

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Meeting
Tuesday 11 April – Wednesday 12 April 2023**

Virtual Meeting

Name of Registrant:	Miss Gaudencia Dator
NMC PIN	00H11920
Part(s) of the register:	Registered Nurse – Adult Nursing August 2000
Relevant Location:	Liverpool
Type of case:	Misconduct
Panel members:	Phillip Sayce (Chair, Registrant member) Janine Ellul (Registrant member) Alan Greenwood (Lay member)
Legal Assessor:	John Moir
Hearings Coordinator:	Jasmin Sandhu
Facts found proved:	Charges 1a and 1b
Facts not proved:	N/A
Fitness to practise:	Impaired
Sanction:	Striking-off order
Interim order:	Interim suspension order (18 months)

Details of charge

That you, a registered nurse:

1. On 5 February 2020,
 - a. slapped Resident A to the side of their head; **[FOUND PROVED]**
 - b. deliberately let go of their wheelchair whilst it was in motion. **[FOUND PROVED]**

AND in light of the above, your fitness to practise is impaired by reason of your misconduct.

Decision and reasons on service of Notice of Meeting

Notice of this meeting had been sent to Miss Dator's registered email address by secure encrypted email on 2 March 2023.

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Meeting provided details of the allegations, that the meeting would be taking place on or after 6 April 2023 and that if Miss Dator would like to send in any comments, that she should do so by 31 March 2023.

In the light of all of the information available, the panel was satisfied that Miss Dator has been served with notice of this meeting in accordance with the requirements of Rules 11A and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Background

The Nursing and Midwifery Council (NMC) received a referral regarding Miss Dator on 2 March 2020 from Wavertree Nursing Home (the Home). At the time of the concerns raised in the referral, Miss Dator was employed at the Home as a staff nurse. The Home specialises in the care of elderly patients.

The alleged facts are said to have occurred whilst Miss Dator was working a night shift which commenced on 5 February 2020. Miss Dator working alongside Ms 2 and the senior carer. At about 22:00, it is said that Miss Dator was pushing Resident A out of the dining area. It is alleged that at this time, Ms 2 was entering the dining area when Resident A, who was holding their head, told her that Miss Dator had hit them on the head. Ms 2 asked Miss Dator if she had hit Resident A and Miss Dator allegedly said she had not.

This incident was reported to the senior carer, who viewed the CCTV footage from the dining area. They saw Miss Dator hit Resident A on the head on the CCTV.

The following morning, the senior carer reported what they had viewed on the CCTV footage to Ms 1, the Deputy Home Manager at the time. It is said that Ms 1 viewed the CCTV footage from 5 February 2020 and noted that Miss Dator had also allegedly let go of Resident A's wheelchair whilst moving them around the Home. Ms 1 assessed Resident A, completed a body map and also spoke to them, but was unable to obtain any information about what happened.

It is said that Ms 1 asked Miss Dator to wait for the Home Manager to arrive so they could speak to her, but Miss Dator said her taxi was waiting and left the Home. The Home Manager tried to contact Miss Dator on a number of occasions, but those attempts were unsuccessful.

Miss Dator was consequently suspended by the Home, following which the Home made a number of attempts to arrange a disciplinary meeting, but this was unsuccessful. The CCTV was also passed onto Merseyside Police (the Police) who also attempted to contact Miss Dator without success. Miss Dator subsequently sent a resignation letter to the Home which was believed to have come from the Philippines date stamped 9 February 2020. In that letter Miss Dator wrote that she was '*so sorry for all the things I have caused*', albeit she did not expressly state what she was sorry for.

The Police circulated Miss Dator as wanted, however were unable to locate her. The Police determined in September 2020, to take no further action on the basis that Miss Dator was believed to be out of the country and, due to the six-month statutory limit for common assault, were unable to take the matter further.

Miss Dator has not engaged with the NMC investigation. Multiple attempts have been made by the NMC to contact Miss Dator at her last registered address, via email and telephone. There has been some suggestion that Miss Dator may be in the Philippines.

Decision and reasons on facts

In reaching its decisions on the facts, the panel took into account all the documentary evidence in this case, including the CCTV recordings, together with the written representations from the NMC.

The panel had regard to the written statements of the following witness on behalf of the NMC:

- Ms 1: Deputy Manager at the Home (at the time of events)

- Ms 2: Healthcare assistant at the Home

The panel accepted the advice of the legal assessor.

The panel was aware that the burden of proof rests on the NMC, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that a fact will be proved if a panel is satisfied that it is more likely than not that the incident occurred as alleged.

The panel then considered each of the disputed charges and made the following findings:

Charge 1a

1. On 5 February 2020,
 - a. slapped Resident A to the side of their head;
 - b. ...

This charge is found proved.

