

**Nursing and Midwifery Council**  
**Fitness to Practise Committee**  
**Substantive Hearing**  
**2 August 2019**

Nursing and Midwifery Council, 114-116 George Street, Edinburgh, EH2 4LH

<b>Name of registrant:</b>	Elaine Marie Fox
<b>NMC PIN:</b>	88H0398S
<b>Part(s) of the register:</b>	Registered Nurse – Sub Part 1 Mental Health - January 1992
<b>Area of Registered Address:</b>	Scotland
<b>Type of Case:</b>	Conviction
<b>Panel Members:</b>	Noreen Kent (Chair, Registrant member) Pamela Campbell (Registrant member) Geoffrey Baines (Lay member)
<b>Legal Assessor:</b>	John Moir
<b>Panel Secretary:</b>	Elaine Stewart
<b>Ms Fox:</b>	Neither present nor represented in absence
<b>Nursing and Midwifery Council:</b>	Represented by Yusuf Segovia, Case Presenter
<b>Facts proved:</b>	All
<b>Fitness to practise:</b>	Impaired
<b>Sanction:</b>	Striking Off Order
<b>Interim Order:</b>	Interim Suspension Order – 18 months

**Details of charge:**

That you, a registered nurse:

1. On 23 October 2018 at Dundee Sheriff Court, were convicted of embezzlement.

And, in light of the above, your fitness to practise is impaired by reason of your conviction.

## **Decision on Service of Notice of Hearing**

The panel was informed at the start of this hearing that Ms Fox was not in attendance and that written notice of this hearing had been sent to Ms Fox's registered address by recorded delivery and by first class post on 1 July 2019. Notice of this hearing was delivered to Ms Fox's registered address on 2 July 2019.

The panel took into account that the notice letter provided details of the allegation, the time, dates and venue of the hearing and, amongst other things, information about Ms Fox's right to attend, be represented and call evidence, as well as the panel's power to proceed in her absence.

Mr Segovia submitted the NMC had complied with the requirements of Rules 11 and 34 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004, as amended ("the Rules").

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Ms Fox has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34. It noted that the rules do not require delivery and that it is the responsibility of any registrant to maintain an effective and up-to-date registered address.

## **Decision on proceeding in the absence of the Registrant**

The panel next considered whether it should proceed in the absence of Ms Fox.

The panel had regard to Rule 21 (2) which states:

- (2) Where the registrant fails to attend and is not represented at the hearing, the Committee—

- (a) shall require the presenter to adduce evidence that all reasonable efforts have been made, in accordance with these Rules, to serve the notice of hearing on the registrant;
- (b) may, where the Committee is satisfied that the notice of hearing has been duly served, direct that the allegation should be heard and determined notwithstanding the absence of the registrant; or
- (c) may adjourn the hearing and issue directions.

Mr Segovia invited the panel to continue in the absence of Ms Fox on the basis that she has indicated in email correspondence received on 28 and 30 July 2019 that she would not be attending the hearing and was content for it to proceed in her absence.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised “with the utmost care and caution” as referred to in the case of *R. v Jones (Anthony William)*, (No.2) [2002] UKHL 5.

The panel noted the correspondence from Ms Fox on 28 July 2019 in which she stated: “I would like to withdraw from attending and hope the Committee can make their decision in my absence.” The panel noted that a further email was received from Ms Fox on 29 July 2019 in which she said: “I am formally stating that I will not be able to attend and am happy for the hearing to be held in my absence.”

The panel has decided to proceed in the absence of Ms Fox. In reaching this decision, the panel has considered the submissions of the case presenter, and the advice of the legal assessor. It has had regard to the overall interests of justice and fairness to all parties. It noted that no application for an adjournment has been made by Ms Fox and

she has confirmed in two recent emails that she will not attend the hearing and is content for the hearing to proceed in her absence.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Ms Fox. The panel will draw no adverse inference from Ms Fox's absence in its decision making.

