

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

Substantive Hearing

**Monday 6 February 2023 to Friday 10 February 2023
and
Monday 13 February 2023 to Friday 17 February 2023**

Nursing and Midwifery Council
2 Stratford Place, Montfichet Road, London, E20 1EJ

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| Name of registrant: | Robert Musasizi |
| NMC PIN: | 05E1005E |
| Part(s) of the register: | Registered Nurse – Sub part 1 Adult Nurse (level 1) – September 2005 |
| Relevant Location: | Birmingham |
| Type of case: | Misconduct |
| Panel members: | Gregory Hammond (Chair, Lay member) Jonathan Coombes (Registrant member) Linda Redford (Lay member) |
| Legal Assessor: | John Bromley-Davenport KC |
| Hearings Coordinator: | Chantel Akintunde |
| Nursing and Midwifery Council: | Represented by Joe O’Leary, Case Presenter |
| Mr Musasizi: | Present and represented by John da Rocha-Afodu, R&A Solicitors |
| Facts proved: | Charges 1a), 1b), 2a), 2b), 2c), 2d), 3a), 3b), 3c), 3d), 3e), 3f) 3g), 4 and 5 |
| 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 29 July 2017;*
 - a. *Said to Colleague B ‘you know you want a piece of me, why don’t you come over to my place’ or words to that effect;*
 - b. *Grabbed Colleague B around the waist;*

- 2) *Between August – September 2020:*
 - a) *Stroked Colleague A’s arm/s;*
 - b) *Hugged Colleague A;*
 - c) *Said you liked Colleague A’s arms or words to that effect;*
 - d) *Asked Colleague A whether she was in a relationship or words to that effect;*

- 3) *On 3 September 2020;*
 - a) *Put your hands on Colleague A’s arm/s;*
 - b) *Stroked Colleague A’s arm/s;*
 - c) *Tried to kiss Colleague A’s arm/s;*
 - d) *Pushed your groin to Colleague A’s leg/s;*
 - e) *Rubbed your crotch up and down Colleague A’s leg;*
 - f) *Said to Colleague A that you loved her or word to that effect;*
 - g) *Said to Colleague A ‘you need to see this, this is what you do to me every time I see you’ or words to that effect and/or whilst touching your genital area;*

- 4) *Your actions in charge 1 and/or 2 and/or 3 were sexually motivated in that you were seeking sexual gratification and/or intended to pursue a future sexual relationship with Colleague A and/or Colleague B;*

- 5) *Your actions in charge 1 and/or 2 and/or 3 breached professional boundaries.*

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

Decisions and reasons on application on admissibility of evidence

The panel heard an application from Mr da Rocha-Afodu to consider the evidence relating to Colleague B as inadmissible by way of res judicata, issue estoppel and cause of action estoppel. The panel had regard to the skeleton arguments provided by Mr Da Rocha-Afodu and the Nursing and Midwifery Council's (NMC) responses in relation to this application.

Mr da Rocha-Afodu submitted that the charges concerning Colleague B, namely charges 1a) and 1b), were not included as part of the original referral of this matter to the NMC by the University Hospitals Birmingham NHS Foundation Trust (the Trust). Further, he submitted that you only received notification of these charges in January 2023, which is insufficient time to prepare a suitable defence to such charges.

Mr da Rocha-Afodu submitted that the matter concerning Colleague B occurred in 2017, which the Trust formally investigated and dismissed in July 2017. Therefore, Mr da Rocha-Afodu submitted that it is irrelevant to include this matter as part of this case.

Mr da Rocha-Afodu went on to explain the legal definition of 'res judicata' and referred to the guidance around this set out in the case of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46.

Mr da Rocha-Afodu then referred the panel to the judgment in the case of *R (Coke-Wallis) (Appellant) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, where it confirms that a cause of action estoppel also applies in disciplinary hearings conducted by local authorities, not just in a court of law. Mr da Rocha-Afodu provided an example of this in the case of *R (on the application of Vesna Mandic-Bozic) v British Association for Counselling & Psychotherapy & United Kingdom Council for Psychotherapy* [2016] EWHC 3134 (Admin).

Mr da Rocha-Afodu noted that the documentary evidence the NMC have provided in support of charges 1a) and 1b) is a letter from Birmingham Heartlands Hospital (the Hospital) dated 18 October 2017 (Exhibit GS24). He submitted that such evidence alone is insufficient and that, should the NMC seek to substantiate charges 1a) and 1b), it should provide further documentation in support of this.

Mr O'Leary accepted that the matter concerning Colleague B which form charges 1a) and 1b) was not included in the Trust's original referral to the NMC, rather, it came to the NMC's attention during its investigation into the allegations concerning Colleague A.

Mr O'Leary submitted that the NMC notified you of these matters on 10 August 2022, which is nearly six months prior to this hearing and sufficient time for you to prepare a defence to these charges.

Mr O'Leary submitted that Colleague B has provided a witness statement dated 4 April 2022, which will be supported by her oral evidence as she is due to attend this hearing as a witness. He submitted that the evidence of Colleague B is clearly relevant to charges 1a) and 1b), and that the admission of her evidence is fair. Mr O'Leary further submitted that the inclusion of Colleague B's written statement, notwithstanding any local investigation, does not raise issues of res judicata, nor does it amount to an abuse of process.

Mr O'Leary submitted that the concept of res judicata as put forward by Mr Rocha-Afodu has no merit, and that his submissions for charges 1a) and 1b) to not be considered in this case is misconceived. He referred the panel to the case of *R (Mandic-Bozic) v BACP* [2016].

Mr O'Leary then referred the panel to the case of *R (Coke-Wallis) v ICAEW* [2011] in response and outlined the test for cause estoppel and issue estoppel. He submitted that the application of res judicata, in the absence of a judicial (or quasi-judicial) decision and the fundamental difference in parties, along with the application of cause or issue estoppel is misconceived.

Mr O'Leary referred the panel to the case of *Bhatt* [2011] EWHC 783 as an example where an acquittal in the Crown Court of a criminal offence does not prevent a professional disciplinary panel from hearing the allegations based on the same facts.

Mr O'Leary further submitted that the bodies in this case (the Trust and the NMC) are different in nature, substance and procedure, and as such, it is within this panel's jurisdiction to hear and consider the allegations concerning Colleague B.

Mr O'Leary then referred the panel to the case of *Enemuwe v Nursing and Midwifery Council* [2015] EWHC 2081 (Admin), which he stated supports his submissions that an investigation having been completed at a local level does not prevent this panel from hearing evidence and deliberating on the same allegations.

In conclusion, Mr O'Leary submitted that the local investigation into the matter set out in charges 1a) and 1b) concerning Colleague B does not create an abuse of process under the res judicata principles.

The panel heard and accepted the advice of the legal assessor, who referred to Rule 31 of 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules) and the points it should take into consideration in respect of this application.

The panel considered that the local investigation and disciplinary hearing conducted by the Trust is not a judicial process, but rather an employment process. The function of the Trust and the NMC in relation to this matter differs. This is because the Trust's consideration of this matter will have an impact on your future employment with the Hospital, whereas the NMC's consideration of the matter will have an impact on your nursing practice registration. Therefore, any decisions made by the Trust and this panel in relation to these allegations have no bearing on each other.

The panel also considered that it was a matter for them to decide how much weight to place on the evidence the NMC seeks to rely on in relation to charges 1a) and 1b) at the facts stage.

The panel therefore decided to refuse the application.

Decision and reasons on application to admit hearsay evidence

The panel heard an application from Mr O'Leary to adopt the hearsay evidence of Witness 1 into evidence for this case.

Mr O'Leary submitted that Witness 1 confirms that she was the Matron for the A&E department at the Hospital at the time of the allegations, and that she had a professional working relationship with you. He submitted that, whilst Witness 1 was not on shift on the

days of the allegations, she was alerted to the allegations upon her return and, having reviewed the DATIX report, escalated the matter. Mr O'Leary further submitted that Witness 1 spoke with you regarding the matter, albeit she says this was done via telephone call and 'the specifics of the allegation' were not discussed. He also submitted that Witness 1 has exhibited interview notes of an interview held between her and Witness 2.

