Neutral Citation Number: [2019] EWHC 971 (Admin)

Case No: CO/5118/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

NASRIN ABBAS	**Appellant**
- and -	
THE NURSING AND MIDWIFERY COUNCIL	**Respondent**

- -
- -

Simon Gurney (instructed by **Stephensons Solicitors LLP**) for the **Appellant**
Matthew Cassells (instructed by **The Nursing and Midwifery Council**) for the **Respondent**

Hearing date: 27 March 2019

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Approved Judgment

Mrs Justice Lang:

1. The Appellant appeals, pursuant to Article 30(10) of the Nursing and Midwifery Order 2001 ("the NMC Order"), against the decision of a panel ("the Panel") of the Fitness to Practise Committee ("FTP Committee") of the Nursing and Midwifery Council ("the NMC"), made on 23 November 2018, to strike her off the Register.

Facts

2. The Appellant qualified as a nurse in Dubai in 1982. She came to England in 1988 and qualified as a registered general nurse in 2003. She completed a BSc degree in critical care nursing in 2007.

3. Between 2004 and December 2007 the Appellant worked in the intensive care units of North West London Hospitals NHS Trust. In December 2007, the Appellant made a medication error which resulted in her being given a written warning and being required to undertake a period of supervised practice. During the period of supervised practice, when she was given training and support, further concerns were raised about her competence, both in general nursing skills and in intensive care nursing. She was dismissed, but following an appeal, she was re-employed as a health care assistant.

4. The Appellant's employer referred her to the NMC. On 26 March 2012, the NMC's Conduct and Competence Committee ("CCC")[1] found the following allegations proved, on the basis of the Appellant's admissions:

> "That you, whilst employed by North West London Hospitals NHS Trust working within Northwick Park Hospital Intensive Therapy Unit (ITU):
>
> 1. Failed to demonstrate the standards of knowledge, skill and judgement required to practise without supervision as a Band 5 Registered Nurse, from June 2008 to January 2009, more particularly on one or more occasion:
>
> i. You did not interpret the output of clinical equipment and relate this to the condition of your patient;
> ii. You did not demonstrate that you understood the theory and practice in relation to the use of a ventilator;
> iii. You did not demonstrate that you understood the theory and practice in relation to Advanced Life Support;
> iv. You did not demonstrate that you understood the theory and practice in relation to inotropic therapy
> v. You did not demonstrate that you understood the theory and practice in relation to the renal system;
> vi. You did not listen effectively to instructions;
> vii. You did not manage your time effectively;
> viii. You did not relate theory to practice;
> ix. You did not retain theoretical information as required;

[1] The predecessor to the FTP Committee

x. You did not retain clinical information as required;
xi. You did not communicate clinical information to your colleague(s) as required;
xii. You communicated incorrect information to your colleague(s);
xiii. You did not make full and complete clinical notes at the end of a shift;
xiv. You were unable to complete simple calculations correctly;"

5. In the light of these findings, the CCC found that the Appellant's fitness to practise was impaired, by reason of lack of competence. The CCC imposed a conditions of practice order for 6 months. The Appellant was required to practise only with direct supervision, not to practise in any critical care unit, and to confine her practice to the National Health Service ("NHS"). She was required to formulate a personal development plan to address the particular deficiencies the CCC had identified, namely: (1) interpretation of the output of clinical equipment relating to patients; (2) communication of clinical information at multi-disciplinary meetings (both orally and in writing); (3) time management; (4) relating theory to practice; and (5) numerical skills relevant to her practice.

Previous reviews

6. On 17 September 2012 the Appellant's order was reviewed by the CCC and extended for a further 6 months. The Appellant's health had prevented her from complying with her conditions. At her request, the conditions were varied to make it easier for her to find work as a nurse. She was no longer required to work under direct supervision throughout the duration of the order, but rather for a period of 4 weeks, which was to be reviewed by her employer at its conclusion, reported on to the NMC and, if appropriate, then changed to indirect supervision by a Band 6 nurse.

7. On 6 March 2013 the Appellant's order was reviewed by the CCC and it was extended for 12 months. It was again submitted on the Appellant's behalf that the conditions should be varied to make it easier for her to find work as a nurse. The CCC removd the requirement that a report be sent to the NMC at the conclusion of the period of direct supervision.

