

# Nursing and Midwifery Council Fitness to Practise Committee

## Substantive Hearing

Thursday 20 – Friday 21 October 2022 & Wednesday 4 – Friday 6 January 2023 &  
Wednesday 11 – Friday 13 January 2023 & Friday 17 March 2023 & Monday 20  
March 2023

## Virtual Hearing

**Name of registrant:** Mr Chester Villanueva

**NMC PIN:** 18D02630

**Part(s) of the register:** Registered Nurse  
Sub part 1 - Adult Nurse (23 April 2018)

**Relevant Location:** Cumbria

**Type of case:** Misconduct

**Panel members:** Rachel Carter (Chair, Registrant member)  
Rosalyn Mloyi (Registrant member)  
Rachel Barber (Lay member)

**Legal Assessor:** Nigel Pascoe KC (20 – 21 October 2022 & 4 – 6 January 2023 & 11 – 13 January 2023)  
Andrew Reid (17 & 20 March 2023)

**Hearings Coordinator:** Monsur Ali (20 – 21 October 2022 & 4 – 6 January 2023 & 11 – 13 January 2023)  
Sherica Dosunmu (17 & 20 March 2023)

**Nursing and Midwifery Council:** Represented by Conall Bailie, Case Presenter  
(20 – 21 October 2022 & 4 – 6 January 2023 & 11 – 13 January 2023)  
Represented by Assad Badruddin, Case Presenter (17 & 20 March 2023)

**Mr Villanueva:** Not present and unrepresented at the hearing

**Facts proved:** Charges 1a, b, d, 2a, b, c, 3a, 4a, 5a, b, 6a, b, 7a, b, 8a, b, 9a, b, 10, 11a, b, c, d, e, f, g, h, i, j, 12a, b

**Facts not proved:** Charges 1c, 3b, 4b

**Fitness to practise:** Impaired

**Sanction:**

**Striking-Off Order**

**Interim order:**

**Interim suspension order (18 months)**

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

The panel was informed at the start of this hearing that Mr Villanueva was not in attendance and that the Notice of Hearing had been sent to his registered email address by secure encrypted email on 15 September 2022.

Mr Baillie, 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 accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the substantive hearing, the time, dates and the nature of the hearing and, amongst other things, information about Mr Villanueva'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 Villanueva 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 Villanueva**

The panel next considered whether it should proceed in the absence of Mr Villanueva. The panel had regard to Rule 21 and heard the submissions of Mr Baillie who invited the panel to continue in the absence of Mr Villanueva. He submitted that Mr Villanueva had not attended previous hearings and there is nothing to suggest that he will attend if this hearing is adjourned. Mr Baillie submitted that Mr Villanueva had voluntarily absented himself.

Mr Baillie referred the panel to the documentation from the NMC which included an email dated 17 July 2022, which states that Mr Villanueva will not be attending the hearing today. The email states as follows:

*'I won't be attending. They can proceed with the hearing.*

*Thanks!*

*Chester'*

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

The panel has decided to proceed in the absence of Mr Villanueva. In reaching this decision, the panel has considered the submissions made by Mr Baillie and the advice of the legal assessor. It had particular regard to the factors set out in the decision of *R v Jones* and *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment had been made by Mr Villanueva;
- Mr Villanueva had not attended the previous hearings;
- Mr Villanueva had informed the NMC that he will not be attending and is content for the hearing to proceed in his absence;
- There is no reason to suppose that adjourning would secure Mr Villanueva's attendance at some future date; and
- There is a strong public interest in the expeditious disposal of the case.

The panel concluded that Mr Villanueva had voluntarily absented himself. In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Mr Villanueva.

### **Details of charge**

That you a Registered Nurse while employed by Risedale Estates Ltd :

1. On a night shift commencing 3 August 2020:

- a) Said to Colleague B that she had a 'belly now' or words to that effect.
  - b) Touched Colleague B on the waist/belly.
  - c) Begged Colleague B to massage your back.
  - d) Initiated giving and gave Colleague B a back lift during which your penis became erect.
2. On a night shift commencing 4 August 2020:
- a) Asked Colleague B to give you a massage at your flat the following Tuesday.
  - b) Initiated giving and gave Colleague B a back lift during which your penis became erect.
  - c) Told Colleague B that her breast is 'small'.
3. On a night shift commencing 5 August 2020:
- a) Repeated the suggestion to Colleague B that she should come to your flat and massage you the following Tuesday.
  - b) Gave Colleague B a back lift without their consent during which your penis became erect.
4. On a night shift commencing 6 August 2020:
- a) Repeated the suggestion to Colleague B that she should come to your flat and massage you the following Tuesday.
  - b) Gave Colleague B a back lift without their consent during which your penis became erect.
5. On a night shift commencing 7 August 2020:
- a) Walked towards Colleague B with your arms open and asked to hug her.
  - b) When Colleague B was sat in the conservatory:
    - i. Moved a chair in front of Colleague B and sat down;
    - ii. When Colleague B complied with your request to apply pressure to your shoulder due to pain, touched Colleague B's hand with your own.

- iii. When Colleague B stood up and indicated she needed to check a resident you stood up behind her and put your face to Colleague B's neck and smelt her while breathing heavily.
  - iv. Pushed your body in a thrusting motion into Colleague B's back.
- 6. On a night shift commencing 7 August 2020 when Colleague B was in the staff room:
  - a) Came and stood behind Colleague B and placed your right hand on their waist.
  - b) Pressed your erect penis into Colleague B's back.
- 7. Your conduct at one or more of Charge 1 – Charge 6 amounts to harassment in that you:
  - a) engaged in unwanted conduct related to a relevant protected characteristic, namely sex; and
  - b) That conduct had the purpose or effect of:
    - i. Violating Colleague B's dignity, or
    - ii. Creating an intimidating, hostile, degrading humiliating or offensive environment for Colleague B.
- 8. Your conduct at one or more of Charges 1 – 6 was sexually motivated in that you were in pursuit of:
  - a) Sexual gratification; and/or
  - b) A sexual relationship with Colleague B.
- 9. From approximately the end of November 2020/beginning of December 2020 onwards:
  - a) Confronted Colleague A, on one or more occasions while at work, as to why he had not messaged and/or phoned you.
  - b) Asked Colleague A for his mobile number on one or more occasions while at work.

10. The conduct set out at Charge 9a and/or Charge 9b occurred when Colleague A was alone.

11. On 23 December 2020, at the Townhouse in Barrow:

- a) Took Colleague A to a bedroom you had booked there.
- b) Supplied Colleague A with alcohol.
- c) Got undressed down to a pair of swimming trunks/speedos and got into a bath in front of Colleague A.
- d) Invited Colleague A to join you in the bath.
- e) Tried to remove Colleague A's shorts and/or t-shirt.
- f) Tried to kiss Colleague A on one or more occasions.
- g) Offered to give Colleague A a massage.
- h) Pulled Colleague A onto the bed
- i) Said to Colleague A 'don't tell anyone about this, just be friends' or words to that affect.
- j) Pushed Colleague A against the wall and kissed their neck.

12. Your conduct at Charge 11 breached professional boundaries in that you:

- a) Knew you had a position of seniority over Colleague A at work
- b) Relied on your seniority at work to advance your own interests.

13. Your conduct at one or more of Charges 9, 10 and 11 was sexually motivated in that you were in pursuit of:

- a) Sexual gratification; and/or
- b) A sexual relationship with Colleague A.

