Neutral Citation Number: [2023] EWHC 1406 (Admin)

Case No: CO/3976/2022

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

Priory Court, 33 Bull Street,
Birmingham, B4 6DS

Date: Wednesday, 17th May 2023
Start Time: 11:45 Finish Time: 12:16

Before:

MR JUSTICE EYRE

- -

Between:

NENEH FOFANAH

Appellant

- and -

NURSING AND MIDWIFERY COUNCIL

Respondent

- -
- -

The Appellant appeared in **Person**

Adam Slack (instructed by **Genevieve Quaynor, Paralegal)** for the **Respondent**

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR JUSTICE EYRE:

1. The Appellant, Neneh Fofanah, was, until the decision under appeal, a registered mental health nurse. On 26th September 2022 she was struck off by the Fitness to Practise Panel of the Nursing and Midwifery Council. The hearing is before me of Miss Fofanah's appeal pursuant to section 29 of the Nursing and Midwifery Council Order 2001.

The Background.

2. On 16th April 2022 the Appellant was convicted at Nottingham Crown Court on six counts of fraud, spanning a period from July 2014 until October 2015. The fraud took the form of dishonestly making false representations for gain. Five of the six representations were as to fitness for work, or rather that Miss Fofanah was unfit for work. The final representation, although not the last in time, was as to being on compassionate leave.

3. The prosecution case in those proceedings was that while employed by the Cheshire and Wirral Hospital Trust Miss Fofanah told that trust that she was unfit for work through illness or sickness and received sick pay, or in the case of the compassionate leave special leave pay, but that at the same time was working and receiving payment for such work as a bank nurse in Derby. Miss Fofanah was sentenced to nine months' imprisonment, suspended for 18 months; together with an unpaid work requirement of 150 hours; and a rehabilitation activity requirement of 15 days.

4. Miss Fofanah contends that the conviction was a miscarriage of justice and that she was not guilty of fraud. In essence, her position is that she was not dishonest; that she acted with the knowledge of her employer; and that false allegations are made against her. By way of background her contention was that she was genuinely unfit for the Cheshire and Wirral work but that the work for Derby was of a different nature and/or therapeutic.

5. The Appellant's attempts to appeal the criminal decision have failed albeit the matter is now still under consideration by the Criminal Cases Review Commission.

The Approach of the Panel.

6. The approach of the Fitness to Practise Panel was that the conviction was conclusive. Taking that approach, they applied rules 31(2) and (3) of the Fitness to Practise Rules. Those provide as follows:

> "(2) Where a registrant has been convicted of a criminal offence −
>
> (a) a copy of the certificate of conviction, certified by a competent officer of a Court in the United Kingdom ... shall be conclusive proof of the conviction; and
>
> (b) the findings of fact upon which the conviction is based shall be admissible as proof of those facts.

> (3) The only evidence which may be adduced by the registrant in rebuttal of a conviction certified ... in accordance with paragraph (2)(a) is evidence for the purpose of proving that she is not the person referred to in the certificate."

(I omit irrelevant words relating to Scottish convictions.)

7. The reference to the findings of fact on which a conviction is based is a slightly odd turn of phrase when dealing with a Crown Court conviction after a jury trial. However, I am satisfied that Mr Slack is right and that, read in context, the findings of fact on which a conviction is based where there has been a conviction after trial by a jury must be the matters of which the jury needed to be satisfied so as to be sure in order to reach a guilty verdict. In this case that means the findings necessarily made by the jury that they were satisfied so as to be sure that the representations which Miss Fofanah was alleged to have made were made; that they were false; and that they were made dishonestly with the requisite intent.

8. I am not going to recite the entirety of the reasons given by the panel for their decision. The key elements are as follows.

9. First, that the panel considered whether the Appellant's fitness to practise was impaired. It heard and summarised submissions from both sides, and then concluded that Miss Fofanah's fitness to practise was impaired by reference to the judgment of Cox J in the case of *Council for Healthcare Regulatory Excellence v NMC and Grant* [2011] EWHC 927 (Admin). At [76] Cox J said that the test was:

> "Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her [or their] fitness to practise is impaired in the sense that s/he [or they]: ...
>
> (b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or
>
> (c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or
>
> (d) has in the past acted dishonestly and/or is liable to act dishonestly in the future."

