

**Notice of Decision of the Northern Ireland Social Care Council's Fitness to Practise Committee**

**Name:** Marta Maria Aluko

**SCR No:** 1149800

**NOTICE IS HEREBY GIVEN THAT** the Fitness to Practise Committee of the Northern Ireland Social Care Council, at its meeting on **07 and 08 February 2018**, made the following decision about your registration with the Northern Ireland Social Care Council:

**The Committee found the facts proved;**

**The Committee found that your fitness to practise is impaired by reason of misconduct;**

**The Committee decided to make an Order suspending your registration for a specified period of six months ('a Suspension Order').**

**Particulars of the Allegation:**

That, being registered under the Health and Personal Social Services Act (Northern Ireland) 2001 (as amended), and whilst working as a Care Assistant at the Somerton Nursing Home, 47 Somerton Road, Belfast, BT15 3LH:

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| 1. | On or around 02 September 2016, you failed to comply with Service User A's care plan, which stated that personal hygiene and dressing needs should be provided by the assistance of two staff. |
| 2. | On or around 02 September 2016, you falsely recorded that Service User A had received personal care by the assistance of two carers.   |
| 3. | On or around 02 September 2016, you failed to allow Service User A to use the toilet, despite him requesting you to do so.   |
| 4. | On or around 02 September 2016, you failed to clean faeces from Service User A's body.   |
| 5. | Between 11 pm on 02 September 2016 and 8 am on 03 September 2016, you failed to clean a dirty bed pan.   |
| 6. | During 2016, you failed to keep up to date with mandatory training as a social care worker.  |

And your actions as set out above, show that your fitness to practise is impaired by reason of your misconduct.

**Preliminary Matters**

**Service**

The Registrant was neither present nor represented. The Council was represented by Ms Rachel Kelso, Solicitor, Directorate of Legal Services, BSO. In a Notice of Hearing, dated 08 January 2018, sent by Special

Delivery and addressed to the Registrant at her address as it appears on the Register, the Council notified her of the date, time and venue for this hearing. The postal package was signed for as received by the Registrant on 09 January 2018.

The Committee, in all the circumstances of the case, is satisfied that the Notice of Hearing has been served in accordance with Rule 3 of the NISCC Fitness to Practise Rules 2016 ('the Rules') and the requirements of Paragraph 5 of Schedule 2 of the Rules.

### **Proceeding in the Absence of the Registrant**

Ms Kelso made an application to proceed in the absence of the Registrant under Paragraph 15 of Schedule 2 of the Rules, and submitted that the Committee should hear and determine the case in the absence of the Registrant. Ms Kelso referred the Committee to the cases of *General Medical Council v Adeogba* 2016 and *R v Jones* 2003, and submitted that the Council's position was that the Registrant had voluntarily absented herself from the hearing today. Ms Kelso submitted that the Council had received no communication from the Registrant, and was not aware of any reason to suggest that she would be any more likely to attend on another date if the case was adjourned today. Ms Kelso accepted that the Registrant may be disadvantaged by not being in attendance but submitted that, in her view, this factor is outweighed by the seriousness of the allegation. Ms Kelso stated that it was in the public interest for the case to proceed today, and explained that the Council had four witnesses in attendance and that an adjournment could have a detrimental impact on the recall of these witnesses.

The Committee was mindful that the discretion to proceed in the absence of the Registrant should only be exercised with the utmost care and caution. In considering the application, the Committee sought to satisfy itself that all reasonable efforts had been made to notify the Registrant of the hearing and the importance of attending. The Committee heard and accepted the advice of the Legal Adviser.

The Committee paid careful consideration to the submission from the Council. The Committee took into account the detailed information contained within the Notice of Hearing, which provided the Registrant with details of the allegations, the time, date and the venue of the hearing and, amongst other things, the Registrant's right to attend and to be represented, as well as the Committee's power to proceed in her absence. The Committee considered the extent of the disadvantage to the Registrant in not being able to give evidence and present her account of events relating to the allegations. However, taking into account the seriousness of the allegation and the general public interest in this hearing taking place, as well as the previous postponement, the Committee considered that the public interest in having the matter heard outweighed the interests of the Registrant. The Committee had no information to suggest that the Registrant would be any more likely to attend on another date if the case was adjourned, and was concerned that further delay could impact on the recall of the witnesses.

Taking all these factors into account and after careful consideration, the Committee decided to exercise its discretion to proceed in the absence of the Registrant. The Committee exercised this discretion with the utmost care and caution, balancing the rights of the Registrant against the wider public interest in the expeditious

disposal of the case. The Committee decided that the Registrant has voluntarily absented herself from today's hearing.

### **Application to Admit Hearing Bundle**

The Committee received an application from Ms Kelso to admit a bundle of papers into evidence. Ms Kelso advised the Committee that the papers had been served on the Registrant by Special Delivery post and signed for on 09 January 2018. The Committee accepted the submission that the bundle met the requirements of fairness and relevance, and admitted the bundle into evidence as Exhibit A pursuant to Paragraph 12 (1) (a) of Schedule 2 of the Rules.

