Neutral Citation No: [2024] NIKB 33 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* SIM12510 *ICOS No:* 23/83327 *Delivered:* 29/04/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING S BENCH DIVISION

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BETWEEN:

PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH & SOCIAL CARE
Applicant

-and-

[1] NURSING AND MIDWIFERY COUNCIL
[2] SAMUEL THOMAS HAWARD
Respondents

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Dennis Hamill (instructed by Michael May, Edwards & Co., Solicitors) for the Applicant
Mark Hayward (instructed by Bernadette McCloskey, Shean Dickson Merrick, Solicitors) for the first Respondent
The second Respondent was not represented and did not appear

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SIMPSON J

Introduction

[1] The second respondent is a registered nurse. In 2015 he was employed as an agency Registered Mental Health Nurse at a brain injuries rehabilitation unit run by the West London Mental Health Trust.

[2] On 17 September 2015 a female colleague, known as registrant B attended for a night shift at the unit, which was understaffed. A patient at the unit, known as patient A required checks to be carried out on him every 15 minutes. Registrant B carried out a check on the patient at 9:15pm noting that he was alive at that time.

[3] The second respondent came on duty that evening, and at approximately 9:45pm was informed by a support worker that, during routine checks, she had found patient A hanging in his room. The second respondent entered patient A s room, released him from the ligature around his neck and placed him on the floor. He did not immediately commence cardiopulmonary resuscitation (CPR), but went to a

nearby office, called 999 and asked for the police. He was overheard saying that there had been a death at the unit. Registrant B took over the call and was asked by the 999-operator if resuscitation had commenced. Registrant B asked others if resuscitation had commenced, and then informed the operator that it had not.

[4] Paramedics attended the unit but their attempts to resuscitate the patient were unsuccessful and he was pronounced dead.

[5] The second respondent, registrant B and the support worker all told police and the coroner that CPR was commenced on the patient as soon as he was found, and before calling 999. Police were suspicious, as these accounts differed from what was said to the 999-operator and commenced an investigation. The second respondent in interview and statement reiterated his account that resuscitation had commenced on the patient before the 999 call was made.

[6] This version of events was initially supported by registrant B and the support worker. However, a few days later registrant B contacted police and asked to be reinterviewed. During this interview she told police that CPR had not been attempted prior to the 999 call being made and that her previous account was untrue. She told police that she had lied at the request of the second respondent as he feared the consequences for him and his family if it was discovered that he had not immediately attempted to resuscitate the patient.

[7] The second respondent was charged with perverting the course of public justice and convicted after a trial at Swindon Crown Court on 26 February 2020. He was sentenced on 21 July 2020 to 21 months imprisonment, suspended for 24 months, with 270 hours of unpaid work.

[8] In July 2023 the second respondent appeared before a three-member panel of the Nursing and Midwifery Council (NMC"), the first respondent to this application. The NMC is the regulator for nurses and midwives in the UK. It is governed by the provisions of the Nursing and Midwifery Order 2001, and rules made thereunder. At the panel hearing he was represented by counsel, instructed by the Royal College of Nursing (RCN"). He was charged with the following disciplinary offences:

> That you, a Registered Nurse
>
> 1. On 26 February 2020 were convicted of committing an act/series of acts with intent to pervert the course of public justice, at Swindon Crown Court.
>
> AND, in light of the above, your fitness to practise is impaired by reason of your conviction.

> 2. On 17 September 2015, [at the unit] did not respond appropriately and/or provide CPR to Patient A as required.
>
> AND, in light of the above, your fitness to practise is impaired by reason of your misconduct."

[9] The second respondent admitted the disciplinary charges.

[10] On 31 July 2023 the panel handed down its determination. In reaching its determination the panel adopted a two-stage approach; first, it determined whether the facts found amounted to misconduct; secondly, if so, whether the second respondent s fitness to practise was then currently impaired as a result of that misconduct. Having decided both in the affirmative, the panel imposed a sanction of 9 months suspension from the register.

