

48. The Panel simply noted in their decision that the witness had been called by the Appellant. Such an indication is not unusual when expert evidence is summarised in a decision or judgment, especially, perhaps, when, some of the evidence given by the expert is adverse to the party who instructed them. Counsel for the Appellant accepted in oral submissions that such a characterisation applied to Witness 2's evidence. This description of the expert does not prove that the Panel considered his evidence in an unreasonable way.

(iii): The matrix of interview information

49. Witness 1 also gave evidence about an "interview matrix" she had produced (exhibit LG/02). She had contacted the lead person on the Panels that had interviewed the Appellant in response to her NUH applications and asked them by email whether she had referred to her COPO. Witness 1 had then included their email responses on the matrix. Witness 1 was cross-examined by counsel for the Appellant, including as to the methodology she had used to prepare the matrix. The Panel also asked her questions.

50. The Appellant submitted that the Panel had erred in quoting from an entry in the matrix from one lead interviewer to the effect that the Appellant "did not disclose what her restrictions were, and I had to contact the NMC to find out more information". The Panel gave the date of this interview as 3 September 2019, but it appears to have been 8 September 2019: LG/02 is a little hard to read, so I can see how this error was made. No criticism was made of the Panel for this. However the Appellant argued that a contemporaneous email record between the Appellant and the interviewer showed that she had disclosed the COPO conditions in writing during this particular interview and that the further information sought was the decision letter from the Respondent.

51. The Appellant is correct in summarising what the email from 8 September 2019 suggests. However, even if the entry on the matrix relating to this date was inaccurate, there is no reason to think that this vitiates the other ten entries on the matrix. More fundamentally, it does not vitiate the Panel's decision to uphold either charges 3 or 4. Charge 3 was specifically framed on the basis of the Appellant's conduct on "one or more" interview dates, and was not limited to the 3 September 2019 interview. Further, the Panel accurately quoted from the entries on the matrix relating to other dates, namely 18 November 2019, 18 October 2019 and 9 October 2019.

52. More generally, the Appellant contended that the matrix was "inherently unreliable" and the Panel was not entitled to find it "compelling" as they did. This was because Witness 1 had not been in the interviews and had obtained the quotes from the lead

interviewers by email; and the time interval between the interviews and the emails was unknown.

53. In oral submissions counsel for the Appellant suggested that the matrix had been constructed without reference to any contemporaneous notes by the interviewers. I cannot see a basis for this submission: indeed the Panel's understanding was that the matrix had been constructed by reference to such notes: they observed that "interviewers are professionals who take notes during the interview and this will be a material matter to place in their notes".

54. As to the general methodology used to create the matrix, the Panel had seen Witness 1 give evidence, and heard her answers to the various questions put to her by counsel for the Appellant about the methodology. The Panel plainly accepted her evidence. I cannot see any reason that renders it unreasonable for them to have done so.

55. The Panel understood that Witness 1 had been "specifically tasked with creating the interview matrix which is a synopsis of eleven interviews with senior people in the organisation". The Panel effectively accepted that the matrix was a compendious and efficient way of Witness 1 presenting some relatively limited evidence from a series of other professionals who would otherwise have all had to give evidence separately.

56. Overall, I do not consider that the Panel's acceptance of this evidence was unreasonable in any way, let alone one that meets the *Martin* test set out at [26] above.

<u>Ground 2: The Panel made a finding that was not supported by the evidence</u>

57. The Appellant argued that the Panel's finding under charge 3 that "at no stage did…[the Appellant] mention [the COPO] until asked by the interviewers" was unsupported by the evidence.

58. I cannot accept this submission for the following reasons.

59. <u>First</u>, the passage criticised at [57] above was not in fact a finding of the Panel. Rather, it formed part of the Panel's summary of the evidence on the matrix, in this way:

> "the…matrix…is a synopsis of eleven interviews with senior people in the organisation and within all their recollections, at no stage did you raise the matter of your COPO "immediately" nor did you mention it until asked by the interviewers".

60. <u>Second</u>, if by this passage the Panel intended to convey that all eleven of the professionals whose accounts featured on the matrix had said that the Appellant did not volunteer the fact of the COPO until asked about it, that was an overstatement of the evidence. The position was, as the Appellant correctly submitted on appeal, that this was only the evidence of four of them: three described her as only having disclosed the COPO when she was asked specific questions about her fitness to practise and one said she only disclosed it when she was asked to complete a candidate declaration.

61. However the Panel's ultimate finding on charge 3 was more nuanced: they concluded that "on more than one occasion" the Appellant had not told the interviewing Panels about the COPO until she was "directly asked about it in the interview <u>or</u> until the end of the interview" [my emphasis]. In other words the Panel did not find that in every

interview (or "at no stage", as relied on in this ground) did the Appellant only disclose the COPO when asked: rather, they understood and accepted the evidence that this was the position in more than one of the eleven interviews about which they had evidence.