## **Background**

Ms Fox notified the NMC on 10 April 2018 that she had been arrested on 4 March 2018 regarding allegations associated with her employment as the project manager for ENeRGI, a charity providing support to people with mental health and/or substance misuse issues. Ms Fox was charged with embezzlement on 12 March 2018 and appeared in court on 27 March 2018 and was initially charged with offences relating to the embezzlement of around £48000 from ENeRGI.

Ms Fox resigned from her post on 24 August 2017 and commenced employment with Meallmore Ltd in October 2017. She was employed as the Deputy Manager at Hilton Court, Mental Health Rehabilitation Unit. Ms Fox notified Meallmore of the criminal proceedings on 2 April 2018 and was subsequently dismissed.

Ms Fox appeared at Dundee Sheriff Court on 23 October 2018 and, after pleading guilty, was convicted of embezzlement. She was sentenced on 21 November 2018 to a four month Restriction of Liberty Order, and community payback orders requiring her to complete 160 hours of unpaid work and repay £18 236 to ENeRGI.

## **Decision on the findings on facts and reasons**

The charges concern Ms Fox's conviction and, having been provided with a copy of the extract of conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3) of the Rules which states:

- (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 (or, in Scotland, an extract conviction) 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 or extracted in accordance with paragraph (2)(a) is evidence for the purpose of proving that she is not the person referred to in the certificate or extract.

## Decision on impairment

The panel next went on to decide if, as a result of this conviction, Ms Fox's fitness to practise is currently impaired.

The panel considered the submissions of Mr Segovia who invited the panel to find Ms Fox's fitness to practice impaired as a result of the seriousness of her conviction and the inevitable disrepute such dishonesty brings upon the reputation of the profession.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. To justify that trust, nurses must be honest and open and act with integrity. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession. In this regard the panel considered the judgment of Mrs Justice Cox in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin) in reaching its decision, in paragraph 74 she said:

In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.

Mrs Justice Cox went on to say in Paragraph 76:

I would also add the following observations in this case having heard submissions, principally from Ms McDonald, as to the helpful and comprehensive approach to determining this issue formulated by

Dame Janet Smith in her Fifth Report from Shipman, referred to above. At paragraph 25.67 she identified the following as an appropriate test for panels considering impairment of a doctor's fitness to practise, but in my view the test would be equally applicable to other practitioners governed by different regulatory schemes.

Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

- a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or
- b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or
- c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or
- d. has in the past acted dishonestly and/or is liable to act dishonestly in the future.

The panel finds that Ms Fox has, by virtue of her conviction for embezzlement, brought the reputation of the profession into disrepute. The panel considered that her dishonesty breached a fundamental tenet of the profession.

The panel considered Ms Fox's dishonesty to be a breach of trust and an abuse of the responsible position she held. It noted that her embezzlement related to a large sum of money over a prolonged period of time and that this was money that was intended to be used to support vulnerable service users.



Regarding insight, the panel considered that in her written submissions prior to her conviction, Ms Fox sought to minimise her responsibility for the situation. The panel noted however, that in her recent email of 28 July 2019, she accepts that she “acted in a way that brings the integrity of our profession into disrepute”.

In its consideration of whether Ms Fox has remedied her practice the panel took into account that dishonesty is very difficult to remediate and the relatively short period of time that has passed since Ms Fox’s conviction. Nonetheless, it noted that no testimonials or other evidence has been submitted to attest to Ms Fox’s honesty and integrity.

The panel considered that Ms Fox’s actions represented a breach of The Code. Particularly:

**20 Uphold the reputation of your profession at all times**

To achieve this, you must:

20.4 keep to the laws of the country in which you are practising

**21 Uphold your position as a registered nurse, midwife or nursing associate**

To achieve this, you must:

21.3 act with honesty and integrity in any financial dealings you have with everyone you have a professional relationship with, including people in your care

Whilst the panel did not consider there to be any clinical issues or matters relating specifically to public protection, it did consider that the diversion of funds destined to support vulnerable service users would have the potential to impact on the care those service users received.