8. On 12 March 2014 the Appellant's order was reviewed by the CCC and it was extended for a further 18 months. It was further varied to make it easier for the Appellant to find work as a nurse. The CCC removed the requirement that she had to be indirectly supervised by a Band 6 nurse, indicating indirect supervision by a Band 5 would be sufficient, and also removed the condition which prevented the Appellant working outside the NHS.

9. On 6 August 2015 the Appellant's order was reviewed by the CCC and it was extended for a further 2 years, without variation. By Article 29 (6) of the Order, a striking-off order may not be made in respect of a nurse whose fitness to practise is impaired by reason of her lack of competence, unless she has been subject to a conditions of practice order for, at least, 2 years. Thus, this was the first review at which the CCC had the power to impose a striking-off order.

10. In October 2016, the Appellant obtained employment as a nurse for the first time during the currency of the conditions of practice order. Since 2012, she had only been able to obtain employment as a healthcare assistant.

11. On 18 January 2017 the Appellant's order was reviewed by the CCC and it was continued, with minor variations, for the remaining 7 months. The CCC expressed concern about the length of time that conditions had been in place.

12. On 8 September 2017 the Appellant's order was reviewed by a panel of the FTP Committee and it was extended for a further 6 months. The order was varied to remove the requirement for direct supervision.

13. On 8 March 2018 the Appellant's order was reviewed by a panel of the FTP Committee and it was extended, with minor variations, for a further 9 months. The panel indicated in the course of their determination that a period of 9 months had been arrived at as it would, 'allow sufficient time to remedy the deficiencies in [the Appellant's] practice and complete [her] assertiveness training'.

The challenged review decision

14. On 23 November 2018 the Appellant's order was reviewed by the FTP Committee. The Appellant admitted that her fitness to practise remained impaired. The Panel considered the earlier decisions, together with references, reflective writings by the Appellant and an updating report from the matron on her ward. Although the Appellant invited the Panel to make a further conditions of practice order, the Panel decided instead to impose a striking-off order.

15. In its determination on sanction, the Panel stated:

> "The panel next considered whether to extend the current conditions of practice order. It noted that you have been subject to a conditions of practice order for six-and-a-half years, and have been working as a nurse continuously whilst under conditions for over two years. It had regard to the decision of the previous reviewing panel, which stated that, in imposing the current order for nine months, such a period would "allow you sufficient time to remedy the deficiencies in your practice and complete your assertiveness training". The panel noted that you have completed your assertiveness training, but the issues in your practice remain outstanding. The panel considered that these issues relate to basic and fundamental areas across all aspects of nursing; even when working in what appears to be a supportive environment, you have not managed to successfully remediate them over a period of over two years.
>
> Accordingly, the panel concluded that extending a conditions of practice order would not, in the long term, serve a useful purpose. Although the public would be protected were you to remain subject to a conditions of practice order, the public interest would not be upheld due to the length of time you have

> been subject to such an order, and the lack of progress you have made in that time.
>
> The Panel next considered imposing a suspension order. However, it concluded that such sanction would not serve a useful purpose. Although the public would be protected by such a sanction, in that you would not be able to provide nursing services to patients, it would not enable you to improve your competence, which remains lacking. The panel also considered that such a sanction would not uphold the public interest.
>
> In considering whether to impose a striking-off order, the panel had regard to the SG. Given the length of time you have been subject to restrictions on your practice, as well as the lack of progress you have made in that time, the panel considered that public confidence in the nursing profession and the NMC would not be maintained if you remained on the register. The panel accepted that you have made efforts to improve your nursing competence, but was not satisfied that you would ever reach a point where you would be able to practise unrestricted.
>
> It therefore concluded, with regret, that the appropriate and proportionate sanction in this case is that of a striking-off order. The panel therefore directs the registrar to strike your name off the register."

Grounds of appeal

16. The Appellant appealed on the grounds that:

    i) the Panel was wrong to decide that a striking-off order was the appropriate and proportionate sanction;

    ii) the Panel was wrong to conclude that the Appellant would never reach a point where she would be able to practise unrestricted; and

    iii) the decision of the Panel was unjust because of serious irregularity in the proceedings, namely the failure to give adequate coherent reasons justifying its decision.

Legal framework

Regulatory functions

17. The NMC's functions in respect of allegations of misconduct against registered nurses are governed by the NMC Order and the Nursing and Midwifery (Fitness to Practise) Rules 2004 ("the Rules").