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

## **Submissions on application to adduce hearsay evidence**

Mr Baillie made an application under Rule 31 to allow the hearsay testimony of Colleague B into evidence. Despite numerous attempts, the NMC had not been able to obtain a signed, written statement from Colleague B. Mr Baillie submitted that the evidence is highly relevant and though not provided during the course of the NMC's investigation, was produced for the purpose of the internal investigations.

Mr Baillie provided the panel with a written skeleton argument and made oral submissions. He made reference to the seven specific principles in the case of *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 Admin:

- whether the statements were the sole or decisive evidence in support of the charges;
- the nature and extent of the challenge to the contents of the statements;
- whether there was any suggestion that the witnesses had reasons to fabricate their allegations;
- the seriousness of the charge, taking into account the impact which adverse findings might have on the Appellant's career;
- whether there was a good reason for the non-attendance of the witnesses;
- whether the Respondent had taken reasonable steps to secure their attendance; and
- the fact that the Appellant did not have prior notice that the witness statements were to be read.

The panel adopted the following written submissions from Mr Baillie in relation to each of the seven principles from *Thorneycroft*:

### ***‘Whether the hearsay evidence is the sole or decisive evidence in support of the charges***

*The issue of sole and decisive evidence and corroboration were considered at length in Al – Khawaja and Tahery v UK [2011] ECHR 2127 (Grand Chamber) (Al – Khawaja). Al – Khawaja concerned a consultant physician who faced two counts*

*of indecent assault on a female patient. One of the patients (S) had committed suicide prior to the trial, however a prior statement submitted to the police, was admitted at trial. The issue of the propriety of the admission of S' statement was considered by the Grand Chamber. The Grand Chamber stated that although a conviction based solely or decisively on the statement of an absent witness was likely to be incompatible with the requirements of fairness under ECHR Article 6, this was not an inevitability. Account should be taken of the safeguards within the particular legal framework and any court should consider the competing interests of the defendant, the complainant and the public interest in the proper administration of justice. It was also noted that there was strong evidence to corroborate S' account and that the Jury had been properly directed. These factors were said to have provided sufficient safeguards to counterbalance any unfairness.*

*The question for the Panel therefore is whether the reliability of that evidence can be fairly tested. There are a number of features set out in Colleague B's accounts which are corroborated by independent evidence.*

*[Witness 3] in paragraph 6 of their witness statement, states that they were present during a conversation during which it was said, 'We joked that the Nurse would cook for us. During the same conversation, the [Registrant] invited [Colleague B] to his house for a massage and in exchange he would cook and have drinks after.' This corroborates Colleague B's account at LM/8 that the Registrant had asked her to give him a massage at his home and have a drink, whilst in the presence of [Witness 3].*

*At paragraph 8 of their witness statement, [Witness 3] states that Colleague B had told [Witness 3] that she felt harassed when the Registrant had lifted her. [Witness 3] at paragraph 9 goes on to state 'I had seen the above mentioned lifts carried out before when we were dining together...', he also states 'I have seen [the Registrant] lifting [Colleague B] when we were on nights...' This corroborates Colleague B's account that the Registrant performed lifts on her during night shifts.*

*[Witness 3] describes the lift at paragraph 9 of his witness statement as: 'this lifts are done by both people being stood up where the person to be lifted (Person A) stands in front of person who will do the lift (Person B). With both hands, Person A should hold the back of the neck with elbows together then Person B would be holding them from the back of their shoulders round to their elbows and then lift them.'* This description by [Witness 3] of the lifts corroborates Colleague B's description at page 4 of LM/11, her local interview on 11 September 2020.

*The Registrant had a local interview on 19 August 2020 at LM/6 during which he admitted to giving Colleague B a massage. He was further interviewed on 12 October 2020 (LM/25) during which he again confirmed that he had massaged Colleague B and performed a lift.*

*During the Registrant's interview at LM/25 he states the following which overlaps with Colleague B's account:*

- i. The Registrant told Colleague B that she had no breasts (page 10);*
- ii. That he performed a lift on Colleague B - one in the upstairs lounge, one in the nurses station (Page 11);*
- iii. Colleague B massaged his back because he asked for it on 3<sup>rd</sup> August (page 11);*
- iv. That he perhaps performed a lift on Colleague B on 5<sup>th</sup> August;*
- v. One lift on Colleague B was performed on Monday (3<sup>rd</sup> August), two may be Thursday-Saturday (6-8 August) (page 14);*
- vi. Colleague B would stand with her hands on her neck - elbows bent facing forward (page 14);*
- vii. That he walked towards Colleague B with open arms asking if he could hug her (page 15);*
- viii. That he performed the second lift on Thursday (6 August) (page 17).*

*There are clear overlaps in the accounts provided by Colleague B and the Registrant, which corroborates Colleague B's account to a large extent.*

*The evidence provided by [Witness 3] and the Registrant's account in interview will enable the Panel to fairly and objectively test the reliability of Colleague B's hearsay evidence. The independent corroborating evidence will give the Panel an opportunity to scrutinise the hearsay evidence, to test whether it is reliable.*

*If it is concluded that the hearsay evidence is the only evidence on the issue of whether sexual harassment occurred, there is no rule prohibiting the admission of such evidence, if it is fair to do so, there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence.*

### ***The nature and extent of the challenge to the contents of the statements***

*The Registrant by email on 15 August 2022 to the NMC stated 'I am voicing in the most strongest and loudest words to deny all the allegations charged against me.'*

*No further communication from the Registrant has been received, nor is it expected. Therefore, whilst the Registrant has stated that he denies the allegations against him, he has not been specific to the content of the statements and exhibits.*

### ***Whether there was any suggestion that the witnesses had reasons to fabricate their allegations***

*There has been no suggestion that Colleague B either fabricated or had reason to fabricate her allegations against the Registrant.*

### ***The seriousness of the charge, taking into account the impact adverse findings might have on the Registrant***

*The Charges in this matter are serious and adverse findings will likely have an impact on the Registrant's career. However, the Registrant has advised by email to the NMC on 15 August 2022 that he does not have any intention of working as a nurse in the UK and that he is 'voluntarily delisting myself of the registry'. Therefore whilst adverse findings could have an impact on the Registrant's career, they are unlikely to impact his career as a nurse in the UK.*

**Whether there is good reason for the Witnesses non-attendance;**

**Whether the Respondent had taken reasonable steps to secure their attendance**

*It is evident that around the time of these incidents and for a period of time after between August – November 2020, Colleague B was engaging with the local investigation, attending 2 interviews in September and November 2020. She provided her email account soon after the incidents on 21 August 2020 and provided screenshots of her text message exchange with the Registrant.*

*Colleague B engaged throughout the investigation and attended an interview with NMC investigators on 17 September 2021. A draft statement was sent to Colleague B for her review on 22 September 2021, a further call was arranged with Colleague B to take place on 24 September 2021. However, she sent an email on 23 September 2021 to advise of the emotional difficulties that she encountered whilst reading over her statement and requested the telephone call arranged for 24 September 2021 be moved to a later date.*

*A call from Colleague B was then received on 23 September 2021 advising that she was finding this investigation difficult, particularly when reading her statement, and that she no longer wanted to be a witness. Colleague B stated that this was now greatly impacting on her (...) and that she just wanted to move on from this incident.*

*The investigators instructed by the NMC offered to put Colleague B in touch with the NMC witness liaison team but she refused. Colleague B was also asked if there was anything that could be done to support her in making her involvement*