### **Background**

Ms Kelso provided the Committee with the background to the case. The Committee heard that the Council received a referral in respect of the Registrant on 12 September 2016 from the Nurse Manager of Somerton Nursing Home. The Particulars of the Allegation are based on this referral.

Ms Kelso advised that the Registrant is registered on Part 2 of the Register and began employment at Somerton Nursing Home on 25 March 2014, until her suspension in September 2016.

The Committee heard that the complaints against the Registrant relate to care provided to Service User A during the night shift on 02 September 2016 into 03 September 2016. Service User A was attended to by two care assistants on the morning of 03 September 2016 for personal care. On entering his room, the care assistants saw a red bag on the floor which contained a dirty bed pan, and noticed hard faeces on his legs and back passage. The Service User reported that he had asked the Registrant to take him to the toilet but she had refused, and had put him on the bed pan.

Ms Kelso advised the Committee that the matter was reported to the Nurse Manager. Witness statements were prepared by the two carers who attended to Service User A on 03 September 2016. The matter was referred to the Trust Adult Safeguarding Team and to the PSNI. The PSNI submitted a file to the Public Prosecution Service, who directed no prosecution.

The Committee heard that the Registrant's employer ('the employer') conducted their own investigation, and that the minutes of this investigation and disciplinary meeting are contained in Exhibit A. The minutes record that the Registrant denied the allegations. The Registrant stated that she had offered to transfer Service User A to the toilet or bed pan but, due to urgency, the service user requested a bed pan.

Ms Kelso submitted that the investigation by the employer included an allegation that the Registrant had failed to complete mandatory training. The Committee heard that the Registrant admitted that she had not attended training arranged as she had to collect her child from school.

### **Evidence**

In addition to the hearing bundle, the Committee heard oral evidence from four witnesses.

Witness 1 is a Care Assistant at Somerton Home and Witness 2 is a Senior Care Assistant. They had provided care to Service User A on the morning of 03 September 2016. The Committee found Witness 1 and Witness 2 to be credible, factual and straightforward. There were some inconsistencies about when and to whom their concerns were reported but, on balance, the Committee did not consider that this took away from their honesty or the quality of their evidence. The Committee accepted the evidence of Witness 1 and Witness 2 as a credible account of their recollection of events. Both witnesses gave a similar account of finding Service User A with hard faeces on his legs and back passage, and of finding a dirty bed pan in a red bag on the floor by the bed. The Committee heard that Service User A had told both Witness 1 and Witness 2 that the Registrant had put him on the bed pan when he wanted to use the toilet.

Witness 3 is an Administrator at Somerton Nursing Home. The Committee found Witness 3 to be a credible and professional witness. Her evidence was limited to her presence at the meeting between the Council Solicitor and Service User A. She explained that she attended this meeting because Service User A had asked her to do so. The Committee also heard that Service User A had complained to her about the Registrant making him use a bed pan. The Committee accepted the evidence of Witness 3.

Witness 4 is a nurse and is currently the manager of Somerton Nursing Home. Witness 4 was credible and co-operative. His evidence in respect of the current arrangements for training was very clear, but the Committee was not as clear about his evidence on the arrangements for training relating to the Registrant. He told the Committee that the Registrant was offered dates for training but that he did not recall her ever giving apologies for not attending. He said that he would have reminded her about training two to three times, but that she was aware that it was her responsibility as a social care worker. He told the Committee that the majority of carers do attend training but that the Registrant did not have any interest in doing so.

In addition to the minutes of the Investigatory Meeting on 24 January 2017 ('the Investigatory Meeting') and the Disciplinary Meeting on 02 February 2017 ('the Disciplinary Meeting'), the Committee had the benefit of a statement from the Registrant provided as part of the employer's investigation. The Committee noted that the Registrant denied the allegations and stated that the bed pan had been requested by the service user, he didn't use it and she removed the empty bedpan and placed it in between his bed and the wardrobe in case he would need to use it again.

### **Finding of Facts**

In reaching a decision on the facts, the Committee gave careful consideration to all of the evidence in this case and to the submissions of Ms Kelso on behalf of the Council. The Committee heard and accepted the advice of the Legal Adviser.

The Committee considered each of the Particulars of the Allegation as follows:

- 1. On or around 02 September 2016, you failed to comply with Service User A's care plan, which stated that personal hygiene and dressing needs should be provided by the assistance of two staff.**

The Committee carefully considered the care plan for Service User A, and noted that the care plan states that Service User A is to be assisted by two staff for personal hygiene. The Committee heard evidence from Witness 1 and Witness 2, who were both clear that they knew that Service User A was to be assisted by two people for personal hygiene.

