Neutral Citation Number: [2020] EWHC 3356 (Admin)

Case No: CO/2424/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2020

Before :

MRS JUSTICE EADY DBE

- -

Between :

MR MICHEE PASCAL DHOORAH	**Appellant**
- and -	
NURSING AND MIDWIFERY COUNCIL	**Respondent**

- -
- -

Mr Lewis MacDonald of counsel (instructed by **the Royal College of Nursing**) for the **Appellant**
Mr Michael Bellis of counsel (instructed by **the Nursing and Midwifery Council**) for the **Respondent**

Hearing dates: 2 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 3pm on

Monday 7 December 2020.

The Honourable Mrs Justice Eady:

Introduction

1. The appellant appeals against a suspension order review ("SOR") decision, made by a panel of the Respondent's Fitness to Practise Committee ("FtPC") at a hearing on 10 June 2020, adding six months to a suspension order imposed on 14 June 2019. For convenience, I refer to the original FtPC panel as "the substantive panel" and to that undertaking the SOR as "the SOR panel".

2. The hearing before me has taken place remotely, by Microsoft Teams, given the need to reduce the transmission of the Covid-19 virus and in light of this being found to be acceptable by the parties and being a means by which the application could be fairly and justly determined. The principle of open justice was secured by details for accessing the hearing having been published in the cause list. There were no issues of connectivity or audibility during the hearing.

Preliminary Application

3. By way of preliminary application, the appellant was required to seek an extension of time for the service of the papers in this matter. The appellant's solicitor had not realised she was required to do this, having wrongly thought the Court would do so; the papers were eventually served on 19 October 2020. The respondent does not oppose this application, but observes that no good explanation has been provided for a significant delay (service should have occurred within 7 days; the delay was around 3 months), which has led to prejudice in terms of preparation time.

4. I agree with the respondent that the explanation provided for this delay is unsatisfactory; ultimately, however, I am bound to hold that justice favours granting the application. Although the extended period of suspension has almost been completed, and the FtPC will undertake a further review in the appellant's case on 8 December 2020, the appellant would still suffer disproportionate prejudice if not permitted to pursue this appeal. The necessary extension of time is therefore allowed.

The Factual Background

5. The appellant is a registered nurse. After a hearing attended by the appellant, on 14 June 2019 the substantive panel found that, on 10 November 2017, while working as a peripatetic Deputy Manager at Erskine Hall Care Home, the appellant had discussed the perineum with a student nurse ("Student Nurse 1"); had then locked himself in a bathroom with Student Nurse 1, unzipped Student Nurse 1's trousers and pulled down his boxer shorts, exposing his genitals, and touched Student Nurse 1 on his inner thighs; the appellant had then instructed Student Nurse 1 not to tell anyone about any of these actions. All but the first of these actions were, and remain, denied by the appellant; all were found proven by the substantive panel, which concluded that the appellant's actions were both inappropriate and sexually motivated and that his instruction to Student Nurse 1 not to tell anyone of these matters constituted a lack of integrity.

6. The substantive panel considered whether the appellant's fitness to practise was impaired, concluding as follows:

"… your actions put Student Nurse 1 at risk of harm albeit you did not put patients at risk of harm.

In looking to the future, the panel considered that whilst you have not made admissions, indeed you maintain your denial, you have demonstrated an understanding of why the conduct found proved was wrong and how this impacted negatively on the reputation of the nursing profession.

Your reflective piece and oral evidence demonstrated to the panel that you have an understanding of the impact that the behaviour found proved will have on others. The panel accepts that you understand the gravity of the allegation, and that you are mindful of how people will regard you in the future. It was the judgement of the panel that this reduces the risk of you repeating your misconduct. Your evidence was that the proceedings have been a salutary lesson and the panel accept that that is the case. The panel took all those points into account, whilst remembering that you maintain your position that the facts found proved did not occur. The panel took into account the case of *Yusuff v General Medical Council* [2018] EWHC 13 and understood that it would be wrong to equate maintenance of innocence with a lack of insight. The panel concludes there is some risk of repetition going forward, but accepts, in light of your developing insight, and your genuine understanding of the seriousness of the charges that have been found proved, that your behaviour is highly unlikely to be repeated. Therefore the panel does not find impairment on public protection grounds.

