

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

Substantive Hearing

10 – 13 July heard as a physical hearing

14 – 17 July 2023 the hearing was heard as virtually

20 – 21 November 2023 the hearing was heard virtually

22-23 April 2024 the hearing was heard virtually

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

Name of registrant: Iria Rita Diaz Tapia

NMC PIN: 15D0013C

Part(s) of the register: RN1: Registered Nurse – (sub part 1)
Adult – Level 1 - 1 April 2015

Relevant Location: Reading

Type of case: Misconduct

Panel members: Nicola Dale (Chair, Lay member)
Anne Grauberg (Registrant member)
Sally Underwood (Registrant member)

Legal Assessor: Cyrus Katrak
Graeme Sampson (22 April 2024 onwards)

Hearings Coordinator: Tyrena Agyemang (10-17 July 2023)
Clara Federizo (20-22 November 2023)
Vicky Green (22 April 2024 onwards)

Nursing and Midwifery Council: Represented by Shekyena Marcelle-Brown,
Case Presenter
Represented by Mohsin Malik, Case Presenter
(22 April 2024 onwards)

Ms Diaz: Present and unrepresented on 12 and 14 July
2023 only.
Not present on or after 22 April 2024

Facts proved: All

Facts not proved:	None
Fitness to practise:	Impaired
Sanction:	Suspension order – 6 months with a review
Interim order:	Interim suspension order – 18 months

An application in relation to Ms Diaz's attendance on 12 July 2023

At the outset of the hearing, Mr Olphert on behalf of Mr Nivet Egea (known as Mr Nivet in the hearing), made an application, that he explained was not an explicit application for an adjournment of the hearing, but he submitted it was an application that may result in an adjournment.

Mr Olphert submitted that Ms Diaz is the registrant and is also an NMC witness, who should be here in person to give her evidence. He told the panel that at the case management stage, a request was made on behalf of Mr Nivet that the hearing should be in person. He told the panel that there was no option on the case management form for them to formally request that Ms Diaz were to also attend the hearing in person, but they made the inference that if the hearing was in person that all the witnesses attending would also be in person.

Mr Olphert submitted that he is aware the panel do not have the power to request Ms Diaz attend the hearing in person and he referred the panel to the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules), specifically 2ZA, which states:

'Meetings and hearings arranged under these Rules may be conducted using audio or video conferencing facilities'

Mr Olphert submitted that according to the rules, the panel may deal with the hearing virtually where there is a vulnerable witness, but he stated this is not the case in this matter.

Mr Olphert submitted that there are circumstances when evidence can be given remotely, but there are no express rules in relation to the manner in which evidence can be given to a panel. He submitted that panels could hear evidence in whatever method it deems appropriate, but he submitted that the panel today should first consider the rules where there is a dispute regarding the manner in which a witness gives evidence.

He told the panel that a hybrid hearing can only apply when there is agreement between the parties.

Mr Olphert submitted that if the panel are not with him, then he invited the panel to consider fairness to Mr Nivet. He told the panel that your evidence is central to the NMC's case and that the panel may think Ms Diaz's evidence is the only evidence in this case. Mr Olphert submitted that the only way to decide if there is any fact in Ms Diaz's evidence is to test her credibility.

Mr Olphert submitted that there is no better way to assess a witness' credibility that to hear their evidence in person. He told the panel that Mr Nivet has travelled from Spain to attend in person to give his evidence nevertheless, he is unable to question Ms Diaz in person as she is not physically attending the hearing.

Mr Olphert submitted that the proper approach is that Ms Diaz attends the hearing in person to give her evidence. He further submitted that if the panel are in agreement with him, then the hearing should be adjourned, and arrangements made for Ms Diaz to attend the hearing in person.

Ms Diaz told the panel that when she enquired as to whether she could attend the hearing virtually, she was told that she could attend the hearing virtually, as she is unable to leave Spain and come to the UK. She told the panel that she works full time managing a nursing team, as a nurse herself and due to nursing shortages in Spain, she is unable to leave Spain to attend the hearing in person.

[PRIVATE].

Ms Marcelle-Brown submitted that there is numerous guidance available to panels regarding evidence and how it may be heard by panels during hearings. One of the methods, she told the panel, is via video link.

Ms Marcelle-Brown submitted that there is no disadvantage to Mr Nivet, by Ms Diaz attending the hearing virtually and she reminded the panel that in relation to

demeanour, this is not to be relied upon by the panel. She further submitted that the panel should rely on the content of Ms Diaz's evidence rather than her demeanour.

Ms Marcelle-Brown told the panel that the Royal College of Nursing (RCN), who represent Mr Nivet, requested for Ms Diaz to attend the hearing to give evidence and they were made aware that she would be attending the hearing virtually. Ms Marcelle-Brown submitted that there is no disadvantage to Mr Nivet by Ms Diaz attending the hearing virtually as this is routinely done in NMC hearings.

Ms Marcelle-Brown submitted that based on the guidance, Ms Diaz's evidence can be properly put forward for the panel's consideration, the credibility of her evidence should be based on the content and not on her demeanour and she will be seen and heard clearly on screen.

The panel accepted the advice of the legal assessor, who referred the panel to relevant case law including, *YI v AAW* [2020] CSOH 76, and *R v Secretary of State*.

