

**Nursing and Midwifery Council**

**Fitness to Practise Committee**

**Substantive Order Review Hearing**

**Tuesday, 12 December 2023 -**

**Wednesday, 13 December 2023**

**Virtual Hearing**

<b>Name of Registrant:</b>	Brian Munyuki
<b>NMC PIN</b>	08G2607E
<b>Part(s) of the register:</b>	Registered Nurse – Sub Part 1 Mental Health Nursing – November 2008
<b>Relevant Location:</b>	Birmingham
<b>Type of case:</b>	Misconduct
<b>Panel members:</b>	Darren Shenton (Chair, Lay member) Sally Underwood (Registrant member) Shaun Donnellan (Lay member)
<b>Legal Assessor:</b>	Graeme Henderson/Justin Gau
<b>Hearings Coordinator:</b>	Maya Khan
<b>Nursing and Midwifery Council:</b>	Represented by Richard Webb, Case Presenter
<b>Mr Munyuki:</b>	Not present in AM and not represented Present in PM and not represented
<b>Order being reviewed:</b>	Conditions of practice order (9 months)
<b>Fitness to practise:</b>	Impaired
<b>Outcome:</b>	<b>Suspension order (9 months) to come into effect at the end of 20 January 2024 in accordance with Article 30 (1)</b>

## **Decision and reasons on service of Notice of Hearing**

The panel was informed at the start of this hearing that Mr Munyuki was not in attendance and that the Notice of Hearing had been sent to Mr Munyuki's registered email address on 10 November 2023.

Mr Webb, on behalf of the Nursing and Midwifery Council (NMC), submitted that it 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 heard and accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the substantive order being reviewed, the time, date and means of joining the virtual hearing and, amongst other things, information about Mr Munyuki's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

In light of all of the information available, the panel was satisfied that Mr Munyuki has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

## **Decision and reasons on proceeding in the absence of Mr Munyuki**

The panel next considered whether it should proceed in the absence of Mr Munyuki. The panel had regard to Rule 21 and heard the submissions of Mr Webb who invited the panel to proceed in the absence of Mr Munyuki.

Mr Webb referred to an email from the NMC case officer to Mr Munyuki dated 20 November 2023 which stated:

*'Can you let us know if you will be attending your upcoming virtual SOR hearing, scheduled for Tuesday 12 December 2023?'*

*Also if you have any documents that you would like the panel at the hearing*

*to review, please send them in to me and I will add them to the hearing bundle.'*

Mr Webb referred the panel to the telephone note by the NMC case officer dated 11 December 2023 which stated:

*'Telephone call to the registrant's mobile number... It rang out for a while and then went to voicemail; I left my name and number and said it was about his hearing tomorrow, and asked if he could ring me back to confirm whether he would be attending.'*

Mr Webb further referred the panel to the email from the Hearings Coordinator to Mr Munyuki dated 11 December 2023 providing him with a link of the hearing and details of joining, however there was no response to this email.

Mr Webb informed the panel that the last time Mr Munyuki communicated with the NMC in relation to today's hearing was on 12 July 2023. He submitted that it appears that Mr Munyuki has disengaged with the NMC and it is on that basis that the panel should proceed today.

Mr Webb submitted that Mr Munyuki has not requested any adjournment and there is nothing to suggest that not proceeding today would secure his attendance at a future date. He further submitted that the order is due to expire soon in January 2024 and there would not be a large window for this hearing to be rescheduled.

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

The panel decided to proceed in the absence of Mr Munyuki. In reaching this decision, the panel considered the submissions of Mr Webb. It has had particular regard to any relevant case law and to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mr Munyuki.
- the NMC has exhausted all efforts to contact Mr Munyuki in relation to his attendance to today's hearing however there has been no response and therefore has thereby voluntarily absented himself.

- There is no reason to suppose that adjourning the hearing would secure his attendance at some future date.
- There is a strong public interest in the expeditious review of the substantive order.

After midday, the Hearings Coordinator was informed by the NMC case officer that Mr Munyuki had contacted the NMC regarding his hearing today and wished to attend this afternoon.