[11] The NMC has no power to appeal a decision by the panel. It is the applicant (the PSA") which appeals against that decision, contending that so serious are the matters that the appropriate sanction should have been striking-off the register. I am informed by Mr Hamill by way of his helpful skeleton argument that the PSA is entirely funded by the [various] regulatory bodies [including the NMC] it oversees" and that the regulators send the PSA all of the decisions made by their final fitness to practise committees. The PSA read the decisions and if they have a concern as to whether the outcome is sufficient to protect the public … a detailed review is undertaken. The PSA only refer decisions to court if there is no other effective means of protecting the public."

[12] The appeal was not contested by the first respondent. In his equally helpful skeleton argument on behalf of the first respondent Mr Hayward says that the NMC in broad terms agrees with the submissions made in the skeleton argument submitted on behalf of the PSA."

[13] The second respondent is no longer represented by the RCN or any solicitor or counsel, the solicitors having come off record by order of Master Bell dated 22 February 2024. He was not present at the hearing. In circumstances where both parties before the court agree the course of action to be taken by the court, which would (if granted) adversely affect the career of an absent respondent, I consider that it is appropriate for the court to provide a written judgment so that the matters leading to the decision are in the public domain.

[14] I was provided with affidavits of service of this application on the second respondent. An affidavit from Lisa Green, legal secretary employed in Edwards & Co, deposes to the service by post on the second respondent s address on 15 March 2024, and the e-mailing of the trial bundle to him on 9 April. I have seen copies of the letters. An affidavit from Niall Smyth, trainee solicitor in Sean Dickson Merrick

deposes to service by post on 10 April 2024 and by email on the same date. Again, I have seen copies of the correspondence.

[15] In the circumstances I am satisfied that he was properly served and was made aware of the date of the hearing. He was called in the precincts of the court on two occasions prior to the hearing before me, but there was no answer.

The legislative framework

[16] The PSA was established by the provisions of section 25 of the National Health Service Reform and Health Care Professions Act 2002 (the 2002 Act"). It is referred to in the legislation as the Authority." Section 25(2A) provides that the overarching objective of the Authority in exercising its functions … is the protection of the public." Section 25(2B), where material, provides:

> The pursuit by the Authority of its over-arching objective involves the pursuit of the following objectives—
>
> (a) to protect, promote and maintain the health, safety and wellbeing of the public;
>
> (b) to promote and maintain public confidence in the professions regulated …
>
> (c) to promote and maintain proper professional standards and conduct for members of those professions…"

[17] Where relevant to this matter, section 29 of the 2002 Act provides:

> (1) This section applies to —
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> …
>
> (i) any corresponding measure taken in relation to a nurse or midwife under the Nursing and Midwifery Order 2001."
>
> …
>
> (3) The things to which this section applies are referred to below as *relevant decisions."*
>
> (4) Where a relevant decision is made, the Authority may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

(4A) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient—

(a) to protect the health, safety and well-being of the public;

(b) to maintain public confidence in the profession concerned; and

(c) to maintain proper professional standards and conduct for members of that profession.

(5) In subsection (4)…, the relevant court' —

…

(b) in the case of a person who (in accordance with the rules applying to the body making the relevant decision) was, or was required to be, notified of the relevant decision at an address in Northern Ireland, means the High Court of Justice in Northern Ireland.

[18] In The Nursing and Midwifery Council (Fitness to Practise) Rules 2004 Rule 34 provides:

> Any notice of hearing required to be served upon the registrant shall be delivered by sending it … to the registrant s address in the register."

[19] Thus, the jurisdiction of the court is dependent on the address of the registrant. In the case of the second respondent, that address is in Northern Ireland.

[20] Section 29(7) provides that if the Authority does refer a case to the court,

(a) the case is to be treated by the court to which it has been referred as an appeal by the Authority against the relevant decision (even though the Authority was not a party to the proceedings resulting in the relevant decision), and

(b) the body which made the relevant decision (as well as the person to whom the decision relates) is to be a respondent."

[21] Section 29(8) provides the court s discretion if a decision is referred to it, in the following terms:

> The court may —
>
> (a) dismiss the appeal,
>
> (b) allow the appeal and quash the relevant decision,
>
> (c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or
>
> (d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court …,
>
> and may make such order as to costs … as it thinks fit."