Mr O'Leary submitted that Witness 1 gives details of the 'culture' within the department and the usual interaction between colleagues, particularly her observation of your physical contact with colleagues.

In light of the above, Mr O'Leary submitted that the NMC considers the evidence contained within Witness 1's statement to be relevant information.

Mr O'Leary referred the panel to the following cases: *NMC v Ogbonna* [2010] EWCA Civ 1216; *Bonhoeffer v GMC* [2011] EWCH 1585; and *Thorneycroft v Nursing and Midwifery Council* [2014] All ER (D) 161.

Mr O'Leary submitted that Witness 1's evidence is not the sole and decisive evidence in relation to the charges, nor is she a direct witness to any of the allegations and, by her own acceptance, was only made aware of the allegations against you following the incidents.

Mr O'Leary further submitted that Witness 1 refers to the CCTV footage of concern in this case which she has viewed and, although the panel have not seen this evidence, Witness 2, who is attending the hearing to give live evidence, has also viewed such evidence and can be cross-examined on its contents if required.

Mr O'Leary submitted that the NMC accepts that on 12 October 2022, Witness 1 was informed via letter that she was not required to give live evidence in these proceedings. However, 13 days later upon further review of the case, it was considered that Witness 1 ought to be called as a witness. Mr O'Leary submitted that Witness 1 was contacted further on 25 October 2022 and 11 January 2023 via email to advise her of this and confirm the dates she would be required to give live evidence.

Mr O'Leary went onto explain that during a telephone call between the NMC and Witness 1 on 17 January 2023, she stated she had not checked her emails and therefore did not see the later emails from the NMC. Witness 1 advised that she was currently abroad in Kenya and would not be available to give live evidence until her return. Mr O'Leary referred the panel to the telephone call record between the NMC and Witness 1 dated 17 January 2023, and the follow up email from Witness 1 dated 17 January 2023 where she states:

“Further to our telephone conversation this morning, unfortunately I missed the email sent in October advising that I was required to attend the above hearing.

In any event, I am out of the country from 31st January until 14th February returning on a long haul flight with my family on 14th.

Please accept my apologies that you were not made aware of this earlier...”

Mr O'Leary submitted that Witness 1 has confirmed that she will be available to give live evidence on 16 and 17 January 2023 if required.

Mr O'Leary submitted that the NMC have taken all reasonable steps to confirm Witness 1's attendance via email and telephone (albeit it is accepted that she was initially de-warned) in good time and, as a product of Witness 1's circumstances, she is unable to attend but has offered to do so later in the hearing timetable.

Mr O'Leary further submitted that notification of this application was provided to you, in good time, on 23 January 2023.

In light of his submissions, Mr O'Leary requested that the hearsay evidence of Witness 1 be admitted into evidence as it is both fair and relevant.

Mr da Rocha-Afodu raised no objections to this application, but requested that the panel place little weight on such evidence as part of this case.

The panel heard and accepted the advice of the legal assessor on the points it should take into consideration in respect of this application. This included that Rule 31 provides that, so

far as it is 'fair and relevant', a panel may accept evidence in a range of forms and circumstances, whether or not it is admissible in civil proceedings.

The panel gave the application in regard to Witness 1 serious consideration. The panel noted that Witness 1's statement had been prepared in anticipation of being used in these proceedings and contained the paragraph, 'This statement is true to the best of my knowledge and belief' and signed by her.

The panel considered whether you would be disadvantaged by the change in the NMC's position of moving from reliance upon the live testimony of Witness 1 to that of a written statement. It took into account the fact that you were given prior notice of this application in good time. The panel also considered that Witness 1's statement is not the sole and decisive evidence to any of the charges, and that the reason for Witness 1 being unable to attend these proceedings is because she is currently abroad.

In these circumstances, the panel came to the view that it would be fair to accept the hearsay evidence of Witness 1. The panel also considered that Witness 1's evidence was relevant to the case, albeit she was not a direct witness to the alleged events. The panel would give what it deemed appropriate weight once it had heard and evaluated all the evidence before it.

The panel therefore decided to accept this application.

Decision and reasons on application for special measures for vulnerable witnesses

Mr O'Leary made a request that Colleague A and Colleague B's live evidence be held in private on the basis that both witnesses are deemed vulnerable given the sexual nature of the charges in this case, of which they are both the alleged victims. This measure would enable both witnesses to give their best evidence during their live testimony. This application was made pursuant to Rule 23(1)(e) and 23(3)(d) of the Rules.

Mr da Rocha-Afodu indicated that he did not oppose the application.

The panel accepted the advice of the legal assessor.

The panel determined to hold parts of the hearing in private, specifically the live evidence of Colleague A and Colleague B, given the sensitive nature of the charges in the case which involve allegations of a sexual nature, of which both witnesses are the alleged victims.

The panel therefore decided to accept this application.

Background

The charges arose whilst you were employed as a Band 6 Charge Nurse by Birmingham Heartlands Hospital (the Hospital) in their Accident and Emergency (A&E) Department, part of the University Hospitals Birmingham NHS Foundation Trust (the Trust).

It is alleged that whilst working as the Nurse in Charge within an area of the A&E department at the Hospital between 5 August and 3 September 2020, you breached professional boundaries with Colleague A on several occasions whereby you stroked her arm with your hand, told her that you liked her arms, hugged her and asked her whether she was in a relationship, all with the intention of either seeking sexual gratification or pursuing a sexual relationship with Colleague A.

Furthermore, on 3 September 2020, Colleague A entered a treatment room within the A&E department to use the Arterial Blood Gases (ABG) machine to run one of her patients' blood sample. It is alleged that whilst she was in the treatment room, you entered the room and proceeded to put your hand on Colleague A's arm and stroke it. It is then alleged that you repeatedly told Colleague A that you loved her and attempted to kiss her arm. It is further alleged that you backed Colleague A into a corner of the treatment room and pushed your groin onto Colleague A's leg in a forceful manner, and rubbed your groin up and down against her leg despite her pleas for you to stop. It is then alleged that you held your erect penis in your hands through your trousers and told Colleague A she "*needed to see this*" and "*this was what happens every time I see you*". Colleague A at this point managed to get past you and exit the treatment room.

Colleague A did not report the incident immediately, but messaged her friends via WhatsApp to disclose what had happen. Upon the completion of her shift, Colleague A

asked another colleague to walk her to her car as she was fearful that you might be still in the vicinity of the Hospital. She told her colleague of her distress, but did not divulge any details of the alleged events. Colleague A later discussed the alleged incident with her parents and wrote a statement of the incidents for her own record. Colleague A attended her next shift at work which was on 10 September 2020 and, upon seeing you for the first time since the incident on 3 September 2020, went to the department toilet facility to vomit. After speaking with concerned colleagues that day, Colleague A decided to complete a DATIX of the incidents. Following receipt of the DATIX in relation to the incident, you were suspended from your role with immediate effect pending an internal investigation into the matter.

Following a disciplinary hearing on 12 April 2021 held by the Trust, where the allegations against you were found proved and amounted to gross misconduct, you were dismissed from your role on 7 May 2021. You appealed this decision on 20 September 2021. This appeal was unsuccessful.

On 22 October 2021, the NMC received a referral from the Trust concerning the allegations which involved Colleague A. During the NMC's investigation into the allegations, it was discovered that you had a prior similar incident with another colleague at the Hospital back in 2017. At this time, it was alleged that on 29 July 2017, you approached Colleague B during a shift and told her '*you know you want a piece of me*'. It is further alleged that a few minutes later, you told Colleague B '*you know you want a piece of me, why don't you come over to my place*' or words to that effect, and then grabbed her around the waist.

Following an internal investigation by the Trust, these allegations were not substantiated.

Decision and reasons on facts

In reaching its decisions on the disputed facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Mr O'Leary on behalf of the NMC and Mr da Rocha-Afodu on your behalf.