*easier but she stated that she did not want to be involved. The decision was made to give Colleague B further time to consider whether she did want to engage. However, she sent an email on 28 September 2021 stating that she did not want to be involved in the case anymore.*

*The anguish and distress that Colleague B has suffered as a result of the incidents and the continued investigation is conceivably understandable and serves as good reason for her non - attendance. She is a vulnerable witness and due weight should be given to the distress she must feel to not be willing to further engage with regulatory proceedings.*

*All reasonable endeavours were made by the NMC investigators, set out at paragraphs 37-40 above to engage Colleague B, as mentioned, a statement was taken from Colleague B but unfortunately she declined to continue engaging with the investigation because of the impact on her (...) Support and a referral to the witness liaison team was offered but declined.*

***The fact that the Appellant did not have prior notice that the witness statements were to be read***

*The Registrant has been aware that Colleague B has not engaged with the NMC, when he was provided with the Investigation report, which set out the NMC's failed attempt to engage Colleague B. The Investigation Report was sent to the registrant by secure email on 28 February 2022.*

*The CE decision letter which nevertheless found a Case To Answer was sent to the Registrant by secure email on 16 May 2022.*

*Further, the Registrant was sent the Case Management Form on 20 July 2022 which sets out the NMC evidence.'*

## **Decision and reasons on application to adduce hearsay evidence**

The panel accepted the advice of the legal assessor on the issues that it should take into consideration in respect of this application, which included reference to *Thorneycroft, NMC v Ogbonna* [2010] EWCA Civ 126 and *R (Bonhoeffer) v GMC* [2011] EWHC 1585 (Admin). 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 considered each of the seven principles of *Thorneycroft* in making its decision.

The panel first considered whether the statement of Colleague B was the sole or decisive evidence in support of the charges. It decided that in relation to some of the charges it was sole evidence, particularly due to the sexual nature of the charges. The panel determined that there was no other corroborating evidence in relation to the sexual aspect of the charges and some of them were alleged to have occurred in areas where there were no witnesses. However, there was corroborating evidence in relation to the other aspects of the charges such as Mr Villanueva's behaviour towards Colleague B.

The panel then considered the nature and extent of the challenge to the contents of the statement. It noted that Mr Villanueva had challenged the sexual nature of the charges but there was a change in the nature of his responses at the time of the initial investigation. Mr Villanueva had the opportunity to attend the hearing and challenge these charges further but decided not to attend nor make written submissions, and this suggests that he is not going to challenge them any further. The panel noted that Mr Villanueva accepted his behaviour but did not accept the sexual nature of the charges.

The panel considered whether there was any suggestion that Colleague B had reasons to fabricate her allegations. The panel noted that Mr Villanueva threatened to report Colleague B for being on the phone at work. This would have been the second time that Colleague B would have been reported for being on her phone at work. The panel took

into account that this could have upset Colleague B and made her feel that she wanted to retaliate in some way. However, the panel considered also that Mr Villanueva may have mentioned this to defend himself from the allegations. There was no evidence of him reporting Colleague B for being on her phone while at work. This was only mentioned after Colleague B had made the allegations against him. The panel gave very careful consideration to the potential implication and how much effect that would have upon Colleague B should Mr Villanueva have reported her for being on the phone at work. The panel considered all the evidence around this and determined that this was not a serious allegation and therefore on balance Colleague B is unlikely to have made these allegations in retaliation for reporting her for being on her phone whilst at work.

The panel considered the seriousness of the charge, taking into account the impact which adverse findings might have on Mr Villanueva's career. It determined that these allegations are serious and if found proved could have significant impact on Mr Villanueva's nursing career. The panel took into account that the matter was not reported to the police. However, the panel weighed this against the serious nature of the allegation and the public interest, and determined that there is a public interest to consider this evidence of Colleague B in order to deduce the facts of the allegations.

The panel next considered whether there was a good reason for the non-attendance of Colleague B. It noted that there was evidence which states that Colleague B was experiencing distress in reliving the events in order to provide her evidence in the format required for this process, especially considering the sexual nature of the allegations. The panel also noted that Colleague B spent a lot of time supporting the internal investigation and engaged with the NMC at the initial stage. The panel further noted the negative responses of others within Colleague B's community when she mentioned that she did not want Mr Villanueva to continue practicing as a nurse and considered, although not mentioned by Colleague B, that this may also be part of the reason she was not able to give evidence. The panel found the explanation of Colleague B for not engaging further with the NMC and not attending the hearing reasonable as she did not want to revisit the incidents.

The panel considered whether the NMC had taken reasonable steps to secure Colleague B's attendance. It determined that reasonable steps had been taken, which included offering support through the Witness Liaison Team.

The panel then considered the fact that Mr Villanueva did not have prior notice that the witness statement was to be read in Colleague B's absence. The panel determined that it became clear that Mr Villanueva did not know that it was going to be a statement, rather than Colleague B being in person at the hearing. The panel is of the view that even if it tried to inform Mr Villanueva of this, as he had not fully engaged with the proceedings and not been part of the process, previous responses would suggest this would not change the situation, and it was not possible to know how much impact this would have on his response.

The panel concluded that Mr Villanueva did not have prior knowledge that Colleague B's witness statement was not going to be confirmed in person, and that it was going to be hearsay which may have affected his decision. However, the overriding factor is that he has not engaged with the process and it is difficult to know what his response would be even if he had been informed of this.

The panel considered all seven principles of *Thorneycroft* and concluded that on balance, due to the serious nature of the allegations in relation to the public interest and the future of Mr Villanueva's career in nursing, there was important and relevant information in Colleague B's statement which included detailed contemporaneous reporting of the incidents. The panel noted that in considering this evidence at the later stages of the hearing it would be important for the panel to give detailed consideration as to the weight it attached to this in reaching its decision.

The panel therefore decided that Colleague B's statement should be allowed as hearsay evidence in the purpose of public interest.

### **Application to adjourn the hearing**

Mr Baillie made an application on 5 January 2023 to adjourn the hearing until 11 January 2023, on the basis that Witness 3 is not available to provide oral evidence until then. Mr Baillie submitted that all reasonable efforts have been made by the NMC to get Witness 3 to come before the panel today or tomorrow to give evidence in order that the panel has sufficient time to conclude the hearing. However, due to Witness 3's work and family commitments he is unable to attend the hearing until 11 January 2023 when he was warned to give evidence.

Mr Baillie acknowledged that as a result of this adjournment the panel will not have sufficient time to conclude the hearing and the case is likely to go part-heard. However, he submitted that Witness 3 is an important witness and requested the panel to hear from him, notwithstanding the risk of the hearing going part-heard.

The panel gave careful consideration to whether it should adjourn the hearing until 11 January 2023. It noted that Witness 3 was the only direct witness available to the panel with regard to allegations made by Colleague B. In the absence of Mr Villanueva and there being no representation for him, it was necessary to hear from this witness in the interest of fairness to Mr Villanueva.

The panel considered the submission of Mr Baillie regarding the importance of oral evidence from Witness 3 and agreed that it needs to hear this evidence in the interest of fairness and justice.

The panel considered that the adjournment would cause delay in concluding the hearing as the case will likely go part-heard and therefore would need to be relisted which could take some considerable time. The panel noted that the adjournment may cause unfairness to Mr Villanueva due to the delay in relisting the hearing. However, given the wide ranging and seriousness of the allegations, the panel determined that it was in the interest of justice and fairness to all parties, that it must hear from all available witnesses in order to ascertain the true facts of the case.