The panel has found that you have breached fundamental tenets of the profession both by reason of your sexual misconduct and your lack of integrity. In so doing you have clearly brought the profession into disrepute. The panel took into account your acceptance of this, when you said in evidence that "colleagues will look at me in disgust and question why I am allowed to practise as a nurse. And patients wouldn't want me anywhere near them". The panel took into account the case of *Grant* where it was said that:

Where a Fitness to Practice Panel considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence in the medical profession, a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and the profession.

The panel concluded that this was just such a case, by reason of both your sexually motivated conduct and your lack of integrity,

> and it was the decision of the panel that you are clearly impaired on public interest grounds. Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired on public interest grounds but not on grounds of public protection."

7. As for sanction, the substantive panel determined that:

> "… although there had been a clear breach of a fundamental tenet of the profession, there are in your case mitigating circumstances. As such, the panel considered that, in your case, the misconduct was not fundamentally incompatible with remaining on the register. The panel determined that the misconduct occurred on a single shift, albeit there were a number of component parts. The panel noted that Student Nurse 1 told the panel that he had not suffered any lasting harm. The panel has no evidence before it of deep seated personality and attitudinal problems. The panel had regard to the positive reference from your current employer and noted you had practised under direct supervision without further incident. The panel had no evidence before it that you had repeated this misconduct. The panel previously noted that you had developing insight into your misconduct and it was of the view that there was no significant risk that you would repeat the behaviour and therefore found no public protection concerns.
>
> In considering the wider public interest, the panel concluded that an informed observer would accept that a suspension order is the appropriate and proportionate sanction in the circumstances of this case, and that such an order would be sufficient to uphold standards and maintain confidence in the profession.
>
> The panel further considered whether a striking off order would be appropriate and proportionate in your case. Taking account of all the information before it, and in particular the mitigating features of the case, the panel concluded that this would be disproportionate. Whilst the panel acknowledges that a suspension order may have a punitive effect, it would be unduly punitive in your case to impose a striking off order. The panel had concluded that you do not pose a risk to patients. Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction.
>
> The panel noted the hardship such an order will inevitably cause you. However this is outweighed by the public interest in this case.
>
> The panel considered that this order is necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

> The panel determined that a suspension order for a period of 12 months was appropriate in this case to mark the seriousness of the misconduct, which involved both sexual impropriety and a lack of integrity on your part.
>
> At the end of the period of suspension, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order. Any future panel may be assisted by evidence of:
>
> •Training in professional boundaries, in particular with staff.
>
> •Personal reflection on the learning you have undertaken around professional boundaries.
>
> •Testimonials for any paid or unpaid work."

8. At the end of the period of suspension thus imposed, a hearing took place before the SOR panel on 10 June 2020. The appellant did not attend, and was not represented, but sent in the following documentation for the SOR panel to consider: written submissions from his representative from the Royal College of Nursing, two testimonials from colleagues, a reflective piece written by the appellant, reading that he had undertaken since the substantive hearing, and a certificate from an on-line safeguarding course.

9. The SOR panel first considered whether it should proceed in the appellant's absence. Referring to a letter from the appellant's representative, dated 18 May 2020, which confirmed that the appellant had received notice of the hearing and was happy for it to proceed in his absence, and having taken advice from its legal assessor, the SOR panel determined to do so.

10. Having considered the appellant's documentation and submissions, along with the representations made on behalf of the respondent, and having received advice from its legal assessor, the SOR panel concluded that the appellant's fitness to practise remained impaired, reasoning as follows:

> "In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession, and the need to declare and uphold proper standards of conduct and behaviour. It had regard to all of the information before it.
>
> The panel considered whether Mr Dhoorah's fitness to practise is currently impaired. It considered that Mr Dhoorah's misconduct is remediable. However, his reflective piece does not demonstrate insight into the impact of the misconduct found proved by the substantive panel on colleagues, patients, and the wider nursing profession. The panel considered that Mr Dhoorah's reflective piece read like an academic essay, and did not address the concerns raised by the substantive panel. The only part of the reflective piece written in first person concerned the impact of the suspension on him personally.