18. The over-arching objective of the NMC in exercising its functions is the protection of the public (Article 3(4) of the NMC Order). By Article 3(4A) of the NMC Order, this entails the pursuit of the following objectives: (1) the protection, promotion and maintenance of the health, safety and wellbeing of the public (2) the promotion and maintenance of public confidence in the professions (3) the promotion and maintenance of proper standards and conduct among members of the professions.

19. Proceedings before the FTP Committee are governed by the Rules. By virtue of rule 6C(2)(a)(ii), the FTP Committee must consider any allegation referred to it by the Case Examiners, and if, having considered the allegation, it considers that it is well founded, must proceed to make one of a number of prescribed orders, which by Article 29(5)(a) – (d) of the NMC Order, include a striking-off order, a suspension order, a conditions of practice order and a caution order.

20. Unless the FTP Committee directs under Article 29(8A) of the NMC Order that Article 30(1) should not apply, there must be a review of any suspension order or conditions of practice order imposed at a substantive hearing prior to the expiry of the order. On review, the FTP Committee has the power to extend the existing order or make any other order falling within Article 29(5) of the NMC Order.

21. Orders of the FTP Committee can also be reviewed on application under Article 30(2) of the NMC Order. The FTP Committee has the power to, with immediate effect, confirm the existing order, extend the existing order, reduce the period for which the order has effect, replace the order with another order falling within Article 29(5), revoke the order or vary any conditions imposed by the order.

Appeals

22. Articles 30(10) and 38 of the NMC Order confer on a registrant a right of appeal against an order by a panel of the NMC Committee. By virtue of Article 38(3) of the NMC Order, 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 Practice Committee concerned or the Court, as the case may be, could have made, or (d) remit the case to the Practice Committee concerned or the Council, as the case may be, to be disposed of in accordance with the directions of the Court.

23. CPR r.52.21(3) provides:

> "(3) 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 in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence."

24. Practice Direction 52D provides that an appeal to the High Court under the NMC Order will be by way of re-hearing (paragraph 19). Such appeals are not conducted as re-hearings in the full sense, where the appellate court hears evidence and reaches a decision unconstrained by the conclusion of the lower court. Save in exceptional cases, the appellate court will not hear evidence and it will accord appropriate respect to the primary findings of fact made by the first instance panel.

25. Appeals from professional regulatory bodies have three distinctive features. First, the appeal is from a panel with specialist expertise in the relevant profession. These panels are established by statute, indicating Parliament's intention that the primary decision-making body in relation to fitness to practise in the professions would be a specialist panel, and the courts would only have an appellate function. Second, the panels have power to impose sanctions, whose primary purpose is to maintain public confidence in the profession, not to provide retribution or compensation. The expertise of a specialist panel will assist it in assessing the appropriate sanction in order to maintain public confidence in the standards of the particular profession. Third, Article 6 of the European Convention on Human Rights is likely to be engaged where the appellant's right to practise his profession may be at stake (see *Albert & Le Compte v Belgium* (1983) 5 EHRR 533).

26. The approach to be taken by an appellate court to professional regulatory appeals has been comprehensively considered in a series of appeals from the General Medical Council ("GMC").

27. In *Ghosh v General Medical Council* [2001] UKPC 29, [2001] 1 WLR 1915. Lord Millet said at [33] – [34]:

> "33. Practitioners have a statutory right of appeal to the Board under section 40 of the Medical Act 1983, which does not limit or qualify the right of the appeal or the jurisdiction of Board in any respect. The Board's jurisdiction is appellate, not supervisory. The appeal is by way of a rehearing in which the Board is fully entitled to substitute its own decision for that of the Committee. The fact that the appeal is on paper and that witnesses are not recalled makes it incumbent upon the appellant to demonstrate that some error has occurred in the proceedings before the Committee or in its decision, but this is true of most appellate processes.
>
> 34. It is true that the Board's powers of intervention may be circumscribed by the circumstances in which they are invoked, particularly in the case of appeals against sentence. But their Lordships wish to emphasise that their powers are not as limited as may be suggested by some of the observations which have been made in the past. In *Evans v General Medical Council* (unreported) Appeal No 40 of 1984 at p. 3 the Board said:
>
> > "The principles upon which this Board acts in reviewing sentences passed by the Professional Conduct Committee are well settled. It has been said time and again that a disciplinary committee are the best possible

> people for weighing the seriousness of professional misconduct, and that the Board will be very slow to interfere with the exercise of the discretion of such a committee. … The Committee are familiar with the whole gradation of seriousness of the cases of various types which come before them, and are peculiarly well qualified to say at what point on that gradation erasure becomes the appropriate sentence. This Board does not have that advantage nor can it have the same capacity for judging what measures are from time to time required for the purpose of maintaining professional standards."