The panel therefore granted the application to adjourn the hearing until 11 January 2023 when Witness 3 is available to provide oral evidence.

## **Decision and reasons on facts**

In reaching its decisions on the facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Mr Baillie on behalf of the NMC.

The panel has drawn no adverse inference from the non-attendance of Mr Villanueva.

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:

- Witness 1: Healthcare Assistant at Risedale Abbey Road Care Home
- Witness 2: Clinical Nurse Manager for Risedale Estates Ltd
- Witness 3: Healthcare Assistant for Risedale Estates Ltd

## **Background**

Mr Villanueva was employed at Risedale Estates Ltd (The Company) as a nurse and was employed by The Company from 30 August 2017.

The regulatory concerns related to two separate incidents. The first incident related to Mr Villanueva's employment at Lonsdale Care Home (Lonsdale), a home owned by the Company. The second incident related to Mr Villanueva's employment at Abbey

Meadow Care Home (Abbey Meadow), where Mr Villanueva was transferred to by the Company following report of the first incident.

### First Incident

On 3, 4, 5, 6 and 7 August 2020 it was alleged that Mr Villanueva harassed and intimidated a colleague (Colleague B) by:

- manipulating her shoulders and neck;
- undertaking back lifts (a physio technique said to be taught in the Philippines) pressing himself against Colleague B's back pushing himself to the extent that his erect penis could be felt by Colleague B;
- putting his face on Colleague B's neck and smelt her whilst breathing heavily, and thrust his body into Colleague B's back;
- requesting that Colleague B massage his back;
- commenting on the size of Colleague B's breasts;
- touching Colleague B's waist/belly; and
- asking Colleague B to come for a meal at his flat as repayment for the massage.

Mr Villanueva and Colleague B had been working at the Lonsdale for the week commencing 3 August 2020 (the week of the incident) as registered nurses. It is understood that Lonsdale operates a one week on, one week off shift rota hence they were working the same shifts.

This allegation was reported by Colleague B to her line manager on 19 August 2020 and The Company investigated this complaint internally through its disciplinary procedure. Mr Villanueva agreed to move to another care home whilst the allegations were investigated.

### Second Incident

On 23 December 2020 further concerns were alleged about Mr Villanueva sexually harassing a 17 year old colleague (Colleague A) by:

- pressurising Colleague A to give Mr Villanueva their phone number whilst at

work;

- pressuring Colleague A to come for a drink;
- booking a hotel room for the drink without Colleague A's knowledge;
- undressing in front of Colleague A before getting into a bath in the hotel room;
- inviting Colleague A to join him in the bath;
- trying to undress Colleague A;
- trying to touch and kiss Colleague A;
- trying to get Colleague A to lie on the bed;
- supplying Colleague A with alcohol despite them being underage; and
- saying to Colleague A '*don't tell anyone about this*' or words to that effect.

These allegations were reported to The Company on 24 December 2020 and were investigated by the Company by way of grievance. The Company referred both matters to the NMC.

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 Mr Villanueva.

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

### **Charge 1)**

That you a Registered Nurse while employed by Risedale Estates Ltd:

On a night shift commencing 3 August 2020:

- a) Said to Colleague B that she had a 'belly now' or words to that effect.

**This charge is found proved.**

In reaching this decision, the panel took into account all the evidence before it, including the oral evidence of the witnesses, the submissions made by Mr Bailie and the interview notes of the interviews held with Mr Villanueva during the local investigation.

The panel noted that Colleague B stated in her local statement, dated 21 August 2020, the following: *'while in the corridor upstairs, he [Mr Villanueva] commented that I've got belly now.'* In the interview notes with The Company, dated 14 October 2020, Mr Villanueva stated that he did not remember saying that Colleague B had a *'belly now'* or words to that effect. The panel also noted the evidence before it and the consistent accounts of this interaction given by Colleague B during the local investigation, and the fact that Mr Villanueva's account was inconsistent, saying he did not remember a number of times or did not respond to questions requiring a direct answer.

The panel determined that there is evidence that shows Mr Villanueva is more than likely to have said that Colleague B had a belly now or words to that effect. The panel therefore found this charge proved.

b) Touched Colleague B on the waist/belly.

**This charge is found proved.**

The panel took into account the internal interview notes dated 14 October 2020 where Mr Villanueva denied touching Colleague B's waist/belly. Colleague B in her local statement, dated 21 August 2020, stated that Mr Villanueva *'started to touch me on my waist to feel my belly. I tapped his hand as a sign not to do it again'*.

The panel determined that the evidence from Colleague B, although in the form of hearsay, was consistent and clear. The panel found Mr Villanueva's account to be inconsistent and that he had changed his account. The panel also noted Mr Villanueva's pattern of behaviour and determined that on the balance of probability, it was more than likely that Mr Villanueva touched Colleague B's belly/waist. The panel therefore found this charge proved.

c) Begged Colleague B to massage your back.

**This charge is found NOT proved.**

The panel is of the view that there is insufficient evidence before it which suggests Mr Villanueva begged Colleague B for a back massage. It was of the view that the word 'beg' is very specific and there is insufficient evidence of Mr Villanueva begging Colleague B. The panel determined that on the balance of probability the NMC had not proved that Mr Villanueva begged Colleague B for a back massage and therefore found this charge not proved.

d) Initiated giving and gave Colleague B a back lift during which your penis became erect.

**This charge is found proved.**

The panel took into account the local statement of Colleague B where she stated that Mr Villanueva *'offered to lift me. He's behind me and he said it will just be quick. This time I had backpain so I agreed. This time, I can now feel his penis erecting.'*

The panel took into account the text messages between Mr Villanueva and Colleague B, dated 11 August 2020, where Colleague B made it clear that she felt uncomfortable about the incident and felt humiliated, and used the words *'felt how many times you gone harder'*.

The panel also noted that Mr Villanueva did not deny having an erect penis but apologised for making her feel uncomfortable and also in his local interview did not answer when this was first put to him. He later stated that Colleague B may have felt his wallet which he carries on him at all times and she may have thought it was his penis. The panel found Mr Villanueva's explanation implausible. However, it found Colleague B's account of the events consistent and clear and accepted her account of events over Mr Villanueva's.

The panel took into account all the evidence and determined that on the balance of probability, it was satisfied that this charge is found proved.

## **Charge 2)**

On a night shift commencing 4 August 2020:

- a) Asked Colleague B to give you a massage at your flat the following Tuesday.

### **This charge is found proved.**

The panel took into account the evidence of Witness 3 who stated in his statement to the NMC that *'the Nurse invited [Colleague B] to his house for a massage and in exchange he would cook and have drinks after.'* Witness 3 also confirmed this during his oral evidence.

The panel further noted that Colleague B stated in her local statement, dated 21 August 2020, that Mr Villanueva asked her to go to his flat to give him a massage. She stated *'He [Mr Villanueva] then asked me if I can give him massage in his flat just the two of us and have a drink on Tuesday (week off).'*

The panel noted that Mr Villanueva in his local interview, dated 14 October 2020, stated that he did not ask Colleague B for a massage at his flat, rather it was Colleague B who suggested drinking alone with Mr Villanueva.

The panel considered all the evidence and determined that it found Colleague B's account more credible and consistent. It therefore gave more weight to the account of Colleague B and on the balance of probability, the panel determined that it was more than likely that Mr Villanueva asked Colleague B to give him a massage at his flat. The panel therefore found this charge proved.