10. The panel said that it found limbs (b), (c) and (d) to be engaged and that it found that the Appellant had in the past, and was liable in the future, to bring the reputation of the nursing profession into disrepute; that the same could be said for breaching fundamental tenets of the profession; that the conviction was serious; and that the Appellant had been convicted multiple times of fraud, which is dishonest behaviour.

11. In assessing the Appellant's level of reflection the panel considered that the Appellant had demonstrated no insight into the conviction and that she was under the impression that she had done nothing wrong. It considered remediation. In doing so it rejected the contention that referring other nurses to the council was remediation, It said that in

principle the Appellant's behaviour was capable of remediation but that this would need the requisite level of insight. It concluded that in the circumstances there was a real risk of repetition.

12. The panel did not consider that there were any public protection issues involved but it did have regard to the overarching objectives of the Nursing and Midwifery Council including promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for the members of those professions. It was in the light of those matters that the panel concluded that the Appellant's fitness to practise was impaired.

13. The panel then considered the appropriate sanction. It summarised the submissions on that and noted that the sanction imposed must be appropriate and proportionate. A number of aggravating factors were listed namely: the seriousness of the conviction; the abuse of trust resulting in financial loss to the Health Service; the conviction for multiple offences; the impact on the reputation of the nursing profession; the presence of some evidence of deep-seated attitudinal issues; and the absence of evidence of insight or remorse. The decision also said that the panel did not identify any mitigating factors in the particular circumstances.

14. The panel then considered the steps which should be taken rejecting as inadequate the courses of taking no action; making a caution order; or imposing conditions of practice. It considered whether suspension would be appropriate and said that it did not regard the Appellant's convictions as trivial because the criminal activity was serious and had been persisted in for a prolonged period of time and because the Appellant had engaged in the repeated pattern of behaviour which amounted to abusing her position of trust as a registered nurse. They then said this:

> "The panel was of the view a suspension order may have been appropriate, had [the Appellant] demonstrated a significant degree of insight, remorse and remediation."

It then added that before the panel the Appellant had blamed staff at the trust for her conviction, and, instead of taking responsibility for her own actions, had reiterated that she had absolutely nothing to apologise for.

15. The panel then said that not merely was the conviction a serious departure from the standards expected of a registered nurse and a serious breach of the fundamental tenets of the profession but that it was also incompatible with her remaining on the register. It said that, in its judgement, to allow someone who had behaved in that way, without demonstrating insight and remediation, to remain on the register would undermine public confidence in the nursing profession as a whole and in the NMC as a regulatory body. It was in the light of those matters that the panel concluded that the only appropriate and proportionate sanction was that of striking off.

The Approach to be taken on Appeal.

16. An appeal is to be allowed pursuant to CPR Part 52.21 if the decision under appeal was wrong, or if it was flawed as being unjust because of a serious procedural irregularity. The contention here is that the decision was wrong. The effect of the authorities is that I need to have regard to the particular expertise of the panel and the

breadth of its discretion but that I also need to exercise my own judgment. If the panel decision was wrong then the appeal must be allowed.

17. I draw that summary of the effect of the authorities from the following, all of which I have considered but which I will not quote *in extenso.* The passage at [17] of *R(on the application of Low) v. General Osteopathic Council* [2007] EWHC 2839 (Admin), where Sullivan J adopted the test and approach set out by Collins J in *R(on the application of Bevan) v. General Medical Council* [2005] EWHC 174 (Admin). The case of *Amao v. Nursing and Midwifery Council* [2014] EWHC 147 (Admin), where, at [13] – [15], Walker J set out the appropriate approach, drawing on decisions of Laws and Bingham LJJ. *Nazari v. SRA* [2002] EWHC 1574 (Admin) at [28] where Lang J referred to and adopted passages from the judgment of Morris J in *Ali v. SRA*.