The Committee noted the admissions made by the Registrant in the minutes of the Investigatory and Disciplinary meetings. In the Investigatory Meeting, it was put to the Registrant directly whether she was aware that Service User A's care plan read that he had to be assisted by two members of staff and the Registrant replied "yes". In the minutes of the Disciplinary Meeting, it is recorded that the Registrant was asked if she was aware that the care plan for Service User A read that he had to be assisted by two members of staff and the Registrant again replied "yes", as when he is put on the toilet he has to be hoisted. When asked why she used the bed pan by herself, knowing that the service user required the assistance of two carers, the minutes record that the Registrant explained that the service user said that it was urgent and that this was the right thing to do. She said that this was something which she had done in the past.

Accordingly, the Committee found this Particular proved.

**2. On or around 02 September 2016, you falsely recorded that Service User A had received personal care by the assistance of two carers.**

The Committee considered the entry in the Daily Reports for Service User A dated 02 September 2016 which reads:

*" on 02/09/16 about 23.17pm SUA's teeth were cleaned, he was washed, he was undressed and his night clothes put on and he retired to bed. SUA was toileted with dignity when required. All of his pressure points were checked and his skin confirmed as intact. With the assistance of two carers"*

This entry was recorded as being reported by the Registrant.

The Committee considered whether it was possible that this entry had been made by someone else using the Registrant's name. There is no evidence to suggest that this was the case. The Committee next considered whether the Registrant did not intend this entry to refer to the use of the bed pan, which she had done by herself. However, as the entry refers to toileting with dignity, the Committee considered it unlikely that the entry did not include the use of the bed pan. On the balance of probabilities, the Committee finds that it is more likely than not that the Registrant did make this entry, and that she did intend it to refer to the care which she provided on her own to Service User A.

Accordingly, the Committee found this Particular proved.

**3. On or around 02 September 2016, you failed to allow Service User A to use the toilet, despite him requesting you to do so.**

The Committee paid careful attention to the attendance note with Louise Harvey, a Council Solicitor, and Service User A on 01 March 2017. Service User A reported to the Council Solicitor that he remembered asking the Registrant could he go to the toilet. However, the Registrant said no.

The Committee then considered the evidence of Witness 1. In the handwritten statement made to her employer, Witness 1 recorded that Service User A had told her that he asked the Registrant to go to the toilet and "she just put him on the bed pan". In her statement to the Council, Witness 1 stated that Service User A told her that he had asked to go to the bathroom but that he was given a bed pan instead. In her oral evidence before the Committee, she stated that Service User A told her that the Registrant insisted he use a bed pan.

The Committee next considered the evidence from Witness 2. Witness 2 also prepared a handwritten statement for her employer. In this statement, Witness 2 recorded that she had been told by Service User A that when the Registrant was putting him to bed at 9.00 pm, he asked if he could sit on the toilet and "she told him no". In her written statement to the Council, Witness 2 stated that Service User A had told her that he had asked the Registrant to go the bathroom but she told him no and that she would get him a bed pan. The Committee heard oral evidence from Witness 2 that Service User A had asked to be put on the toilet and the Registrant said no.

The Registrant gave a different account of events. In the minutes of the Investigatory Meeting, it is recorded that the Registrant stated that she heard a buzzer from Service User A's room and went to assist. When she entered the room, Service User A stated that he needed to go to the toilet and that it was very urgent. The Registrant asked him if he wanted to use the toilet or should she fetch a bed pan to which he replied "bed pan". The minutes of the Disciplinary Meeting record that the Registrant explained that Service User A said he needed to go to the toilet urgently, the Registrant offered the use of the toilet or bed pan and he replied "bed pan".

The Committee did not have the benefit of live evidence from either the Registrant or Service User A.

Having considered all of the evidence, the Committee is of the view that the Registrant failed to allow Service User A to use the toilet, despite him requesting to do so. Service User A consistently reported the same thing to Witness 1, Witness 2 and a Council Solicitor, namely that he asked the Registrant to take him to the toilet and she refused. The Committee also noted that Service User A said to the Council Solicitor that the bed pan hurts his back. The Committee heard evidence from Witness 4 that because of Service User A's medical condition, a bed pan would be uncomfortable for him. In these circumstances, the Committee finds it unlikely that Service User A would have chosen to use a bed pan, as suggested by the Registrant.

Accordingly, this Particular is found proved.

**4. On or around 02 September 2016, you failed to clean faeces from Service User A's body.**

**5. Between 11 pm on 02 September 2016 and 8 am on 03 September 2016, you failed to clean a dirty bed pan.**

The Committee considered Particulars 4 and 5 together.

The Committee noted that the Registrant admitted bringing the bed pan into the room, but stated that Service User A did not use it and said it was a false alarm. In her witness statement to her employer, the Registrant said:

*"I removed the empty bedpan and placed it in-between his bed and the wardrobe, in case he would need to make use of it again. I also placed an empty red bag on top of the bedpan and planned to remove the bedpan before my shift ends".*

The Committee heard and accepted the evidence from Witness 1 and Witness 2 that when they entered Service User A's bedroom the next morning, they found hardened faeces on Service User A's legs and back passage. The Committee heard and accepted the evidence of Witness 1 and Witness 2 that they also found a bed pan with faeces on it inside the red bag.