62. This finding was sufficient to prove charge 3, which only required that "on one or more" of the relevant dates the Appellant had not provided information about the COPO "until directly asked within the interview".

Ground 3: The Panel failed to take into account relevant matters

(i): All the applications were to the same Trust

63. The Appellant submitted that when reaching their view on dishonesty the Panel wrongly placed no (or no adequate) weight on the fact that all the applications she had made had been to the same trust; and her reasonably held assumption that the information she provided about her COPO to Witness 1 at the recruitment fair would be kept centrally and could be used by the Trust in further applications and interviews. The Appellant had made the same point in respect of a Matron who worked at NUH. She said she had told her about the COPO in June or July 2018.

64. The Panel concluded that there was a lack of evidence about the Appellant's alleged conversation with the Matron. However, the Panel concluded that, in any event, the Appellant's views about the responsibilities of Witness 1 and the Matron were unreasonably held: see [41] above. In my judgment the Panel was entitled to conclude that the effect of condition 9(c) was that disclosure of the COPO had to be made in relation to each application; and that neither Witness 1 nor the Matron in question had any responsibility for anything to do with the Appellant's COPO information. I accept the Respondent's contention that condition 9(c) is focussed on individual applications, such that the Panel was entitled to conclude that the fact that the applications were all made to the same Trust was irrelevant.

(ii): It was illogical for the Appellant to delay disclosure

65. The Appellant argued that the Panel wrongly considered, as a factor indicating dishonesty, her awareness that she would not be employed if an employer could not facilitate her COPO. Rather, it was her case that it would be illogical for her to believe that delaying disclosure to an employer who could not facilitate the COPO would increase the prospects of securing employment with that employer.

66. In my judgment the Panel was entitled to reject the Appellant's argument as to illogicality.

67. The Appellant's own evidence had been that "no matter how well you do in the application process, if the employer cannot facilitate the COPO, they will not employ you – I could not be employed by them". The Panel was therefore entitled to conclude that the Appellant was "fully aware that some employers simply could not accommodate [the] COPO" and was "experiencing difficulty in finding an employer who could [do so]".

68. In Witness 2's written report he had specifically posited that it was "likely" that the Appellant was "avoiding declaring [the COPO] until the last minute…perhaps because

she thought that would give her a better chance of success". This effectively contradicted the Appellant's illogicality argument: it provided a logical reason why the Appellant would delay disclosure.

69. The Panel was therefore entitled to find that the Appellant had "deliberately delayed mentioning [the] COPO to secure an interview with the Trust" and more generally was "reluctant to disclose the restrictions on [her] practice because [she] knew it would harm [her] prospects of securing employment".

(iii): The Appellant's awareness of the UCLH investigation points away from dishonesty

70. The Appellant contended that the Panel wrongly treated as supportive of their finding on dishonesty her awareness of the investigation in relation to the UCLH matters, which had commenced before the NUH applications were made. Rather, it was said that once she learned that she was under scrutiny for concerns in relation to her applications, she made changes to her application method, albeit still waiting to disclose the COPO until the interview stage. Logically, it was argued, this behaviour pointed more towards a genuine belief that such conduct was permissible under her COPO than towards an intention to deceive; it therefore undermined rather than supported the allegation of dishonesty.

71. This argument reflected the submissions the Appellant had made before the Panel. However the Panel was entitled to take the contrary view about the significance of the UCLH investigation; and conclude that in fact it showed that the Appellant clearly understood the seriousness of complying with the COPO, and specifically that one of the concerns was her failure to include details of the COPO on application forms, and yet she had persisted in similar conduct. The Appellant knew from 3 July 2019 that the Case Examiners had determined that there was a case to answer against her on the UCLH allegations and that the matter had been referred to the Fitness to Practise Committee. In these circumstances the Panel were justified in concluding, as they plainly did, that the Appellant had not moderated her behaviour sufficiently to comply with the COPO, despite clear indications through the UCLH investigation of what was required.

(iv): The Appellant's personal circumstances required a more cautious approach to the assessment of dishonesty

72. The Appellant submitted that the Panel had wrongly failed to take into account her personal circumstances, in particular her specific medical conditions and the potential impact of those conditions on her conduct, when making its decision about her state of mind and whether there was an alternative innocent explanation for her conduct which pointed away from her having been dishonest.

73. Significant reliance was placed on Witness 2's evidence. He had been instructed to address whether the Appellant's "mindset" at the time she made the applications to NUH and attended the interviews was dishonest in that she deliberately sought to mislead NUH or whether her actions "could be explained by any component of her [medical conditions]": [20]-[21] of his report.