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 heard live evidence from the following witnesses called on behalf of the NMC:

- Colleague A: Paediatric Specialist Trainee Doctor at Birmingham Heartlands Hospital within the A&E Department (at the time of the incident), part of the University Hospitals Birmingham NHS Foundation Trust.
- Colleague B: Band 6 Sister Charge Nurse at Birmingham Heartlands Hospital within the A&E Department, part of the University Hospitals Birmingham NHS Foundation Trust.
- Witness 2: Matron at Goodhope Hospital, part of the University Hospitals Birmingham NHS Foundation Trust.

The panel heard live evidence from you under oath.

The panel heard live evidence from the following witnesses called on your behalf:

- Witness 3: Staff Nurse at Birmingham Heartlands Hospital within the A&E Department, part of the University Hospitals Birmingham NHS Foundation Trust.
- Witness 4: Staff Nurse at Birmingham Heartlands Hospital within the A&E Department,

part of the University Hospitals
Birmingham NHS Foundation Trust.

In closing submissions, Mr O'Leary submitted that, in order to consider whether the facts in this case are proved, the panel have had regard to live evidence from Colleague A, Colleague B and Witness 2, as well as the admitted written statement of Witness 1. He submitted that the panel have also had regard to the documentary evidence available within the bundles.

Mr O'Leary noted that no previous concerns were raised regarding your fitness to practise throughout your nursing career, which the panel may wish to consider when determining your credibility and whether it finds the facts proved. However, Mr O'Leary reminded the panel that it ought not to rely on this fact as the sole reason for not finding the facts as alleged. He referred the panel to the judgement (paragraph 24) in the case of *Donkin v The Law Society* [2007] EWHC 414 (Admin).

In relation to the charges that fall under Charge 1, Mr O'Leary submitted that Colleague B has been clear, credible and consistent in her evidence. He submitted that there appears to be no dispute that her allegations refer to you, and that you have both accepted knowing each other in a professional capacity.

Mr O'Leary referred the panel to Colleague B's local statement (EX 9, page 170) and submitted that this adds to Colleague B's consistency in her evidence, specifically that:

- the incident took place outside the treatment room;
- you grabbed her by the waist; and
- you made several inappropriate comments towards her.

Furthermore, Mr O'Leary noted that Colleague B in her local statement makes reference to you 'touching' and 'grabbing' her arm. He submitted that the touching of arms bears significant similarity to the allegations put forward by Colleague A.

Mr O'Leary referred to your oral evidence where you claimed that the allegations put forward by Colleague B were fabricated by her and another colleague, and that her

reasoning for this was due to fear of repercussion for her partner having attended the A&E department. However, Mr O'Leary submitted that it is not clear how implicating you in such allegations would have aided Colleague B (as you accepted in your oral evidence that there was no 'bad blood' between you both). Furthermore, he submitted that the involvement of another individual in your alleged fabrication of these allegations has not been put directly to Colleague B during her live evidence and, without her response, he invited the panel to place little weight on this.

In relation to the charges that fall under Charge 2, Mr O'Leary accepted that Colleague A was unable to recall the exact dates the allegations occurred, but submitted that her lack of speculation and candour during her live evidence supports her credibility.

Mr O'Leary referred the panel to the shift patterns for you and Colleague A from August to September 2020 (EX 8, part 1, page 100). He submitted that the brief encounters of the incidents described by Colleague A (which she stated lasted for seconds) are capable of having taken place within the specified timeframe. He further submitted that Colleague A was able to give a clear picture of her location at the time of incidents, giving specific detail about the desk and where you were positioned.

Mr O'Leary submitted that there is no material dispute that the allegations put forward by Colleague A refers to you, which you have accepted. He submitted that your repeated description of an event involving an argument over the nurses' computer prior to the incidents set out by Colleague A indicates that you both knew each other at the time of the incidents.

Mr O'Leary submitted that Colleague A's version of events has been consistent throughout both the local investigation and these proceedings. Therefore, he submitted that the panel can be satisfied that Colleague A's account is truthful, despite your claims of a 'vendetta' she has against you which has no merit.

Mr O'Leary submitted that some of the witnesses have testified to the 'tactile culture' within the A&E department, although the conduct alleged by Colleague A falls well beyond this culture. He noted that Colleague A was new to the department at the time of the incident, was in the role of a junior doctor, and was in the middle of performing a task, so such

alleged contact from you was uninvited and unnecessary. Mr O'Leary submitted that you were a tactile person, as noted by Witness 1 in her statement, and that you accepted having either held hands with or hugged other members of staff, which in turn increases the likelihood of your displaying the conduct as alleged.

Furthermore, Mr O'Leary submitted that the comment staff made referring Colleague A as the '*new [Colleague F]*' increases the likelihood that you hugged Colleague A. He referred the panel to the local investigation interview with Colleague F, who stated that it was not unusual for you to hug each other, for which you stated in your oral evidence that this was not something for you to hide. Mr O'Leary submitted that if the panel are satisfied that Colleague A did hear such comment, then it is likely that this comment was made in reference to a hug and that it was you who were giving this hug.

Mr O'Leary submitted that it is highly likely that you are a 'physical' communicator, and that you therefore engaged in the conduct alleged under Charge 2, including the words used.

In relation to the charges that fall under Charge 3, Mr O'Leary submitted that there is no material dispute as to the date this allegation took place.

Mr O'Leary accepted that the CCTV obtained during the local investigation has been lost. The Trust made efforts to locate this, but to no avail. He further accepted that what was seen on the CCTV according to Witness 2's oral evidence does not show the door to the treatment room where the alleged incident took place, or either you or Colleague A entering the room. However, Mr O'Leary submitted that the CCTV footage does in fact place both you and Colleague A within metres of the treatment room within minutes of the incident. Further, he submitted that you reluctantly identified yourself on the CCTV during a local investigation interview. Therefore, the panel can be sure that you were near the treatment room at the time of the incident.

Mr O'Leary referred to your oral evidence where you claimed to have been at the computer at the time of the alleged incident, but noted this was not mentioned in your statement dated 7 April 2021 (EX 8, part 4, page 54). He submitted that when questioned about this, you stated you 'did not think it important', when in fact such statement is an important detail given the allegations. Furthermore, Witness 2 in his oral evidence confirmed that your IT

report for that day was obtained during the local investigation, which does not show any activity for the relevant time period (although you stated that you may have used a generic login account that day).

Mr O'Leary referred to Colleague A's oral evidence where she stated she did not shout out at the time of the alleged incident in the treatment room. He submitted that the lack of shouting in these types of situation is not uncommon.

Mr O'Leary referred to Witness 3's oral evidence where she stated the following:

- From cubicles 15-18 where she was stationed, she did not have line of sight to the treatment room or the coordinator's computer desk.
- At the time of the incident, she could not recall where you were, and that she was likely busy with her patients.
- Whilst a coordinator (which was your role at the time) may inform colleagues when leaving the area, if they were just going to the treatment room, they would not necessarily inform colleagues of this.
- You told staff earlier in the day that you may be absent during the day and on the phone due to a personal matter.

Mr O'Leary submitted that the panel can be satisfied of the approximate timing of the incident from the following sources:

- The written and oral evidence of Colleague A.
- The WhatsApp messages Colleague A sent to her friends immediately after the event from 18:58 to 19:04.
- The ABG machine printout timed at 18:48, for which it is submitted that Colleague A borrowed Colleague C's badge pass in order to access and use the machine, despite the fact that Colleague C cannot remember lending the badge pass.
- The timings on the CCTV footages, albeit it is accepted that there is a slight divergence in timing between the two cameras.

In relation to Charge 4, Mr O'Leary submitted that the physical particulars in relation to charges 1 to 3 demonstrate a desire for sexual gratification. With regard to Colleague B in

respect of Charge 1, he submitted that the waist is widely considered as an intimate area, and your grabbing of her waist was therefore for your sexual gratification. Mr O'Leary submitted that saying '*you want a piece of me*', combined with the grabbing, demonstrates an intention to pursue a future sexual relationship with Colleague B.

