

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

**Substantive Order Review Hearing
Thursday, 11 May 2023**

Virtual Hearing

Name of Registrant: Marlynn Joy Tubana

NMC PIN 17G3160E

Part(s) of the register: Nursing – Sub Part 1
Children’s Nursing – October 2017

Relevant Location: Southampton

Type of case: Lack of competence

Panel members: David Crompton (Chair, Lay member)
Richard Lyne (Registrant member)
Anthony Kanutin (Lay member)

Legal Assessor: Douglas Hogg KC

Hearings Coordinator: Elena Nicolaou

Nursing and Midwifery Council: Represented by Ben Edwards, Case Presenter

Miss Tubana: Present and represented by Inez Grummitt, instructed by the Royal College of Nursing (RCN)

Order being reviewed: Conditions of practice order (12 months)

Fitness to practise: Impaired

Outcome: **Conditions of practice order (2 years)**

Decision and reasons on review of the substantive order

The panel decided to vary the current conditions of practice order and extend it for a period of two years.

This order will come into effect at the end of 23 June 2023 in accordance with Article 30(1) of the 'Nursing and Midwifery Order 2001' (the Order).

This is the second review of a substantive conditions of practice order originally imposed for a period of 36 months by a Fitness to Practise Committee panel on 4 July 2019. This was reviewed on 24 June 2022 when the conditions of practice order was extended for 12 months.

The current order is due to expire at the end of 23 June 2023.

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

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

'That you failed to demonstrate the standards of knowledge, skill, and judgement required to practise without restriction as a band 5 nurse as follows:

- 1) *On 14 December 2017, did not adequately monitor both of the patients in your care in that you did not notice one of your patients was desaturating and required suction.*
- 2) *On 16 December 2017:*
 - a) *Did not escalate a patient's poor blood gas results;*
 - b) *Did not adequately communicate with that patient's family why you were monitoring their blood gases;*
 - c) *Did not adequately communicate with that patient's family the blood gas results.*

- 3) *On 21 December 2017:*
- a) *Did not notice that a patient under your care had a saturation reading of 35%;*
 - b) *Did not escalate that patient's low saturation reading*
- 4) *At a performance improvement meeting on 3 January 2018, did not demonstrate that you were meeting the following objectives fully:*
- a) *Time management skills in relation to taking observations in a timely manner;*
 - b) *Communicating with patients and/or their families;*
 - c) *Escalating concerns to the Nurse in Charge, including:*
 - i. *Increasing PEWS,*
 - ii. *Clinical concerns,*
 - iii. *When uncertain how to complete a task;*
 - d) *Asking at the beginning of shift for JAC and when medications are due;*
 - e) *Beginning preparation of medication so it can be checked in a timely manner;*
 - f) *Listening to ward rounds, communicating concerns to doctors, and ensuring plan is understood;*
 - g) *Communicating concerns and asking for extra or specific support when appropriate.*
- 5) *At a performance improvement meeting on 7 March 2018, did not demonstrate that you were meeting the following objectives fully:*
- a) *Time management skills in relation to taking observations in a timely manner;*
 - b) *Communicating with patients and/or their families;*

- c) *Escalating concerns to the Nurse in Charge, including:*
 - i. *increasing PEWS,*
 - ii. *Clinical concerns,*
 - iii. *When uncertain how to complete a task;*

 - d) *Asking at the beginning of shift for JAC and when medications are due;*

 - e) *Beginning preparation of medication so it can be checked in a timely manner;*

 - f) *Listening to ward rounds, communicating concerns to doctors, and ensuring plan is understood;*

 - g) *Communicating concerns and asking for extra or specific support when appropriate.*
- 6) *At a performance improvement meeting on 6 June 2018, did not demonstrate that you were meeting the following objectives fully:*
- a) *Time management skills in relation to taking observations in a timely manner;*