74. He described the significant features of the Appellant's presentation. He opined that in light of them, she might have focussed on the "letter not the spirit" of the rules, akin to evading but not avoiding tax, and avoided declaring the COPO until the very last minute "within what she saw as the limits and requirements of the process": [96], [103]-[104], [109] and [114]. He also highlighted that someone with the features of one of the Appellant's medical conditions might not declare a COPO in "supporting information" on an application form as they could think that to do so would not, in fact, support the application: [109]. He observed that the Appellant's actions across the interviews were "congruent with someone who has [a perspective relating to one of the Appellant's medical conditions], such as the different ways she tried to share this information without sharing it": [110]. Accordingly, he suggested that the Panel "might consider that the Appellant was not intentionally dishonest": [116].

75. The Appellant argued in oral submissions that the Panel had failed to refer to Witness 2's evidence that the Appellant thought she was operating within the rules. I do not consider that criticism of the Panel's decision is fair, in light of this element of their reasoning on charge 4:

> "The Panel considered the evidence of Witness 2. Witness 2 said you believe your own interpretation of what transpired. In considering the evidence, the Panel noted that you appear to have a selective recollection of events and your participation in them".

76. The second sentence of this passage specifically reflects Witness 2's view of what was in the Appellant's mind.

77. This passage was, in fact, the sole reference to Witness 2's evidence in the Panel's decision. Witness 2 had provided a written report which had been adduced into evidence. He had been cross-examined by the Respondent's representative. The Panel had asked him a series of questions and he was then re-examined at some length by the Appellant's counsel. His evidence featured heavily in both representatives' closing submissions. In those circumstances it would have been preferable if the Panel had dealt with Witness 2's evidence in their decision in more detail than they did.

78. However, taking the approaches required as set out at [31] above, I am satisfied that the Panel did consider Witness 2's evidence, as part of the question of whether there was any possible explanation for the Appellant's conduct other than dishonesty, but on balance concluded that the other explanation he was suggesting was less probable than dishonesty.

79. Further, it is clear that the Panel did not accept his opinion on the central question of whether the Appellant had been dishonest. Ultimately, this was a matter for the Panel to decide, not an expert, in any event. The Panel had to determine that issue in light of all the evidence, by reference to the test set out in *Ivey v Genting Casinos* [2017] 3 WLR 1212, to which they specifically directed themselves. The Panel were free to accept or reject Witness 2's expert evidence in the usual way when reaching their decision on the issue.

80. The first stage of the *Ivey* test required the Panel to established what the Appellant's state of knowledge or belief was as to the facts. One element of this was, as Witness 2 identified, "whether [the Appellant's] interpretation of the rules was reasonable under

the circumstances": [105]. Reading the decision as a whole, and looking across the totality of the Panel's reasoning with respect to charges 2 and 4, it is clear that the Panel answered this question in the negative. The Panel's findings on this issue also reflected several areas that posed a challenge for the credibility of Witness 2's opinion, and justified them in rejecting it.

81. First, the Appellant had told Witness 2 that she had been advised by the Panel at the December 2016 hearing when the COPO was imposed that if no space was available on the application form to disclose the COPO, she should disclose it at the interview stage. That was also her case before the Panel. Witness 2 very fairly accepted in cross-examination that if the transcript of the December 2016 hearing showed that the Applicant had not been given the advice, this would "undermine his opinion": p.16 of the transcript. This was precisely what the Panel found: they considered the transcript of the December 2016 hearing and concluded that it showed that "[n]o issue was raised in respect of condition 9c)", such that it was "not supportive" of the Appellant's case.

82. Second, Witness 2 was unclear as to whether he was aware that the relevant condition of the COPO required disclosure of it "at the time" of the application: pp.15 and 19-20. If he was not aware of the specific terms of the COPO, this also undermines his evidence, by analogy with the concession he made as described in the preceding paragraph.

83. Third, and perhaps more importantly, it is unclear whether Witness A was aware of the UCLH proceedings and what the Appellant had been told about them and when. This was directly material to the question of whether the Appellant's interpretation of the rules was reasonable under the circumstances. The Respondent's representative had submitted that even if there was a misunderstanding in 2016, that must have been "cleared up" in 2018 when the Appellant was receiving letters to indicate she was being investigated because of her alleged non-compliance with Condition 9 in the UCLH proceedings. The Panel plainly accepted that submission, and concluded that in light of the UCLH investigation, the Appellant was aware by December 2018 of the need to make a prospective employer aware of the COPO immediately.

84. There were a series of other factors that justified the Panel in finding that the appellant's interpretation of the rules was unreasonable and that her conduct had been dishonest applying the objective standards of ordinary decent people (the second stage of the *Ivey* test).

85. The following were mentioned in the context of charge 2:

86. First, as noted at [41] and [63]-[64] above, the Panel had not felt able to accept the Appellant's evidence in respect of the Matron. As with Witness 1, the Panel rejected the Appellant's case that it was reasonable for her to have believed these people "held" the knowledge of her COPO for the purposes of future applications.

87. Second, the Panel clearly preferred the evidence of the professionals whose accounts were captured on the matrix over the Appellant's evidence as to when and how she disclosed the COPO during the interviews, and was entitled to do so.