The Application of that Approach to the Appellant's Case.

18. There are two matters with which I must deal at the outset namely: the evidence of the facts underlying the criminal conviction and the irrelevance of the criminal sanction.

19. The Appellant remains convinced that she was wrongly convicted. She remains convinced that there was a miscarriage of justice. She is of the view that the panel ought, in the light of the facts that she is a registered nurse and that the purpose of the panel and the rules is in part to protect the position of such nurses, to have investigated the facts underlying the conviction and that it should not have taken the conviction at face value.

20. That approach was not open to the panel. The panel, by reason of rules 31(2) and (3) which I have quoted above, was compelled to regard the conviction as conclusive as to its facts and also to regard the jury's findings of fact as proof of the facts underlying that conviction. Not only is that approach in accordance with the rules, but it is clearly right as a matter of principle. I have regard in that respect to the approach summarised in *Nazari* at [50], that:

> "There are sound public policy reasons why criminal convictions are held to constitute conclusive proof of guilt in subsequent proceedings ... [and] a departure from that approach is only justified where there is new evidence that entirely changes the nature of the case. The exceptional circumstances that might persuade a Tribunal to look behind the facts of a conviction must be more than just a submission that the Appellant was wrongfully convicted."

It follows that the panel simply could not do anything other than proceed on the footing that the Appellant had engaged in the making of dishonest representations in the circumstances set out in the indictment.

21. In *Low*, Sullivan J quoted from the judgment of Sir Thomas Bingham MR in *Bolton v. The Law Society* making the point that the purpose of criminal proceedings and regulatory proceedings are different. A regulatory order is not punitive in intention. Instead its purpose is, first, to ensure there is no repetition, but also, and more fundamental, to maintain the reputation of the relevant profession. Considerations

accordingly which might weigh in mitigation of punishment in the criminal courts would have less relevance to the operation of the striking-off jurisdiction.

22. The Appellant advanced eight grounds of appeal. Mr Slack for the Respondent in his skeleton argument says that they are properly to be seen as relating to different stages in the process undertaken by the panel and I agree, although they are to be considered not only individually and in relation to those stages in the process but also cumulatively. Some of the grounds relate to more than one aspect of the panel's approach.

23. Grounds 3 and 5 relate to the panel's approach to the facts. Thus

> "3 The conviction is undergoing a review with CCRC and until then I should be allowed to return to work. The Committee had wrongly decided knowing full well that the case [is] pending a review with the CCRC and an appeal to the Supreme Court".
>
> "5 I have had a 23 year fruitful and enjoyable career until 2016 when allegations of false misrepresentation and representation was made against me by a set of nurses working within a particular trust which incorporated with so much lies aiming to end my career. This journey has brought to light so much corruption and cohesive structure that existed within the CPS/justice system and [I] am pursuing justice no matter how long it takes."

24. Grounds 2 and 6 relate to the impairment findings, albeit also to sanction.

> "2. Claiming a risk of repeating is not a known fact and that an alleged risk is not a fact proof on this type of case where I was allowed to work despite being convicted and sentenced. In any case the alleged issues are work related/employment matters not done within the exaggerated context of being criminalised."
>
> "6. The Committee had placed emphasis on the fact that I need to show remorse and insight even though [I] am telling the truth and am standing by the truth."

25. Then Grounds 1, 4 and 7 relate to sanction.

> "1.The appeal court to set aside/overturn the order as the panel's decision is flawed as they have failed to consider all mitigation at the sanction stage."
>
> "4. The sentencing report that was relied upon by sentencing judge clearly advocate[s] to get me back to working and build trust around colleagues so therefore the committee decisions are not in accordance with the court's rehabilitation that was undertaken."
>
> "7. "The sanction imposed was disproportionate in all circumstances. This is victimization and bullying from an organisation who claimed to value honesty and integrity within its profession."

26. Then the process as a whole is criticised at Ground 8, which said:

> "The Committee took sides with the NMC and made it obvious that the fact I refer the liars for their professional misconduct and lies against me was a punishment and [a racially] motivated attack towards me."