 - b) *Communicating with patients and/or their families;*

 - c) *Escalating deteriorating patients;*

 - d) *Correctly preparing medication;*

 - e) *Communicating concerns and ask for extra or specific support when appropriate.*
- 7) *At a formal review meeting on 26 July 2018, did not demonstrate that you were meeting the following objectives fully:*
- a) *Time management skills in relation to:*
 - i. *Taking observations in a timely manner,*

- ii. *Providing patient care in a timely manner,*
 - iii. *Administering medication when due;*
- b) *Prioritising care whilst responsible for the care of two patients and taking new admissions to the unit;*
- c) *Communicating with patients and/or their families;*
- d) *Communicating with colleagues;*
- e) *Escalating concerns, including:*
- i. *Deterioration in condition of patients,*
 - ii. *Asking for help when struggling with time management,*
 - iii. *When uncertain how to complete a task.'*

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

'The panel considered whether Miss Tubana's fitness to practise remains impaired.

The panel noted that the original panel found that Miss Tubana had developing insight. At this hearing, the panel were of the view that Miss Tubana showed a good level of insight and concluded that Miss Tubana has shown an impressive level of theoretical reflection. However, she has not yet been able to demonstrate how this insight will be applied in practice as a nurse as she has not yet secured employment in a nursing role.

In its consideration of whether Miss Tubana has taken steps to strengthen her practice, the panel took into account the reflective piece written by Miss Tubana dated 13 June 2022 addressing effective time management, leadership, prioritisation, escalation of deteriorating patients, communication, and her current role as well as future plans. The panel was of the view that Miss Tubana has strengthened her knowledge, skills, and judgement but that she has not yet has the opportunity to put this into practise as a nurse.

The original panel determined that Miss Tubana was liable to repeat matters of the kind found proved. Today's panel concluded that until Miss Tubana has demonstrated a period of safe practise as a nurse, there remains a risk of repetition. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

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

For these reasons, the panel finds that Miss Tubana fitness to practise remains impaired.'

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

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

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

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Miss Tubana'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 Miss Tubana’s misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether imposing a further conditions of practice order on Miss Tubana’s registration would still be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable.

The panel determined that it would be possible to formulate appropriate and practical conditions which would address the failings highlighted in this case. The panel accepted that Miss Tubana has complied with the conditions to the best of her ability, and engaged with the NMC, but as she has not been working as a registered nurse, she has not had the opportunity to demonstrate practically how she has strengthened her nursing practice. The panel was of the view that Miss Tubana has displayed her dedication to nursing and concluded that conditions of practice would be most appropriate to provide her with an ongoing opportunity to develop her practice further and display this development.

The panel noted the written submissions from the RCN and concluded that less onerous conditions would provide Miss Tubana with the opportunity to secure employment as a registered nurse and strengthen her practice further. It was also of the view that more relaxed conditions would be workable in the light of current practises in the majority of workplaces where a registered nurse would expect to be employed. The panel considered the variation suggested by the RCN to condition four but concluded that Miss Tubana has not yet had been able to demonstrate her time management skills as a registered nurse, and that the personal development plan would aid her in doing so. The panels agreed the changes to condition five as this would be sufficient to provide support to the registrant but less onerous on the senior staff in the clinical area.

The panel was of the view that a varied conditions of practice order is sufficient to protect patients and the wider public interest, noting as the original panel did that there was no evidence of general incompetence and no deep-seated attitudinal

problems. In this case, there are conditions could be formulated which would protect patients during the period they are in force.

The panel was of the view that to impose a suspension order or a striking-off order would be wholly disproportionate and would not be a reasonable response in the circumstances of Miss Tubana's case because of the progress she has made since the imposition of the conditions of practice order in July 2019 and Miss Tubana's dedication to her nursing practice.