> The panel had regard to two testimonials provided by Mr Dhoorah's colleagues, attesting to his nursing skills and team working. However, Mr Dhoorah's misconduct was not related to his clinical practice. It concerned an abuse of power and sexual assault on a junior colleague. The panel therefore considered that the testimonials did not address the relevant issues. Further, Mr Dhoorah has not undertaken any training in professional boundaries as was recommended by the substantive panel.
>
> The panel found that Mr Dhoorah's insight was not sufficiently developed such as to reduce or remove the risk to the public or to remove the opprobrium of the wider public interest. It considered that, although the previous panel had found impairment on public interest grounds alone, such is Mr Dhoorah's current lack of insight that there is now a risk that he could repeat the misconduct. The panel considered that Mr Dhoorah therefore poses a risk to the public, insofar as this case relates to sexual misconduct towards a junior professional colleague. In light of this lack of insight or remediation, the panel determined that there is a risk of harm to the public if Mr Dhoorah was permitted to practise as a nurse without restriction, and concluded that his fitness to practise is currently impaired on the ground of public protection.
>
> The panel also had regard to the wider public interest, which includes declaring and upholding proper professional standards and maintaining public confidence in the regulatory process. The panel considered that public confidence in the profession and the regulatory process would be undermined if there were no finding of impairment. In the panel's judgement, such was the serious nature of the misconduct, and such is the lack of progress of Mr Dhoorah's remediation, that an informed member of the public would be offended if they learned that the panel had declared Mr Dhoorah not impaired today. The panel therefore concluded that a finding of current impairment also remained necessary on wider public interest grounds."

11. The SOR panel then considered what, if any, sanction it should impose. Doing so, it had regard to the respondent's Sanctions Guidance ("the SG"), and first considered whether to take no action; it concluded, however, that, in the light of the seriousness of the public protection and public interest concerns it had identified, that would be neither appropriate nor sufficient given the risks involved. Considering each possible sanction on an escalating scale, the SOR panel reasoned as follows:

> "The panel then considered whether to impose a caution order but concluded that, for the same reasons, this too would be inappropriate and insufficient. It would also allow Mr Dhoorah to return to unrestricted practice upon expiry without a further review.

The panel next considered the imposition of a conditions of practice order. As this case is not related to Mr Dhoorah's clinical practice, the panel was not satisfied that conditions of practice could adequately address the concerns identified. In addition, the matters found proved against Mr Dhoorah related to an attitudinal issue that has yet to be fully remediated, and as such, would not be conducive to a conditions of practice sanction. As a result, the panel considered that a conditions of practice order was not workable in this case.

The panel carefully considered a suspension order. It concluded that a suspension order for a period of six months would be the appropriate, proportionate, and sufficient sanction. …

…

The panel noted that Mr Dhoorah had begun to develop insight as a journey to full remediation. However, it also noted his insight appeared to have become static and had not progressed to the level that the panel would have expected. Mr Dhoorah has not attended, and/or has not sent his instructed representative. He has not produced a relevant reflective piece or relevant testimonials, and he has not demonstrated relevant training, all of which was correctly indicated by the last panel as being helpful to this panel.

This was a case involving Mr Dhoorah's attitude to a junior colleague, and where there had been a breach of trust. As indicated above, that has not been fully remediated. The panel has already concluded that Mr Dhoorah continues to have a lack of insight and that he poses a risk to the public and public confidence in the profession (the wider public interest). For these reasons, the panel decided that the only proportionate and appropriate order to impose is that of an extension of the suspension order. The panel considered that a further suspension for a period of six months would be appropriate to protect the public and satisfy the wider public interest, whilst allowing time for Mr Dhoorah to develop full insight and remediation.

The panel gave consideration to a striking off order, but concluded that this would be a disproportionate sanction at this time, given that Mr Dhoorah's misconduct is remediable. The panel was mindful of the principle of proportionality highlighted in the SG and that the least restrictive sanction that provides satisfactory protection to the public and is fair should be applied. Therefore, the panel concluded that a further period of suspension is appropriate and proportionate at this time. However, this panel sought to remind Mr Dhoorah that all sanctions will be available to any future reviewing panel."