The panel considered the submissions of Mr Olphert and Ms Marcelle-Brown and Ms Diaz's submissions in relation to this application.

The panel considered that there would be no unfairness to Ms Diaz or Mr Nivet and nothing would be lost by the panel hearing Ms Diaz's evidence virtually. The panel acknowledged Mr Olphert's submissions [PRIVATE], however it considered that should the hearing be adjourned today, that Ms Diaz would still be unable to attend at a later date as she is working full time.

The panel was aware that a witness' demeanour should not be taken into consideration when hearing witness evidence. The panel acknowledged that Mr Nivet was expecting Ms Diaz to attend the hearing in person and that he has made arrangements to travel from Spain to attend the hearing physically, however, the panel noted that there was nothing on Mr Nivet's case management form that states he would like Ms Diaz to attend the hearing in person.

The panel considered that there is nothing lost by Ms Diaz attending the hearing virtually and there is nothing gained by her attending physically. The panel noted that Ms Diaz requested to attend virtually, the NMC agreed to this and there would be no adverse impact on the quality of her evidence by her attending virtually.

In light of this, taking the information into consideration, the panel decided to reject Mr Olphert's application.

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

At the outset of the hearing, Mr Olphert made a request on behalf of Mr Nivet that this case be held partially in private on the basis that proper exploration of Mr Nivet's case involves references to [PRIVATE]. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Ms Marcelle-Brown indicated that she supported the application to the extent that any reference to [PRIVATE] should be heard in private.

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

The panel determined to go into private session as and when issues relating to [PRIVATE] in order to maintain their privacy.

Application to proceed in Ms Diaz's absence

When the panel handed down its decision in relation to Ms Diaz attending the hearing virtually (at which she was present virtually), Ms Marcelle-Brown told the panel that Ms Diaz was only attending the hearing to give her evidence as an NMC witness and thereafter she would not be attending the remainder of the hearing.

The panel asked Ms Diaz to confirm whether this was still her position and if she was content for the panel to continue with the hearing on future dates in her absence.

Ms Diaz told the panel that she did not wish to engage further in the proceedings and she was happy for the hearing to continue in her absence.

Decision and reasons on proceeding in the absence of Ms Diaz

The panel considered whether it should proceed in the absence of Ms Diaz on future dates should she not attend. It had regard to Rule 21 and heard the submissions of Ms Marcelle-Brown who invited the panel to continue in the absence of Ms Diaz. She submitted that it was explored with Ms Diaz on 19 June 2023 via email, whether she would be attending the whole hearing and whether she would be attending in person. Ms Diaz confirmed the following in an email to the NMC dated 21 June 2023:

“I will be able to attend on the 11th of July however I won’t attend to all the hearing. So the panel can proceed without me. [sic]”

Ms Marcelle-Brown submitted that Ms Diaz did not request an adjournment and further she confirmed during her oral evidence and in an email, that she was content for the hearing to proceed without her. Ms Marcelle-Brown submitted that there is no unfairness in proceeding in the absence of Ms Diaz, and that it is fair and proportionate for the panel to continue with the hearing.

Mr Olphert had no objections to the application. He told the panel that he is satisfied that Ms Diaz is aware of the hearing and that she has expressly stated that she would only be attending to give evidence as an NMC witness only. He told the panel that he is content for the hearing to proceed in her absence.

The panel accepted the advice of the legal assessor.

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 Ms Diaz. In reaching this decision, the panel has considered the submissions of Ms Marcelle-Brown, the representations from Ms Diaz, and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v Jones* and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Ms Diaz;
- Ms Diaz has informed the NMC that she has received the Notice of Hearing and confirmed she will only attend the hearing to give evidence and otherwise she is content for the hearing to proceed in her absence;
- There is no reason to suppose that adjourning would secure her attendance at some future date;
- A witness has attended today to give live evidence;
- Not proceeding may inconvenience the witnesses, their employer(s) and, for those involved in clinical practice, the clients who need their professional services;
- The charges relate to events that occurred in 2016 to 2019;
- Further delay may have an adverse effect on the ability of witnesses accurately to recall events; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Ms Diaz in proceeding in her absence. Although the evidence upon which the NMC relies will have been sent to her at her registered address, she will not be able to challenge the evidence relied upon by the NMC in person. However, in the panel's judgement, this can be mitigated. The panel can make allowance for the fact that the NMC's evidence will not be tested by cross-examination and, of its own volition, can explore any inconsistencies in the evidence which it identifies. Furthermore, the limited disadvantage is the consequence of Ms Diaz's

decisions to absent herself from the hearing, waive her rights to attend, and/or be represented, and to not provide evidence or make submissions on her own behalf.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Ms Diaz. The panel will draw no adverse inference from Ms Diaz's absence in its findings of fact.