At 14:00 Mr Munyuki arrived to the hearing on videocall whilst sat in his car. He told the panel that he had received the Notice of Hearing and was expecting a link to be sent to him the day before the hearing which he did not receive. He explained after making enquiries with the NMC mid-morning, he realised in the afternoon that the link to the hearing went to his spam emails. He said he was now in a position to attend the hearing and he wished to give evidence and submissions this afternoon.

During the course of attending the hearing, the battery of Mr Munyuki's phone expired, he rejoined the hearing one hour and a half later on his mobile phone having returned to his home address.

### **Decision and reasons on application for hearing to be held in private**

During your evidence, Mr Webb made a request that this case be held partly in private on the basis that there will be references to your health. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

You supported this application.

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

The panel determined to go into private session in connection with your health as and when such issues are raised.

### **Decision and reasons on review of the substantive order**

The panel decided to impose a suspension order for a period of 9 months.

This order will come into effect at the end of 20 January 2024 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is the seventh effective review of a substantive conditions of practice order originally imposed by a Fitness to Practise Committee panel on 26 April 2018 for a period of 12 months, by way of Consensual Panel Determination (CPD). The order was varied and extended for 12 months on 10 May 2019. On 20 April 2020, a further 12 month conditions of practice order was imposed. On 24 May 2021, the conditions of practice order was confirmed and extended by 8 weeks. The order was reviewed again on 2 July 2021 where it was varied and extended for 9 months. On 29 March 2022 the conditions of practice order was reviewed and the panel decided to vary the order and extend it for a period of 9 months. On 1 December 2022, the conditions of practice order was confirmed and extended for a period of 12 months.

The current order is due to expire at the end of 20 January 2024.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved by way of admission which resulted in the imposition of the substantive order were as follows:

*'That you:*

- 1. on one or more occasions set out within Schedule 1 did not maintain records associated with Patient A to a clinically appropriate standard.*

2. on 07 December 2016:

- a. took Patient A to a public house in circumstances whereby such an intervention had not been agreed by Patient A's multidisciplinary team.
  - b. paid for Patient A's meal/beverage(s) in circumstances whereby such an intervention had not been agreed by Patient A's multidisciplinary team.
3. on one or more unknown occasions sent Patient A inappropriate text messages.
4. on or around 19 January 2017 made a retrospective entry in Patient A's notes in respect of an appointment you had with her on 07 December 2016.

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

The sixth reviewing panel determined the following with regard to impairment:

*'The panel had regard to your evidence including the positive references and training courses you have undertaken. It noted that you have been working as a carer since March 2022 and was encouraged by your efforts to secure a job in a clinical setting and by your voluntary work.*

*However, the panel noted that you have been unable to engage with the conditions of practice order formulated by the last review panel as you have been unable to secure employment as a registered nurse. The panel determined that a risk of repetition remains as you have not been able to strengthen your practice as a nurse since the substantive order was imposed. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.*

*The panel has borne in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment on public interest grounds is also required.*

*For these reasons, the panel finds that your fitness to practise remains impaired.'*

The fifth reviewing panel determined the following with regard to sanction:

*'The panel determined that the previous conditions from the last review hearing are still appropriate and practical conditions which would address the failings highlighted in this case. The panel accepted that you have been unable to engage with the conditions of practice as you have indicated you have not been able to secure employment as a registered nurse. However, it noted that you are engaging with the NMC and are willing to comply with any conditions imposed. The panel determined that this conditions of practice order is sufficient to protect patients and the wider public interest.*

*The panel was of the view that to impose a suspension order would be wholly disproportionate and would not be a reasonable response in the circumstances of the case in light of your continued engagement with the NMC and the fact that you are currently working as a carer and would like to return to nursing.*

*Accordingly, the panel determined, pursuant to Article 30(1)(c) to make a conditions of practice order for a period of 12 months, which will come into effect on the expiry of the current order, namely at the end of 20 January 2023. It decided to impose the following conditions which it considered are appropriate and proportionate in this case.*