12. The next SOR hearing in the appellant's case is now due to take place on Tuesday 8 December 2020.

The Grounds of Appeal

13. By his grounds of appeal, the appellant contends as follows:

(1) The SOR panel wrongly found the appellant presented a risk to the public and had an attitudinal problem, without giving sufficient reason for these findings.

(2) The SOR panel wrongly disregarded the appellant's reflective piece and testimonials.

(3) The SOR panel wrongly relied on the fact that the appellant was not represented.

(4) The SOR panel wrongly disregarded the Covid-19 epidemic as providing some explanation why the appellant had not undertaken specific training.

Ground (4) had originally included a procedural objection that the appellant's explanation for not having undertaken specific training was not before the SOR panel. Accepting that this had in fact been included in the SOR panel bundle, Mr MacDonald did not pursue this point.

14. Should the appeal be upheld, the appellant invites the Court to quash the determination of 10 June 2020, and substitute a decision to revoke the suspension order on expiry, or replace it with a lesser sanction; alternatively, to remit the matter to the Respondent's FtPC, to determine the SOR afresh.

The Regulatory Framework

15. The respondent's regulatory functions in respect of allegations of misconduct are governed by the Nursing and Midwifery Order 2001 ("the Order"). In exercising its functions, the respondent's overarching objective is the protection of the public (article 3(4) of the Order); that, in turn, involves 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; and (3) the promotion and maintenance of proper standards and conduct among members of the professions (article 3(4A)).

16. Where an allegation is referred to the FtPC, it is bound to consider it; if it then finds that the allegation is well-founded, it must proceed to make one of a number of prescribed orders, which include a striking off order, a suspension order, a conditions of practise order and a caution order (article 29(5)(a)-(d)). Unless the FtPC, at the time of making such an order, is satisfied that it will not be necessary to extend or vary the order or to make any other order falling within article 29(5) (see article 29(8A)), the FtPC must then review any suspension order or conditions of practice order imposed at a substantive hearing prior to the order's expiry (article 30(1)). On that review, the panel has the power to confirm or extend the existing order, or to reduce the period for which the order has effect, or to replace it with another order falling within article 29(5), or to vary or revoke it.

Regulatory Reviews

17. The purpose of a review hearing in a regulatory context was considered by the Supreme Court in *Khan v General Pharmaceutical Council* [2017] 1 W.L.R. 169, where Lord Wilson observed that:

> "27. … the focus of a review is upon the current fitness of the registrant to resume practice, judged in the light of what he has, or has not, achieved since the date of the suspension. The review committee will note the particular concerns articulated by the original committee and seek to discern what steps, if any, the registrant has taken to allay them during the period of his suspension. The original committee will have found that his fitness to practise was impaired. The review committee asks: does his fitness to practise remain impaired?"

18. The respondent's SOR Guidance explains how a decision will be reached on a review, as follows:

> "How the panel reaches a decision
>
> At the review, we will ask the panel to consider whether the nurse or midwife's fitness to practise remains impaired in light of any new facts or information about the issue of impairment. The nurse or midwife is also able to put new information before the panel. ….
>
> The panel will then go on to consider what has happened in the nurse or midwife's practice since the last hearing …, and will take into account the following factors:
>
> Has the nurse or midwife complied with any conditions imposed? What evidence has the nurse or midwife provided to demonstrate this? What is the quality of that evidence and where does it come from?
>
> Does the nurse or midwife show insight into their failings or the seriousness of any past misconduct? Has their level of insight improved, or got worse, since the last hearing?
>
> Has the nurse or midwife taken effective steps to maintain their skills and knowledge?
>
> Does the nurse or midwife have a record of safe practice without further incident since the last hearing?
>
> Does compliance with conditions or the completion of required steps demonstrate that the nurse or midwife is now safe to practise unrestricted, or does any risk to patient safety still remain?