27. I will address the grounds in that order albeit I repeat that I have looked at them as a whole and looked at the matter in the round.

28. Ground 1 – the failure to consider mitigation. The decision is in stark terms in saying that the panel did not identify any mitigating factors in the particular circumstances of the case. At one reading, it looked as if the panel were simply saying that there was nothing by way of the Appellant's background which was relevant. However, it is apparent that the panel was aware of the Appellant's background, and, in context, what was being said there was that there was no mitigation in respect of the particular circumstances of the particular offences. That must be right. The panel was compelled to proceed on the footing there had been repeated instances of deliberate dishonesty, and in those circumstances there could be nothing of mitigation in respect of the particular offences themselves.

29. Then, still on the facts, Ground 5 talks of the fruitful and long-standing career the Appellant had and repeats the assertion that the allegations against her were false and maliciously made. That amounts to an attempt to go behind the fact of the conviction and, as I have already said, the Appellant is not entitled to do that.

30. In terms of Ground 3, where the Appellant refers to the CCRC review, the fact of the matter is that unless and until the conviction is overturned the panel must proceed on the basis of the conviction.

31. In terms of impairment, Ground 2 makes reference to the fact that the Appellant had at one stage, after the coming to light of the alleged offences, been allowed to continue working and indeed had been able to continue working after conviction. The panel was, however, in my assessment, justified in concluding that in light of the Appellant's minimising of the importance of these matters there was a risk of repetition. It is apparent that the Appellant believes she was entitled to act as she did and that she had done nothing wrong. In those circumstances, there was clearly a risk of repetition, or at least the position is such that the panel was entitled to come to that conclusion.

32. Similarly, in terms of Ground 6, the Appellant is right that, being convinced as she is that she was wrongly convicted and has done nothing wrong, she cannot profess remorse or show insight. There was a degree of double-thinking on the part of the Respondent in saying that what should have been undertaken was an exercise in looking at the effect in abstract of nurses who are dishonest. That is an artificial exercise and the Appellant is not to be criticised for not having engaged in that. Nonetheless the panel was entitled to take the view that the absence of insight was indicative of impairment and a risk of repetition in the respects I noted above. If the Appellant believes, as she does, that she did nothing wrong then there must be a risk of repetition and an impairment of her fitness to practise.

33. I turn to sanction. Ground 1 refers to the failure to consider mitigation; Ground 4 refers to the perceived inconsistency between the approach of the panel and the apparent recommendation of the pre-sentence report and the approach of the sentencing judge; and Ground 7 says the sanction imposed was disproportionate. There is no substance in any of those grounds.

34. For the reasons I set out above there was no mitigation in the actual circumstances of the offence. The purpose of the panel's approach was different from the purpose of the Crown Court judge and the fact that the author of the pre-sentence report took the view that it would assist in the Appellant's rehabilitation to be back at work cannot be

relevant for current purposes. I am simply unable to take the view that the sanction imposed was disproportionate. That is because I come back to the fact that the panel approached the matter, rightly, on the footing that over a period of something more than a year there had been repeated instances of deliberate dishonesty. The sanction of striking-off for such conduct cannot be seen as disproportionate.

35. Finally, it is said that, in effect, there was a false and concocted campaign against the Appellant which was racially motivated. Again, that simply cannot hold up in the circumstances where a jury convicted the Appellant of six counts of fraud after a contested trial. The Appellant cannot say that the panel should have gone behind the conviction nor that the sanction was inappropriate in the light of the conviction.

36. The effect of all that is that the panel was entitled, and indeed bound, to proceed on the footing of the dishonesty as shown by the conviction. In those circumstances it was entitled to come to the conclusion that there was impairment of the Appellant's fitness to practise. I go as far as to say any other conclusion would have been bordering on the perverse. In those circumstances it was certainly not disproportionate for the sanction of striking off to be imposed. Again, it would have been puzzling and surprising if any other sanction had been imposed in the context where the Appellant was maintaining the stance that she had done nothing wrong.

37. It follows that the appeal is dismissed.

(This Judgment has been approved by Mr Justice Eyre.)