Details of charge

That you, a registered nurse at Berkshire Healthcare NHS Foundation Trust ("the Trust"):

1. On a date between 4 April 2016 and 3 September 2019:
 - a. administered one unit of blood to Patient A when two units were prescribed; **[Proved]**
 - b. signed to confirm that two units of blood were provided to Patient A when one was provided; **[Proved]**
2. Your actions in charge 1(b) were dishonest in that you knew you had not provided the patient with two units of blood and intended to cover up what had happened; **[Proved]**
3. Your actions in charge 1(b) were in breach of the duty of candour in that you were not open and honest in relation to what happened at the time; **[Proved]**

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

Registrant's evidence and submissions

Ms Diaz gave evidence that Mr Nivet was her clinical team leader. She worked very closely with him. Nonetheless, she said that while Mr Nivet tried to be friendly, on occasions if he was questioned "*he would get angry and violent*". Ms Diaz also said that Mr Nivet was "*very manipulative*".

Prior to the incident in question, Ms Diaz said that she had spoken to her manager about Mr Nivet's behaviour, but nothing happened.

As to the incident itself, Ms Diaz explained that she and Mr Nivet would normally give Patient A two units of blood every other week although with some exceptions – for example, if the patient was on holiday or there were staffing capacity issues. Two units of blood were always ordered.

On the day in question, Ms Diaz explained that she and Mr Nivet were about to give Patient A her second unit of blood. She said that Mr Nivet went to collect the blood from the blood fridge, which was in a ward approximately ten minutes away from their clinic.

When Mr Nivet returned, Ms Diaz said that he was very nervous and said that he had broken a unit of blood. Also alleged that the registrant had said he could not "*deal*" with the Datix "*because he will have problems*".

Ms Diaz went on "*the Registrant influenced me to sign saying the broken unit of blood was given to the patient and the Registrant signed also*".

Ms Diaz did not report this at the time as she was "*frightened [sic] the Registrant bullied me so much*".

However, Mr Nivet was subject to an unrelated disciplinary process in August 2019 when he had been accused of bullying by Ms Diaz. It was during an investigation interview on 3 September 2019 that Ms Diaz disclosed for the first time about the incident and that she and Mr Nivet had falsified the treatment records.

Ms Diaz also said during the disciplinary proceedings that, although she had not seen it, she assumed that Mr Nivet had emptied the broken blood bag down the sink.

Ms Diaz denied that she had been dishonest or had breached her duty of candour. She said she had not been dishonest because when she spoke of the incident she had always told the truth and had never tried to cover anything up.

Ms Marcelle-Brown's Submissions

Ms Marcelle-Brown told the panel that Ms Diaz is a witness of fact and in the absence of contemporaneous notes, or CCTV and she was able to give evidence as to what happened on the day in question. She submitted that it is Ms Diaz's evidence that only one unit of blood was given to Patient A, and that Mr Nivet disposed of the second unit of blood and thereafter the patient's records were falsified.

Ms Marcelle-Brown submitted that as there are no contemporaneous notes, the strength and/or weakness of the evidence amounts to Ms Diaz's credibility and the weight that the panel should attach to her evidence with reference to the guidance. Ms Marcelle-Brown submitted that there is clear evidence to support each charge.

Charge 1a

Ms Marcelle-Brown submitted in relation to charge 1a, that Ms Diaz gave clear evidence that only one unit of blood was administered and that was irrespective of whether concerns were raised at the time of the incident. She told the panel that Ms Diaz had raised general concerns about Mr Nivet's conduct rather than specifically about this incident and it was only until she made a formal complaint that this incident came to light. Ms Marcelle-Brown referred the panel to Ms Diaz's witness statement in which she states two units of blood were normally administered to Patient A, and that they were '*about to give the patient her second unit of blood*'. She submitted that this evidence supports the NMC's case that two units of blood were to be administered to Patient A and only one was given.

Charge 1b

Ms Marcelle-Brown submitted that Ms Diaz gave clear evidence that two nurses were required to sign the treatment chart when blood was administered to a patient and she was also clear in her evidence that from the outset, both Mr Nivet and Ms Diaz signed those charts.

Charges 2 and 3

Ms Marcelle-Brown agreed with Mr Olphert's submission that charges 2 and 3 are for the panel to decide whether or not there is sufficient evidence in order to find these charges proved. She submitted that these charges depend on the factual element of the charges being found proved in order for these charges to apply. She submitted that Ms Diaz gave clear evidence that Mr Nivet told her to sign the treatment plan in order to conceal that the second unit of blood had not been administered, such that Mr Nivet did not have to wait for a second bag of blood to be delivered to the unit and also so Mr Nivet did not have to complete a Datix report.

Ms Marcelle-Brown submitted that it is clear Ms Diaz did not report this incident at the time, including to the patient, as it was first disclosed when she when raised concerns about Mr Nivet's conduct more than a year later.

Ms Marcelle-Brown submitted that whilst Ms Diaz is a credible witness it doesn't mean that her actions at the time could not be dishonest, it was a logical inference that she could be dishonest. She submitted that Ms Diaz knew that the second unit had not been given and it was not a careless mistake. She went on to submit that Ms Diaz had a professional duty to be open and staying silent was a breach of this professional duty of candour.

The panel took account of the submissions made and heard and accepted the advice of the legal assessor.

Decision and reasons on facts

At the outset of the hearing, the panel heard admissions from Ms Diaz, who informed the panel that she admits charges 1a and 1b.