The appeal

[22] The referral to this court (by way of appeal) is brought pursuant to Order 55 Rule 20 of the Rules of the Court of Judicature in Northern Ireland which provides:

> Any application under the provisions of any statutory provision, not otherwise provided for (other than an application by way of appeal or reference) may be brought in the manner in which appeals may be brought under the foregoing rules of this Part."

[23] The Notice seeks an order that the sanction of a 9-month suspension be quashed, that the court impose an order of striking-off and award the PSA its costs of the matter.

[24] Seven grounds of appeal are relied upon — inter alia, that the sanction imposed is insufficient for the protection of the public, the maintenance of public confidence and the need to uphold and declare standards in light of the gravity and seriousness of the charges; that the panel failed to consider that such was the nature of the misconduct and the conviction that they were incompatible with his continued registration; and that the panel took a flawed and perverse approach to aggravating and mitigating factors.

The nature of the appeal hearing

[25] In *The Council for the Regulation of Health Care Professionals v The Nursing and Midwifery Council and McDonnell* [2006] NIJB 228 Weatherup J considered a notice of appeal under section 29 of the 2002 Act. Having cited English authority on the approach to section 29 appeals, and noting that the court in England referred to the

then current Civil Procedure Rules which provided how the appeal should be dealt with by the court, he said:

> [16] In Northern Ireland Pt 2 of Order 55 … applies to appeals, references and applications under statutory provisions but does not contain particular provisions in relation to the nature of a statutory appeal. The issue was considered by Carswell J in *Re Baird* [1989] NI 56. Sixteen members of Craigavon Borough Council appealed to the High Court against the decision of a local government auditor under s 82 of the Local Government Act (Northern Ireland) 1972. Equivalent statutory appeals in England were conducted without a complete oral rehearing. Carswell J stated (at 60) that where the statutory provisions for appeal are identical in the two jurisdictions it would appear that the method of appeal should be the same in each, for it was not easy to suppose that the legislature intended that council members appeals against surcharges under similar legislation should be conducted in a different fashion…In the present case the appeal was not conducted by way of a re-hearing but by evidence on affidavit and argument by counsel on the affidavits and exhibits."

[26] The same view is also expressed in the judgment of MacDermott J in *Doyle v The Northern Ireland Council for Nurses and Midwives* [1980] 2 NIJB, at pages 3-8.

[27] I respectfully agree that it is appropriate in this case for the court to deal with the matter on the papers presented to it supplemented by oral submission, rather than to require a complete re-hearing of the matter such as in a Civil Bill appeal to the High Court. I have available to me a transcript of the disciplinary hearing, the decision of the panel and, by way of exhibits to an affidavit of Ms McCloskey, various NMC guidance documents and relevant correspondence.

The approach of the court to such appeals

[28] In what was cited to me as the *Ruscillo* case (orse *Ruscillo v Council for the Regulation of Healthcare Professionals and General Medical Council; Council for the Regulation of Healthcare Professionals v Nursing and Midwifery Council and Truscott* [2004] EWCA Civ 1356) the Court of Appeal set out the general approach to an appeal such as this. The court said, where material to my consideration in this case:

> [70] If the Court decides that the decision as to the penalty was correct it must dismiss the appeal, even if it concludes that some of the findings that led to the imposition of the penalty were inadequate. No doubt any

comments made by the Court about those findings will receive due consideration by the disciplinary tribunal if, at a later stage, it has occasion to review the standing of the practitioner.

[71] If the Court decides that the decision as to penalty was wrong , it must allow the appeal and quash the relevant decision, in accordance with CPR 52.11(3)(a) and section 29(8)(b) of the Act. It can then substitute its own decision under section 29(8)(c) or remit the case under section 29(8)(d).

…

[73] What are the criteria to be applied by the Court when deciding whether a relevant decision was wrong ? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the Court when a case is referred is to consider whether the disciplinary tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty. Is that any different from the role of the Council in considering whether a relevant decision has been unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession.

…

[75] The reference [in paragraph [74] of the judgment] to having regard to double jeopardy when considering whether a sentence is unduly lenient is not, as we have already indicated, really apposite where the primary concern is for the protection of the public.

[76] …We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed.

[77] … In any particular case under section 29 the issue is likely to be whether the disciplinary tribunal has reached

a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public.