- b) Initiated giving and gave Colleague B a back lift during which your penis became erect.

**This charge is found proved.**

The panel took into account the evidence of Witness 3 who stated that he witnessed a number of lifts and massages given by Mr Villanueva to Colleague B although he cannot remember the exact days. It also took into account the evidence of Colleague B who the panel found to be consistent and credible.

The panel considered the text messages between Mr Villanueva and Colleague B, dated 11 August 2020, where she stated that she felt Mr Villanueva's erect penis on her back. The panel determined that there is sufficient evidence which shows that Mr Villanueva gave Colleague B a number of lifts and massages. It therefore determined that Mr Villanueva initiated giving and gave Colleague B a back lift during which his penis became erect. The panel found this charge proved.

- c) Told Colleague B that her breast is 'small'.

**This charge is found proved.**

The panel noted that Mr Villanueva in his local interview, dated 14 October 2020, admitted to telling Colleague B that she does not have breasts. Mr Villanueva claimed that he was joking. Based on the admission of Mr Villanueva, the panel found this charge proved.

**Charge 3)**

On a night shift commencing 5 August 2020

- a) Repeated the suggestion to Colleague B that she should come to your flat and massage you the following Tuesday.

**This charge is found proved.**

The panel noted that Witness 3 heard Mr Villanueva ask Colleague B to go to his flat and give him a massage. It also took into account the local statement of Colleague B and found her account more credible. The panel therefore determined that on the balance of probability it was more than likely that Mr Villanueva repeated the suggestion to Colleague B that she should go to his flat and massage him the following Tuesday. The panel therefore found this charge proved.

- b) Gave Colleague B a back lift without their consent during which your penis became erect.

**This charge is found NOT proved.**

The panel noted that Colleague B would have had to get into a position for Mr Villanueva to give her a back lift. It further noted that there is no evidence which would have suggested to Mr Villanueva that Colleague B did not consent at this time and the fact that she went along with the lift could have implied to him there was consent. Notwithstanding that Colleague B may have acquiesced because she felt she had no choice, the panel is not satisfied that the NMC established to the required standard that this was done without the consent of Colleague B. It therefore found this charge not proved.

**Charge 4)**

On a night shift commencing 6 August 2020

- a) Repeated the suggestion to Colleague B that she should come to your flat and massage you the following Tuesday.

**This charge is found proved.**

The panel found this charge proved based on the evidence of Witness 3 who heard Mr Villanueva ask Colleague B to go his flat and give him a massage. It also took into account the consistency of Colleague B's reports and found her account more credible. The panel therefore determined that on the balance of probability it was more than likely that Mr Villanueva repeated the suggestion to Colleague B that she should go to his flat and massage him the following Tuesday. The panel found this charge proved.

- b) Gave Colleague B a back lift without their consent during which your penis became erect.

**This charge is found NOT proved.**

For the reasons outlined in charge 3b above, the panel did not determine that the NMC had provided sufficient evidence to prove that these actions were taken without the consent of Colleague B, and therefore found this charge not proved.

#### **Charge 5)**

On a night shift commencing 7 August 2020

- a) Walked towards Colleague B with your arms open and asked to hug her.

**This charge is found proved.**

The panel took into account the local statement of Colleague B where she stated, '*He [Mr Villanueva] was walking towards me open arms and asking if he can hug me. I felt offended this time so told him off.*' The panel noted that Mr Villanueva stated in his local interview, dated 14 August 2020, that he thinks and had offered Colleague B a hug giving an explanation that this was because there was an incident with a resident where Colleague B had been kicked. The panel considered Mr Villanueva's

explanation, however, it determined that there is sufficient evidence to find this charge proved.

b) When Colleague B was sat in the conservatory:

- i) Moved a chair in front of Colleague B and sat down;
- ii) When Colleague B complied with your request to apply pressure to your shoulder due to pain, touched Colleague B's hand with your own.
- iii) When Colleague B stood up and indicated she needed to check a resident you stood up behind her and put your face to Colleague B's neck and smelt her while breathing heavily.
- iv) Pushed your body in a thrusting motion into Colleague B's back.

**These charges are found proved.**

The panel considered the evidence of Colleague B and found her account to be more credible and consistent than Mr Villanueva who kept changing his account in the local interview. The panel noted that Mr Villanueva claimed that Colleague B reported him because he threatened to report her for being on the phone whilst on duty. It noted that given the fairly minor consequences for Colleague B should she have been reported for being on the phone, as stated by Colleague A in her oral evidence, it was implausible that Colleague B would make these allegations to counter this. Therefore notwithstanding the issue of being on the phone, the panel determined that on the balance of probability, it was more than likely that Mr Villanueva did do all the acts listed in charge 5b. The panel therefore found this charge proved in its entirety.

### **Charge 6)**

On a night shift commencing 7 August 2020 when Colleague B was in the staff room:

- a) Came and stood behind Colleague B and placed your right hand on their waist.

**This charge is found proved.**

The panel took into account Colleague B's account of events which was more credible for the reasons outlined above than that of Mr Villanueva's. The panel determined that Colleague B had been consistent in her account of what happened while in contrast Mr Villanueva had not and that there is evidence of a pattern of such behaviour from Mr Villanueva. The panel therefore determined that on the balance of probability it was more than likely that this incident did occur. The panel found this charge proved.

- b) Pressed your erect penis into Colleague B's back.

**This charge is found proved.**

The panel found this charge proved for the same reason as charge 6a. The panel noted the description of how this lift happened and the explanation given by Mr Villanueva that it was his wallet which gave the impression that his penis was erect. The panel is of the view that this means Mr Villanueva was aware that something was pressing against Colleague B's back and tried to provide an explanation which the panel determined was improbable. It therefore determined that on the balance of probability it is more than likely that this incident had occurred. The panel found this charge proved.

**Charge 7)**

Your conduct at one or more of Charge 1 – Charge 6 amounts to harassment in that you:

- c) engaged in unwanted conduct related to a relevant protected characteristic, namely sex; and

**This charge is found proved.**

The panel considered the evidence of Colleague B and based on the fact that it gave more weight to her account of events, the panel determined that on the balance of probability Mr Villanueva engaged in unwanted conduct related to a relevant protected characteristic, namely sex. The panel drew a safe and reasonable inference from all the evidence before it which went beyond speculation and determined that there was no other plausible explanation which would account for his behaviour over that week. It therefore found this charge proved.

d) That conduct had the purpose or effect of:

- iii. Violating Colleague B's dignity, or
- iv. Creating an intimidating, hostile, degrading humiliating or offensive environment for Colleague B.

**This charge is found proved.**

The panel considered the evidence of Colleague B and her reaction to the conduct of Mr Villanueva. It also noted the nature of Mr Villanueva's behaviour that it found proved in the above charges. Colleague B stated very clearly on the text messages that she felt uncomfortable and that she was humiliated. This shows her dignity was violated.

The panel also noted that the hearsay evidence of Colleague B and the text message exchange between her and Mr Villanueva, demonstrates a consistent pattern of behaviour over a period of five to six days. The panel determined that Mr Villanueva did create an intimidating, hostile, degrading and humiliating or offensive environment for Colleague B. It therefore found this charge proved in its entirety.