With regard to Colleague A in respect of Charge 2, Mr O'Leary submitted that the stroking of arms, combined with stating you liked her arms, clearly show that sexual gratification was sought. He further submitted that to hug an individual without their consent is for sexual gratification and, when all combined with enquiring whether Colleague A was in a relationship, demonstrates a wish to pursue a future sexual relationship.

In respect of Charge 3, Mr O'Leary submitted that stroking of arms, attempting to kiss, pushing and rubbing of the groin are all acts of an inherently sexual nature, even more so when in a secluded room with no one else around. He submitted that in this incident, sexual gratification is the only reasonable explanation for such conduct. Furthermore, Mr O'Leary submitted that the telling of an individual they are loved is also for sexual gratification, particularly when combined with the grabbing of an erect penis with the words '*you need to see this, this is what you do to me every time I see you*'.

In relation to Charge 5, Mr O'Leary submitted that the findings of fact in relation to Charge 4 are relevant when considering Charge 5. He submitted that should the panel find that the alleged conduct was sexually motivated, this would plainly cross professional boundaries. However, should the panel find it was not sexually motivated, Mr O'Leary submitted that the actions of touching and words used as described in the charges would cross professional boundaries

Mr O'Leary referred to the Dignity at Work Policy which indicates that harassment in the workplace is not acceptable. He submitted that, whilst the allegations in this case do not relate to a protected characteristic, the Policy indicates that inappropriate touching amongst other behaviours would cross professional boundaries.

Mr O'Leary submitted that the panel can be satisfied on the balance of probabilities that the evidence it has heard, read and seen in this case is clear, credible and consistent, and that there is no reason for a false or malicious allegation to be put forward by either Colleague A

or Colleague B. He therefore invited that panel to find all the charges in this case proved.

Mr da Rocha-Afodu submitted that the res judicata applies in respect of the allegations that fall under Charge 1. He referred the panel to the 'Outcome of Investigation' letter from the Trust dated 18 October 2017 (EX 8, part 1, page 10), which states that the allegations brought forward by Colleague B were dismissed. Mr da Rocha-Afodu noted within the letter that witnesses who were present at the time of the alleged incident stated they did not see you behaving inappropriately towards Colleague B as she alleges. He submitted that the NMC have not challenged this outcome, and have failed to gather sufficient evidence to substantiate this charge.

Mr da Rocha-Afodu submitted that Colleague B's claim that she was not aware of the local investigation outcome in respect of her allegations is false. He referred the panel to the letter from the Trust dated 11 September 2017 (EX9, page 164), which enclosed notes taken during an interview with you as part of the local investigation, where the interviewer stated "*We have met with [Colleague B] in respect of this investigation...*" and "*When I talked to [Colleague B] she said historically there is an element of banter in the department that is acceptable*". He submitted that this therefore shows that Colleague B would have been aware of the investigation outcome at the time as she was involved in the local investigation.

Mr da Rocha-Afodu submitted there are inconsistencies in Colleague B's oral evidence, in comparison to her local statement and NMC statement, the first concerning when she disclosed the alleged incident to her boyfriend and the Matron on duty at the time, and the second concerning where around her waist you allegedly grabbed. Therefore, Mr da Rocha-Afodu submitted that Colleague B lacks credibility as a witness, which in turn means that her evidence is unreliable. He also submitted that these inconsistencies support your claim that Colleague B fabricated the allegations against you.

Mr da Rocha-Afodu referred the panel to the judgment in *R v Lucas* [1981] QB 720. He submitted that, where there is insufficient evidence in support of an allegation, which in turn conflicts with the evidence presented by the defence, preference should be made to the evidence of the defence.

Mr da Rocha-Afodu also noted that Colleague B did not report this incident to the police, which he submitted was because the allegations are false and she feared police action against her as a result.

Mr da Rocha-Afodu submitted that the allegations that fall under charges 2 and 3 are false in their entirety, and that the NMC have provided insufficient evidence to substantiate these charges.

Mr da Rocha-Afodu submitted that the description of the CCTV provided, along with the blood gas report from the ABG machine located in the treatment room for 3 September 2020 (EX GS12), shows that the incident did not take place in the timeframe alleged. He submitted that the CCTV footage places Witness 3 in the vicinity of the treatment room around the time the alleged incident occurred, and in her oral evidence stated she did not witness any incident as Colleague A alleges. Witness 3 also stated in her oral evidence that you, as the coordinator, would usually be at the computer desk. He referred the panel to the diagram (EX 8, part 2, EX MMA1) of the Majors B, which shows that the computer desk is within the vicinity of the treatment room, hence why you are seen in the area on the CCTV footage. However, Mr da Rocha-Afodu submitted that there is no evidence placing you in the treatment room at the alleged time of the incident.

Mr da Rocha-Afodu submitted that there are also discrepancies in the timing of when Colleague A entered the treatment room during this period, or if she entered the room at all, and that the CCTV description does not show Colleague A leaving the room. Furthermore, Colleague C confirmed in her local investigation interview that, in accordance with Trust policy, she did not loan her badge pass to Colleague A on the day of the incident. Mr da Rocha-Afodu also submitted that you did not see Colleague A in the area or entering the treatment room within the timeframe of the alleged incident. Therefore, he submitted that there is no evidence placing Colleague A in the treatment room at the time the badge pass was used on the ABG machine at 18:48.

Mr da Rocha-Afodu submitted that little to no weight should be given to Witness 1's written statement. Witness 1 in her statement claims she saw you enter the treatment room within the timeframe of the alleged incident when viewing the CCTV footage. He submitted that this contradicts Witness 2's oral evidence where he stated he could not see you entering

the treatment room when he viewed the CCTV footage. Furthermore, Mr da Rocha-Afodu submitted that Witness 1 stated that the footage quality was poor, so her claim that she saw you entering the room on the CCTV footage is incorrect.

Mr da Rocha-Afodu submitted that Colleague A's credibility as a witness is inconsistent and unreliable due to the following:

- She did not inform Colleague D of the incident when asking him to escort her to her car after the alleged incident.
- There was a delay in the reporting of the incident to the Trust by one week.
- No report was made to the police, which he submitted was because the allegations are false and she feared police action against her as a result.

Mr da Rocha-Afodu submitted that Witness 2 has admitted several failings by the Trust in the investigation of Colleague A's allegations, which deprived you of a fair investigation and hearing. He submitted that the failures include: the loss of the CCTV footage (for which no incident report was created); and potential witnesses within the vicinity of the treatment room at the time of the alleged incident not being interviewed.

Mr da Rocha-Afodu submitted that the NMC have failed to provide evidence to corroborate the alleged comment staff made referring Colleague A as '*the new [Colleague F]*' and therefore this has no merit.

Mr da Rocha-Afodu further submitted that the NMC's suggestion that you are a 'tactile' person has no merit, as witness testimonies in this case have confirmed that physical contact between colleagues within the department was normal and a regular occurrence.

Mr da Rocha-Afodu submitted that there is overall insufficient evidence to substantiate the charges against you. He therefore invited the panel to find all the charges in this case not proved.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor. It considered the witness and documentary evidence provided by both the NMC and your representative.

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

Charges 1a) and 1b)

“On 29 July 2017;

- a. Said to Colleague B ‘you know you want a piece of me, why don’t you come over to my place’ or words to that effect;*
- b. Grabbed Colleague B around the waist”*

These charges are found proved.

The panel reminded itself of its previous decision on the res judicata application.

The panel considered that Colleague B was consistent in both her local statement (EX 9, page 170) and oral evidence with regard to the choice of words you used towards her at the time of the alleged incident. In her local statement, she said “*...he then stated inappropriately “I wouldn’t mind a piece of that”*”. In her oral evidence, Colleague B said that you told her “*do you want a piece of me?*”. The panel noted the consistency in Colleague B referring to the word ‘piece’ when recalling the alleged comment you made to her at the time of the incident.