The panel acknowledged Ms Diaz's admissions, but it was not bound by the admissions due to the nature of the case. The panel determined that if, after hearing all the evidence, it preferred the evidence of Mr Nivet and found the charges not proved, then the charges in relation to Ms Diaz could not be found proved and the admissions would be groundless.

In reaching its decisions on the disputed facts, the panel took into account all the oral and documentary evidence in this case together with the submissions made by Ms Marcelle-Brown on behalf of the NMC, Mr Olphert on behalf of Mr Nivet and by Ms Diaz during her oral evidence.

The panel has drawn no adverse inference from the non-attendance of Ms Diaz for part of the hearing.

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: Named Professional for
Safeguarding at the Trust and the
Trust's internal investigator

- Ms Diaz: although you were primarily giving evidence as an NMC Witness against Mr Nivet

The panel also heard evidence from Mr Nivet as the joint registrant in this case.

Background

The charges arose whilst Ms Diaz was employed as a registered nurse by Berkshire Healthcare NHS Foundation Trust (“the Trust”).

In September 2019, during a local investigation into a formal complaint about bullying against Mr Nivet. In giving examples of incidents of bullying, she included allegations that Mr Nivet had damaged and thrown away a unit of blood prescribed for Patient A. This resulted in Patient A being administered one unit of blood instead of the two that had been prescribed. Ms Diaz claimed that she falsified the patient’s record, as she had been pressured to do so by Mr Nivet to do so, to indicate that the second unit of blood had been administered when it had not been. Ms Diaz alleges that Mr Nivet asked her to countersign the documents regarding the blood administration. This incident allegedly occurred 12-18 months prior to the September 2019 local investigation. Due to the lack of detail around dates, and the frequency that Patient A was receiving blood it was not possible to identify which entry was alleged to be falsified. Ms Diaz could also not recall the week, month or year that this incident allegedly took place. She did not record anything or inform anyone at the time.

Mr Nivet denied these allegations and both he and Ms Diaz maintained their respective positions throughout the investigative process regarding the administration of the second unit of blood to Patient A.

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, Ms Diaz and Mr Nivet.

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

Charge 1a

1. On a date between 4 April 2016 and 3 September 2019:
 - a. administered one unit of blood to Patient A when two units were prescribed;

This charge is found proved.

In reaching this decision, the panel took into account the oral and documentary evidence of Ms Diaz and Mr Nivet.

The panel was aware that although Ms Diaz had made an admission to this charge, the panel's primary decision was to determine which registrant's evidence it preferred and then make its decision on the facts.

The panel referred to evidence from Witness 1, who gave evidence as to the local investigations, where Ms Diaz stated:

"We signed two units on prescription and gave one unit."

The panel heard oral evidence from Ms Diaz that you told her that the second unit of blood had broken when you went to collect it.

Then the panel heard oral evidence from Mr Nivet that this incident simply did not happen.

Despite the panel not having a specific time or date of the incident, the panel preferred the evidence of Ms Diaz that only one unit of blood was given when two were prescribed. The panel considered Ms Diaz's reasons for making these allegations. The panel considered Ms Diaz evidence and noted she would have known that only administering one unit of blood when two units were prescribed would have serious

professional consequences for her and that there was nothing for her to gain by making the allegations. It therefore found this charge proved on the balance of probabilities and also by Ms Diaz's admission.

Charge 1b

1. On a date between 4 April 2016 and 3 September 2019:
 - b. signed to confirm that two units of blood were provided to Patient A when one was provided;

This charge is found proved.

In reaching this decision, the panel took into account the evidence of Ms Diaz and Mr Nivet.

The panel accepted that Ms Diaz had also made an admission to this charge and referred back to its earlier decision that in order to determine the facts of the case, it must determine which registrant's evidence it preferred and then make its decision.

The panel acknowledged that Ms Diaz gave evidence in relation to this charges despite the personal consequences she would face. The panel found that Ms Diaz was scared of upsetting Mr Nivet and the consequences for her of not doing as he instructed.

The panel acknowledged Mr Nivet's evidence but was not persuaded by his account. It therefore preferred the evidence of Ms Diaz and finds this charge proved.

Charges 2

2. Your actions in charge 1(b) were dishonest in that you knew you had not provided the patient with two units of blood and intended to cover up what had happened;

This charge is found proved.

In reaching this decision, the panel took into account all the evidence before it, including the oral evidence of Ms Diaz and Mr Nivet.

The panel acknowledged Ms Diaz's account in oral evidence in which she told the panel that she knew what they were doing at the time was wrong, but that she was scared of the repercussions of going against Mr Nivet, the more experienced nurse. Ms Diaz told the panel that she was aware Patient A was prescribed two units of blood and that by signing to confirm two units of blood were provided to Patient A when only one was given, was dishonest.

Further the panel considered that an ordinary, decent person would consider her actions to be dishonest.

The panel acknowledged the context as outlined by Ms Diaz, but finds this charge proved.

Charge 3

3. Your actions in charge 1(b) were in breach of the duty of candour in that you were not open and honest in relation to what happened at the time;

This charge is found proved.

In reaching this decision, the panel took into account all the evidence before it, including the oral evidence of Ms Diaz and Mr Nivet.