> If the panel decides that the nurse or midwife's fitness to practise is no longer impaired and no further restrictions on their practice are needed, they can allow the existing order to expire and the case will conclude.
>
> However, if the panel decides that some restriction on the nurse or midwife's practice remains necessary, because their fitness to practise is still currently impaired, they will decide what sanction, if any, to impose."

19. The SOR panel will thus first consider whether a registrant's fitness to practise remains impaired. As is common ground before me, it will consider the case afresh in the light of any new evidence and come to its own independent view as to the registrant's fitness to practise; the question of impairment will be a matter for the panel's professional judgement, it is not a matter that must be proved. If the panel concludes that the registrant's fitness to practise remains impaired, it will then go on to consider what, if any, sanction is appropriate.

20. As the appellant observes, however, the imposition of a further sanction at the review stage cannot be due to the panel's view that the original decision was too lenient; as Lord Bridge stated (at p 545D) in *Taylor v General Medical Council* [1990] 2 AC 539:

> "It can never be a proper ground for the exercise of the power to extend the period of suspension that the period originally directed was insufficient to reflect the gravity of the original offence or offences. ..."

21. Guidance on how to consider the question of impairment on review was set out in *Abraheam v General Medical Council* [2008] EWHC 183 (Admin), in which Blake J stated:

> "23. … the statutory context for the Rule relating to reviews must mean that the review has to consider whether all the concerns raised in the original finding of impairment through misconduct have been sufficiently addressed to the Panel's satisfaction. In practical terms there is a persuasive burden on the practitioner at a review to demonstrate that he or she has fully acknowledged why past professional performance was deficient and through insight, application, education, supervision or other achievement sufficiently addressed the past impairments."

22. In *Yusuff v General Medical Council* [2018] EWHC 13 (Admin), Yip J addressed the particular difficulty that can arise where (as here) a registrant maintains their innocence:

> "18. It would be wrong to equate maintenance of innocence with a lack of insight. However, continued denial of the misconduct found proved will be relevant to the Tribunal's considerations on review… refusal to accept the misconduct and failure to tell the truth during the hearing will be very relevant to the initial sanction. At the review stage, things will have moved on. The registrant may be able to demonstrate insight without accepting

> that the findings at the original hearing were true. The Sanctions Guidance makes it clear that at a review hearing the Tribunal is to consider whether the doctor has fully appreciated the gravity of the offence and must be satisfied that patients will not be put at risk if he resumes practice. A want of candour and continued dishonesty may be taken into account by the Tribunal in reaching its conclusions on impairment…"

The Court's Approach on Appeal

23. The Court's powers on appeal are defined by articles 30 and 38 of the Order; the Court may dismiss or allow the appeal, substitute any decision that the FtPC might have made or remit the case to the FtPC.

24. By CPR 52.21(3) it is provided that the Court will allow the appeal where it finds that the decision of the FtPC is "*wrong*" or is "*unjust because of a serious procedural or other irregularity in the proceedings*".

25. Appeals to the Court are by way of re-hearing; the approach the Court is to adopt has been considered in a number of cases. In *Cheatle v GMC* [2009] EWHC 645 (Admin), it was stated:

> "15. … in considering whether the decision of a Fitness to Practise Panel is wrong the focus must be calibrated to the matters under consideration. … As to findings of fact, … [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. However, the degree of deference will depend on the circumstances. …."

26. In *GMC v Jagjivan* [2017] 1 WLR 4438, at paragraph 40, the Divisional Court explained the Court's approach, as follows:

> " (i) … A court will allow an appeal under CPR Pt 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 Pt 52 that decisions are "clearly wrong"….
>
> (iii) The court will correct material errors of fact and of law…. 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….
>
> (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 Pt 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….
>
> (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 …" … As Lord Millett observed in *Ghosh v General Medical Council* [2001] 1 WLR 1915, para 34, the appellate court "will accord an appropriate measure of respect to the judgment of 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…."

27. In addressing the requirement to give reasons in this context, in *Phipps v General Medical Council* [2006] EWCA Civ 397, Wall LJ cited the following passage from *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119:

> "...a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties, and if need be, the Court of Appeal the basis on which he has acted."