*For the purposes of these conditions, 'employment' and 'work' mean any paid or unpaid post in a nursing, midwifery or nursing associate role. Also, 'course of study' and 'course' mean any course of educational study connected to nursing, midwifery or nursing associates.*

1. *Whilst employed as a registered nurse, you must work with your line manager, mentor or supervisor (or their nominated deputy) to formulate a personal development plan (PDP) specifically designed to address the deficiencies in the following areas of your practice:*
  - *maintenance of professional boundaries;*
  - *record keeping.*
2. *Whilst employed as a registered nurse, you must meet with your line manager, mentor or supervisor (or their nominated deputy) at least monthly to discuss the standard of your performance and your progress towards achieving the aims set out in your PDP.*
3. *You must forward to the NMC a copy of your PDP and send a report from your line manager, mentor or supervisor (or their nominated deputy) setting out the standard of your performance and your progress towards achieving the aims set out in your PDP to the NMC at least 7 days before any NMC review hearing or meeting.*
4. *You must notify the NMC within 7 days of any nursing or midwifery appointment (whether paid or unpaid) you accept within the UK or elsewhere, and provide the NMC with contact details of your employer.*
5. *You must inform the NMC of any professional investigation started against you and/or any professional disciplinary proceedings taken against you within 7 days of you receiving notice of them;*
6. *You must within 7 days of accepting any post or employment requiring registration with the NMC, or any course of study connected with nursing or midwifery, provide the NMC with the name/contact details of the individual or organisation offering the post, employment or course of study;*
7. *You must allow the NMC to exchange, as necessary, information about the standard of your performance and your progress towards achieving the aims set out in your personal development plan with your line manager, mentor or supervisor (or their nominated deputy) and any other person who is or will be*



*involved in your retraining and supervision with any employer, prospective employer, and at any educational establishment.*

8. *You must immediately inform the following parties that you are subject to a conditions of practice order under the NMC's fitness to practise procedures, and disclose the conditions listed at (1) to (7) above, to them:*

- *Any organisation or person employing, contracting with, or using you to undertake nursing work;*
- *Any agency you are registered with or apply to be registered with (at the time of application);*
- *Any prospective employer (at the time of application) where you are applying for any nursing appointment; and*
- *Any educational establishment at which you are undertaking a course of study connected with nursing or midwifery, or any such establishment to which you apply to take such a course (at the time of application).*

*The period of this order is for 12 months to afford you adequate time to obtain a nursing role and/or demonstrate strengthened practice in the areas of maintaining professional boundaries and record keeping.*

*This conditions of practice order will take effect upon the expiry of the current conditions of practice order, namely the end of 20 January 2023 in accordance with Article 30(1).*

*Before the end of the period of the order, a panel will hold a review hearing to see how well you have complied with the order. At the review hearing the panel may revoke the order or any condition of it, it may confirm the order or vary any condition of it, or it may replace the order for another order.*

*Any future panel reviewing this case would be assisted by:*

- *Your attendance at the next review hearing*
- *An up-to-date reflective piece regarding professional boundaries, record keeping and your insight into your previous actions.*

- *Testimonials from your employer, line manager, supervisor and/or colleagues specifically addressing your ability to maintain professional boundaries and your record keeping in a clinical or care setting.'*

## **Decision and reasons on current impairment**

The panel has considered carefully whether your fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant's suitability to remain on the register without restriction. In considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. Whilst it has noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel has had regard to all of the documentation before it including the NMC bundle and further documentation including an unsigned PDP dated as completed 25 June 2021, reflective statement, two identical references dated September 2022 and one reference dated May 2023, all of which you produced to the panel today. It has taken account of the submissions made by Mr Webb and you and your oral evidence.

Mr Webb outlined the background of the case and took the panel through the decisions of the previous panels. He submitted you have not worked in a nursing position since the imposition of substantive order and you are currently working in a support worker role.

## **Evidence**

You gave evidence under affirmation.