The Committee considered whether there was any evidence that the bed pan had been used after the Registrant says that she left it on the floor. The Committee heard from Witness 1 that Service User A would not have been physically capable of reaching down to get to the bed pan from the bottom of the bed where the Registrant said she left it. The Committee did not therefore consider it possible that the service user had reached for and used the bedpan.

The Committee next considered whether there was any evidence that another carer had given Service User A the bed pan later in the night. The Committee noted the consistent evidence of Service User A that it was the Registrant who had put him on the bed pan. At no point did he tell Witness 1, Witness 2 or the Council Solicitor that another carer had also put him on the bed pan that evening.

After careful consideration of all the evidence, the Committee decided that it was more likely than not that the Registrant was responsible for failing to clean Service User A and for leaving a dirty bed pan in his room.

**6. During 2016, you failed to keep up to date with mandatory training as a social care worker.**

The Committee noted that in the minutes of the Investigatory Meeting, it is recorded that the Registrant stated that she could not attend mandatory training due to "timings, child at school". It was put to her that the times had been adjusted to suit staff with children and the Registrant responded that she didn't see these new times as she would have attended, and stated that she knows how important these training events are.

The Committee next considered the minutes of the Disciplinary Meeting, which record that the Registrant said that the times of training coincided with her child being collected from school, and that most of the training was done when she was off due to suspension.

The Committee heard evidence from Witness 4 that, despite requests, the Registrant failed to participate in mandatory training. The Committee heard that she had not attended training in Moving and Handling, Vulnerable Adults, Fire Training, Basic First Aid, Basic Food Hygiene and Infection Control.

Having carefully considered the evidence from Witness 4, the documentary evidence, and the admission made by the Registrant in her disciplinary interview, the Committee is satisfied that this Particular has been proven on the balance of probabilities.

## **Fitness to Practise**

### **Misconduct**

The Committee received submissions from Ms Kelso. She submitted that the Registrant's fitness to practise is impaired by reason of misconduct. Ms Kelso stated that impairment was defined in the Rules as circumstances which call into question the suitability of a registrant to remain on the Register without restriction or at all. She referred the Committee to the case of Cohen and to the requirements of Paragraph 24 (3) of Schedule 2 of the Rules. Ms Kelso submitted that, in the opinion of the Council, the following Standards of Conduct have been breached: Standard 1 (1.1, 1.2, 1.4 and 1.5); Standard 5 (5.1, 5.2 and 5.7); and Standard 6 (6.1, 6.2 and 6.3).

Ms Kelso referred the Committee to the case of CHRE v Grant 2011, and submitted that when considering whether the Registrant's fitness to practise is impaired, her level of insight is central. Ms Kelso submitted that there was no evidence of insight or expression of regret, and nothing to confirm that the Registrant has now participated in further training.

Ms Kelso submitted that the Registrant's actions were serious and bring into disrepute the profession of social care.

The Committee heard and accepted the advice of the Legal Adviser.

The Committee first considered whether the facts found proved amount to misconduct. The Committee had regard to the Standards of Conduct for Social Care Workers and found the Registrant's actions to be in breach of the following provisions:

**Standard 1: As a social care worker, you must protect the rights and promote the interests and wellbeing of service users and carers. This includes:**

- 1.1 Treating each person as an individual;
- 1.2 Treating people with consideration, respect and compassion;
- 1.3 Empowering service users and carers to communicate their views, needs and preferences, taking account of their preferred language and form of communication;
- 1.5 Supporting service users' right to control their lives and make informed choices about the services they receive;
- 1.8 Respecting and maintaining the dignity and privacy of service users.



**Standard 3: As a social care worker, you must promote the autonomy of service users while safeguarding them as far as possible from danger or harm. This includes:**

3.1 Promoting service users' independence and empowering them to understand and exercise their rights.

**Standard 5: As a social care worker, you must uphold public trust and confidence in social care services. In particular you must not:**

5.1 Abuse, neglect or harm service users, carers or colleagues;

5.7 Put yourself or other people at unnecessary risk;

5.8 Behave in a way, in work or outside work, which would call into question your suitability to work in social care services.

**Standard 6: As a social care worker, you must be accountable for the quality of your work and take responsibility for maintaining and improving your knowledge and skills. This includes:**

6.1 Meeting relevant standards of practice and working in a lawful, safe and effective way;

6.2 Taking personal and, where appropriate, collective responsibility for quality improvement and safety in line with your job role;

6.4 Maintaining clear and accurate records as required by procedures established for your work;

6.17 Undertaking relevant training and learning to maintain and improve your knowledge and skills and meeting NISCC Post Registration Training and Learning Requirements in line with your job role.