The panel noted the slight inconsistency in Colleague B’s local statement in comparison to her oral evidence. In her local statement, she stated that you grabbed hold of the left side of her waist, but in her oral evidence she stated you grabbed the right side of her waist. Nevertheless, the panel noted Colleague B’s consistency in stating that you grabbed her by the waist at the time of the incident.

The panel took into account the fact that this incident occurred in 2017, but noted Colleague B’s honesty during her oral evidence in saying when she could not recall certain details of the incident.

The panel considered the fact that Colleague B chose not to report the incident straight away and accepted her reasoning for this, particularly given the nature of the allegation which she stated only lasted for a few seconds. The panel also considered the fact that the incident was not fully investigated by the Trust at the time, so it did not have the benefit of an investigation report. However, it noted that the request for mediation from Colleague B was refused by you.

The panel did consider your version of events in your local statement (EX 9, page 171) and oral evidence. However, the panel determined that Colleague B's description of the events, when compared with your own, was accurate.

The panel is therefore satisfied, on a balance of probabilities, that the account provided by Colleague B of the incident as set out in charges 1a) and b) are true.

Charges 2a), 2c) and 2d)

“Between August – September 2020:

- a) Stroked Colleague A's arm/s;*
- b) ...*
- c) Said you liked Colleague A's arms or words to that effect;”*
- d) Asked Colleague A whether she was in a relationship or words to that effect;”*

These charges are found proved.

The panel considered that Colleague A was clear and consistent in her description of the incident in her oral statement and local investigation interview (EX GS14), specifically when she stated how uncomfortable the interaction in this charge made her feel:

“There were a couple of instances before 3rd September which made me feel quite uncomfortable. The first time I met Robert when we working in Majors C, it was probably one of my first shifts. I introduced myself as [Colleague A], one of the new Doctors. I went to see one of the patients in Majors C, following seeing the patient, I

was sat at the Nurses desk by 5, 6, 7 and 8 and making my notes, Robert had touched my arms on several occasions and said he liked the appearance of my arms. He also asked quite a few questions including if I was in a relationship, to which I was quite surprised at given that I didn't really know him and I had never met him before. I just answered and said "Oh I'm seeing someone" and brushed it off, and didn't really think that much of it..."

The panel considered the fact that Colleague A chose not to report the incident at the time and considered it reasonable, given that Colleague A was a new starter at the time, and she stated in her oral evidence that the interaction 'shocked' her. Moreover, Colleague A stated that the question regarding whether she was in a relationship 'came out of the blue' and 'surprised' her.

The panel did consider your version of events in your oral evidence. However, the panel determined that Colleague A's description of the events, when compared with your own, was accurate.

The panel therefore determined that, on a balance of probabilities, the account provided by Colleague A of the incident as set out in Charges 2a), c) and d) is true.

Charge 2b)

"Between August – September 2020:

b) Hugged Colleague A;"

This charge is found proved.

The panel considered that Colleague A was clear and consistent in her description of the incident in her oral statement and local investigation interview, specifically when she stated how uncomfortable the interaction in this charge made her feel:

"...The second time I saw him, I went to pod some bloods in assessment. Robert was working in assessment for the day and he instantly came over and pulled me

into a hug, which was a bit odd, and I didn't respond, I had a pod in my arms and my arms were down by my side..."

The panel understood that there appeared to be a 'tactile culture' within the A&E department at the Hospital, whereby colleagues engaged in physical communication with each other (i.e. hugging and holding hands). The panel considered the written statement of Witness 1 who explained that, given the challenging environment of the A&E department where staff would often face traumatic situations when dealing with patients, a hug is the usual way they would comfort each other. The panel also noted in Witness 1's interview notes during the local investigation, she stated:

"Yes some staff do communicate more physically in general, and I believe Robert to be one of those. ...things like that, the hand holding, the arm touching, it's almost like a physical comfort."

The panel also considered Colleague F's interview notes during the local investigation (EX 8, tab 3, page 37) where she stated:

"...Hugs happen between people that know each other and should be with mutual consent."

"If I hadn't seen Robert for a while...we would greet each other by hugging and it would be by mutual consent."

The panel also noted that Witness 4 in her oral evidence confirmed that both of you would at times hold hands within the department.

Taking into account the evidence from the witnesses referred to above, the panel was satisfied that you were, and were known to be, a tactile or 'touchy feely' person within the department.

The panel did consider your version of events in your oral evidence, along with your explanation as to how you would often communicate with colleagues within the department in general. Particularly, you confirmed that you have hugged and held hands with other

members of staff. Taking into account the witness testimonies/evidence referred to and Colleague A's description of the events, the panel determined that, on a balance of probabilities, the account provided by Colleague A of the incident as set out in Charge 2b) is true.

Charges 3a) to g)

“3) On 3 September 2020;

- a) Put your hands on Colleague A's arm/s;*
- b) Stroked Colleague A's arm/s;*
- c) Tried to kiss Colleague A's arm/s;*
- d) Pushed your groin to Colleague A's leg/s;*
- e) Rubbed your crotch up and down Colleague A's leg;*
- f) Said to Colleague A that you loved her or word to that effect;*
- g) Said to Colleague A 'you need to see this, this is what you do to me every time I see you' or words to that effect and/or whilst touching your genital area;”*

These charges are found proved.

Witness 2 in his oral evidence acknowledged that the timing of the footage from the two CCTV cameras was out of synchronisation due to the Trust's poor CCTV system. Nevertheless, the panel considered that the description of the CCTV footages referred to during the local investigation identifies both you and Colleague A within the vicinity of the treatment room between 18:45 and 18:50 on 3 September 2020, which is around the time the incident occurred.

The panel acknowledged that the CCTV footage description does not confirm that you entered the treatment room. However, the footage does place you within the vicinity of the treatment room. In addition, Witness 3 in her oral evidence told the panel that, whilst you would tell someone if you needed to leave the coordinator's desk to visit another area or use the toilet, this would not be the case if you just needed to visit the treatment room within Majors B.

The panel had regard to the blood gas report from the ABG machine located in the treatment room for 3 September 2020 (EX GS12), which shows that Colleague C's pass was used at 18:48 that day. Colleague A in her oral evidence explained that, as she was a new starter at the time, she had not received her own badge pass yet. Therefore, if she needed to use the ABG machine which requires a badge pass, she would have no choice but to borrow someone else's, which in this case was Colleague C's badge pass. The panel considered Colleague C's interview notes during the local investigation (EX GS26) where she denies lending Colleague A her badge pass on 3 September 2020, but also said that she might do so if a patient was very unwell. The panel bore in mind that Witness 2 in his oral evidence told the panel that, within the Hospital, staff are not permitted to loan their badge passes to each other.

The panel considered that there is no reasonable explanation as to why Colleague A would lie about borrowing someone else's pass given the circumstances, in comparison to Colleague C who is more likely in this situation to be reprimanded for lending her badge pass out. Furthermore, the panel has seen no evidence to suggest that Colleague C was identified on the CCTV footage within the vicinity of the treatment room around the time her badge pass was used on the ABG machine at 18:48. The panel therefore accepted that Colleague A had used Colleague C's badge pass on the ABG machine within the treatment room on 3 September 2020 as she describes. In turn, the panel was satisfied that Colleague A was in the treatment room at 18:48, which is within the timeframe of the incident occurring.

Taking into account the CCTV footage and Witness 3's testimony, the panel was also satisfied that it is more likely than not that you entered the treatment room shortly after Colleague A entered the room.