You said that you have not been working as a registered nurse since your last review. The previous reviewing panel suggested to you that you could work as a support worker in a healthcare setting which would afford you the opportunity to demonstrate your compliance with the conditions of practice order and allow you to further strengthen your practice and develop your insight.

You told the panel that you had worked at the same nursing home over two extended periods between May to September 2022 and November 2022 to May 2023. You said that your role as a support worker in a care home involves responsibilities such as taking

residents for walks and to buy groceries, handling their money, washing and bathing residents. You said that you take notes of the residents' day to day activities.

You said that you do not administer medication to residents and told the panel that you *'have been unable to comply with that condition'*. The panel noted that this is not a condition of your registration.

You referred the panel to the references you provided today from your temporary position as a healthcare worker. You said you considered this to be useful evidence that you have been working well as a support worker. You accepted when questioned by the panel that the references contained sparse detail and did not address the areas of concern that the last panel considered a future panel may be assisted by i.e. maintaining professional boundaries.

You referred the panel to your reflective account. You said that you included details about how you would face the same circumstances in the future and what you would do differently.

In relation to public protection, you said that you have been independently working with residents and there have been no concerns raised.

[PRIVATE]

In response to questions from the panel, you said that you produced the reflective statement using the Gibbs model and you wrote it in 2022, immediately after the last review hearing. You did not forward it to the NMC and did not subsequently develop that reflective piece any further. It was only produced to this panel on the day of your attendance.

The panel acknowledged that you recognise the need for managing boundaries in professional relationships in your reflective statement however you did not provide any reasons about how you would do this. In response to this, you said that you will maintain professional boundaries by always following the care plan of the residents only.

The panel asked you about any training or courses you had completed to strengthen your practice. You said that you are due to complete a two-day MAPPA course. You also stated that you had completed one-day training on 30 November 2023 which covered moving and

handling, safeguarding adults, safeguarding children and medication administration. You said that you paid for these courses yourself. You did not produce any independent evidence, such as emails, confirmation of attendance, receipt for payment of the course fee, joining instructions or certificates to support your evidence to the panel. You said you requested the certificates, but they have not come through yet and you intend on forwarding the certificates to the NMC.

In response to questions regarding your PDP, you said that your PDP was produced with your manager whilst you were working as a registered nurse in a nursing home. You explained that you worked at a nursing home for a three-month probationary period and had to leave due to a '*medication administration near miss*'.

You said that your PDP has not been updated since June 2021 but you had not thought to continue it when working for two extended periods as a Healthcare Assistant (HCA) at another nursing home. You said you are hoping to update it when you get another registered nurse role. You said that you have been applying for nursing roles, you had an interview three months ago which you have not heard back from and you have another interview coming soon.

You accepted that you should have probably asked for help to complete your PDP and undertaken one to one reflections with the agency you are currently registered with.

### **Closing submissions**

Mr Webb submitted that you have not demonstrated full compliance with the conditions of practice order and there is insufficient information to demonstrate that your fitness practise is no longer impaired.

Mr Webb submitted that your practise should continue to be restricted, the NMC's position, at minimum, is that there should be a continuation of the conditions of practice order however the panel may impose an alternative sanction.

You submitted that you would continue to work towards complying with the conditions of practice order. You submitted that you are hoping to get one of the registered nurse positions you have applied for in Birmingham and Solihull. The interview for the first role

applied took place over three-months ago but you have not received any outcome and you do not have any dates for interviews for the second role applied for.

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

The panel were unable to conclude the review on the date allocated, due to the delay caused by your late attendance. It identified that it could sit the following day, 13 December 2023. You stated you were unavailable to attend this date, due to a family member graduation. It was explained that the purpose of going into a second day was for the panel to conclude its deliberations. In light of this and with no objections from the NMC and following legal advice, you agreed that the panel could deliver its decision in the hearing without you being present and you would receive it in writing.

In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether your fitness to practise remains impaired.