> For these reasons the Board will accord an appropriate measure of respect to the judgment of the Committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the Committee's judgment more than is warranted by the circumstances. The Council conceded, and their Lordships accept, that it is open to them to consider all the matters raised by Dr Ghosh in her appeal; to decide whether the sanction of erasure was appropriate and necessary in the public interest or was excessive and disproportionate; and in the latter event either to substitute some other penalty or to remit the case to the Committee for reconsideration."

28. In *Meadow v General Medical Council* [2007] QB 462, Auld LJ said at [197]:

> "On an appeal from a determination by the GMC, acting formerly and in this case through the FPP, or now under the new statutory regime, whatever label is given to the section 40 test, it is plain from the authorities that the court must have in mind and give such weight as is appropriate in the circumstances to the following factors. (i) The body from whom the appeal lies is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserve respect. (ii) The tribunal had the benefit, which the court normally does not, of hearing and seeing the witnesses on both sides. (iii) The questions of primary and secondary fact and the overall value judgment to be made by the tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers."

29. In *Raschid v General Medical Council* [2007] 1 WLR 1460, which was an appeal against sanction, Laws LJ said, after reviewing the authorities, at [19] – [20]:

> "19. …. the fact that a principal purpose of the panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, particular force is given

to the need to accord special respect to the judgment of the professional decision-making body in the shape of the panel. That I think is reflected in the last citation I need give. It consists in Lord Millett's observations in *Ghosh v General Medical Council* [2001] 1 WLR 1915, 1923, para 34:"

> "The Board will afford an appropriate measure of respect to the judgment of the committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the committee's judgment more than is warranted by the circumstances."

20. These strands in the learning then, as it seems to me, constitute the essential approach to be applied by the High Court on a section 40 appeal. The approach they commend does not emasculate the High Court's role in section 40 appeals: the High Court will correct material errors of fact and of course of law and it will exercise a judgment, though distinctly and firmly a secondary judgment, as to the application of the principles to the facts of the case."

30. In *Cheatle v General Medical Council* [2009] EWHC 645 (Admin), [2009] WL 873748 Cranston J. said at [15]:

> "In my view the approaches in *Meadow* and *Raschid* are readily reconcilable. The test on appeal is whether the decision of the Fitness to Practise Panel can be said to be wrong. That to my mind follows because this is an appeal by way of rehearing, not review. In any event grave issues are at stake and it is not sufficient for intervention to turn on the more confined grounds of public law review such as irrationality. However, in considering whether the decision of a Fitness to Practise Panel is wrong the focus must be calibrated to the matters under consideration. With professional disciplinary tribunals issues of professional judgment may be at the heart of the case. *Raschid* was an appeal on sanction and in my view professional judgment is especially important in that type of case. As to findings of fact, however, I cannot see any difference from the court's role in this as compared with other appellate contexts. As with any appellate body there will be reluctance to characterise findings of facts as wrong. That follows because findings of fact may turn on the credibility or reliability of a witness, an assessment of which may be derived from his or her demeanour and from the subtleties of expression which are only evident to someone at the hearing. Decisions on fitness to practise, such as assessing the seriousness of any misconduct, may turn on an exercise of professional judgment. In this regard respect must be accorded to a

> professional disciplinary tribunal like a Fitness to Practise Panel."

31. In *Khan v General Pharmaceutical Council* [2016] UKSC 64, [2017] 1 WLR 169, Lord Wilson said, at [36]:

> "An appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence. In a case such as the present, the committee's concern is for the damage …. done to the reputation of the profession and it is best qualified to judge the measures required to address it: *Marinovich v General Medical Council* [2002] UKPC 36 at [28]. Mr Khan is, however, entitled to point out that (a) the exercise of appellate powers to quash a committee's direction or to substitute a different direction is somewhat less inhibited than previously: *Ghosh* … para 34; (b) on an appeal against the sanction of removal, the question is whether it was "was appropriate and necessary in the public interest or was excessive and disproportionate" the *Ghosh* case, again para 34 …. "

32. In *General Medical Council v Jagjivan & Anor* [2017] EWHC 1247 (Admin), [2017] 1 WLR 4438, Sharpe LJ summarised the effect of the authorities in the following way:

> "40. In summary:
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> i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
>
> ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.
>
> iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).

> iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).
>
> v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.
>
> vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …": see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".
>
> vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.
>
> viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56)."

33. In *Wisniewska v Nursing and Midwifery Council* [2016] EWHC 2672 (Admin), Hayden J. held that it was incumbent on tribunals to demonstrate coherent reasoning, including in respect of the weight given to factors advanced in mitigation.

NMC Guidance

34. The NMC provides guidance on sanctions to FTP Committees in its publications: '*Factors to consider before deciding on sanctions'* and *'Available sanction orders'*. It also provides guidance in its publication on *'Substantive Order Reviews*'.

35. The sanctions guidance emphasises the importance of proportionality in determining the appropriate sanction, i.e. finding a fair balance between the nurse and the overarching objective of public protection. Sanctions have to be considered in ascending order of severity.

36. Previous fitness to practise history may be relevant if problems seem to be repeating themselves, which may mean that previous orders by the FTP Committee were not effective.

37. The Guidance indicates that, in deciding whether or not to impose a conditions of practice order, the key consideration is whether conditions can be put in place that will be sufficient to protect patients or service users and, if necessary, address any concerns about public confidence or proper professional standards and conduct. Conditions must be relevant, proportionate, workable and measurable.

38. The Guidance advises that a striking-off order is likely to be appropriate when what the nurse has done is fundamentally incompatible with being a registered professional. Three key considerations are listed to assist the Committee:

    (a) Do the regulatory concerns about the nurse raise fundamental questions about their professionalism?

    (b) Can public confidence in nurses be maintained if the nurse is not removed from the register?

    (c) Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?

39. A striking-off order cannot be imposed if the nurse's fitness to practise is impaired due to lack of competence until he or she has been subject to a suspension or a conditions of practice order for a continuous period of two years.

Conclusions

40. In my judgment, the Panel's approach to its task was in accordance with the law and NMC Guidance. It addressed its mind to the need to protect the public, maintain public confidence in the profession, and to declare and uphold proper standards of conduct and performance. It carefully considered the available sanctions in turn, in ascending order of gravity, thus safeguarding against an excessive sanction. It expressly had regard to the need to impose an appropriate and proportionate sanction. On my reading of the decision, the Panel applied the relevant law and guidance to the evidence in this case, fairly and with care.

41. The Panel was not satisfied that the Appellant would ever be sufficiently competent to practise unrestricted and therefore concluded that a further conditions of practice order was not in the public interest and would not maintain public confidence in the profession. In my view, the reasons which the Panel gave for these conclusions were both clear and sufficient, and there is no basis for the Appellant's criticism of the reasons in her ground 3.

42. The Appellant had been subject to a succession of conditions of practice orders for six and a half years, following dismissal from her NHS Trust employer on competence grounds. At each review, an NMC panel had assessed the progress which she had made, but concluded that her fitness to practise remained impaired, and identified areas in which further remediation was required.

43. Most recently, in March 2018, the evidence from the matron of her ward expressed concern about her inability to take appropriate steps when confronted with acute, critical patients. The panel concluded that managing deteriorating patients, and escalating when appropriate, was an identifiable area of practice which could be developed and improved. It made a further conditions of practice order, concluding "a period of 9 months is a proportionate period which would allow you sufficient time to remedy the deficiencies in your practice and complete your assertiveness training".

44. Despite the expectation of the last panel that she would only need another 9 months to remedy the deficiencies in her practice, by the date of this hearing, the Appellant had still not been able to do so. In a written report, the matron of her ward referred to four areas of weakness which she had identified in an earlier report for the review meeting in September 2017, namely:

    i) When working with other team members, in particular the Health Care Assistants, she needs to be more assertive and take the lead.

    ii) Continuing to perfect her drug administration.

    iii) When confronted with acute situations, she does not always know how to prioritise her work. She should liaise with the nurse in charge who can help her.

    iv) Adhering to the routine of safety checks prior to starting her duties on each shift.

45. In an update prepared for the review hearing on 22 November 2018, the matron said:

> "The four points outlined above have remained. It was emphasised to Nasrin that when she is not transparent with her duties then it becomes difficult for the ward to know where she needs extra help and how she can be assisted to achieve her optimum.
>
> Nasrin has been in the same clinical area for 2 years and 2 months now. It is unfortunate that during this time, she still has the same outstanding issues…."