[78] The question was raised in argument as to the extent to which the Council and the Court should defer to the expertise of the disciplinary tribunal. That expertise is one of the most cogent arguments for self-regulation. At the same time Part 2 of the Act has been introduced because of concern as to the reliability of self-regulation. Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed."

[29] I adopt the above approach.

Consideration

[30] The material before the court indicates that the second respondent lied to the police and coroner and maintained this dishonesty for a period of some five years from the death of patient A, through his Crown Court trial to conviction and, even following conviction, did so when dealing with the probation service for the purposes of the pre-sentence report. The impact on the patient s family and on colleagues was significant. Even at the fitness to practise hearing, the second respondent challenged the account given by registrant B in relation to the contact he had with her in an effort to persuade her to maintain the initial account of their actions. The panel found that he had contacted her in the manner alleged, preferring her version of events to his.

[31] The first charge of which he was convicted before the panel, therefore, involved an egregious breach by the second respondent of his duty of candour, which he maintained for some five years, leading to a Crown Court conviction. The NMC s own guidance on seriousness states, inter alia:

Honesty is of central importance to a nurse s…practice. Therefore, allegations of dishonesty will always be serious…Generally, the forms of dishonesty which are most likely to call into question whether a nurse…should be allowed to remain on the register will involve:

- deliberately breaching the professional duty of candour by covering up when things have gone wrong…

…

- premeditated, systematic or longstanding deception."

[32] Secondly, the panel found that the failure immediately to administer CPR was very concerning and to be at the higher end of the spectrum of seriousness. The panel found:

> "… that patient A was put at risk of unwarranted physical harm as a result of you not performing CPR on him prior to calling 999. The panel determined that you did not act professionally and competently, or in the best interests of patient A. The panel found that your conduct breached the fundamental tenets of the nursing profession and had brought its reputation into disrepute."

[33] The panel also found a risk of repetition if the second respondent was put under similar pressure in the future. Further, the panel found that some eight years after the events the second respondent evinced no substantial insight into how his dishonesty had affected his colleagues.

[34] The panel had to grapple with the issue of whether his conduct was incompatible with remaining on the register. Having recited various submissions made to it, the panel stated only that it:

> was satisfied that in this case, the misconduct and conviction were not fundamentally incompatible with [his] remaining on the register.
>
> The panel then went on to consider whether a striking-off order would be proportionate but, taking into account all the information before it, and of the mitigation provided, it concluded that this would be disproportionate."

[35] The NMC s own sanctions guidance dealing with striking-off provides:

> This sanction is likely to be appropriate when what the nurse … has done is fundamentally incompatible with being a registered professional. Before imposing this sanction, key considerations the panel will take into account include:
>
> - Do the regulatory concerns about the nurse … raise fundamental questions about their professionalism?

- Can public confidence in nurses … be maintained if the nurse … is not removed from the register?
- Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?

[36] In *Professional Standards Authority v Nursing and Midwifery Council and Jalloh* [2023] EWHC 3331 (Admin) Morris J said, para [23], sub-para (7):

> As regards the sanctions guidance provided by the professional body itself, it is an authoritative steer for tribunals as to what is required to protect the public, even if it does not dictate the outcome; it is an authoritative steer as to the application of the principle of proportionality. If the tribunal departs from the steer given by the Guidance, it must have careful and substantial case-specific justification. A generalised assertion that erasure or striking off would be disproportionate and that the conduct was not incompatible with continued registration will be inadequate and will justify the conclusion that the tribunal has not properly understood the gravity of the case before it."

[37] In *Threlfall v General Optical Council* [2004] EWHC 2683 (Admin), Stanley Burnton J in dealing with the need to give adequate reasons said at paragraph [37]:

> Lastly I mention that there is a further practical reason why disciplinary committees should give adequate reasons for their decisions, and that is to enable the Council for the Regulation of Healthcare Professionals [in this case, the PSA] to consider whether to exercise its powers under Section 29 of the 2002 Act."

[38] I agree with those views.

[39] On the face of the panel s determination there was, in my view, a failure to engage with the important guidance. In my view, further, if the panel had properly considered those questions in paragraph [35] above in light of all the circumstances of this case, the only appropriate answers would have been Yes , No and Yes.