In reaching this decision, the panel had regard to the CCTV footage from the Home, as provided by Ms 1. The footage consisted of two recordings, one from the first-floor office corridor and the other from the dining room at the Home on 5 February 2020. Having reviewed this footage, the panel noted that Miss Dator made an open-handed contact with the side of Resident A's head, whilst they were sitting in their wheelchair.

The panel considered whether the contact made amounted to a slap. It bore in mind that the contact made was a quick hand movement by Miss Dator to the right side of Resident A's head which resulted in Resident A's head moving, in an apparently involuntary manner, to the left. It also noted that Resident A's immediate reaction to this contact was to hold the part of their head where Miss Dator had made contact. The panel determined Resident A's reaction to be one of shock and on the footage seemed to make a remark to Ms 2 with some observable surprise. Further, the panel took into account Ms 2's reaction as she was entering the scene immediately after the alleged incident occurred. It noted that she seemed to be very shocked and expressed her concern with another healthcare assistant straight away. The panel also bore in mind that this didn't seem to be an innocent act from Miss Dator, but a hostile one.

In addition, the panel took into account Ms 2's witness statement who details the following:

'At about 22:00, I was walking from the 'B side' into the dining room. As I was going to go through the doors to the dining room, Nurse Dator was coming through the doors with Resident A in a wheelchair. I had to stop to let them through the doors. As they were coming through the doors, I could see that Resident A had her hand on the side of her head. I looked at Resident A and said "are you okay [Resident A]?" Resident A said "she hit me on the head again nurse". I said "really, [Resident A]?" I then said to Nurse Dator, "have you just hit [Resident A] on the head?" She responded "no". I said "really?" and Nurse Dator responded "no".

Nurse Dator seemed shocked that I had seen her. I don't think she was expecting to see me. I felt that if I had been a second quicker, I would probably have seen her hitting Resident A on the head.

I can't remember which side of her head Resident A had her hand on, but it was definitely the side.'

The panel also had regard to Resident A's spontaneous utterances to Ms 2 that she had been struck by Miss Dator.

Having considered all the circumstances of this incident, the panel was of the view that the contact made on Resident A's head by Miss Dator amounted to a slap. It bore in mind the immediate reactions from both Resident A and Ms 2, as well as Miss Dator's shocked reaction to unexpectedly seeing Ms 2 at that point. Having made this finding, the panel determined that there is sufficient evidence to find this sub-charge proved.

Charge 1b

1. On 5 February 2020,
 - a. ...
 - b. deliberately let go of their wheelchair whilst it was in motion.

This charge is found proved.

In reaching this decision, the panel had regard to the CCTV footage from the first-floor office corridor at the Home on 5 February 2020. Having reviewed this footage, the panel considered that it is clearly visible that Miss Dator did let go of Resident A's wheelchair, which was moving out of the direct control of Miss Dator until it collided with a door frame. The panel also determined that Miss Dator's actions in this regard was deliberate. It noted that Miss Dator's actions were underpinned by an element of active propulsion, indicative of deliberate conduct rather than a mistake or a slip of her hands.

The panel also had regard to the written statement from Ms 1 who confirms that Miss Dator did let go of Resident A's wheelchair:

'In relation to Nurse Dator pushing the wheelchair with Resident A forward and letting go, no one has control of the wheelchair when it is let go this way'.

On the basis of both of the above, the panel was satisfied that there was sufficient evidence to find this sub-charge proved.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether Miss Dator's fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's suitability to remain on the register unrestricted.

The panel, in reaching its decision, has recognised its statutory duty to protect the public and maintain public confidence in the profession. Further, it bore in mind that there is no burden or standard of proof at this stage and it has therefore exercised its own professional judgement.

The panel adopted a two-stage process in its consideration. First, the panel must determine whether the facts found proved amount to misconduct. Secondly, only if the facts found proved amount to misconduct, the panel must decide whether, in all the circumstances, Miss Dator's fitness to practise is currently impaired as a result of that misconduct.

Representations on misconduct and impairment

In its written representations, the NMC referred the panel to relevant case law. It also referred to 'The Code: Professional standards of practice and behaviour for nurses and midwives (2015)' (the Code), outlining the provisions which it submits have been breached in this case. It was submitted that whilst breaches of the Code will not be conclusive as to the issue of misconduct, the conduct illustrated in this case is a serious departure from the standards expected of a registered professional and as such amounts to serious misconduct.

The NMC referred to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin) and outlined the ‘test’ set out by Dame Janet Smith in the fifth Shipman Report. It was submitted that the first three limbs can be answered in the affirmative in this case.