The panel accepted Ms Diaz's evidence that she did not speak up at the time for reasons previously outlined, and although she did speak up some time later, the panel found that she should have done so at the time.

The panel determined that as an experienced nurse, Ms Diaz would have been aware of her duty of candour and made a decision not to be open and honest about the incident. On the balance of probabilities, the panel therefore finds this charge proved.

Proceeding in absence for the purpose of receiving the panel's decision on facts

The hearing resumed on 20 November 2023, neither registrant was present. Ms Marcelle-Brown made submissions to the panel in relation to proceeding in the absence of both registrants for the purpose of receiving the panel's decision on facts. She referred the panel to the documentation before it which shows that Notice was sent to Ms Diaz on 20 July 2023 along with details in relation to this hearing. She submitted that service has been affected in accordance with the rules. Ms Marcelle-Brown invited the panel to proceed in the absence of Ms Diaz as she voluntarily absented herself from these proceedings.

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

The panel accepted the submissions and was satisfied that Notice was served. It decided to proceed in the absence of the registrants in order to hand down its decision on facts. However, it was mindful that a different position may be taken regarding the next stage of the hearing.

Decision and reasons on application to adjourn the hearing

Mr Olphert made an application, on behalf of Mr Nivet, to adjourn the hearing to a later date which the panel granted.

Ms Marcelle-Brown did not oppose the application made by Mr Olphert. She confirmed the NMC's position that in this case, where the facts found proved found 'joint fault', the panel may consider the need to hear the next stage of the process together or separately. She submitted that both cases are inextricably linked and should remain heard together in the interest of fairness to both parties. She submitted that the panel may consider the attendance and engagement of the parties in the proceedings, and highlighted for the panel that should it make a decision to adjourn, the potential unfairness of this on Ms Diaz is limited as she has previously stated that she would only attend as an NMC witness and otherwise not take part in the hearing. Any unfairness to

Ms Diaz would be outweighed by the fairness to the overall proceedings in ensuring the overarching objective is met.

Ms Marcelle-Brown invited the panel to consider the public interest in this case being dealt with expeditiously. However, she outlined there are no further witnesses to be called from the NMC and the panel may also consider that Mr Nivet intends to provide evidence at the misconduct and impairment stage. She submitted the decision whether to adjourn was a matter for the panel.

The panel heard and accepted the advice of the legal assessor in relation to adjournment as well as proceeding in the absence of one or both registrants.

The panel acknowledged that these are unexpected circumstances and recognised that Mr Nivet's request to adjourn this hearing was reasonable. The panel noted that Mr Nivet wishes to continue to engage in the proceedings, and it is in the interest of fairness that he is fit to participate in proceedings and that his evidence is also heard. The panel considered that Ms Diaz may also attend at a future date.

The panel considered that because the facts of Ms Diaz's case is so interlinked with Mr Nivet's case, it could prejudice one or the other if these are heard separately. The panel determined to continue to hear both cases jointly and adjourn the proceedings in both instances.

The panel was mindful that it is in the interest of the public that the case is dealt with expeditiously. However, it noted that there are no witnesses due to give evidence and although it could be potentially unfair to Ms Diaz that the process is delayed, the panel noted that Ms Diaz has voluntarily disengaged with the proceedings. The panel balanced any potential unfairness with fairness to the overall proceedings and concluded any unfairness caused by a delay would be extremely limited.

Accordingly, the panel will adjourn the proceedings and this case will be re-listed and a future date will be arranged.

Considerations on interim order following adjournment

Whilst the panel heard no application from the NMC to impose an interim order, the panel considered whether an interim order was necessary following its decision to adjourn the hearing until it resumes at a future date.

The panel considered the charges found proved to be serious in nature, particularly as these include dishonesty.

The panel was mindful of the length of time since the incident (up to eight years) and that it had not yet considered misconduct or impairment. Solely for the purposes of considering whether, in light of the adjournment, an interim order was necessary the panel was not satisfied at this stage that there is a real risk of significant harm to the health, safety or wellbeing of patients, visitors or colleagues nor that an order is required in the public interest.

The panel has therefore decided that it is not necessary in all the circumstances to impose an interim order at this stage.

The NMC may ask for this decision to be reviewed if any new evidence becomes available that may be relevant to Ms Diaz's case.

[This hearing resumed on 22 April 2024]

Decisions and reasons on application to proceed in the absence of Ms Diaz

At the outset of the resumed hearing, the panel was informed that Ms Diaz was not present or represented. The panel was informed that Ms Diaz was sent notice of this resuming hearing on 10 January 2024.

Mr Malik, on behalf of the NMC, drew the panel's attention to an email from Ms Diaz to the NMC dated 17 April 2024 in which she confirmed that she was happy for the hearing to proceed in her absence. In the light of this email response, Mr Malik invited the panel to proceed in the absence of Ms Diaz.

The panel accepted the advice of the legal assessor.

The panel noted that Ms Diaz, after she gave evidence to the panel, made it clear that she would not be taking any further part in this hearing. The panel was of the view that her continued intention to not engage with these proceedings was set out in her recent communication. The panel was satisfied that Ms Diaz had voluntarily absented herself and that an adjournment would not secure her attendance in the future. The panel therefore decided to proceed in Ms Diaz's absence.