However, the panel found that the seriousness of the conviction is such that a finding of impairment is made primarily on public interest grounds.

The panel bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health, safety and well-being of the public and patients, and to uphold/protect the wider public interest, which includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

The panel considered that the behaviour of a nurse who had a conviction for embezzlement of over £34 000 from a registered mental health charity would be found to be deplorable by the public and other nurses. The panel considered that public confidence in the profession, and the NMC as its regulator would be negatively impacted should a finding of impairment not be made.

Having regard to all of the above, the panel was satisfied that Ms Fox's fitness to practise is currently impaired on public interest grounds.

## **Determination on sanction:**

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Ms Fox off the register. The effect of this order is that the NMC register will show that Ms Fox has been struck-off the register.

In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case.

The panel heard submissions from Mr Segovia who told the panel that the NMC sanction bid in this case was for a striking off order. He told the panel that Ms Fox has been notified of this bid in the notice of hearing letter.

The panel heard and accepted the advice of the legal assessor.

The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the Sanctions Guidance (“SG”) published by the NMC. It recognised that the decision on sanction is a matter for the panel, exercising its own independent judgement.

The aggravating factors that the panel took into account, in particular, are

- dishonesty over a prolonged period of time
- abuse of a responsible position
- deliberate deception for personal gain
- diversion of funds from a mental health charity supporting vulnerable service users

In mitigation, the panel took into account:

- Ms Fox’s guilty plea
- No previous regulatory concerns

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the SG, which states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that Ms Fox's conviction was too serious to be considered as the lower end of the spectrum. It considered that a caution order would be inappropriate in view of the seriousness of the case nor would it restrict her practice. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Ms Fox's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable.

The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charge in this case. The panel considered that dishonesty is not remediable through retraining.

Furthermore the panel concluded that the placing of conditions on Ms Fox's registration would not adequately address the seriousness of this case or the public interest concerns.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The panel considered that Ms Fox has had a long career without previous regulatory findings but considered her actions to be a serious breach of trust which took place over a prolonged period of time with the intention of personal financial gain.

The conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel noted that the serious breach of the fundamental tenets of the profession evidenced by Ms Fox's conviction.

The panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction due to the systematic, pre-meditated and long standing deception carried out by Ms Fox.

Ms Fox's actions were significant departures from the standards expected of a registered nurse, and are fundamentally incompatible with Ms Fox remaining on the register. The panel was of the view that the findings in this particular case demonstrate that Ms Fox's actions were serious and to allow her to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

The panel noted that, in her email of 28 July 2019, Ms Fox stated: "*I also feel a criminal conviction and continued registration are not compatible or appropriate. Despite the complexities of the situation leading up to my arrest and all the issues I have raised in the responses I have already provided, I feel there can only be one outcome- striking off.*"

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. Having regard to the matters it identified, in particular the effect of Ms Fox's actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct herself, the panel has concluded that nothing short of this would be sufficient in this case.

The panel considered that this order was 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.

## **Determination on Interim Order**

The panel has considered the submissions made by Mr Segovia that an interim order is necessary on public interest grounds. He submitted that given the seriousness of the conviction and the panels' earlier findings, an interim order is necessary.

The panel accepted the advice of the legal assessor.

The panel was satisfied that an interim suspension order is necessary in this case. The panel considered that the seriousness of the conviction was such that it was in the public interest that Ms Fox was prevented from practicing until the substantive striking off order comes into effect. The panel had regard to the seriousness of the facts found proved and the reasons set out in its rationale for the substantive order in reaching the decision to impose an interim order. To do otherwise would be incompatible with its earlier findings.

The period of this order is for 18 months to allow for the possibility of an appeal to be made and determined.

If no appeal is made, then the interim order will be replaced by the striking-off order 28 days after Ms Fox is sent the decision of this hearing in writing.

That concludes this determination.