88. u, the Panel relied on their assessment that the Appellant had "deliberately delayed mentioning [the] COPO to secure an interview with the Trust" for the reasons set out under [65]-[69] above.

89. The following further factors were mentioned in the context of charge 4:

90. First, some of the interviews were of a considerable length: one professional had referred to the interview being "an hour and half" long and said that the Appellant did not declare her fitness to practise until the very end of the interview. The Panel assessed that this provided "a sense of the extent to which [the Appellant was] delaying disclosure". It concluded that she had "deceived the interviewers" which suggested that she was "prepared to continue the deception".

91. Second, they noted further anomalies between the Appellant's evidence and the matrix. The Appellant had said that she had taken advice from her union representatives which resulted in letters being drafted for the purpose of being handed over at interviews, which she consistently provided in the interviews. The Panel noted that the matrix presented "a different factual position entirely", as the union letters were not provided in all the interviews. Further, in some of the interviews, the specific conditions do not appear to have been disclosed during the interview at all: for example it was only after the 9 October 2019 interview that the Appellant called the ward to inform them of the restrictions.

92. Third, having seen and heard the Appellant give evidence, the Panel concluded that "a significant proportion" of her answers were "evasive and unconvincing". It considered she was not being "honest and straightforward" in her answers.

93. Even if it could be said that the Panel failed to give sufficient consideration to the Appellant's medical conditions when approaching the way in which she gave her evidence (and I am not saying that such a proposition is merited), it can be seen from the preceding paragraphs that there were a significant number of other factors that justified the Panel in reaching the decision on dishonesty that they did.

94. I therefore do not consider that the Panel erred by not giving adequate consideration to the Appellant's medical conditions; or that their decision on this issue was wrong.

Conclusion on Grounds 1-3

95. Accordingly, for all these reasons, I do not uphold any of the grounds of appeal in relation to the Panel's findings of fact, including their findings that the Appellant had been dishonest for the purposes of charges 2 and 4.

6.2: Grounds relating to the finding of impairment

96. The Panel's approach to the issues of misconduct and impairment was again a careful one. They summarised the evidence and submissions they had received on each issue before giving their decision and reasons.

Ground 4: The Panel committed a serious error of principle and procedure by failing to consider and apply the factors from *Sawati* at the impairment stage

97. The Appellant argued that there was no evidence that the Panel had considered or applied the *Sawati* factors when deciding whether her fitness to practise was impaired. In oral submissions counsel for the Appellant framed this as the key ground of appeal relied on, which went to the heart of the Appellant's criticism of the Panel's approach.

98. The Panel recorded in terms that they had received submissions from both representatives on the *Sawati* issue. They accurately identified the central issue that *Sawati* raised namely whether or not to "hold against" the Appellant the fact that she did not accept that her actions were dishonest when considering her insight. They noted that there were a series of factors they needed to take into account when approaching this issue. They recorded the Respondent's case, to the effect that the Appellant's lack of insight strongly demonstrated that a finding of impairment was required. They summarised the Appellant's case that (i) she had in fact shown insight, had now reflected on and understood the charges, and had addressed the concerns raised through learning; and (ii) the only thing she had positively denied was her own dishonesty and there was no other evidence of a lack of insight, such that, per *Sawati*, it would be unfair to hold her denial of dishonesty against her.

99. In giving their decision on impairment, the Panel confirmed that they had taken account of "the four factors identified by the High Court in [*Sawati*]".

100. The Panel then said that "[s]et against the case of *Sawati*", they had taken into account the Respondent's guidance, SAN-2, in particular, which provided that:

> "the Panel should consider whether there is any other evidence of a lack of insight on the part of the professional, other than the rejected defence
>
> the Panel should consider the nature of the rejected defence: a failure to admit an allegation does not always indicate that someone has not told the truth to the Panel. The Panel must consider, for example, whether the defence amounted to an act of dishonesty or misconduct in its own right. Did it wrongly implicate or blame others, or falsely accuse witnesses of being dishonest".

101. In my judgment the above passages indicate that the Panel had the *Sawati* test well in mind. It also indicates that they considered the third and fourth *Sawati* factors, as reflected in the two issues at the end of the passage, to be of particular relevance to the Appellant's case.

102. SAN-2, the guidance to which the Panel referred, relates to sanctions.

103. The Appellant argued that the fact that the Panel considered it appropriate to consider the guidance on sanctions "set against the case of *Sawati*" (see the passage at [100] above) further demonstrates that they misunderstood how *Sawati* should have been applied at the impairment stage.

104. I respectfully disagree. Although the Panel mistakenly described the SAN-2 guidance as relating to impairment, the text of it was accurately quoted, and was relevant at the impairment stage. Accordingly, I do not consider that the error in describing the

guidance was material. These various sources of guidance (and indeed others) had been referred to in submissions and so this minor error was understandable.