Decision and reasons on application to sever the hearing

Having decided to adjourn the hearing in respect of Mr Nivet's case, the panel invited submissions on whether to sever this hearing and to continue with the linked case of Ms Diaz.

Mr Malik submitted that as the facts stage has concluded and in the light of Mr Nivet's circumstances it would be appropriate to continue to consider his and Ms Diaz's case separately.

Mr Olphert submitted that given the uncertainty [PRIVATE] and that the panel has made its determination on the facts it is possible for these cases to now be considered separately. He submitted that any risk of prejudice can be managed as the panel will remain the same for both Mr Nivet and Ms Diaz.

The panel accepted the advice of the legal assessor.

The panel determined that given the change in circumstances it was now appropriate to sever the two cases and to proceed to consider the case of Ms Diaz separately and carefully manage any risk of prejudice. Whilst the panel has decided to adjourn Mr Nivet's hearing for good reason, it determined that there was no good reason to delay proceeding with the case of Ms Diaz. The panel noted that Ms Diaz has indicated that she does not wish to further engage in these proceedings. The panel was of the view that severing these cases and concluding the case of Ms Diaz as soon as possible would be in both Ms Diaz's interest and the public interest in the expeditious disposal of hearings.

Fitness to practise

Having reached its determination on the facts of this case, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether Ms Diaz'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 ability to practise kindly, safely and professionally.

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

The panel adopted a two-stage process in its consideration. First, the panel must determine whether the facts found proved amount to misconduct. Secondly, only if the facts found proved amount to misconduct, the panel must decide whether, in all the circumstances, Ms Diaz'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.*' 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.

Mr Malik identified the specific, relevant standards where Ms Diaz's actions amounted to misconduct. He submitted that Ms Diaz's actions fell short of the standards of the Code and invited the panel to take the view that the facts found proved amount to misconduct. In addition to the case of *Roylance*, Mr Malik referred the panel to the

cases of *Calhaem v GMC* [2007] EWHC 2606 (Admin) and *Nandi v General Medical Council* [2004] EWHC 2317 (Admin).

Mr Malik submitted that in respect of Patient A, Ms Diaz acted dishonestly, she knew what she was doing at the time was wrong. He submitted that Ms Diaz was aware that Patient A was prescribed two units of blood and that by signing to confirm two units of blood were provided to Patient A when only one was given, her actions were dishonest. He submitted that the panel had previously found that as an experienced nurse, Ms Diaz would have been aware of her duty of candour but made a decision not to be open and honest about the incident. Mr Malik submitted that honesty and integrity are fundamental tenets of the profession and the public would expect nurses to be trustworthy and ensure they tell the truth.

Mr Malik submitted that the concerns relate directly to Ms Diaz's clinical practice, she placed Patient A at a risk of harm by not administering the prescribed units of blood. He submitted that a finding of dishonesty is serious and fellow practitioners would consider her departures from the Code deplorable. Mr Malik submitted that the facts found proved are serious and amount to misconduct.

Submissions on impairment

Mr Malik 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. Mr Malik submitted that the panel must consider the following question:

'Can the nurse, midwife or nursing associate practise Kindly, safely and professionally?'

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) and submitted that all four limbs are engaged in this case. Mr Malik submitted that a decision about whether a professional's fitness to practise is impaired takes a holistic approach, so that

anything that's relevant should be considered and it is dependent on the individual circumstances surrounding each concern. He reminded the panel of the contextual factors of this case, namely that Ms Diaz in her evidence told the panel that she was acting under the influence of Mr Nivet and felt frightened of and bullied by him. He acknowledged that the panel found that Ms Diaz was scared of upsetting Mr Nivet and was scared of the consequences of her not doing as he instructed.

In respect of determining future risk, Mr Malik referred the panel to the case of *Cohen v General Medical Council* [2008] EWHC 581 (Admin). He submitted that the misconduct in this case is directly linked to Ms Diaz's clinical practice and is attitudinal in nature. Mr Malik submitted that concerns relating to dishonest conduct and a breach of the duty of candour, are more difficult to remediate. He referred the panel to the NMC guidance on '*Serious concerns which are more difficult to put right*' (Reference FTP-3a) in which it sets out that breaching the professional duty of candour to be open and honest when things go wrong is a concern that is so serious that it may be less easy for a nurse, midwife or nursing associate to put right the conduct.

Mr Malik also referred the panel to the NMC Guidance on '*Insight and strengthened practice*' (Reference: FTP-13) in which it states the following:

'Evidence of the nurse, midwife or nursing associate's insight and any steps they have taken to strengthen their practice will usually be central to deciding whether their fitness to practise is currently impaired.'

Mr Malik submitted that a finding of impairment is necessary on public protection grounds as the misconduct is serious and involves dishonesty which is directly linked to her clinical practice. He submitted that a finding of impairment is also necessary in the public interest to uphold proper professional standards and to maintain public confidence in the profession.

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

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 Ms Diaz's actions did fall significantly short of the standards expected of a registered nurse, and that Ms Diaz's actions amounted to a breach of the Code. Specifically:

'10 Keep clear and accurate records relevant to your practice

This applies to the records that are relevant to your scope of practice. It includes but is not limited to patient records.