The Parties' Submissions

Ground (1)

28. The focus of the appellant's case is on this ground. He submits that, while the SOR panel was required to reach its own view on impairment, it was not entitled to go behind the findings of the substantive panel (see *Khan*); by so doing, the SOR panel had erred or, at least, had failed to adequately explain its decision. The appellant argues that, in June 2019, the substantive panel had found there was no significant public risk and no attitudinal problem; to find such a risk and attitudinal problem existed in June 2020, the SOR panel thus had to explain what factors had subsequently given rise to, or increased, that risk. It is the appellant's case that to find that his insight "*appeared to have become static and had not progressed*..." was insufficient to permit a conclusion that went behind the finding of the substantive panel; either the SOR panel had erred in its approach (imposing a harsher sanction without any change in circumstance (contrary to the guidance in *Taylor*)) or it had failed to provide adequate reasons.

29. The respondent says this submission is founded on a superficial reading of the substantive panel's nuanced decision on risk of repetition. Relevantly, the substantive panel had *not* directed that no review of the suspension order was required (as allowed by article 29(8A) of the Order), and had expressly advised that the SOR panel would be assisted by evidence of training in professional boundaries. The appellant's submissions on review recognised that risk of repetition had to be addressed; he bore a persuasive burden in this regard (per *Abraheam*). The SOR panel then had to form its own view on current impairment, unfettered by any earlier finding. Doing so, it had reached a conclusion open to it as a matter of professional judgement, which was adequately explained.

Ground (2)

30. Under this ground, the appellant complains that the SOR panel wrongly dismissed his reflective essay and his testimonials as irrelevant. Accepting the SOR panel was entitled to criticise the reflective essay (albeit some of the criticisms were too harsh), it was apparent that the appellant had attempted to do that which he had been advised by the substantive panel and it could not be said that his reflections were not relevant. Similarly, the two testimonials spoke to the appellant's appropriate behaviour with other staff, his response to feedback and his safety to practise; the referees (the manager from the appellant's former place of work, and a practice nurse who had previously worked alongside him) referred to the appellant's work in a relevant healthcare setting during the period of suspension. The SOR panel could not dismiss this evidence as irrelevant to its considerations.

31. For the respondent it is contended that the SOR panel's view as to the weight to be attached to this evidence could not be said to be wrong. It had been entitled to find that the appellant's reflective essay did not demonstrate adequate insight and to conclude that the testimonials did not assist in addressing the concerns that arose in this case.

Ground (3)

32. Although accepting that the appellant bore the burden of demonstrating he had remediated his misconduct, under this ground it is objected that, when considering the

question of sanction, the SOR panel had wrongly taken into account that the appellant had not been represented before it. The SOR panel had been entitled to have regard to the appellant's non-attendance but it could not be right to hold against him the fact that he had not been represented at the hearing.

33. The respondent observes that the SOR panel had referred to case-law addressing the difficulty in assessing remediation in the absence of the registrant (*Kimmence v GMC* [2016] EWHC 1808 (Admin); *PSA v HCPC and anor* [2017] EWCA Civ 319); it was plainly with that in mind, that it had permissibly referred to the appellant's decision not to attend the hearing or send his representative.

Ground (4)

34. The appellant further objects that the SOR panel had not appeared to have considered the impact of the Covid-19 epidemic on his ability to undertake specific training. Although that did not cover the entirety of the suspension period, it was not something he could have foreseen and it had meant that he had much less time to find specialist training before the review hearing.

35. The respondent observes, however, that the burden was on the appellant and he had singularly failed to explain what steps he had taken to find relevant training before any restrictions had been put in place, or what investigations he had made in relation to on-line training thereafter.

Discussion and Conclusions

36. The task for the SOR panel was to assess the question of current impairment: it was required to form its own independent professional judgement as to the appellant's fitness to practise as at the date of the SOR, taking account of the decision reached by the substantive panel and the concerns it had identified, together with the information before it (*Khan*). It was not for the SOR panel to seek to impose a more draconian sanction because it felt the original decision was too lenient (*Taylor*). It was, however, entitled to place a persuasive burden on the appellant to demonstrate that he had insight into his failings and the seriousness of his past misconduct (*Abraheam*). The appellant's continued maintenance of his innocence did not mean he could not show insight and an appreciation of the seriousness of the misconduct found against him (*Yusuff*) and it would not necessarily be fatal to his case that he had not attended the SOR hearing, albeit that would inevitably mean that the SOR panel would have to reach its decision on the basis of the other information available (*PSA v HCPC*).