The NMC move on to the issue of future risk, referring the panel to the comments of Silber J in *Cohen v General Medical Council* [2008] EWHC 581 (Admin) namely: (i) whether the concerns are easily remediable; (ii) whether they have in fact been remedied; and (iii) whether they are highly unlikely to be repeated.

It was submitted by the NMC that these concerns relate to Miss Dator’s attitude and as such are not easy to remedy. The NMC considers that Miss Dator had ample opportunities to engage in the investigation however has failed to do so. Whilst she has written a letter to the Home expressing that she was sorry, this letter did not specify what she was sorry about. It was submitted that Miss Dator has not engaged with the NMC’s fitness to practise process and has not provided sufficient reflections to demonstrate that she understands how to act differently in the future to avoid similar problems happening. It was further submitted that there is a continuing risk to the public due to Miss Dator’s lack of full insight.

The NMC submitted that Miss Dator’s failings fall seriously below the standards expected of a nurse and therefore a finding of impairment is required for the protection of the public and to uphold professional standards and behaviour. The NMC also submitted that a finding of impairment is required to declare and uphold proper standards and to maintain confidence in the profession and the NMC as a regulator.

The panel accepted the advice of the legal assessor.

Decision and reasons on misconduct

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of the Code. The panel was of the view that Miss Dator’s actions constituted a breach of the following provisions of the Code:

1 *Treat people as individuals and uphold their dignity*

To achieve this, you must:

1.1 treat people with kindness, respect and compassion

1.2 make sure you deliver the fundamentals of care effectively

1.5 respect and uphold people's human rights

14 *Be open and candid with all service users about all aspects of care and treatment, including when any mistakes or harm have taken place*

To achieve this, you must:

14.1 act immediately to put right the situation if someone has suffered actual harm for any reason or an incident has happened which had the potential for harm

14.2 explain fully and promptly what has happened, including the likely effects, and apologise to the person affected and, where appropriate, their advocate, family or carers

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

To achieve this, you must, as appropriate:

20.1 keep to and uphold the standards and values set out in the Code

20.2 act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment

20.3 be aware at all times of how your behaviour can affect and influence the behaviour of other people

20.8 act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel was of the view that Miss Dator's failings in respect of both sub-charges were very serious and did amount to misconduct.

In relation to charge 1a concerning Miss Dator slapping Resident A, the panel was satisfied that this was a significant departure of the standards expected of a registered nurse. The panel considered that the assault of a patient is very serious and does meet the threshold of serious misconduct.

In respect of charge 1b concerning the deliberate letting go of Resident A's wheelchair, the panel was of the view that this was also very serious, bearing in mind these specific circumstances. It noted that Resident A was a vulnerable resident who was put at a risk of serious harm as a result of Miss Dator's conduct. Resident A was left in an unsecured, out of control wheelchair which they could have fallen from, which put them at risk of serious harm. The panel considered that this act was deliberate from Miss Dator, involving an element of active propulsion. In this regard, the panel determined that Miss Dator's conduct fell far below the standards expected of a registered nurse and does meet the threshold of serious misconduct.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, Miss Dator's fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses 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 *CHRE v NMC and Grant* 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.'

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's 'test' which reads as follows:

‘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) ...’*

The panel found that limbs a – c were engaged in this case. The panel determined that Miss Dator’s actions put Resident A at a significant risk of harm. It also concluded that if her behaviour were to be repeated, Miss Dator is liable to put patients at an unwarranted risk of harm in the future. In addition, the panel determined that Miss Dator’s misconduct breached the fundamental tenets of the nursing profession and brought its reputation into disrepute. It was the view of the panel that these concerns are very serious, and that Miss Dator’s failings have the potential to seriously damage public confidence in the profession and the NMC as the regulator.

When assessing future risk, the panel had regard to the case of *Cohen v General Medical Council*, in which the court set out three matters which it described as being ‘*highly relevant*’ to the determination of current impairment:

- ‘(a) Whether the conduct that led to the charge(s) is easily remediable?*
- (b) Whether it has been remedied?*
- (c) Whether it is highly unlikely to be repeated?’*

Bearing in mind the nature and seriousness of these concerns, the panel determined that Miss Dator's conduct is not easily remediable.

Whilst the panel bore in mind that the conduct in this case would be difficult to remediate, it did consider whether Miss Dator has any taken steps to address these concerns. The panel noted that Miss Dator has had much opportunity to engage in this process but has failed to do so. It also took into account that Miss Dator failed to engage with the criminal investigation against her, resulting in the Police having to take no further action on the basis that she was believed to be out of the country and due to the six-month statutory limit for common assault. Furthermore, whilst the panel had regard to Miss Dator's letter from 2020 in which she states, '*sorry for all the things I have caused*', it noted that this letter did not specify what she was sorry for and was not adequate to demonstrate any insight on her part.