To achieve this, you must:

10.3 complete records accurately and without any falsification, taking immediate and appropriate action if you become aware that someone has not kept to these requirements

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

To achieve this, you must:

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

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

14.3 document all these events formally and take further action (escalate) if appropriate so they can be dealt with quickly

16 Act without delay if you believe that there is a risk to patient safety or public protection

To achieve this, you must:

16.3 tell someone in authority at the first reasonable opportunity if you experience problems that may prevent you working within the Code or other national standards, taking prompt action to tackle the causes of concern if you can

20 Uphold the reputation of your profession at all times

To achieve this, you must:

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

20.2 act with honesty and integrity at all times, ...'

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct. However, the panel was of the view that Ms Diaz's actions in administering one unit of blood when Patient A was prescribed two units, then concealing this, was dishonest and fell seriously short of the conduct and standards expected of a nurse and amounted to serious misconduct.

Decision and reasons on impairment

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

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.

Nurses occupy a position of privilege and trust in society and are expected, at all times to be professional. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must be honest and open and act with integrity. They must make sure that their conduct, at all times justifies both their patients' and the public's trust in the profession.

In coming to its decision, the panel had regard to the Fitness to Practise Library, updated on 27 March 2023, which states:

'The question that will help decide whether a professional's fitness to practise is impaired is:

"Can the nurse, midwife or nursing associate practise kindly, safely and professionally?"

If the answer to this question is yes, then the likelihood is that the professional's fitness to practise is not impaired.'

In this regard the panel considered the judgment of Mrs Justice Cox in the case of *CHRE v NMC and Grant* in reaching its decision. In paragraph 74, she said:

'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'

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

'Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her/ fitness to practise is impaired in the sense that S/He:

- a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or*
- b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*
- c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*
- d) has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

The panel determined that all four limbs were engaged in this case. The panel found that Ms Diaz put Patient A at a risk of harm by not administering the prescribed amount of blood and by concealing that the incorrect amount was given. Duty of candour is a fundamental tenet of the profession, the panel determined that Ms Diaz breached fundamental tenets of the profession and as a consequence brought the medical profession into disrepute. The panel determined that Ms Diaz's actions were dishonest.

In determining whether the misconduct in this case is capable of remediation, the panel had regard to the NMC guidance on *'Serious concerns which are more difficult to put right'* (Reference FTP-3a) and the case of *Cohen*. The panel noted that concerns relating to dishonesty are inherently more difficult to remediate.

In taking a holistic approach in determining current impairment, the panel had regard to the contextual factors of this case. The panel heard evidence from Ms Diaz's that her actions were a consequence of her feeling frightened of and intimidated by Mr Nivet. The panel noted that an investigation into allegations of bullying was carried out by the Trust, and it found no evidence that Mr Nivet had bullied Ms Diaz. The panel found that there was an unusual and intense dynamic between Mr Nivet and Ms Diaz and that their relationship extended beyond that of just colleagues. The panel had regard to Mr Nivet's oral evidence about his relationship with Ms Diaz and noted the following:

"I was very attracted to her, well educated, so knowledgeable, amazing person, lovely lady, so sweet. She always used to bring me an elephant. Very special."

"We were very close most of the time"

"She was like my sister. When driving home, lots of traffic I would make sure she was home safely. To me she was my sister."

"I would always call to make sure she was home safely"

"I treated her like a princess, ..."

"We were having a wonderful time. She was living the dream. We were the happiest team ever"

"I was still buying her salad, I stayed calling her first thing in the morning to check safe, in the evenings to check safe"

"A lot of love and a lot of passion, didn't mean losing my support. I was always caring about her. In the beginning it was passion and love but I had to respect her. On Wednesday we have Marks and Spencers salad, coffee on Tuesday and on Thursday and Friday I was calling her to check safe"[sic]

“She couldn’t challenge me. I would challenge her many, many times. In the beginning she accepted.”[sic]

The panel determined that given the intensity of the relationship, it was more likely than not Ms Diaz felt pressurised by Mr Nivet and that this contributed to her dishonesty. However, the panel determined that this did not detract from the seriousness of her actions, she had ample opportunity to correct the issue and to report the incident at the time, or immediately after, but she did not.

The panel had regard to the NMC guidance on *‘Insight and strengthened practice’* (Reference: FTP-13). The panel had sight of a number of positive references and testimonials. It also had sight of Ms Diaz’s written reflective statement and had particular regard to the following:

‘I know the patient was not harmed and she still comes for a blood transfusion, but I still feel awful that I was in that situation and she could have been put at risk... When I was interviewed for the investigation I admitted everything, even though I knew that I would get into trouble, but I knew that I had to say everything. I am so sorry and I and[sic] ashamed that I did not stand up to him, and that this has meant that I did not do the right thing for the patient or myself...

I could have said no at the time, but unless people are in those sort of situations with people like that, it is difficult to understand how they convince you that you are doing the right thing. I could have reported it straight away, but my Team Leader had [previously] said that was just the way he is so I did not know where to go and I just tried to keep the peace in the team, nobody looks for trouble. I have never done anything like that before and after, and I told the truth about it finally even knowing that I would get into trouble for it.’