105. The Respondent's guidance explained, and was consistent with, *Sawati*. There was no contradiction between the two. Accordingly, and when seen in the context in which it was used, the perhaps misleading phrase "set against" simply means something along the lines of "we also looked at". I do not consider that it indicates that the Panel misunderstood the task it had to perform or wrongly considered that there was any tension between the guidance and *Sawati* that it had to resolve.

106. When read as a whole I am satisfied that the Panel applied the *Sawati* factors, and reached a conclusion on each of them which was justified, for the reasons amplified under Ground 5.

<u>Ground 5: The Panel's findings are unsustainable in the light of the proper application of the principles from *Sawati*</u>

107. The Appellant submitted that the Panel's finding that she had "yet to fully understand and reflect on the impact of [her] breaches and dishonesty" and that she had demonstrated "dishonesty with [her] regulator" were unsustainable in light of *Sawati*. Rather, proper consideration of each of the *Sawati* factors meant that it was unjust to use her defence of dishonesty against her at the impairment stage as demonstrative of either a lack of insight or additional dishonesty. I address the *Sawati* factors in turn.

(i): How far state of mind or dishonesty was a primary rather than second-order allegation

108. The Appellant faced a series of charges of breaching the substance of the COPO, by failing to make the necessary disclosures. These were serious allegations in themselves in that breaches of a COPO undermine the Respondent's statutory objective of protection of the public. However, she faced separate charges that she had been dishonest in breaching the COPO by deliberately seeking to mislead a potential future employer.

109. The addition of charges relating to dishonesty did not aggravate the other charges disproportionately; or fall into the kind of "charging trap" described in *Sawati*. Rather, they allowed the Panel to give proper consideration to the question of whether the COPO had in fact been breached, and if so whether the breach was accidental or dishonest. The element of dishonesty was therefore a primary allegation under charges 2 and 4, and properly so, but was separate from other primary allegations under charges 1 and 3.

(ii): What if anything the [Appellant] was positively denying other than [her] own dishonesty or state of knowledge

110. The Appellant argued that her positive denial went only to the secondary facts, the evaluation of the primary facts as dishonest, not the primary facts themselves.

111. I respectfully disagree. At the fact finding stage the Appellant had positively denied the breach of the COPO, as well as her dishonesty. At the misconduct/impairment stage she had given further evidence to the effect that she did not accept that she had breached condition 9(c) of the COPO by her actions.

112. It could therefore properly be said in *Sawati* terms that the Appellant was positively denying the primary facts (in the form of the breaches themselves) and showing resistance to the "objectively verifiable" which was "potentially more problematic behaviour (and more relevant to sanction) than insistence on an honest subjective perspective".

(iii): How far 'lack of insight' was evidenced by anything other than the rejected defence

113. The Appellant contended that there was no evidence of a lack of insight other than her continued denial of dishonesty.

114. I cannot accept that submission. The finding of a lack of insight was not solely based upon the rejection of the Appellant's defence of dishonesty.

115. First, the Appellant had denied that her actions in delaying disclosing her COPO amounted to a breach of 9(c), as well as that she had been dishonest.

116. Second, the Appellant had provided a further application form dated 27 June 2023 as evidence of her improved way of making applications. This was said to support the argument that she had gained insight and taken steps towards remediation. The Panel in fact found that this form raised further concerns about her lack of insight for the reasons explained below under Ground 7, contributing to the Panel's conclusion that it could not be satisfied that the Appellant's conduct would not be repeated.

117. Third, the Appellant had provided a reflective document, which did not address the circumstances in which two separate Panels had found her to have breached the COPO.

118. Fourth, the Panel had the benefit of hearing the Appellant giving oral evidence and being cross-examined at the misconduct/impairment stage. The Panel was not fully reassured by this evidence. The Panel was entitled to conclude that the Appellant was evasive when asked whether she accepted the Panel's findings that her actions had breached the COPO. She finally answered that she herself did not accept that she was in breach of the COPO because she had not immediately declared her COPO when she had put in her written applications.

119. All of these items of evidence supported the suggestion that the Appellant had failed to gain sufficient insight into the facts proved, understand the wrongdoing fully or acknowledge why her actions remained a concern.

(iv): The nature and quality of the defence, identifying clearly any respect in which it was itself a deception, a lie or a counter-allegation of others' dishonesty

120. The Appellant submitted that there was no impropriety in the nature and quality of the defence; and no sense in which it was itself a deception, a lie or a counter-allegation of others' dishonesty.

121. Again, I disagree. The Appellant advanced a substantive case that notifying a potential employer of the COPO mid-way through an interview, subsequent to the submission of an application form, conformed with condition 9(c). The Panel rejected this as an unreasonable interpretation of condition 9(c). There was also a sense in which the Appellant was seeking to "wrongly implicate or blame others" (per *Sawati* at [108]), namely the December 2016 Panel and her union representative, who she said had

suggested that disclosure during the interview was appropriate. The Panel rejected this evidence as set out at [81] above.

122. For all these reasons I am satisfied that the Panel did apply the *Sawati* factors appropriately and that their decision on impairment was not wrong or unjust.