37. Looking at the decision reached by the substantive panel, I think it is right to say it was nuanced. In terms of future risk, it expressed itself carefully: "*there is some risk of repetition going forward, but …, in the light of your developing insight, and your genuine understanding of the seriousness of the charges that have been found proved, … your behaviour is highly unlikely to be repeated*." It was on that basis that the substantive panel did not find impairment on public protection grounds. Even then, the substantive panel was clear in its finding that the appellant had "*breached fundamental tenets of the profession both by reason of your sexual misconduct and your lack of integrity. In so doing you have clearly brought the profession into disrepute*." It was this that led to its conclusion that the appellant's fitness to practise was impaired on public interest grounds.

38. As for sanction, the substantive panel recorded that it had "*no evidence before it of deep seated personality and attitudinal problems*" and, on the basis it had accepted that the appellant had *"developing insight*" into his misconduct, it again took the view that there was no significant risk of repetition. The substantive panel did not, however, consider this was a case where there was no need of review, and it expressly observed that a future panel might be assisted by evidence of *"[t]raining in professional boundaries, in particular with staff*", *"[p]ersonal reflection on the learning you have undertaken around professional boundaries*", and *"[t]estimonials for any paid or unpaid work"*.

39. When it came to the SOR hearing, the appellant did not take the opportunity to attend, to demonstrate any further development of insight in person. That was not necessarily fatal to his case, but it did limit the material before the SOR panel. By ground (3), the appellant criticises the SOR panel for also referring to the fact that he did not send his instructed representative to the hearing, but I do not read that observation as anything more than a reflection by the panel as to the limitations of the material before it: no adverse inference was drawn from the fact that the appellant was not represented, it was simply part of the factual summation of what was not before the SOR panel.

40. The appellant also objects (ground (2)), to the SOR panel's statement that he had "*not produced a relevant reflective piece or relevant testimonials*" and (ground (4)) had "*not demonstrated relevant training*". Those findings have, however, to be seen in the context of the concerns identified by the substantive panel.

41. The appellant had provided the SOR panel with a document entitled "*Professional Boundaries: A Nurse's Reflective Report through Experiential Learning*". I have read this document and cannot disagree with the SOR panel's description of this as "*like an academic essay*". The problem with this evidence was not one of form but of substance: the SOR panel was required to assess whether the appellant had demonstrated insight into his failings and the seriousness of his past misconduct; it was entitled to find that could not be done by means of a highly theoretical work focusing on nurse-patient relationships rather than the specific misconduct found in this case. It is right to note that the appellant's essay does refer to professional sexual misconduct, to provisions within the respondent's Code that relate to the support to be provided to student nurses, and to the fact that "*boundary violations can also occur in professional colleague relationships*", there is no apparent reflection on how these matters might relate to the misconduct found in this case. Indeed, the appellant's essay goes on to speak of the difficulties in defending allegations of sexual misconduct and then provides the rather opaque statement (the appellant describing himself in the third person as "RN1"):

> "In conclusion, RN1 would have no need or requirement to take SN1 to a secluded area to perform a sensitive procedure that was irrelevant to a care of the elderly setting. Although RN1 is qualified to mentor and educate students, RN1 needed to assess SN1's knowledge in a structured manner rather than presenting with information in bulk."

42. Had the appellant attended the hearing in person, he may have been able to speak to this essay to better explain how he considered it demonstrated the requisite remediation, but, given the concerns identified by the substantive panel and without any further assistance from the appellant, I cannot say that it was wrong for the SOR panel to find that this was not a relevant reflective piece.

43. Similarly, the testimonials provided by the appellant failed to engage with the substance of the misconduct that had been found. Although the referees each state that they are "*fully aware*" of the appellant's suspension, other than fairly generalised references to team working, neither testimonial addresses the question of professional boundaries (let alone in the context of potential sexual misconduct) or the issue of integrity. Again, given the concerns identified by the substantive panel, I cannot say the SOR panel was wrong to state these were not "*relevant testimonials*".