The panel considered the fact that Colleague A chose not to report the incident straight away, but noted that she did message her friend group chat on WhatsApp at 18:58 to 19:04 to disclose what happened, which was on the same day as the alleged incident between the timeframe of 18:45 and 18:50. The panel took into account the fact that Colleague A's shift was due to end around 22:30 that day, which would have been a busy period within the department as this is when the handover to the night shift staff would have occurred. Colleague A in her oral evidence also told the panel that she had asked Colleague D to

walk her to her car after the shift due to fear of bumping into you outside the Hospital (although she did not disclose this to Colleague D at first). In addition, Colleague A said that her next shift following the incident was not until the night shift of 9/10 September 2020, which was her first opportunity to report the matter via the DATIX. Given the nature of the incident, and the circumstances surrounding this as outlined above, the panel considered the time delay of Colleague A reporting the incident to be reasonable. Moreover, the panel had regard to the guidance given [to Juries] in the Crown Court Compendium about the reporting of allegations by sexual assault victims:

“When you consider why this allegation was not made earlier, you must not assume that because it was delayed it is untrue. The fact that a complaint is made late does not make the allegation untrue. And a complaint is not necessarily true just because it was made immediately.

...

To decide this point, you should look at all the circumstances. This includes the reason W gave for not complaining at the time. Different people react to situations in different ways. Some people may tell someone about it straight away. But others may not feel able to do so. This can be out of shame, shock, confusion or fear of getting into trouble, not being believed, or causing problems for other people.”

The panel accepted Colleague A’s description of what occurred within the treatment room at the time of the incident in her oral evidence and NMC written statement. The panel did consider your version of what occurred on 3 September 2020, but considered that Colleague A’s version of events was a clear, consistent, and accurate reflection of what happened on that day.

The panel accepted that there was a prior incident between you and Colleague A where you shouted at her for using a computer within the department that was reserved for nurses only. However, the panel considered that there was insufficient evidence to suggest that the allegations that fall under Charge 3 were fabricated as part of a ‘vendetta’ you allege Colleague A has against you.

The panel therefore determined that, on a balance of probabilities, the account provided by Colleague A of the incident as set out in Charges 3a) to g) is true in all its particulars.

Charge 4)

“4) Your actions in charge 1 and/or 2 and/or 3 were sexually motivated in that you were seeking sexual gratification and/or intended to pursue a future sexual relationship with Colleague A and/or Colleague B;”

This charge is found proved.

In relation to Charge 1a) the panel considered that the comment said to Colleague B was made with the intent of pursuing a future sexual relationship with her. Within this context, the panel considered that your conduct in Charge 1b) in grabbing Colleague B’s waist, which was done at the same time you made the comment in Charge 1a), was done for sexual gratification.

In relation to Charges 2 a), c) and d), the panel considered that your comments to Colleague A and the stroking of her arm was done with the intent of pursuing a future sexual relationship with her. Within this context, the panel considered that your conduct in Charge 2b) in hugging Colleague A without her consent, was done for sexual gratification.

In relation to Charges 3 a) to g), the panel was in no doubt that your conduct could only have been done for reasons of sexual gratification.

Charge 5)

“5) Your actions in charge 1 and/or 2 and/or 3 breached professional boundaries.”

This charge is found proved.

Having found that your conduct outlined in charges 1 to 3 was sexually motivated in that you were seeking sexual gratification and/or intended to pursue a future sexual relationship with both Colleague A and Colleague B, the panel determined that your actions also crossed professional boundaries.

The panel had regard to the Hospital's Dignity at Work procedure (EX GS23) and noted that your conduct violated their policy with regard to sexual harassment. Nevertheless, panel determined that your conduct, in any case, breached professional boundaries with both Colleague A and Colleague B.

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 your 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, your fitness to practise is currently impaired as a result of that misconduct.

Submissions on misconduct and impairment

Following the panel's finding of all the charges in this case proved in their entirety, Mr O'Leary referred the panel to the case of *Cheatle v General Medical Council* [2009] EWHC 645 (Admin). He submitted that the panel must now consider whether the conduct as alleged amounts to misconduct, and only then must it move to consider whether your fitness to practise is impaired.

Mr O'Leary then referred the panel to the test for misconduct in the case of *Roylance v General Medical Council* (No 2) [2000] 1 A.C. 311, noting that the word 'misconduct' has no definition in statute. He also referred to the following cases: *Nandi v General Medical*

Council [2004] EWHC 2317 (Admin); *R (Calhaem) v GMC* [2007] EWHC 2606 (Admin); and *R(Remedy) v General Medical Council* [2010] EWHC 1245.

Mr O’Leary submitted that the conduct found proved in this case clearly amounts to misconduct, in line with the guidance set out in the case of *Roylance v General Medical Council* (No 2) [2000] 1 A.C. 311. He further submitted that the conduct amounts to breaches of The Code, specifically section 1.1 and section 20.1 to 20.5, 20.8 and 20.10.

Mr O’Leary referred the panel back to the case of *Remedy* [2010] EWHC 1245. He submitted that, whilst the conduct found proved does not relate directly to patient care, the principles set out in this case demonstrate that this conduct, committed whilst on shift as a senior nurse, concerns your professional practice. Therefore, Mr O’Leary submitted that you pose a risk to the public, have brought disgrace upon yourself, and have prejudiced the reputation of the nursing profession.

Mr O’Leary submitted that the conduct found proved, which involves sexual touching in reference to Charges 3f) and 3g), can only be described as deplorable. He submitted that this fundamentally violates the standards expected of nurses and shows a complete disregard for the dignity of colleagues. Furthermore, Mr O’Leary submitted that inappropriately touching colleagues, the associated words used, the rubbing of your crotch up and down a colleague’s leg, and the touching of your genital area are highly inappropriate.

Mr O’Leary submitted that your conduct against unwilling participants falls far below the standards as set out in the Code, and has caused significant emotional harm to both Colleague A and Colleague B. He referred the panel to Colleague A’s oral evidence where she said she vomited at the sight of you a week after the 3 September 2020 incident. Mr O’Leary submitted that your behaviour shows a complete disregard for the wellbeing and dignity of your colleagues, and is an example of a senior nurse taking advantage of younger colleagues early in their careers.

Mr O’Leary therefore invited the panel to take the view that the conduct found proved amounts to misconduct.

With regard to impairment, Mr O'Leary referred the panel to the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin). He submitted that limbs b) and c) of the test as set out in that case have been engaged in this instance.

Mr O'Leary also referred the panel to the following cases: *Yeong v General Medical Council* [2009] EWHC 1923; *General Medical Council v Meadow* [2007] QB 462 (Admin); *Cheatle* [2009] EWHC 645; and *Cohen v General Medical Council* [2008] EWHC 581.

Mr O'Leary invited the panel to find that your fitness to practise is currently impaired on the grounds of public protection and public interest.

In respect of public protection, Mr O'Leary submitted that the public includes colleagues and other individuals you work with, to whom you have caused emotional harm as a result of your unwanted sexual behaviour.

Mr O'Leary submitted that you have provided the panel with no evidence of insight or remediation, noting that you also demonstrated a lack of insight during the local investigation into the allegations. Particularly, you refused Colleague B's offer of mediation following the local investigation into the 2017 allegations.

Mr O'Leary submitted that without any evidence of insight or remediation, there is a high risk of you repeating the conduct found proved. He submitted that, even if the panel were provided with some evidence of insight or remediation, the NMC guidance states that allegations of a sexual nature are often difficult to address.

Mr O'Leary further submitted that you have failed to show any understanding of how behaviour of the type found proved may affect the complainants. He noted that in oral evidence, you refused to admit that the behaviour, even if not accepted, could amount to sexual activity, a conclusion which the panel has reached.

With regard to public interest, Mr O'Leary submitted that the conduct significantly undermines public trust and confidence in the nursing profession, as it involved

unwarranted sexual touching and inappropriate language towards colleagues [PRIVATE] both of whom were at relatively early stages in their careers.

Mr O'Leary submitted that an informed member of the public would be concerned if a finding of impairment were not made, given the nature of the matter. He submitted that this would have serious implications for public confidence in the nursing profession.

Mr da Rocha-Afodu submitted that whether your conduct amounts to professional misconduct or serious misconduct, this does not necessarily mean that your fitness to practise is currently impaired.

Mr da Rocha-Afodu referenced the case of *Nandi* [2004] EWHC 2317 (Admin).