The Committee concluded that the Registrant's actions fell significantly below those expected of a social care worker and were serious enough to amount to misconduct. The Committee next considered whether, as result of the misconduct, the Registrant's current fitness to practise is impaired.

The Committee kept at the forefront of its mind its duty to protect the public, uphold proper standards of conduct and behaviour and maintain public confidence in the social care profession.

Carers working in a residential unit like this occupy a position of trust. Service users and their families must be able to trust the care assistants to provide basic care with dignity. In this regard, the Committee considered the judgement of Mrs Justice Cox in the case of Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin) and to her endorsement of the test formulated by Dame Janet Smith in her Fifth Report from Shipman namely:

"Do our findings of fact in respect of the doctor's misconduct, deficient 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 and/or is she 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 and/or is she liable in the future to bring the medical profession into disrepute; and/or

- c. Has in the past 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 in the future to act dishonestly.”

The Committee applied this test to the actions of the Registrant in the social care profession and determined that limbs a, b and c of the above criteria are engaged. The Registrant has posed a risk to service users. The Registrant admitted that she put Service User A on a bed pan, he says this was painful and the Committee has heard that it would be difficult for him to use a bed pan because of his medical condition. Service User A was left all night with faeces on his legs and on his back passage, which also created a risk. The Registrant has created a wider risk to service users, her colleagues and herself by not completing mandatory training. The Registrant has brought the profession into disrepute. Service User A was vulnerable. Not abiding by his wishes, not cleaning him properly and not respecting his dignity would all bring the profession into disrepute. The Committee determined that it is a fundamental part of being a carer to respect the dignity of service users and provide for their basic needs in a caring manner. The Registrant failed to do so and breached one of the fundamental tenets of the social care profession.

The Committee then considered whether the Registrant would be likely to act in the same way in the future. The Committee was of the view that there is limited evidence of insight. The Committee noted that there were circumstances in the home that evening and factors relating to the Registrant which may have contributed to events. The Committee is in no doubt that the misconduct is remediable through proper training and supervision. However, there is no evidence of it having been remediated. The Registrant has not provided the Committee with any evidence that she has now undergone her mandatory training. Without proper training, the Committee is concerned that there remains a risk of repetition.

For that reason, the Committee determined that there would be a risk to service users and therefore concluded that the Registrant's fitness to practise is impaired on grounds of public protection.

The Committee also found that the Registrant's actions brought the profession into disrepute and that she breached the Standards of Practice and the fundamental requirements of being a social care worker, to treat service users with dignity. Therefore, public confidence in the profession would be undermined if a finding of impairment were not made.

Therefore, the Committee decided that the Registrant's fitness to practise is currently impaired on the grounds of public protection and public interest.

### **Sanction**

The Committee heard a submission from Ms Kelso in relation to sanction and accepted the Legal Adviser's advice. In deciding which sanction to impose, the Committee has taken into account:

- a. The seriousness of the Registrant's misconduct;
- b. The protection of the public;

- c. The public interest in maintaining confidence in social care services; and
- d. The issue of proportionality.

In order to ensure that no more severe sanction is imposed than is required, the Committee considered the sanctions set out in Paragraph 26 of Schedule 2 in ascending order of gravity. The Committee gave due consideration to the NISCC Indicative Sanctions Guidance and gave careful consideration to all of the evidence.

The Committee considered the following to be mitigating factors:

1. The Registrant had a previous good history and the Committee was advised that there were no other issues of concern in relation to the Registrant's practice.
2. The Registrant made some admissions. She did accept that she used the bed pan for Service User A, and that she did this on her own. She also admitted that she had not undergone her mandatory training.
3. The Registrant did demonstrate some insight although the Committee concluded that this was limited. The Registrant said that she understood the importance of training.
4. This was an isolated incident.
5. There was no evidence that her behaviour was premeditated or that she had engaged in a pattern of abuse.
6. The Committee considers that the circumstances leading up to the incident provided some mitigation. The Registrant was allowed to work without undergoing the necessary training and circumstances in the Home that evening, and events in the Registrant's life, may well have impacted upon her ability to do her job.

The Committee then went on to consider any aggravating factors:

1. Service User A trusted the Registrant to look after him properly and she failed to do so.
2. The Registrant did not engage with the NISCC investigation.
3. There is limited insight and she has not apologised.
4. Her actions did pose a risk of harm to Service User A. Her failure to undergo training posed a wider risk to service users, colleagues and herself.
5. Her actions demonstrate a serious disregard for NISCC's Standards of Conduct and Practice.
6. The incident occurred at work.

There were no references or testimonials submitted to the Committee by the Registrant.

The Committee then considered the appropriate sanction to apply in this case.

**Warning** – the Committee considered that the Registrant's misconduct was serious and had not been remediated. The Committee therefore concluded that a Warning would not be an appropriate sanction.