**Charge 8)**

Your conduct at one or more of Charges 1 – 6 was sexually motivated in that you were in pursuit of:

- a) Sexual gratification; and/or

**This charge is found proved.**

The panel considered all the evidence and determined that Mr Villanueva behaved in this manner for sexual gratification. It noted that he actively sought inappropriate physical contact with Colleague B. This at times resulted in Colleague B feeling his penis erect in the process. He also attempted to get Colleague B to visit his house on her own, having offered to cook for her in exchange for massage and commented about intimate areas of Colleague B's body. The panel noted the repeated nature of this behaviour and that he was not able to provide a sufficient explanation as to why he pursued Colleague B in this manner. It therefore determined that on the balance of probability Mr Villanueva's conduct at one or more of Charges 1 – 6 was sexually motivated in that he was in pursuit of sexual gratification. The panel found this charge proved.

- b) A sexual relationship with Colleague B.

**This charge is found proved.**

The panel noted that further to the issues raised in 8a, Mr Villanueva's behaviour amounted to a sustained and persistent delivery of intimate acts over a period of time, such as commenting about Colleague B's breast. It noted that his comments about her body and behaviour such as touching her belly/waist created a sexual connotation. The panel also noted that there is evidence that shows Mr Villanueva wanted to get Colleague B to be alone with him by inviting her to his flat and refusing to allow Witness 3 to join them for the meal and drinks as would usually be the case in their community.

Having considered all the evidence, the panel determined that Mr Villanueva's conduct at one or more of Charges 1 – 6 was sexually motivated in that he was in

pursuit of a sexual relationship with Colleague B. It therefore found this charge proved.

### **Charge 9)**

From approximately the end of November 2020/beginning of December 2020 onwards:

- a) Confronted Colleague A, on one or more occasions while at work, as to why he had not messaged and/or phoned you.

### **This charge is found proved.**

The panel took into account the evidence of Colleague A (Witness 1), and determined that his evidence was credible, consistent and clear. Colleague A stated in his written statement to the NMC, dated 9 February 2022, which he confirmed during his oral evidence. He stated that *'If the Nurse saw me in the corridor at work, he would pull me to one side and ask why I had not messaged or phoned him.'* The panel noted that during the local investigation Mr Villanueva did not deny giving Colleague A his phone number and had stated that he thought they could form a friendship, therefore it is likely that he would be the one who approached Colleague A and asked him why had not called or messaged. Colleague A had not at this point given Mr Villanueva his own phone number as he did not feel comfortable doing this.

The panel also noted that Colleague A was 17 years of age and therefore that Mr Villanueva was substantially older, in addition he was considerably higher up the professional hierarchy and this combination potentially created a situation of control and power over Colleague A.

The panel did not see any evidence of Mr Villanueva denying this and therefore determined that based on the evidence before it, on the balance of probability, Mr Villanueva is more than likely to have confronted Colleague A, on one or more

occasions while at work, as to why he had not messaged and/or phoned Mr Villanueva. The panel therefore found this charge proved.

- b) Asked Colleague A for his mobile number on one or more occasions while at work.

**This charge is found proved.**

The panel considered the evidence of Colleague A. He stated in his statement to the NMC and confirmed it in during his oral evidence that *'the Nurse started asking for my number so that he could message me first. Eventually I did give the Nurse my number due to the pressure of him continuously asking me.'* The panel also noted that Mr Villanueva in his local interview, dated 5 March 2021, stated that he had obtained Colleague A's number after a few months. The panel determined that Mr Villanueva asked Colleague A for his mobile number on one or more occasions while at work. The panel found this charge proved.

**Charge 10)**

The conduct set out at Charge 9a and/or Charge 9b occurred when Colleague A was alone.

**This charge is found proved.**

The panel noted that Colleague A stated in his statement to the NMC that he was always alone when Mr Villanueva approached him. Colleague A stated *'If the Nurse saw me in the corridor at work, he would pull me to one side and ask why I had not messaged or phoned him.'* Colleague A further stated *'the Nurse was waiting for me to finish my shift. ... he followed me in to the staff room and said can I have your number. No one else was present at this time. At this point I felt rude if I said no. I got my phone out of my bag and the Nurse said can you give me your number now.'* Colleague A also stated *'Every time the Nurse spoke to me, he would get me on my own.'*

Having considered all the evidence before it, the panel determined that on the balance of probability, the conduct set out at Charge 9a and/or Charge 9b, occurred when Colleague A was alone. The panel therefore found this charge proved.

### **Charge 11)**

On 23 December 2020, at the Townhouse in Barrow:

- a) Took Colleague A to a bedroom you had booked there.
- b) Supplied Colleague A with alcohol.
- c) Got undressed down to a pair of swimming trunks/speedos and got into a bath in front of Colleague A.
- d) Invited Colleague A to join you in the bath.
- e) Tried to remove Colleague A's shorts and/or t-shirt.
- f) Tried to kiss Colleague A on one or more occasions.
- g) Offered to give Colleague A, a massage.
- h) Pulled Colleague A onto the bed
- i) Said to Colleague A 'don't tell anyone about this, just be friends' or words to that affect.
- j) Pushed Colleague A against the wall and kissed their neck.

### **This charge is found proved.**

The panel considered the evidence before it and determined that Colleague A had been consistent throughout the process. Colleague A stated from the outset that he thought he was going to the pub for a drink and had no idea that a room had been booked at a hotel. The panel noted that Mr Villanueva admitted to booking the hotel. It determined that it would have been Mr Villanueva who had been leading Colleague A to the booked hotel room.

Colleague A stated in his statement that he was given alcohol by Mr Villanueva. In his statement to The Company, dated 23 February 2021, Mr Villanueva admitted that he gave Colleague A beer in the hotel room.

In his report back to his colleague, his statement and oral evidence to The Company, and his statement to the NMC, Colleague A gave a clear and consistent account about what had occurred after he arrived in the hotel room. This matches all the information laid out in the charges. Mr Villanueva, however, gave a different account to The Company stating that it was Colleague A who asked him for sex.

The panel preferred Colleague A's account and determined that this charge is found proved in its entirety.

#### **Charge 12)**

Your conduct at Charge 11 breached professional boundaries in that you:

- a) Knew you had a position of seniority over Colleague A at work.

#### **This charge is found proved.**

The panel concluded that Mr Villanueva did have seniority over Colleague A and he would have been aware of his seniority as a registered nurse. During the local interview with Colleague A, Colleague A described an incident where Mr Villanueva had asked Colleague A to mop the floor in the prep room. Mr Villanueva then stood and watched Colleague A and whilst attempting to leave the room, Mr Villanueva grabbed Colleague A by the shoulder and said *'you forgot to mop behind the door'*. The panel determined that this incident demonstrates Mr Villanueva was aware of his seniority and exerted dominance over Colleague A. The panel found this charge proved.

- b) Relied on your seniority at work to advance your own interests.

#### **This charge is found proved.**

The panel drew a reasonable, safe and clear inference, based on all the evidence before it, that Mr Villanueva relied on his seniority to advance his own interests. Building on the incident outlined in charge 12a above, Mr Villanueva then pressured Colleague A to give him his number, coerced him to meet him for a drink by stating that this was the last opportunity he had to meet with him before going on leave outside the country, and then took him to the hotel room and gave him alcohol. The panel therefore found this charge proved.