Mr da Rocha-Afodu referred the panel to the testimonies obtained from your former colleagues, which he confirmed were all aware of the allegations against you in this case when providing these. He submitted that the positive testimonies attest to your character of being an honest and trustworthy family man, not someone capable of committing adultery.

Mr da Rocha-Afodu referenced the case of *Remedy* [2010] EWHC 1245 and *Giele v General Medical Council* [2005] EWHC 2143 (Admin).

Mr da Rocha-Afodu submitted that the conduct found proved, although taking place within the Hospital, did not occur during the course of your professional duties, nor is there any evidence of this.

With regard to impairment, Mr da Rocha-Afodu referenced the case of *Grant* [2011] EWHC 927 (Admin) and submitted limbs b) and c) of the test have not been engaged in this case.

Mr da Rocha-Afodu submitted that you currently present no risk to patients as the allegations only involved colleagues. He submitted that this matter has brought personal disgrace upon yourself, rather than on the nursing profession.

Mr da Rocha-Afodu submitted that, as you denied the allegations from the onset, it would have been contradictory for you to show any level of remorse up until this point. However,

he referred the panel to your oral evidence where you accepted that such allegations were wrong, and that you would not want your daughters to be subject to such behaviour.

Mr da Rocha-Afodu submitted that you fully understand the magnitude of the allegations. Looking forward, he submitted that you will now refrain from tactile behaviour within the workplace, and will distance yourself from female colleagues to avoid any misunderstandings. Mr da Rocha-Afodu also submitted that, if such incidents were to occur again in the future, you would accept any offer of mediation.

Mr da Rocha-Afodu reminded the panel that, following the incident with Colleague B, you were able to work together without any further issues. [PRIVATE]

Mr da Rocha-Afodu submitted that you have not worked with Colleague A since the incident, nor have you undertaken a nursing role. Therefore, you have not been in a position to address the concerns and demonstrate your ability to develop a professional working relationship with female colleagues.

Mr da Rocha-Afodu clarified that, during your oral evidence, you did in fact accept that these allegations amount to sexual activity.

With regard to risk of repetition, Mr da Rocha-Afodu submitted that there is no evidence of the conduct being repeated following the incidents. He also submitted that the touching involved in these incidents was at the lower end of the scale of seriousness, as hugging for example is considered normal in a tactile environment.

Mr da Rocha-Afodu also submitted that there was no evidence to demonstrate Colleague A's understanding or interpretation of the wording set out in Charge 3g). He also submitted that the words used in Charge 3f) shows you to be a caring individual.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments.

Decision and reasons on misconduct and impairment

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of *'The Code: Professional standards of practice and behaviour for nurses, midwives and nursing associates (2015, updated 2018) (the Code), and the case of Roylance v General Medical Council (No. 2) [2000].'*

The panel was of the view that your actions amounted to breaches of the Code, specifically:

Promote professionalism and trust

You uphold the reputation of your profession at all times. You should display a personal commitment to the standards of practice and behaviour set out in the Code. You should be a model of integrity and leadership for others to aspire to. This should lead to trust and confidence in the professions from patients, people receiving care, other health and care professionals and the public.

20 Uphold the reputation of your profession at all times

To achieve this, you must:

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

20.2 *act with...integrity at all times, treating people fairly and without...harassment*

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

20.5 *treat people in a way that does not take advantage of their vulnerability or cause them upset or distress*

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

20.10 *use all forms of spoken...communication...responsibly, respecting the right to privacy of others at all times*

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, it considered that your actions involved abusing your position of relative seniority by subjecting less experienced and much younger colleagues to inappropriate sexual advances whilst on shift, particularly the use of suggestive wording, non-consensual touching and the touching of your genital area. The panel considered that such conduct is deplorable and was done for self-gratification at the expense of vulnerable individuals, which clearly went beyond professional boundaries between colleagues. The panel determined that the nature of these incidents, specifically in respect of Charge 3, not only amounts to serious misconduct, but to a serious sexual assault.

The panel took into account the following principles set out in the case of *Remedy* [2010] EWHC 1245:

“(1) Misconduct is of two principal kinds. First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur within the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession.

(2) Misconduct falling within the first limb need not arise in the context of a doctor exercising his clinical practice, but it must be in the exercise of the doctor’s medical calling. There is no single or simple test for defining when that condition is satisfied.

...

(6) Conduct falls into the second limb if it is dishonourable or disgraceful or attracts some kind of opprobrium; that fact may be sufficient to bring the profession of medicine into disrepute. It matters not whether such conduct is directly related to the exercise of professional skills.”

The panel found that your actions did fall seriously short of the conduct and standards expected of a nurse and amounted to serious misconduct.

Decision and reasons on impairment

The panel next went on to decide if as a result of the misconduct, your 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 and to maintain professional boundaries. 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 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 *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 considered that limbs b) and c) of the test outlined above have been engaged directly. Whilst no patients were involved in your misconduct, your actions had the potential to put patients at an indirect risk of harm. This is because the colleagues being subjected to unwanted sexual advances would have been negatively impacted mentally and emotionally, which in turn could have affected their ability to provide sufficient care to their patients. Furthermore, your misconduct breached the fundamental tenets of the nursing profession and therefore brought its reputation into disrepute.

In considering whether you have demonstrated any level of insight into the matter, the panel determined that you showed little insight during your oral evidence. Whilst the panel acknowledges the fact that you denied the allegations from the onset, it considered that there would still have been an opportunity for you to demonstrate insight, from a theoretical perspective, into the seriousness of such behaviour and the impact this would have on the complainants.

The panel noted that allegations of a sexual nature are difficult to remediate. Nevertheless, you have not provided the panel with any evidence of remorse, reflection or steps you have taken to address the concerns raised (for example retraining in areas of professional boundaries or acceptable behaviour within the workplace, testimonies from current colleagues attesting to your professional relationship etc). However, the panel did note the large number of positive testimonials you have supplied that attest to your good professional practice as a nurse.

In absence of remediation, the panel considered that there was a high risk of the misconduct in this case being repeated in the future. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind 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.

Given the nature of the proved misconduct, along with your lack of remorse and efforts to address your behaviour, the panel considered that an informed member of the public would be appalled if a finding of impairment were not made in this case. In turn, public confidence in the nursing profession, and the NMC as a regulator, would be significantly undermined. The panel therefore determined that a finding of impairment on public interest grounds is also required.

Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired.

Sanction

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

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

Submissions on sanction

Following the panel's findings of impairment by reason of your misconduct, Mr O'Leary submitted that the panel must now consider whether to impose a sanction. Mr O'Leary informed the panel that in the Notice of Hearing, dated 9 January 2023, the NMC advised you that it would seek the imposition of a striking off order if the panel found your fitness to practise currently impaired.

Mr O'Leary referred the panel to the NMC guidance on sanctions.

Mr O'Leary acknowledged that you have had no previous concerns regarding your fitness to practise prior to the incidents. He confirmed that you have been subject to an interim suspension order since 21 January 2022.

Mr O'Leary submitted that the following aggravating factors are present in this case:

- You abused your position of 'relative seniority' at the time.
- The acts you committed were non-consensual.
- The acts committed against Colleague A took place in a small room when she was alone.
- Both complainants were relatively young and, particularly in Colleague A's case, were at the early stages of their careers. He submitted that the panel noted in their previous findings that your actions were 'at the expense of vulnerable individuals'.

Mr O'Leary submitted that, regarding mitigating factors, the panel may consider the fact that the allegations concerning Colleague B occurred some time ago, and the character references you provided. However, he referred the panel to his previous submissions regarding the character references, and to the NMC guidance on mitigating factors.

Mr O'Leary submitted that taking no action would not be appropriate given the seriousness of this case, and the panel's findings of sexual misconduct. He also submitted that a caution order would not be appropriate in this case, given the risk to public safety identified in the panel's findings of impairment.