**Conditions of Practice Order** – the Registrant, for her own reasons, decided not to engage in the regulatory process. The Registrant was not present and was unable to confirm whether conditions of practice were

achievable and accepted. The Committee had no information as to the Registrant's employment status, or evidence that she was willing to undergo further training. In these circumstances, the Committee was unable to formulate conditions of practice that would be workable and measurable, and would adequately protect the public.

**Suspension** – the Committee has already made it clear that it is of the view that the misconduct was serious but felt that removal was not warranted. The Committee did not find evidence that the Registrant's behaviour is fundamentally incompatible with continuing to be a registered social care worker in the long term. There was no evidence of harmful, deep-seated or attitudinal problems. The Committee is clear that the Registrant's misconduct is capable of remediation and it was an isolated incident. The Committee was satisfied that the public would be sufficiently protected by a period of suspension. The Registrant should be aware that a review of her fitness to resume practice will be undertaken towards the end of the period of her Suspension Order. At any review, she would have the opportunity to present evidence of insight and a willingness to undergo further training.

The Committee determined to impose a Suspension Order for a period of six months, with immediate effect. The Committee concluded that a Suspension Order for the maximum period of time of two years would be disproportionate. Although the misconduct was serious, the Committee was of the view that a Conditions of Practice Order may have been appropriate had the Registrant engaged, and workable conditions been determined. Without engagement from the Registrant, the Committee was forced to look at the more restrictive sanction of suspension. The Committee therefore concluded that a shorter period of suspension would be proportionate in all of the circumstances.

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## **Legal Advice Given**

### **Service**

The position, as put forward to you by the Council's solicitor, is that the Notice of Hearing was served on 08 January 2018, and I have been shown of a copy of the Notice and an electronic receipt of delivery dated 09 January 2018. In accordance with Paragraph 5 of Schedule 2 of the Fitness to Practise Rules 2016, a hearing should be fixed more than 28 days after service of the Notice of Hearing. The Notice in this case was served on 08 January 2018 which is more than 28 days before today.

Rule 3 of the Fitness to Practise Rules sets out that the service refers to sending a Notice to the Registrant's home address or electronic address as it appears in the Register. The Notice is deemed to have been served on the day after it was so posted. We have, further than that, the confirmation that it was received by the Registrant on 09 January 2018. It is, therefore, my advice to you as a Committee that it is safe for you to proceed on the basis that service has been effected in accordance with the requirements of the NISCC Fitness to Practise Rules 2016.

## Proceeding in the Absence of the Registrant

You have received a submission on behalf of the Council that you had should proceed with this matter today in the absence of the Registrant. Paragraph 15 of Schedule 2 of the Rules deals with the absence of a registrant at a substantive hearing and where the registrant fails to attend, is not represented, firstly the obligations under the Rules are for you to ensure that service has been properly effected, which you have done, and that reasonable efforts have been made to inform the Registrant of the hearing today. You have already satisfied yourself of that part of the Rule.

You then have enquired as to the Registrant's non-attendance and you have been advised by the Council that there has been no communication whatsoever from this Registrant. While the Committee is satisfied that the Notice of Hearing has been duly served, the options before you are either to direct that the allegations should be heard and determined today notwithstanding the absence of the Registrant, or to adjourn the hearing and issues directions.

The Council's Solicitor has correctly directed you to the case of GMC v Adeogba, which is a Court of Appeal case from March 2016. The Court of Appeal in that case set out the basis upon which a panel such as this should exercise its discretion in deciding whether or not to go ahead in the absence of the Registrant. Lord Bingham said that the principles set out in the well-known cases of R v Hayward and R v Jones do provide a useful starting point for any direction given to the panel and the approach that the panel should take. He went on to say, however, that it is important to bear in mind that there is a difference between a criminal trial proceeding in the absence of a defendant and the decision of a regulator to proceed in a disciplinary hearing in the absence of the registrant. He went on to say that the trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives. That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented. In exercising that discretion fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all of the circumstances of the case including, in particular, the nature and circumstances of the defendant's behaviour in absenting himself from the trial, whether his behaviour was deliberate, voluntary and, as such, plainly waived his right to appear, whether an adjournment might result in the defendant attending, the length of any such adjournment and whether there is any indication that the defendant wishes to be legally represented at the trial even though absent, the extent of the disadvantage to the defendant in not being able to give his account of events having regard to the nature of the evidence against him, the risk of the jury reaching an improper conclusion about the absence of the defendant, then the general public interest and the particular interest of any victims and witnesses that a trial should take place within a reasonable time period and the effect of delay on any memory of the witnesses. Those are essentially the factors that Ms Kelso has outlined for you in her submissions today.

Lord Bingham, having said that, said that that was the starting point and commented that there is a difference between a criminal trial and a disciplinary hearing, went on to say that it is important to bear in mind that there can

be no premium for non-engagement in a regulatory case as that is part of the responsibility when you sign up to a regulated profession.