The panel noted that the last reviewing panel found that you had some insight and acknowledged your efforts to secure a role as a carer since March 2022. At today's hearing the panel determined that you have shown no further insight into the concerns raised against you or demonstrated an understanding of how your actions impacted negatively on the reputation of the nursing profession or how it had impacted the patient.

The panel found your evidence to be unclear and lacking credibility. It found your responses to panel's questions to be vague, unprepared, and unsupported by any documentary evidence.

In its consideration of whether you have taken steps to strengthen your practice, the panel took into account the new information it has before it today which included a reflective statement, a PDP and references. It noted that during your evidence you stated that this reflective statement was written in December 2022. The panel was concerned that you had not updated your reflective statement with any details regarding your progress since the time you had written it, one year ago.

The panel noted that your PDP was dated June 2021, over two and a half years ago. It was concerned that despite you continuing to work in a support worker role giving you the opportunity to update your PDP in various activities within a healthcare role, you failed to make any efforts to do so. It further noted that during your evidence, you failed to provide any satisfactory explanation as to why you could not update your PDP. When the panel asked why your PDP was not updated, you replied "*I probably should have*".

The panel found the written references to be limited as they did not provide any supporting information regarding the concerns relating to maintaining professional boundaries, and only superficial information regarding record keeping. The panel was mindful that you had provided no other evidence relating to your training courses, certificates, receipts of booking the training courses, testimonials, or job interview dates.

The last reviewing panel determined that you were liable to repeat matters of the kind found proved. Today's panel has received no new information to suggest that the risk of repetition has lessened. In light of this the panel determined that you are liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel carefully considered the history of your engagement with the NMC and previous panels. It was concerned that there was evidence of only sporadic engagement, last minute submissions of incomplete documentation and a variety of reasons for noncompliance with the conditions of practice order that were unsupported by independent evidence. The panel concluded that a fully informed member of the public, given the history of this engagement would be concerned were a finding of impairment not made.

The panel determined that, in this case, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that your fitness to practise remains impaired.

### **Decision and reasons on sanction**

Having found your fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Article 30 of the Order. The panel has also taken into account the 'NMC's Sanctions Guidance' (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

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 again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict your practice would not be appropriate in the circumstances. The SG 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 your misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered the continuation of the current conditions of practice order. The panel noted that your engagement with the NMC has been sporadic, unpersuasive and lip service only. It determined that you have not sufficiently engaged with the NMC conditions imposed despite having many opportunities to do so. Today, you failed to provide any substantiated documentary evidence such as independent evidence to support any strengthened practice i.e. certificates. You have also failed to produce any medical evidence to support your oral evidence about your health concerns. The panel was concerned that you had submitted an unsigned PDP dated 2021 (over two year and a half years ago) despite it being attainable for you to comply with the conditions of practice order within your support worker role. The panel noted that recommendations were repeated to you from the last reviewing panels, and you have not shown efforts to comply with those.

On this basis, the panel concluded that a conditions of practice order is no longer the appropriate order in this case. The panel concluded that your lack of insight, limited

evidence of strengthening your practice and sporadic engagement with the conditions of practice order means that you are unlikely to engage sufficiently with a further imposition of a conditions of practice order which would protect the public or satisfy the wider public interest.

The panel determined therefore that a suspension order is the appropriate sanction which would both protect the public and satisfy the wider public interest. Accordingly, the panel determined to impose a suspension order for the period of nine months would provide you with an opportunity to appropriately engage with the NMC and provide updated evidence that you have strengthened your practice and demonstrated sufficient insight to be considered for a return to practice. It considered this to be the most appropriate and proportionate sanction available.

This suspension order will take effect upon the expiry of the current conditions of practice order, namely the end of 20 January 2024 in accordance with Article 30(1).

Before 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 reviewing this case would be assisted by:

- Your attendance at the next review hearing
- An up-to-date reflective piece regarding professional boundaries, record keeping and your insight into your previous actions.
- Testimonials from your employer, line manager, supervisor and/or colleagues specifically addressing your ability to maintain professional boundaries and your record keeping in a clinical or care setting.

This will be confirmed to you in writing.