44. As for the SOR panel's conclusion in respect of training, other than a certificate confirming that the appellant had undertaken an on-line training course in "*Safeguarding Adults*" on 29 May 2020, there was no evidence that the appellant had sought to address this recommendation by the substantive panel. Even before the restrictions imposed as a result of the on-going pandemic, the appellant had some eight months to seek out and undergo training in professional boundaries (particularly in terms of staff relationships); he had apparently not done so. As for the on-line training he had undertaken, there was no explanation as to why this was relevant to the concerns that had been identified or why the appellant had not undertaken on-line training that might have been more obviously relevant to those concerns. I do not infer that the SOR panel lost sight of the fact that there is an on-going pandemic. It was entitled to place a persuasive burden on the appellant to show that he had actively sought out training that could demonstrate remediation efforts on his part; it was equally entitled to find that he had not done so.

45. Having addressed the more detailed objections raised by the appellant, I turn then to the question whether the SOR panel erred by concluding that "*such is Mr Dhoorah's current lack of insight … there is now a risk that he could repeat the misconduct*", such that this now gave rise to a risk to the public, and that (when considering sanction) "*the matters found proved against Mr Dhoorah related to an attitudinal issue that has yet to be fully remediated*". The appellant accepts that, at a review stage, there might be new evidence that would demonstrate an elevation of risk; in argument, Mr MacDonald allowed that this might be the case where a registrant's level of insight was shown to have lessened. Here, however, the appellant points to the SOR panel's observation (when considering sanction) that "*his insight appeared to have become static*"; that was not, he submits, a finding that the position had worsened and it could not warrant the imposition of a more draconian sanction.

46. I remind myself of the task the SOR panel had to undertake; it was required to form an independent professional judgement as to the appellant's fitness to practise as at the date of the SOR. It plainly had careful regard to the reasoning of the substantive panel and looked at the material before it to see whether the concerns identified had been addressed. Doing so, it concluded that, far from addressing those concerns, one year on from the initial penalty, the appellant's lack of insight was such that there was a risk that he could repeat the misconduct. The subsequent reference to the appellant's insight having "*become static*" needs to be seen in context. Whereas the substantive panel had been prepared to take comfort from what it found to be the appellant's "*developing insight*", notwithstanding the 1-year suspension he had faced, the SOR panel could only conclude that there had been no further development. Given the misconduct found – effectively a sexual assault against a more junior colleague – the SOR panel was entitled to then reassess the risk posed to the public (that is, of "*sexual misconduct towards a junior professional colleague*"). The substantive panel had allowed that there was

"*some risk of repetition*" but had concluded that the appellant's behaviour was "*unlikely to be repeated*". On the material before it, the SOR panel was entitled to find that it could not be reassured as to the possibility of repetition.

47. As for the reference to the appellant's behaviour reflecting "an attitudinal issue", I am not persuaded this conflicted with any earlier finding by the substantive panel. The original consideration of sanction had stated that there had been no evidence before the substantive panel of "*deep seated personality and attitudinal problems*"; the SOR panel felt that the matters found proven against him related to an "*attitudinal issue that has yet to be fully remediated*". Both considered that the underlying issue that had led to the misconduct was capable of remediation, neither found that the problem was so deep-seated as to warrant a sanction more severe than a suspension.

48. As for whether the SOR panel's conclusion was adequately explained, I am satisfied that it was. Although the arguments before me have descended into some close textural analysis of the reasoning, I bear in mind that the decision should be read holistically. Adopting that approach, it is clear that the SOR panel kept in mind both the original decision in this case and the task it was required to undertake. Without a great deal of assistance from the appellant, it undertook a careful review of the evidence and reached an entirely permissible professional judgement as to the appellant's fitness to practise as at June 2020. Standing back, and considering the reasoning as a whole, I am satisfied that the decision reached by the SOR panel was one that was open to it, given both the concerns identified by the substantive panel and the material available at the SOR hearing.

49. For all the reasons given, I therefore dismiss this appeal.