I would also refer you to the case of R(Raheem) v Nursing and Midwifery Council. That is a 2010 case and Holman J in that case said that reference by committees or tribunals such as this or indeed judges to exercising the discretion to proceed in a person's absence with the utmost caution is much more than mere lip service to a phrase used by Lord Bingham of Cornhill. If it is the law then in this sort of situation a Committee or tribunal should exercise its discretion with utmost care and caution. It is extremely important that the Committee or tribunal in question demonstrates by its language that it appreciates that the discretion which it is exercising is one which requires to be exercised with that degree of care and caution.

So you must give more than lip service to this decision that you have to make. You must take into account that utmost care and caution is a high threshold for you to reach. In helping you to reach that decision I would remind you that the Registrant is entitled to a fair hearing, to attend the hearing, to be represented and to test the case against herself and to present evidence on her own behalf. You should consider whether there is anything to suggest that an adjournment of this case would result in her attending at a later date and the sort of time frame that would be involved in any such adjournment. If you are satisfied that the Registrant had knowledge or the means of knowledge of today's hearing you should consider whether she has voluntarily absented herself. In considering this point I recommend that you take into account the information set out within the Notice of Hearing and consider whether, in your view, it was sufficient to advise her of the importance of attending today, the date, time and venue of the hearing and that she could be represented. You should balance the rights of the Registrant against the wider interests in this case and take all these factors into account as you reach your decision. I would advise that you should retire to consider your decision at this point.

### **Application to Admit Hearing Bundle**

As correctly stated by the Council's Solicitor, the application to admit the hearing bundle is dealt with under Paragraph 12 of Schedule 2 of the Rules. As an experienced Committee, you will be familiar with the requirements of the Rules that you can admit into evidence the hearing bundle if you are satisfied that it is relevant and fair to do so.

The difficulty that you face is at this stage you have not had the opportunity to consider the bundle. It has, however, been shown to me in advance and I take into account the submission made by Ms Kelso that it has also been disclosed to the Registrant and she has not objected. It would, therefore, appear to me that there is no undue unfairness to the Registrant in admitting the bundle and certainly having had the opportunity to review the documents they are relevant to today's hearing and would be of assistance in the task that is ahead of you.

### **Finding of Facts**

It now falls to me to provide you with some advice in relation to this, the fact finding stage of these proceedings. As Ms Kelso in her closing submissions has correctly referred you to, the position on the burden and standard of

proof is set out in Paragraph 13 of Schedule 2 of the Rules and that makes it clear that the burden of proof shall rest upon the Council and the standard of proof shall be the balance of probabilities. That means that the Council has brought these proceedings today and the Council must, therefore, prove its case. The Registrant is not in attendance and I must remind you that the Registrant does not have to prove that she is innocent of these allegations, it is for the Council to prove its case.

As defined in the case of Re H, that is a 1990 case, the balance of probability standard means that a court is satisfied that an event occurred if the court considers on the evidence before it that the event was more likely than not. Therefore, you should consider all the evidence that has been placed before you today, both the documentary evidence in the bundle and the oral evidence which you have received and apply both logic and common sense to weigh the strength of this evidence in deciding whether the Particulars of the Allegation have been established on the basis that it is more likely than not.

This is a case in which you have received both oral and documentary evidence and it is often said that oral live evidence is the best type of evidence that you can receive. This is because you have the opportunity to observe the bearing and demeanour of the witnesses and you are able to hear the way in which they give evidence, and in fact you have even put your own questions to them today. You must weigh the evidence that they have given and give reasons for any conclusions that you reach as you find a Particular proved or not proved as the case may be.

In respect of some of the allegations before you, you have hearsay evidence. You will be aware that hearsay evidence by its very nature is not the best evidence being second-hand or reported evidence. There are good and cogent reasons for Service User A's non-attendance today and the Council have provided you with the witness statement that the Council's Solicitor took when she attended with him instead. This hearsay evidence is admissible. The Rules allow you to admit hearsay evidence if it is fair and it is relevant to do so, but it is a matter for you what weight you give to it. In the case of Thorneycroft v NMC allegations were raised that a nurse had used derogatory language towards patients. Witness statements were produced by two co-workers who did not attend the hearing and those witness statements were then admitted into evidence as hearsay. That position is different to the facts before you today about the hearsay evidence which you have, but the court gave some guidance with regards to hearsay evidence generally that might be of assistance to you as you reach your deliberations. You should consider whether the hearsay evidence is the sole and decisive evidence in support of the charges, the nature and extent of the Registrant's challenge to the content of any hearsay evidence, whether there is any suggestion that witnesses had any reason to fabricate their allegations, the seriousness of the charge taking into account the impact which adverse findings might have on the Registrant's career, whether there is a good reason for the non-attendance of the witness, whether the Council had taken reasonable steps to secure the attendance of the witness and whether the Registrant had prior notice of the hearsay evidence. In the case of Thorneycroft that was the witness statements that were going to be admitted. In this case it is the statement of Witness 3 and the attendance note that's attached to that. These factors, I hope, should help you in your balancing exercise as you assess the weight of all the evidence that is before you and, in particular, the hearsay evidence in respect of what the service user reported about the care provided by the Registrant.