The panel found that Ms Diaz has shown remorse for her actions and demonstrated some insight into her misconduct. Whilst the panel acknowledged that Ms Diaz did eventually admit to this incident, albeit some months or even years later, and as a consequence of another matter. This should have been reported at the time of the

incident to protect Patient A. Having found that Ms Diaz has not demonstrated full insight into her misconduct and dishonesty, the panel found that there is a risk of repetition and a consequent risk of future harm to patients. The panel therefore determined that a finding of impairment is necessary on public protection grounds.

The panel was of the view that a fully informed member of the public would be shocked to hear that a nurse, after failing to administer the prescribed number of units of blood, did not act in the best interests of the patient and sought to conceal that an incorrect amount was administered. The panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case. The panel therefore determined that a finding of impairment is also required public interest grounds.

Having regard to all of the above, the panel was satisfied that Ms Diaz's fitness to practise is currently impaired on both public protection and public interest grounds.

Sanction

The panel has considered this case very carefully and has decided to make a suspension order for a period of six months with a review. The effect of this order is that the NMC register will show that Ms Diaz's registration has been suspended.

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 Malik informed the panel that in the Notice of Hearing, the NMC had advised Ms Diaz that it would seek the imposition of a suspension order for a period of 3-6 months if the panel found her fitness to practise to be currently impaired.

Decision and reasons on sanction

Having found Ms Diaz'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, it 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:

- Ms Diaz's dishonesty arose in her clinical practice, and she breached the professional duty of candour.
- Ms Diaz's misconduct and dishonesty placed Patient A at risk of suffering harm.
- There was a significant delay in Ms Diaz admitting that the incident occurred and this was admitted inadvertently as part of another matter.

The panel also took into account the following mitigating features:

- Ms Diaz's behaviour was influenced by the intense relationship between her and Mr Nivet where she felt under pressure to acquiesce to his lead.
- The misconduct and dishonesty occurred during an isolated incident.
- No evidence that actual harm was caused to Patient A.
- Ms Diaz has shown remorse for her actions and whilst not full, she has some insight into her actions.
- The dishonesty was not for personal gain.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the serious nature 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 Ms Diaz'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 Ms Diaz'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 placing conditions of practice on Ms Diaz's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel is of the view that there are no practical or workable conditions that could be formulated, given the nature of the charges in this case. The misconduct and dishonesty identified in this case was not something that can be addressed through retraining. Furthermore, the panel concluded that the placing of conditions on Ms Diaz's registration would not adequately address the seriousness of the misconduct and dishonesty, and it would not protect the public or satisfy the public interest in this case.

The panel then went on to consider whether a suspension order would be an appropriate sanction. The SG states that 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;*
- *The Committee is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour;*

The panel found that Ms Diaz's misconduct and dishonesty arose during an isolated incident. The panel also found that there was no evidence of a deep-seated attitudinal issue, and whilst there was a delay in her admitting to the incident having occurred, once this came to light Ms Diaz has been open about her failings. The panel heard no evidence that Ms Diaz has repeated the misconduct or dishonesty since the incident occurred. Ms Diaz has shown remorse for her actions and her insight is developing although it is not full at this stage.

The panel did go on to consider whether a striking-off order would be proportionate but, taking account of all the information before it, and of the mitigating and contextual features of this case, the panel concluded that it would be disproportionate. Whilst the panel acknowledges that a suspension may have a punitive effect, it would be unduly punitive in Ms Diaz's case to impose a striking-off order.

Balancing all of these factors the panel has concluded that a suspension order would be the appropriate and proportionate sanction to mark the seriousness of the misconduct and dishonesty. The panel was satisfied that in this case, the misconduct was not fundamentally incompatible with Ms Diaz remaining on the register.

The panel noted the hardship that a suspension order may cause Ms Diaz. However, the panel determined that this is outweighed by the public interest in this case.

The panel considered that a suspension order is necessary to protect the public, to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse. The panel decided that a suspension order for a period of six months would allow Ms Diaz time to reflect on her misconduct and dishonesty and to develop her insight.

At the end of the period of suspension, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order.

Any future panel reviewing this case would be assisted by:

- A detailed written reflective statement using a recognised reflective model. This statement should include reflection on this panel's findings, focussing on dishonesty and the professional duty of candour, and how Ms Diaz would act differently if faced with similar circumstances in the future.
- Any evidence of strengthened practice.
- Up to date positive testimonials and references that attest to Ms Diaz's good character, professional candour and honesty.

Interim order

As the suspension 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 Ms Diaz's own interests until the suspension order takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

The panel took account of the submissions made by Ms Malik who submitted that in light of the panel's findings and the seriousness of the charges found proved, an interim order is necessary to protect the public and to address the public interest in this case for the appeal period. He invited the panel to impose an interim suspension order for a period of 18 months to cover any appeal period.

The panel accepted the advice of the legal assessor.

Decision and reasons on interim order

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

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. Having already determined that a suspension order is necessary to protect the public and to satisfy the public interest in this case, to not impose an interim suspension order to cover the appeal period would be inconsistent with its earlier findings. The panel therefore imposed an interim suspension order for a period of 18 months.

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

That concludes this determination.

This will be confirmed to Ms Diaz in writing.