Ground 6: The Panel irrationally found that the Appellant's conduct "potentially placed patients at risk of harm"

123. The Appellant submitted that she disclosed her COPO at interview on every occasion. There was never a risk of patient contact without her employer being aware of the conditions and therefore never a risk of patient harm. On that basis it was said that the Panel's finding that her conduct "potentially placed patients at risk of harm" was irrational.

124. However the COPO had been imposed following fitness to practise proceedings in relation to what counsel described as "substantial" findings of lack of competence. The COPO was imposed to strike a balance between the protection of the public and allowing the Appellant to practise as a nurse.

125. Where a COPO is breached, the public is not sufficiently protected. The matrix made clear that on several occasions the Appellant only disclosed her COPO when asked directly. Had the Appellant succeeded in obtaining employment as a nurse without having disclosed her COPO, it is clear that this could have posed a risk to the safety of patients, as she would have been practising as a nurse without the required level of supervision and monitoring.

126. On that basis, the Panel's observation that the Appellant's conduct "potentially" placed patients at harm was a reasonable one. There was nothing wrong or unjust about this finding.

Ground 7: The Panel placed excessive weight on an issue which the Appellant had had no fair opportunity to respond to or address

127. As noted at [116] above, the Appellant had adduced before the Panel a further application form she had submitted on 27 June 2023 as evidence of her improved way of making applications, and as evidence of insight and steps taken towards remediation. This application form disclosed the COPO in full.

128. When giving evidence at the misconduct/impairment stage on 2 August 2023 the Panel questioned her about this form. The Panel concluded that there were "significant omissions" in this application.

129. First, the Appellant had chosen to enter the date when she first qualified as a nurse rather than the correct date of her continuous NHS service which would have been considerably shorter. The Appellant said that she might have incorrectly read the question and not read the word "continuously".

130. Second, the Appellant had not answered a question about why she had left a particular job in Oxford. The Appellant said that she had left the section blank because she could not remember why she had left. In respect of two further employers, the Appellant explained that she had left under agreed terms and said that she was unable to state why.

131. Third, the Appellant had entered 'yes' to the declaration: "The information in this application is true and complete. I agree that any deliberate omission, falsification, or misrepresentation in the application form will be grounds for rejecting this application or subsequent dismissal if employed by the organisation".

132. The Appellant argued that these concerns could themselves have been charged as separate allegations of misconduct, but because they were not, applying the principles set out in *Kearsey* at [25] (see [33] above) it was wrong and unfair to use them to support the findings of misconduct and impairment. This was especially so because the first time these concerns were drawn to the Appellant's attention was in the factual determination handed down by the Panel on 31 July 2023. This meant that she had had no fair opportunity to address them before she made the application in June.

133. The events underpinning the charges took place in 2019. "Current" impairment was being determined at the time of the hearing in July/August 2023. In those circumstances what the Appellant had done in June 2023 was highly relevant. The fact that despite the UCLH proceedings, and despite the hearing in this case, she had completed an application form which she had relied on as evidence of her learning, but which still did not appear to be fully transparent, was plainly material.

134. In my judgment the Panel was justified in concluding that the June 2023 application constituted further evidence of a pattern of similar behaviour by the Appellant, given that both the UCLH investigation and this one involved, in part, the Appellant failing to disclose relevant information on application forms. The Panel was entitled to find that this application showed further evidence of a lack of insight and insufficient remediation.

135. I do not consider that there was any procedural unfairness in the Panel's approach to this evidence. The Appellant had chosen to provide this evidence. It was not the Panel's responsibility to provide her with specific guidance on any particular application before she submitted it. She was specifically questioned about it at the appropriate stage. In any event, in *Kearsey* at [38] Ouseley J accepted that evidence about matters that are not charged can be admissible to impairment and sanction, if it is relevant and fair to do so, and depending on the circumstances. I consider that this was one of those cases.

Ground 8: The Panel wrongly failed to take into account the impact on public confidence of the previous disciplinary proceedings against the Appellant

136. The Panel concluded that the fairest way to look at the impairment issue was to focus on the period between March 2018 and October 2019 as a "course of conduct" in which the Appellant had made numerous applications.

137. As noted at [8] above, in August 2022 the Appellant's fitness to practise was found to be no longer impaired in respect of the UCLH allegations. The Appellant submitted that the Panel conducting the hearing in this case had wrongly failed to take into account the impact on public confidence of the previous finding of impairment and sanction of suspension, which was held to be part of the same course of conduct. There had been no new misconduct since that date capable of undermining that position. It was contended that the Panel's approach to this issue was wrong, applying the principle set out in *Yeong* at [50] (see [29] above); and that the Appellant had already received an appropriate sanction for her actions.

138. The Panel were required to assess whether the Appellant's fitness to practise was impaired by reference to the tests in *Grant* and *Yeong* (see [28]-[29] above), both of which authorities they had been referred to. They were required to consider all of the Appellant's conduct between March 2018 and October 2019 as reflected in the "eighteen-month period as a whole and all the matters found proved [in both sets of proceedings]". The Panel also took into account the earlier substantive Panel's determination of June 2021.