### **Charge 13)**

Your conduct at one or more of Charges 9, 10 and 11 was sexually motivated in that you were in pursuit of:

- a) Sexual gratification; and/or

### **This charge is found proved.**

The panel considered all the evidence and determined that Mr Villanueva behaved in this manner for sexual gratification. It noted the repeated nature of his behaviour and considered his account implausible. His pursuit of Colleague A took place over a few months culminating in the events in the hotel room. There can be no other reasonable motivation for the actions he took towards Colleague A. the panel therefore determined that on the balance of probability Mr Villanueva's conduct at one or more of charges 9 to 11 was sexually motivated in that he was in pursuit of sexual gratification. The panel found this charge proved.

- b) A sexual relationship with Colleague A.

### **This charge is found proved.**

In addition to the evidence considered in relation to charge 13a, the panel noted Mr Villanueva's persistence in trying to get Colleague A's phone number, ending up in

the hotel room, getting undressed in front of Colleague A, giving him alcohol and pushing him to the bed. The panel concluded that Mr Villanueva's actions clearly demonstrated his desire to have a sexual relationship with Colleague A. The panel determined that this charge is found proved.

### **Fitness to practise**

After its findings on facts, the panel adjourned the hearing until 17 March 2023.

On 17 March 2023, Mr Badruddin, on behalf of the NMC, informed the panel that the notice of the resuming hearing was sent to Mr Villanueva's registered email address on 15 February 2023. The panel was satisfied that Mr Villanueva had been served with notice of the resuming hearing in accordance with the requirements of Rules 11 and 34.

Additionally, Mr Badruddin informed the panel that there had been no further communication from Mr Villanueva in relation to these proceedings. On that basis, the panel was satisfied to proceed in the absence of Mr Villanueva for the same reasons previously identified.

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 Mr Villanueva's fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's suitability to remain on the register unrestricted.

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

The panel adopted a two-stage process in its consideration. Firstly, 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 view of all

the circumstances, Mr Villanueva's fitness to practise is currently impaired as a result of that misconduct.

### **Submissions on misconduct**

In coming to its decision, the panel had regard to the case of *Roylance v General Medical Council (No. 2)* [2000] 1 AC 311 which defines misconduct as a '*word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.*'

Mr Badruddin invited the panel to take the view that 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 and midwives 2015' (the Code) in making its decision. He identified the specific, relevant standards where he said Mr Villanueva's actions amounted to misconduct.

Mr Badruddin stated that the incidents between 3 - 7 August 2020, in relation to charges 1 – 6, involved unwanted sexual activity at work which included inappropriate touching and comments directed towards Colleague B. He submitted that Mr Villanueva's actions in respect of these charges can only be described as sexual harassment.

Mr Badruddin noted that in respect of charges 7 – 8, it was found that Mr Villanueva's actions were sexually motivated, in that he attempted to pursue a sexual relationship with Colleague B for sexual gratification and violated Colleague B's dignity.

Mr Badruddin further noted that in respect of charges 9 – 12 which were found proved, Mr Villanueva's actions involved intimidating and exposing a 17-year-old junior colleague (Colleague A) to sexual activity, while he was in a position of seniority. He submitted that Mr Villanueva's actions in these charges amounted to calculated sexual pursuit and grooming of Colleague A, who was a vulnerable colleague.

Mr Badruddin submitted that Mr Villanueva's actions individually and collectively amounted to a breach of professional boundaries, sexual assault and harassment. He

submitted that Mr Villanueva's actions fell significantly short of the conduct and standards expected of a nurse and amounted to serious misconduct.

### **Submissions on impairment**

Mr Badruddin moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. He 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).

Mr Badruddin invited the panel to find Mr Villanueva's fitness to practise currently impaired on both public protection and public interest grounds. He submitted that Mr Villanueva has demonstrated a lack of insight, remediation and remorse into the regulatory concerns, so the risk of repetition remains high. He submitted that the concerns in this case are serious and there is a common theme which involves the pursuit of a sexual relationship, coupled with unreciprocated actions undertaken by Mr Villanueva for sexual gratification, compounded with inappropriate behaviour and comments.

Mr Badruddin submitted that in Mr Villanueva's interviews, there is clear deflection of the misconduct in this case, and in some instances, Mr Villanueva has also attempted to shift accountability to his colleagues. He submitted that Mr Villanueva has failed to consider the impact of his actions upon his colleagues and the wider reputation of the nursing profession. Further, he submitted that, there clearly appears to be deep seated personality or attitudinal behavioural issues at play, which have not been addressed by Mr Villanueva.

Mr Badruddin acknowledged that there is no evidence to suggest that there are any concerns with Mr Villanueva's clinical skills or that boundaries were ever breached with patients. He submitted, however, that the definition of public protection includes a real risk to colleagues. He submitted that Mr Villanueva's behaviour could affect the ability of

staff to do their jobs, which in turn, could affect the level of care they are able to provide to their patients. Further, he submitted that, given the nature of the regulatory concerns, the NMC would need to take restrictive action to promote public confidence in the profession.

Mr Badruddin submitted the first three limbs of the test formulated by Dame Janet Smith in her fifth Shipman report and set out in *Grant* were engaged in this case. He submitted that Mr Villanueva's actions, between August and December 2020, have put patients at unwarranted risk of harm. He submitted that Mr Villanueva's actions were humiliating and degrading for his colleagues, which may have had a direct impact on the level of care they were able to provide patients and therefore breached fundamental tenets of the profession. He submitted that a member of the public knowing that Mr Villanueva sexually harassed his colleagues while on shift would lose significant confidence in the profession, and Mr Villanueva's actions have brought the profession into disrepute.

The panel accepted the advice of the legal assessor.

### **Decision and reasons on misconduct**

When determining whether the facts found proved amount to misconduct, the panel had regard to the terms of the Code.

The panel was of the view that Mr Villanueva's actions did fall significantly short of the standards expected of a registered nurse, and that Mr Villanueva's actions breached the Code. Specifically:

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

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

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

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

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

*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'*

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. In assessing whether the charges amounted to misconduct, the panel considered the charges individually and collectively, as well as the circumstances of the case as a whole. It took account of all the evidence before it.

The panel considered that the facts found proved do not relate to an isolated incident, rather they collectively demonstrate a pattern of sexual indiscretions and breaches of professional boundaries. The panel noted that Mr Villanueva's actions negatively impacted on more than one of his colleagues. The panel concluded that his failings had the potential to impact the level of patient care these colleagues were able to provide, albeit the panel received no evidence of this. The panel was of the view that Mr Villanueva's failings were indicative of deep-seated attitudinal problems. The panel determined that Mr Villanueva's actions would be considered deplorable by fellow practitioners. The panel was in no doubt that Mr Villanueva's failings were serious and amounted to misconduct going to fitness to practise.

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

The panel next went on to decide if, by reason of his misconduct, Mr Villanueva's fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional 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, 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... 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 determined that limbs a, b and c in the above test were engaged in this case.

Taking into account all of the evidence adduced in this case, the panel found that Mr Villanueva's colleagues were caused emotional distress as a result of his misconduct and patients were therefore put at unwarranted risk of harm. It noted that the incidents were not isolated in that Mr Villanueva continued to engage in similar behaviour with Colleague A, a minor, following an internal disciplinary hearing in relation to his behaviour towards Colleague B. The panel was of the view that Mr Villanueva's misconduct had breached the fundamental tenets of the nursing profession and had in the past brought its reputation into disrepute.