Mr O'Leary submitted that a conditions of practice order would not be suitable for this case. He submitted that you have demonstrated a deep-seated personality issue when it comes to sexually motivated touching. Mr O'Leary submitted that no conditions could be formulated that could regulate your practice to ensure public safety, given the sexual nature of the misconduct. Furthermore, he submitted that without any evidence of insight or remediation, the panel ought to consider whether it can be satisfied that any conditions imposed would be complied with.

With regard to a suspension order, Mr O'Leary submitted that such a sanction would not be suitable in this case. He submitted that this was not a single incident of misconduct, and that the repetition indicates a deep-seated personality or attitudinal issue. Mr O'Leary further submitted that you have shown 'little insight' and lack of 'efforts to address your behaviour', which in turn means that there is a high risk of repetition according to the panel's previous findings.

With regard to an imposition of a striking off order, Mr O'Leary submitted that:

- The concerns raise fundamental questions about your professionalism, despite the fact that no patients came to harm. He submitted that to act in a sexually motivated manner towards non-consenting individuals goes against the fundamentals of treating others with dignity and respect. He also noted that the panel in its findings considered that your actions demonstrated a potential indirect risk to patients.
- Public confidence in nurses would be considerably affected should you not be removed from the register, given that these actions took place against colleagues whilst you were on shift. He submitted that, should you be in a position to return to practice, others may not feel safe, and everyone has a right to attend their place of work without fear.
- Given the repeated nature of the allegations, a striking off order would be the only sanction that would be sufficient to protect members of the public and maintain professional standards.

Mr O'Leary submitted that, notwithstanding the lack of clinical concerns, your actions are fundamentally incompatible with remaining on the register, and that a striking off order is therefore the necessary and proportionate sanction in this case. He invited the panel to also take this view.

Mr da Rocha-Afodu submitted that a striking off order is not necessary and would be disproportionate in this case, despite the panel's findings of serious misconduct in respect of the charges found proved.

Mr da Rocha-Afodu referred the panel to the 41 testimonies you provided, which he submitted attested to you being an honest, hardworking, professional, and trustworthy nurse with excellent social skills. He drew the panel's attention to the testimonies from Witness 3 and Witness 4, who are fully aware of the charges against you. He submitted that Witness 4 stated in her testimony that you do not pose a risk to the public, which other testimonies have also attested to.

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Mr da Rocha-Afodu referred the panel to the case of *Giele* [2005] EWHC 2143 (Admin). He then referred to the NMC guidance and reminded the panel that the purpose of a sanction is not to be punitive, but to protect the patients and the public interest. Therefore, any sanction imposed must be proportionate.

Mr da Rocha-Afodu submitted that, if the panel were to strike you off from the register, despite the large volume of positive testimonies provided, the nursing profession would be deprived of a talented nurse. Particularly, he pointed out the fact that there is a known shortage of nurses within the National Health Service (NHS), and preventing a nurse such as yourself from practising would therefore not be in the public interest.

Mr da Rocha-Afodu submitted that, when considering the proportionality of any sanction, the public interests should be weighted up against your Article 8 right under the Human Rights Acts 1998. He made reference to the test noted in the case of *Giele* [2005] EWHC 2143 (Admin), then referred the panel to the case of *Huang and others v Secretary of State for the Home Department Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11. He submitted that it is for the panel to consider whether imposing a striking off order, which in effect would end your nursing career, is proportionate when this could in fact be in violation of your Article 8 human rights.

Mr da Rocha-Afodu submitted that your case does not satisfy the criteria set out in the NMC guidance with regard to imposing a striking off order as:

- Your professionalism has not been called into question, despite the incidents having taken place during a shift.

- You have shown some insight, and were able to continue working with Colleague B following the incident without further issues.
- A striking off order is not the only sanction available in this case that would protect the public and maintain public confidence in the profession.

Mr da Rocha-Afodu submitted that if you were to be struck off the register, you would not be entitled to apply for restoration until after a five-year period and, given your age, this would be towards your retirement age. He also submitted that your clinical skills would diminish during this period, which will end any hope of your being able to return to nursing practice.

Mr da Rocha-Afodu submitted that either a caution order (despite the panel's findings of a risk to the public at the impairment stage) or a conditions of practice order would be proportionate in this case. He submitted that you have shown insight, have said that you will no longer engage in tactile behaviour within the workplace, and have already demonstrated the ability to maintain a professional working relationship with colleagues following an incident (in Colleague B's case).

Mr da Rocha-Afodu submitted that, if the panel do not agree that a caution order or conditions of practice order is appropriate, then he requested that it considers the imposition of a 12 month suspension order. He submitted that such an order would be the most severe and reasonable sanction in this case.

Decision and reasons on sanction

Having found your 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 panel had careful regard to the SG, specifically '*Factors to consider before deciding on sanctions*' (SAN-1) and '*Considering sanctions for serious cases*', particularly the section '*Cases involving sexual misconduct*' (SAN-2). The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel took into account the following aggravating features:

- There was a pattern of similar behaviour which occurred on several occasions escalating to the 3 September 2020 incident.
- You abused your position of 'relative seniority' at the time.
- Both complainants were relatively young and, particularly in Colleague A's case, were at the early stages of their careers.
- Sexual misconduct by nature is serious, and the acts you committed were non-consensual.
- The acts committed against Colleague A took place in a small room when she was alone.
- You caused emotional harm to Colleague A and Colleague B.
- You have demonstrated little to no insight or remorse into your behaviour.

The panel also took into account the following mitigating features:

- You have provided over 40 positive references attesting to your character.
- No concerns have been raised in respect of your clinical practice.

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 seriousness of the case. 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 your registration would be a sufficient and appropriate response. As the concerns did not relate to your clinical practice and, given the sexual nature of your misconduct, the panel decided that it would be unable to formulate any conditions which would address the concerns raised in its findings. Furthermore, it determined that placing conditions on your registration would not appropriately address the seriousness of this case and would not protect the public.

The panel then went on to consider whether a suspension order would be an appropriate sanction. It considered that your conduct was a significant departure from the standards expected of a registered nurse. Given the sexual nature of your misconduct which was repeated on several occasions, it indicates serious deep-seated personality/attitudinal issues. Furthermore, as you have shown very limited insight and no remorse for your actions to date, there is a very high chance of you repeating such misconduct. In this particular case, the panel therefore determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, 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?*

Following your dismissal from the Hospital on 7 May 2021, and the imposition of an interim suspension order on your practice since 21 January 2022, the panel considered that you have had sufficient time to fully reflect on this matter and consider the magnitude of the emotional harm caused to the complainants. It also considered you have had the opportunity to take steps to address the concerns raised to demonstrate that you are capable of safe practice amongst colleagues. However, the panel have received no evidence of reflection or any demonstration that you are capable of being trusted in a workplace as a registered nurse.

Overall, the panel determined that your actions were significant departures from the standards expected of a registered nurse, and are fundamentally incompatible with you remaining on the register. The panel decided that the findings in this particular case demonstrate that your actions were so serious and deplorable that to allow you to continue practising would significantly undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors as well as the effect on you and the loss of qualified nurse to the profession, 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 effect of your actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct himself, the panel has concluded that nothing short of this would be sufficient in this case.

The panel did not accept the submission on your behalf that a striking off order would be unlawful under Article 8 of the Human Rights Act 1998.

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.

This decision will be confirmed to you 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 the specific circumstances of this case. 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 your own interest until the striking-off sanction takes effect.

Submissions on interim order

Mr O'Leary submitted that the NMC are seeking the imposition of an interim suspension order for a period of 18 months on the grounds of public protection and public interest.

Mr O'Leary submitted that in light of the panel's finding of current impairment where a high risk to the public was identified, and its decision to impose a striking-off order, which procedurally will not take effect until after the 28 day appeal period, an interim order is necessary to protect the public during this time. He therefore invited the panel to impose an 18 month interim suspension order.

Mr da Rocha-Afodu did not oppose the NMC's application for an interim order.

The panel accepted the advice of the legal assessor.

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 the 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 imposed an interim suspension order for a period of 18 months to ensure that the public is suitably protected during the appeal period.

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

That concludes this determination.