139. They were also required to take into account the more recent evidence they had received, including all the matters set out at [115]-[118] above. This was a different task to that conducted by the Panel considering solely the UCLH allegations.

140. In those circumstances the Panel was entitled to conclude, as they did, that the Appellant had failed to gain insight, the steps taken in pursuit of remediation had been inadequate, and the tests in *Grant* and *Yeong* were satisfied. I do not consider that their finding was wrong or unjust.

<u>Ground 9: The Panel wrongly failed to take into account critical factors relevant to insight and the risk of repetition</u>

141. The Appellant submitted that the Panel had wrongly found her to appear equivocal and ambivalent in accepting that her actions amounted to misconduct, because they failed to take into account (i) the importance of the perspective from which she was answering the question, i.e. whether she was answering based on her view in 2019 or the new perspective she has had since 2021; and (ii) the significance of her personal circumstances in relation to this issue. In light of the Appellant's medical conditions, greater care was needed with the assessment of her evidence.

142. The Panel had heard detailed submissions from the Appellant's counsel at the impairment stage about the need to approach her evidence with care. Although this particular submission was not noted in the Panel's decision, they were clearly aware of the issues which Witness 2's evidence (and the earlier assessments to which it referred) raised. Moreover, their findings on impairment were based on matters over and above her presentation in oral evidence. They included all the matters set out at [115]-[118] above. In any event, personal mitigation is arguably of less relevance at this stage given the Respondent's overarching objective of the protection of the public.

143. The Appellant also argued under this ground that the Panel wrongly found that the steps she had taken to ensure she pasted information about her COPO into the supporting information box of every application were not sufficient to make the conduct "highly unlikely" to be repeated. The Panel was entitled to reject this submission in light of the issues surrounding the 27 June 2023 application form, and given the other matters set out at [115]-[118] above.

<u>Conclusion on Grounds 4-9</u>

144. I therefore dismiss all the grounds of appeal in relation to the Panel's finding on impairment.

<u>6.3: Grounds relating to sanction</u>

145. The Panel took a similarly careful approach to the issue of sanction, summarising the submissions in some detail before giving their decision and reasons.

146. The Panel again referred to *Sawati*. They reiterated that "any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences". They confirmed they had had regard to the Respondent's guidance on 'Factors to consider before deciding on sanction' (SAN-1) and 'Considering sanctions for serious cases' (SAN-2), in particular the section on cases involving dishonesty.

147. The Panel considered the following to be aggravating features: (i) the previous referrals of the Appellant to the Respondent; (ii) the Appellant's lack of insight into her failings; the (iii) "pattern of misconduct over a significant period of time"; and (iv) the fact that the Appellant's conduct "put patients at a potential risk of suffering harm". The Panel also took into account the Appellant's "health matters" as a mitigating feature; and acknowledged that she had engaged with the proceedings and had given evidence to the Panel.

148. The Panel stated that charges relating to dishonesty were particularly serious; and determined that the Appellant's dishonest actions had been "premeditated, sustained and subsequently repeated on a number of occasions over a long period of time"; that she had "shown a determination in her attempts to deceive" her prospective employer; and that her motivation was for personal gain, to secure a nursing post. They considered all the possible sanctions open to them, but concluded that only a striking off order was appropriate.

<u>Ground 10: The Panel committed a serious error of principle and procedure by failing to consider and apply the factors from *Sawati* at the sanction stage</u>

149. The Appellant submitted that that there was no evidence that the Panel had properly directed themselves to the *Sawati* principles at the sanction stage, to check they were being fair to both the Appellant and the public.

150. I cannot accept this submission. The Panel's approach with respect to *Sawati* at the impairment stage was not wrong, for the reasons given under Grounds 4-5: see [97]-[122] above.

151. The Panel specifically referenced *Sawati* again at the sanction stage. The matters referenced at [115]-[119] above justified the Panel in concluding that the Appellant did not have "insight" and posed a "significant risk of repeating behaviour"; and that there was evidence of "harmful deep-seated personality or attitudinal problems". The June 2023 application form provided some evidence of a "repetition of behaviour" since the incidents that led to the charges. On any view, the charges against the Appellant did not involve a "single instance of misconduct". According to the Respondent's guidance, these four issues indicated that a suspension order would not be an appropriate sanction. In those circumstances a striking off order was the only other option.

<u>Ground 11: The Panel wrongly treated the Appellant's denial of dishonesty as demonstrative of a lack of insight and therefore as an aggravating factor</u>

152. The Appellant submitted that the Panel's conclusion that a "lack of insight" into the Appellant's failings was an aggravating factor was unsustainable if *Sawati* was properly applied. I cannot accept this for the reasons given in respect of Grounds 4-5 and 10: see [97]-[122] and [149]-[151] above.