46. Although the Appellant sought to discount the matron's evidence, on the basis that she was unsupportive and unhelpful, and she had refused to discuss her report with the

Appellant's legal team in advance of the hearing, I consider that the Panel was entitled to attach significant weight to the matron's report. As the Panel observed, it came from a senior colleague with full knowledge of the Appellant's conditions of practice, and who had worked with the Appellant for a considerable period of time.

47. The Panel was well aware that the Appellant had only recently completed an assertiveness training course. The confirmation email, dated 22 November 2018, was in the hearing bundle and it can be seen from the transcript (at p.10, line 34) that her representative emphasised it by holding it up to the Panel. The Case Presenter pointed out that it was distance learning, rather than face-to-face. However, the Panel also relied upon the determination from the previous NMC panel on 8 March 2018 which stated that the Appellant had been undergoing assertiveness training as at March 2018. It quoted the Appellant's reflective submission as follows:

> "I believe the Assertiveness course that I am currently doing will give me ability to put accurate and appropriate action in place i.e. to alert senior or inform doctor when my patient condition start to deteriorates [sic]. I have a step to go but I am confident that I will overcome this and I will be fit for to [sic] practice [sic]."

In the light of this evidence, the March 2018 panel made a condition of practice order for a further 9 months to give her "sufficient time to ….complete your assertiveness training." So in my view the Panel was entitled to conclude that, despite the assertiveness training which she was undertaking in March 2018, and the additional assertiveness training she had undertaken since then, the issues in her practice remained outstanding.

48. In my judgment, on the evidence taken as a whole, the Panel was entitled to conclude that the Appellant's continuing weaknesses were in "basic and fundamental areas across all aspects of nursing: even when working in what appears to be a supportive environment" and that she had not managed to successfully remediate them over a period of over two years.

49. The Panel did not refer to the Appellant's testimonials in its determination. However, I think it is most unlikely that the Panel overlooked them, as they were in the hearing bundle and they were referred to at the hearing. Although the testimonials from colleagues praised her character and her work, they appeared to be general references, which were not addressed specifically to the FTP Committee. The Case Presenter rightly submitted to the Panel that there was no indication that the authors had knowledge of the Appellant's conditions of practice or were aware of the previous findings about her lack of competence. Therefore, I consider that the Panel was entitled to rely upon the evidence of the matron, rather than these testimonials, when assessing the Appellant's competence.

50. Contrary to the Appellant's submission, I consider that the Panel gave the Appellant due credit for the mitigating factors in her case. The Panel took into account that, because of the conditions imposed, she had experienced difficulty in obtaining employment as a nurse, which meant that she had only been working for two plus years. The Panel gave her credit for her admission that her fitness to practise remained impaired, observing that it demonstrated insight. The Panel also gave her credit for the

efforts she had made to improve her competence, and her completion of training courses, including assertiveness training. I do not agree with Mr Gurney's submission that the Panel's expression of regret at striking her off the register was an acknowledgment that the order was unnecessary. I consider it demonstrated the Panel's recognition of her personal qualities and the efforts she had made, as well as the human sympathy the Panel felt for someone who wanted to succeed as a nurse, but had failed to reach the required standard.

51. I consider it is unarguable that the Panel was misled by the Legal Assessor into thinking that the NMC's Case Presenter, Ms Guest, had submitted that the Panel should make a striking-off order. On reading the transcript, it is clear that Ms Guest submitted, when asked, that a conditions of practice order could be the appropriate sanction on this occasion. On my reading, the Legal Assessor was referring to Ms Guest's other submission, namely, that the conditions of practice orders could not go on indefinitely. It was suggested by Mr Cassells that the authority to which she was referring was *Annon v NMC* [2017] EWHC 1879 (Admin) per McGowan J. at [10]. The Appellant has, rightly, not sought to argue that the Legal Assessor's advice that conditions of practice orders could not go on indefinitely, was wrong in principle.

52. I consider that, even though the Case Presenter was not seeking a striking-off order, the independent Panel was entitled to make a striking-off order, in the exercise of its judgment.

53. In the light of the evidence before it, I consider that the Panel was entitled to reach the conclusions which it did, in the exercise of its judgment, and its determination cannot be characterised as "wrong". Perhaps another panel might have given the Appellant one more chance before deciding to strike her off, but that does not mean that this Panel erred in not doing so.

Conclusion

54. For the reasons set out above, the appeal is dismissed.