Accordingly, the panel determined, to make a conditions of practice order for a period of 12 months. The panel determined that 12 months was the appropriate length to give time to secure employment as a nurse and demonstrate compliance with the conditions. This conditions of practice order will replace the current conditions of practice order with immediate effect in accordance with Article 30(2) which will come into effect on the expiry of the current order, namely at the end of 4 July 2022. It decided to impose the following conditions which it considered are appropriate and proportionate in this case:

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

- 1. You must only work for one substantive employer and must not undertake agency work as a registered nurse.*
- 2. At any time that you are employed or otherwise providing nursing services, you must place yourself and remain under the supervision of a registered nurse nominated by your employer, such supervision to consists of working at all times on the same shift as, but not necessarily under the direct observation of, a registered nurse or above who is physically present in or on the same ward, unit, floor or home that you are working in or on.*

3. *You must not administer medication unless directly supervised until you are signed off as competent to do so by another registered nurse.*
4. *You must work with your line manager, mentor or supervisor (or their nominated deputy) to create a personal development plan designed to address the concerns about the following areas of your practice:*
 - 4.1.1. *Time management;*
 - 4.1.2. *Escalation of a deteriorating patient;*
 - 4.1.3. *Communication with patients, families and colleagues; and*
 - 4.1.4. *Prioritisation of care skills.*
5. *You must meet with your line manager, mentor or supervisor (or their nominated deputy) at least every month to discuss the standard of your performance and your progress towards achieving the aims set out in your personal development plan.*
6. *You must send a report from your line manager, mentor or supervisor (or their nominated deputy) setting out the standard of your performance and your progress towards achieving the aims set out in your personal development plan to the NMC prior to any NMC review hearing or meeting.*
7. *You must tell the NMC within 7 days of any nursing appointment (whether paid or unpaid) you accept within the UK or elsewhere and provide the NMC with contact details of your employer.*
8. *You must tell the NMC about any professional investigation started against you and/or any professional disciplinary proceedings taken against you within 7 days of you receiving notice of them.*

9. *You must within 7 days of accepting any post or employment requiring registration with the NMC, or any course of study connected with nursing or midwifery, provide the NMC with the name/contact details of the individual or organisation offering the post, employment or course of study.*
10. *You must within 7 days of entering into any arrangements required by these conditions of practice provide the NMC with the name and contact details of the individual/organisation with whom you have entered into the arrangement.*
11. *You must immediately tell the following parties that you are subject to a conditions of practice order under the NMC's fitness to practise procedures, and disclose the conditions listed at (1) to (10) above, to them:*
- 11.1. Any organisation or person employing, contracting with, or using you to undertake nursing work;*
 - 11.2. Any prospective employer (at the time of application) where you are applying for any nursing appointment; and*
 - 11.3. Any educational establishment at which you are undertaking a course of study connected with nursing or midwifery, or any such establishment to which you apply to take such a course (at the time of application).*

The period of this order is for 12 months.

This conditions of practice order will replace the current conditions of practice order with immediate effect in accordance with Article 30(2).

Before the end of the period of the order, a panel will hold a review hearing to see how well Miss Tubana has complied with the order. At the review hearing the panel

may revoke the order or any condition of it, it may confirm the order or vary any condition of it, or it may replace the order for another order.

Any future panel reviewing this case would be assisted by:

- *Testimonials from your employer and/or line manager; and*
- *An up-to-date reflective piece demonstrating insight into the charges found proved, the learning which has been achieved in this regard, and the implementation of this learning in your clinical practice as a nurse.'*

Decision and reasons on current impairment

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

The panel has had regard to all of the documentation before it, including the NMC bundle and your bundle. It has taken account of the submissions made by Mr Edwards on behalf of the NMC.

Mr Edwards took the panel through the relevant pages within the bundle, as well as both the original and first reviewing panel's findings.

Mr Edwards referred the panel to your bundle which contained testimonials, evidence of training and an updated reflective piece. He submitted that there has not been much change since the last review hearing, and you have still not obtained work as a registered nurse, therefore you are unable to demonstrate your compliance with the current conditions of practice within a nursing role.

Mr Edwards submitted that, in light of the above, it is the NMC's position that you are unable to demonstrate that you can practise unrestricted at this moment in time and your fitness to practice is still impaired on the grounds of public protection and the public interest.