Ground 12: The Panel irrationally treated risk of harm to patients as an aggravating factor

153. For the reasons given in respect of Ground 6 at [123]-[126] above I do not accept that the Panel irrationally found the risk of harm to be patients to be an aggravating factor.

Ground 13: The Panel unfairly placed excessive weight on the concerns it identified in the application form submitted on 27 June 2023

154. For the reasons given in respect of Ground 7 at [127]-[135] above I do not accept that the Panel placed excessive weight on the 27 June 2023 application form. Although there were no specific findings of dishonesty in relation to the Panel's concerns, the Panel was entitled to evaluate the evidence presented by the Appellant and attribute to it such weight as the Panel saw fit. For the purposes of sanction, the Panel was entitled to find that this was, together with the two sets of disciplinary proceedings, further evidence of a continued lack of insight and remediation.

Ground 14: The Panel failed to take into account the effect on public confidence of the Appellant's previous period of suspension for the same course of conduct

155. For the reasons given in respect of Ground 8 at [136]-[140] above I do not accept that the Panel failed to take into account the effect on public confidence of the Appellant's previous period of suspension for the same course of conduct. The Panel had it well in mind when considering sanction. The Panel was entitled to conclude, based on all the evidence before it, that the continued misconduct by the Appellant required a reconsideration of the position and sanction at the time of the hearing, such that the sanction imposed was justified. It was not wrong or unjust.

Ground 15: The Panel reached irrational and unjustifiable conclusions on sanction

(i): The conduct was remediable

156. The Appellant submitted that it was irrational for the Panel to find that "the charges found proved are remediable" and that she had "taken some steps to remedy your failings in respect of your applications forms for nursing jobs in the NHS", yet that her actions were fundamentally incompatible with her remaining on the register.

157. I disagree. Reading the decision as a whole, it is clear that the Panel considered that the Appellant's conduct was "potentially" remediable; but that in light of the nature of the dishonesty, and the evidence of a lack of insight, it had not, in fact, been remediated sufficiently.

(ii): The seriousness was exaggerated

158. The Appellant argued that the Panel wrongly characterised the seriousness of the dishonesty it had found proved by finding "premeditated, systematic or longstanding deception" for the purposes of SAN-2. I do not consider that the Panel was wrong in

this regard: the Appellant had been found to have behaved in a dishonest way on a significant number of occasions between March 2018 and October 2019.

159. The Appellant submitted that the Panel erred in finding that her "motivation was…personal gain in order to secure a nursing post". This was a finding that the Panel was entitled to make, not least given the evidence from Witness 2 noted at [68] above.

160. The Appellant contended that the Panel was wrong to find that if she had gained employment "there may have been a real risk to patients as a result of [her] deception". I disagree for the reasons given with respect to Grounds 6 and 12 at [123]-[126] and [153] above.

161. The misconduct in this case amounted to dishonest, and therefore knowing and deliberate, breaches of the substantive COPO. As noted in *General Medical Council v Donadio* [2021] EWHC 562 (Admin) at [55], in *General Medical Council v Nyamasve* [2018] EWHC 1689 (Admin) a knowing regulatory breach was treated as a species of serious dishonesty. Further, a dishonest breach of a substantive order must be viewed in the context of the efficacy of regulatory regimes and orders made under statutory powers exercised on the grounds of necessity for the protection of the public.

162. The Respondent's guidance 'Serious concerns that are hard to right' (FtP-3a) refers in terms to "deliberately…giving a false picture of employment history which hides clinical incidents in the past, not telling employers that their right to practise has been restricted or suspended, practising or trying to practise in breach of restrictions or suspension imposed by us" as a serious concern.

163. For all these reasons, the Panel was entitled to conclude, and was right to conclude, that this case did not fall towards the less serious end of the spectrum. There was nothing wrong or unjust in the Panel's assessment of the seriousness.

(iii): No deep-seated personality or attitudinal problem

164. Counsel for the Appellant rightly identified, as did the Panel, that the Appellant had exhibited a strong passion and commitment to nursing; she had multiple positive testimonials attesting to her honesty in her general life and clinical practice; and she had engaged fully with the proceedings despite considerable challenges of doing so. However the totality of the evidence before the Panel justified the conclusion that there was a "deep-seated personality or attitudinal problem": see further under Ground 10 at [149]-[151] above.

Conclusion on Grounds 10-15

165. Overall, a striking off order was well within the margin of judgment available to the Panel and was not wrong. It was, in my judgment, appropriate and necessary in the public interest. I therefore dismiss all the grounds of appeal in relation to the sanction imposed.

7: Conclusion

166. Accordingly, for all these reasons, I conclude that the Panel's findings that the Appellant had been dishonest, that her fitness to practise was impaired and that a striking off order was appropriate were not wrong and the proceedings were not unjust.

167. Therefore, despite the very careful and sensitive way in which the appeal was argued by the Appellant's counsel, I dismiss it.