In light of her lack of engagement and insight, the panel considered that there was nothing before it to suggest that if faced in similar circumstances in the future, that Miss Dator would act differently. Whilst it noted that she had written a brief apology letter in 2020, this did not address the impact of her actions on the patient, her colleagues, or the wider implications for the nursing profession. As such, it determined that there is a risk of repetition in this case and therefore a finding of current impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC; to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions. In this regard, the panel also determined that a finding of impairment on public interest grounds was required. It considered that an informed member of the public would be concerned if a registered nurse facing such serious allegations were permitted to practise unrestricted.

Sanction

The panel decided to make a striking-off order. It directs the registrar to strike Miss Dator off the register.

In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case and had careful regard to the Sanctions Guidance (SG) published by the NMC.

The panel accepted the advice of the legal assessor.

Representations on sanction

The panel was aware that the NMC, in its written representations, invited the panel to consider a striking-off order.

The NMC submitted that given the seriousness of the incident, Miss Dator's conduct is fundamentally incompatible with ongoing registration. The allegations involve an assault on a vulnerable resident and a disregard for Resident A's safety when deliberately pushing the resident and letting go of the handles. It was submitted that a striking off order would adequately protect members of the public whilst also send a clear message to the professions that such conduct is wholly deplorable.

Decision and reasons on sanction

Having found Miss Dator's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. 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 decision on sanction is a matter for the panel independently exercising its own judgement.

The panel took into account the following aggravating features:

- Abuse of a vulnerable resident

- Serious failings which could have resulted in significant harm
- Inappropriate and aggressive behaviour towards a resident, which had the potential to seriously damage the public confidence in the profession

The panel determined that there were no mitigating factors which applied to this case.

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.

It then considered the imposition of a caution order but determined that, due to the ongoing public protection and public interest issues identified, an order that does not restrict Miss Dator's practice would not be appropriate or proportionate in the circumstances.

The panel next considered whether placing conditions of practice on Miss Dator's registration would be a sufficient and appropriate response. The panel decided that there are no practical or workable conditions that could be formulated, given Miss Dator's lack of engagement and insight. The panel bore in mind that Miss Dator has not engaged with the NMC in relation to these proceedings and noted that there has been a suggestion that she is now in the Philippines. The panel was not satisfied that if it were to impose a conditions of practice order, that Miss Dator would comply with such conditions. The panel also determined that given the seriousness of these concerns, a conditions of practice order would not address the public interest issues outlined in this case.

The panel then went on to consider whether a suspension order would be an appropriate sanction. It had regard to the NMC's Guidance SAN-3d which outlines that a suspension order may be appropriate when the registered professional has shown insight, does not pose a significant risk of repeating the behaviour and the misconduct is a single instance. The panel noted its previous findings that Miss Dator has shown little insight and does continue to pose a risk of repetition. It also noted that this case concerned two incidents rather than one single instance of misconduct. In these circumstances, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

In looking at a striking-off order, the panel took note of the following paragraphs of the SG:

- *Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?*
- *Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?*
- *Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?*

The panel was of the view that the above factors were relevant. It considered that the concerns highlighted in this case do raise fundamental questions about Miss Dator's professionalism. Further, given the seriousness of her actions, the panel considered that public confidence could not be maintained if Miss Dator were to remain on the NMC register. It also considered that Miss Dator's actions would adversely affect the public's view of how a registered nurse should conduct themselves and therefore nothing short of removing her from the register would be sufficient in this case.

Balancing all these factors and after taking into account all the evidence before, the panel determined that the appropriate and proportionate sanction is that of a striking-off order. It determined that Miss Dator's actions were incompatible with remaining on the NMC register. The panel also 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.

This will be confirmed to Miss Dator in writing.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in this case. It was aware that it may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in Miss Dator's own interests until the striking-off order takes effect.

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

Representations on interim order

In its written representations, the NMC invited the panel to impose an 18-month interim suspension order. It was submitted that an interim suspension order was necessary on the grounds of public protection and was also otherwise in the public interest.

Decision and reasons on interim order

The panel was satisfied that an interim order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching its decision to impose an interim order.

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order.

The panel therefore decided to impose an interim suspension order for a period of 18 months to cover the 28-day appeal period. The panel was of the view that 18 months would allow sufficient time for Miss Dator to lodge an appeal, should she wish to do so, and for any appeal to be heard and determined in full.

If no appeal is made, the interim suspension order will be replaced by the substantive striking off order 28 days after Miss Dator is sent the decision of this meeting in writing.

That concludes this determination.