Mr Edwards submitted that, if the panel agree with the NMC's position, he invited the panel to confirm the current conditions of practice order in order to allow you further time to obtain employment as a registered nurse. He submitted that you have also indicated your future plans with regards to working in the adult nursing field.

Mr Edwards submitted that the current conditions of practice are workable and proportionate. He reminded the panel that you continue to engage with these proceedings, and you have attended your hearings on previous occasions and provided extensive reflective pieces to today's panel and previous panels. He submitted that, whilst it is disappointing to see that no significant improvement has been made since the last review hearing, you continue to engage and it is clear that you want to continue your career as a registered nurse.

Ms Grummitt, on your behalf, referred to your bundle, in particular your most recent reflective piece. She also made reference to the evidence of training you have undertaken and references from your current manager and colleagues.

Ms Grummitt submitted that you qualified as a nurse in 2017, and you were working in a newly qualified role at the time the concerns arose. She agreed with the NMC's submission that, until you have demonstrated a period of safe practice as a registered nurse, there remains a risk of harm and repetition. She reminded the panel that you have not yet had an opportunity to practice within a nursing role since the last review hearing, and that you accept your fitness to practice remains impaired.

Ms Grummitt submitted that you have been working as a Healthcare Assistant (HCA) since 2021 within an adult nursing environment. She submitted that you have complied with the last reviewing panel's recommendations as best as you could, namely: you have provided references from your current manager and colleagues, and you have provided a recent

reflective piece which sets out your learning and how you have applied that to your role as a HCA. You have also provided evidence of training you have undertaken on National Early Warning Scores (NEWS).

Ms Grummitt submitted that, given your continued good practice as a HCA, your positive references and your reflective piece, the panel may agree that you have remedied your shortcomings in time management. She also invited the panel to find that you have now demonstrated full insight even though you are yet to have the opportunity to put that learning into nursing practice. She submitted that you are keen to return to nursing practice, although you have decided you prefer working in an adult setting, and you are making enquires with the NMC to determine whether it is possible for you to retrain in adult nursing whilst subject to the conditions of practice. If this is not possible, she submitted that you would like further time to fully consider all of your options.

Ms Grummitt submitted that the original panel and first reviewing panel determined that there is no evidence of general incompetence or a deep-seated attitudinal problem. She submitted that there is no evidence before the panel today to suggest that the risk has increased since the last review hearing, and as such the only appropriate and proportionate response in this case continues to be that of a conditions of practice order. She submitted that a suspension order or striking-off order would be disproportionate at this stage.

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

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

The panel considered whether your fitness to practise remains impaired.

The panel took account of all the oral and documentary information before it. It considered that both the NMC and Ms Grummitt have accepted that your fitness to practise is still impaired as you have not obtained employment as a registered nurse and, as such, you

have not been able to demonstrate a period of safe practice as a registered nurse nor have you been able to comply with the conditions of practice.

The panel considered that you are currently working as a Band 3 HCA and, although you are working in a clinical setting, you have not worked as a registered nurse for a significant amount of time and subsequently you have not been able to apply your learning to that role.

The panel took account of the documentation you provided in advance of the hearing today, namely: your reflective piece, references from your manager and colleagues and evidence of training you have undertaken. The panel agreed that you have fully developed your insight and it found it to be detailed and comprehensive. However, the panel considered that, in relation to your time management, it is not convinced at this stage and would like to see further evidence of your time management within a more clinically demanding and uncertain situation.

The panel considered that you have expressed your desire to work within the adult nursing field and you have made enquiries with the NMC about this.

The last reviewing panel determined that you were liable to repeat matters of the kind found proved. Today's panel considered that there has not been a material change in circumstances since the last review hearing and you have not yet obtained work as a registered nurse. In light of the above, this panel determined that you are still liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

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

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

Decision and reasons on sanction

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

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

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict your practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where *'the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.'* The panel considered that your actions were not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether imposing a further conditions of practice order on your registration would still be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable.