[40] I also consider that some of the matters which the panel took into consideration as mitigating factors were fundamentally wrong. First, the panel found it to be a mitigating factor that the incident occurred almost eight years ago." However, while the incident involving patient A occurred eight years previously, the dishonest stance which underlay charge one was maintained by the second respondent for a period of five further years. The reference to an emergency situation, the absence of a handover

and lack of staffing cannot be relevant to, or any mitigation of, the charge involving dishonesty. Neither can the reference to adequate training.

[41] In addition, in arriving at its decision that the sanction should be suspension the panel identified the following matters: a single incident of misconduct; no evidence of deep-seated personality or attitudinal problems; no evidence of repetition since the incident; satisfaction that the second respondent had insight. In my view the dishonesty maintained by the second respondent could not, in any circumstances, be described as a single incident. It involved lying to a number of agencies — police, coroner, Crown Court and then the probation service — over some five years. It was wholly wrong of the panel to characterise this as a single incident. In my view, also the panel was wrong, in light of the systematic lying, to find that there was no evidence of a deep-seated personality or attitudinal problem. While there was no evidence of a repetition of the behaviour, the panel did find that there was no real insight into the impact of his behaviour on colleagues and felt that there was a risk of repetition. In the circumstances, I consider that the panel was wrong in its approach to consideration of suspension as the appropriate sanction to impose.

The court s approach to the decision of a specialist panel

[42] As to the court s approach to interference with a decision of a specialist panel, my attention was further drawn by Mr Hayward to the *Jalloh* case (op cit) where Morris J said, at paragraph [23] (omitting some citations):

> (5) Where the misconduct relates to professional performance, the expertise of the tribunal is likely to carry greater weight. However, where the misconduct does not relate directly to professional performance standards, for example, cases of dishonesty or sexual misconduct, the Court is well placed to assess what is needed to protect the public, maintain the reputation of the profession or maintain public confidence in the profession and may attach less weight to the expertise of the tribunal. This approach goes beyond sexual misconduct and dishonesty and extends more generally to matters not related to professional performance. In my judgment, this approach therefore applies in the present case to the findings of assault, as well as to the findings of dishonesty.
>
> (6) Honesty and integrity are fundamental in relation to qualifications and the system of applying for medical positions. Where a doctor engages in deliberate dishonesty and lacks insight into that dishonesty, erasure may, in practical terms, be inevitable."

[43] Mr Hamill cited to me the judgment in *Khan v General Pharmaceutical Council* [2016] UKSC 64 where, in paragraph [36] Lord Wilson said that an appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence." However, at sub-para (c) he said that:

> a court can more readily depart from the committee's assessment of the effect on public confidence of misconduct which does not relate to professional performance than in a case in which the misconduct relates to it."

[44] In my view the circumstances of this case, involving as it does one disciplinary charge based on grave and sustained dishonesty, make it eminently suitable for this court to decide the appropriate sanction.

Disposition

[45] I remind myself that the statutory over-arching objective is the protection of the public which the 2002 Act says involves the pursuit of the following objectives—

> (a) to protect, promote and maintain the health, safety and wellbeing of the public;
>
> (b) to promote and maintain public confidence in the professions regulated …
>
> (c) to promote and maintain proper professional standards and conduct for members of those professions…"

[46] In this case the second respondent was found to have failed to administer CPR immediately on finding patient A and then to have lied to various agencies to cover up his failings. He also persuaded a colleague to lie for him. Those lies were maintained by the second respondent for five years and were maintained even after his conviction for acting with intent to pervert the course of justice. Such was the seriousness of his offence in the mind of the trial judge that he was sentenced to a substantial suspended custodial term. At the date of the disciplinary hearing, the panel found that he showed no substantive insight into how his dishonesty had affected colleagues. The panel also found that there was a risk of repetition of his behaviour if faced with a similar situation.

[47] I consider that a suspension order for nine months is wholly insufficient for the protection of the public, the promotion and maintenance of public confidence and the need to promote and maintain standards and conduct. In my view no sanction less than striking-off was appropriate in the particular circumstances of this case.

[48] Accordingly, I allow the appeal brought by PSA, quash the sanction imposed by the panel and substitute for it an order that the second respondent be struck off the register.

[49] I will hear counsel on the question of costs.