The panel next went on to consider the matter of Mr Villanueva's current level of insight. It took into account Mr Villanueva's response to the regulatory concerns. The panel found that in Mr Villanueva's response to the concerns raised, there were notable attempts to deflect blame and responsibility. The panel was of the view that Mr Villanueva has not demonstrated any understanding of how his actions put colleagues and consequently patients at a risk of serious harm or how this impacted negatively on the reputation of the nursing profession. The panel determined that Mr Villanueva demonstrated a significant lack of insight and remorse.

The panel determined that the misconduct in this case is inherently more difficult to remediate due to the associated attitudinal issues. The panel bore in mind that the facts found proved did not concern issues with Mr Villanueva's clinical practice. In determining whether or not Mr Villanueva has demonstrated insight into his failings, the panel carefully considered the evidence before it. It has not received any information to suggest that Mr Villanueva has reflected on or taken steps to address the specific concerns raised in this case.

The panel was of the view that due to Mr Villanueva's lack of insight or remorse, there remains a substantial risk of repetition of the misconduct. The panel had careful regard to the NMC's guidance, which states that fitness to practise relates to managing risks not only to patients but also to members of the public. On the basis of all the information before it, the panel decided that there is a risk to the public if Mr Villanueva was allowed to practise without restriction. The panel therefore determined that a finding of current impairment on public protection grounds is necessary.

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

The panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds Mr Villanueva's fitness to practise impaired on the grounds of public interest.

Having regard to all of the above, the panel was satisfied that Mr Villanueva's fitness to practise is currently impaired.

### **Sanction**

The panel has decided to make a striking-off order. It directs the registrar to strike Mr Villanueva off the register. The effect of this order is that the NMC register will show that Mr Villanueva has been struck-off the register.

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

Mr Badruddin informed the panel that the NMC was seeking the imposition of a striking-off order.

Mr Badruddin outlined aggravating factors he identified in this case:

- Pattern of misconduct over a period of five months, which involved two separate colleagues;
- Mr Villanueva was in a position of trust and authority and abused his position;
- Mr Villanueva's actions on 23 December 2020 were premeditated/calculated in respect of booking a hotel room to 'ambush' Colleague A;
- During local investigation, Mr Villanueva attempted to shift blame and responsibility of the unreciprocated sexual acts upon the victims of this case, and attempted to minimize the seriousness of his actions; and
- Mr Villanueva has demonstrated limited insight, remorse or remediation and has demonstrated limited engagement with his regulator.

In respect of mitigating factors, Mr Badruddin submitted he was unable to identify any in this case. He stated that the panel may find some limited insight, however, he submitted that this was certainly not sufficient insight.

Mr Badruddin submitted that making no order or imposing a caution order would not be proportionate in this case given the seriousness of the misconduct and the risk of repetition. He submitted that both courses would be wholly inappropriate, would leave the public unprotected and would not adequately address the public interest.

Mr Badruddin submitted that a conditions of practice order would not be appropriate given that the concerns do not relate to Mr Villanueva's clinical practice. He stated that in this respect there are no conditions that could be formulated which would be workable, measurable or proportionate to address the issues of concern identified in this case. He submitted that a conditions of practice order would not protect the public or adequately address the public interest.

Mr Badruddin further submitted that a suspension order would not be appropriate as the concerns of this case do not relate to an isolated incident and there is evidence of deep-seated attitudinal problems. He submitted that a temporary removal from the NMC Register would not adequately address public protection or the public interest.

Mr Badruddin referred the panel to the NMC's guidance on '*seriousness*'. He highlighted that cases which involve sexual misconduct are particularly serious when a nurse abuses a special position of trust.

Mr Badruddin submitted that Mr Villanueva's actions call in to question his professionalism, and public confidence would not be maintained if he was not removed from the NMC Register. He submitted that a striking-off order is the only appropriate sanction in the circumstances of this case.

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

Having found Mr Villanueva's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel took into account the following aggravating features:

- Pattern of misconduct over a period of five months, which involved a number of incidents against two separate colleagues;
- Abuse of position of trust;
- Sexual misconduct against a minor (Colleague A);
- Lack of insight and remorse into failings;
- Attempts to deflect blame and responsibility;
- Mr Villanueva's actions on 23 December 2020 were premeditated; and
- Conduct which put colleagues/patients at risk of harm.

The panel was unable to identify any mitigating features in this case.

The panel first considered whether to take no action but concluded that this would be inappropriate and insufficient to protect the public or meet the public interest.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection and public interest issues identified, an order that does not restrict Mr Villanueva's 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 Mr Villanueva's 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 Mr Villanueva's registration would be a sufficient and appropriate response. The panel reminded itself that the concerns in this case relate to sexual misconduct and not Mr Villanueva's clinical practice. The panel concluded that no practical or workable conditions could be formulated, given the nature of the charges found proved in this case. The misconduct identified is not something that can be addressed through retraining or other practice conditions. In these circumstances, the panel concluded that the placing of conditions on Mr Villanueva's registration would not protect the public or adequately address the public interest.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that a suspension order may be appropriate where some of the following factors are apparent:

- *A single instance of misconduct but where a lesser sanction is not sufficient;*
- *No evidence of harmful deep-seated personality or attitudinal problems;*
- *No evidence of repetition of behaviour since the incident; and*
- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour;*

The panel considered that all these were not applicable for Mr Villanueva's case for the reasons outlined below. The concerns in this case are serious and do not relate to an isolated incident. The panel found that Mr Villanueva repeated sexually inappropriate behaviour with Colleague A after an internal disciplinary hearing in relation to his sexually inappropriate behaviour towards Colleague B. The panel was of the view that the repeated misconduct in this case reflected deep-seated attitudinal issues. It also found a lack of insight or remorse, and a consequent high risk of repetition.

The conduct, as highlighted by the facts found proved, was a significant departure from the standards expected of a registered nurse. The panel decided that the serious breach of fundamental tenets of the profession evidenced by Mr Villanueva's actions is incompatible with his remaining on the NMC register. Therefore, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction.

Finally, in considering a striking-off order, the panel took note of the following paragraphs of the SG:

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

The panel considered that Mr Villanueva has not demonstrated that he can be trusted, as a registered nurse, to act with care and keep colleagues and other members of staff safe from unwarranted risk of harm. This raises fundamental questions about his professionalism. The panel found that Mr Villanueva has demonstrated a lack of insight and remorse into the misconduct. The panel concluded that members of the public would be concerned if a registered nurse who has breached professional boundaries, as in the circumstances of this case, was allowed to remain on the NMC Register. Taking account of the SG, the panel could not be satisfied that anything less than a

striking-off order would maintain professional standards, keep the public protected and address the public interest in Mr Villanueva's case.

Balancing all these factors and after taking into account all the evidence before it, the panel determined that the necessary and proportionate sanction is that of a striking-off order. Having regard to the risk of repetition and consequent harm to the public and the effect of Mr Villanueva's actions in bringing the profession into disrepute, the panel has concluded that nothing short of this would be sufficient in this case.

The panel considered that this order would protect the public, mark the importance of maintaining public confidence in the profession, and send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

This will be confirmed to Mr Villanueva in writing.

### **Submissions on interim order**

The panel took account of the submissions made by Mr Badruddin. He submitted that an interim order should be made on the grounds that it is necessary for the protection of the public and it is otherwise in the public interest. He invited the panel to impose an interim suspension order for a period of 18 months for the reasons stated in the panel's findings.

### **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 Mr Villanueva's own interest until the suspension sanction takes effect.

The panel heard and 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 allow for any possible appeal.

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

That concludes this determination.