The panel agreed with the NMC's and Ms Grummitt's submission in that a conditions of practice order is still the most proportionate sanction at this stage, and that a suspension or striking-off order would be disproportionate, as you have demonstrated your continued engagement and full insight. However, the panel had some concerns that the level of risk in this case is potentially increasing, due to the significant length of time that has passed since you last practised as a registered nurse. This led to the panel re-examining condition two and subsequently making a variation to this condition.

The panel was of the view that a varied conditions of practice order is sufficient to protect patients and the wider public interest, noting as the original panel did that there was no evidence of general incompetence and no deep-seated attitudinal problems. In this case, conditions could be formulated which would protect patients during the period they are in force.

The panel was of the view that to impose a suspension order or a striking-off order would be wholly disproportionate and would not be a reasonable response in the circumstances of your case for the same reasons as set out above.

Accordingly, the panel determined, pursuant to Article 30(1)(c) to make a conditions of practice order for a period of two years, which will come into effect on the expiry of the current order, namely at the end of 23 June 2023. The panel agreed with a period of two years as put forward by Ms Grummitt, and felt that this would be more than enough time for you to either comply with the conditions of practice, or re-evaluate your future career plans. It decided to impose the following varied conditions which it considered are appropriate and proportionate in this case:

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

1. You must only work for one substantive employer and must not undertake agency work as a registered nurse.
2. At any time that you are employed or otherwise providing nursing services, you must place yourself and remain under the direct supervision of a registered nurse nominated by your employer, until they are satisfied you no longer require direct supervision. Thereafter, to work at all times on the same shift as, but not necessarily under the direct observation of, a registered nurse or above who is physically present in or on the same ward, unit, floor or home that you are working in or on.

3. You must not administer medication unless directly supervised until you are signed off as competent to do so by another registered nurse.
4. You must work with your line manager, mentor or supervisor (or their nominated deputy) to create a personal development plan designed to address the concerns about the following areas of your practice:
 - 4.1.1. Time management;
 - 4.1.2. Escalation of a deteriorating patient;
 - 4.1.3. Communication with patients, families and colleagues; and
 - 4.1.4. Prioritisation of care skills.
5. You must meet with your line manager, mentor or supervisor (or their nominated deputy) at least every month to discuss the standard of your performance and your progress towards achieving the aims set out in your personal development plan.
6. You must send a report from your line manager, mentor or supervisor (or their nominated deputy) setting out the standard of your performance and your progress towards achieving the aims set out in your personal development plan to the NMC prior to any NMC review hearing or meeting.
7. You must tell the NMC within 7 days of any nursing appointment (whether paid or unpaid) you accept within the UK or elsewhere and provide the NMC with contact details of your employer.
8. You must tell the NMC about any professional investigation started against you and/or any professional disciplinary proceedings taken against you within 7 days of you receiving notice of them.
9. You must within 7 days of accepting any post or employment requiring registration with the NMC, or any course of study connected with nursing or midwifery, provide the NMC with the name/contact details of the

individual or organisation offering the post, employment or course of study.

10. You must within 7 days of entering into any arrangements required by these conditions of practice provide the NMC with the name and contact details of the individual/organisation with whom you have entered into the arrangement.

11. You must immediately tell the following parties that you are subject to a conditions of practice order under the NMC's fitness to practise procedures, and disclose the conditions listed at (1) to (10) above, to them:

11.1 Any organisation or person employing, contracting with, or using you to undertake nursing work;

11.2 Any prospective employer (at the time of application) where you are applying for any nursing appointment; and

11.3 Any educational establishment at which you are undertaking a course of study connected with nursing or midwifery, or any such establishment to which you apply to take such a course (at the time of application).

The period of this order is for two years.

This conditions of practice order will take effect upon the expiry of the current conditions of practice order, namely the end of 23 June 2023 in accordance with Article 30(1).

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

Any future panel reviewing this case would be assisted by:

- Your continued attendance and engagement with these proceedings;
- Up to date testimonials from your employer and/or line manager; and
- An up-to-date reflective piece demonstrating your learning, and the implementation of this learning in your clinical practice as a nurse.

This will be confirmed to you in writing.

That concludes this determination.