## **Fitness to Practise**

It now falls to me to give you some advice as a Committee as you reach this Fitness to Practise and impairment stage of the proceedings.

The Council's Solicitor has quite correctly directed you to Rule 4 which sets out the gateways, if I could call them that, to impairment within the Fitness to Practise Rules. Rule 4 really allows a number of gateways on which one may establish impairment, and in this case you are asked to consider impairment by reason of the Registrant's misconduct.

In the case of Cheatle v GMC, Cranston J made it clear that panels such as this considering the question of impairment should engage in a two-step process. They should firstly establish whether, on the facts found proved, one or more of the routes provided for in the Rules has been established. That fits with the requirements set out for you in Paragraph 4 of Schedule 2 of the Rules that your first job is to satisfy yourself as to the reason for the alleged impairment of fitness to practise. You must, therefore, consider whether the conduct which has now been found proved and the facts that you have established is sufficiently serious that it can properly be described as misconduct going to fitness to practise.

You are aware as an experienced Committee that misconduct is not usually defined in legislation but as set out in the case of GMC v Roylance misconduct has been taken to be a word of general effect involving some act or omission which falls short of what would be proper in the circumstances. Lord Clyde, giving judgment in that case, said that the standard of propriety may often be found by reference to the Rules and standards required to be followed by a medical practitioner, in this case is a social care worker. That then leads you to consider the Standards of Conduct and Practice issued by the Council, and Ms Kelso has directed you to those which she considers to have been breached. It is, however, a matter for you as a Committee to go through the Standards and to reach an independent judgement on whether you consider the Standards have been breached in any way. This is a matter for you to determine exercising your own independent judgement without reference to a burden or standard of proof.

If you are satisfied that the actions of the Registrant did constitute misconduct, then you should move on to the second step as referred to in Cheatle and that is to consider whether, in light of the Registrant's misconduct, the Registrant's fitness to practise is currently impaired. It is well established through case law that panels or committees such as this considering impairment should do so in the present tense; that is to say to determine whether the practitioner's fitness to practise is impaired at the time you are considering the case, that is today.

Ms Kelso has directed you to the case of CHRE v Grant, which again I am going to reinforce as appropriate case law in a case such as this. Mrs Justice Cox in that case at paragraph 74 stated that 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 the need to uphold proper professional standards and whether public confidence in the profession would be undermined if a finding of impairment were not to be made in the particular circumstances. That reinforces, as set



out in the Rules, that you should therefore take into account the public interest test in your deliberations.

Mrs Justice Cox went on to refer to the formulation adopted by Dame Janet Smith in her Fifth Report for the Shipman Inquiry and the test which she formulated as an appropriate test for panels considering the question of impairment. You may find this helpful in your deliberations.

Firstly, has the Registrant acted in the past and/or is she liable to act in the future so as to put service users at unwarranted risk of harm? Secondly, has the Registrant in the past or is she likely in the future to behave in a way to bring the profession into disrepute? Thirdly, has the Registrant in the past or is she liable in the future to behave in a way so as to breach one of the fundamental tenets of the social care profession? Fourthly, which is not relevant in this case, has the Registrant in the past or is she liable in the future to act dishonestly? There is no allegation of dishonesty within the Notice of Hearing served on her.

I think it would also be helpful to remind you, I know as a Committee you will be familiar with Silber J guidance on remediation, and Ms Kelso has referred you to the proper determination as to whether the impairment is capable of remediation and whether it has, in fact, been remediated. So what Silber J set out when you're approaching those two questions is you should consider firstly whether the conduct which led to the charge in this case is easily remediable; so is there remediation which could be done? Secondly, whether it has been remedied, and thirdly whether it is likely to be repeated.

When considering the issue of remediation future risk is undoubtedly an important one and you will have to take that into account in your deliberations. Again, I would stress that it is a matter for you, using your own independent judgement, to decide whether this is a case which falls into the category of isolated misconduct in an otherwise unblemished career, just as envisaged by Silber J, that could be easily remediated, or whether you are dealing with a different type of misconduct leading to impairment to fitness to practise in this case.

### **Sanction**

At this point it falls to me to give you some advice on the sanctions which you can properly consider and how you should approach that task.

You have received submissions from the Council's Solicitor, but it is not for the Council to seek to persuade you to try to take a particular course, it is for you, exercising your own independent judgement, to decide what is the appropriate response to the findings that you have made so far in this case.

Ms Kelso has highlighted, and I will remind you, that the purpose of sanction is not to be punitive, though sanction may have a punitive effect. Rather, the purpose of sanction is protection of patients, service users and the wider public interest. The public interest does include the maintenance of confidence in the profession and declaring and upholding of proper standards of conduct and behaviour. As Laws LJ said in the case of Raschid and Fatnani v GMC, and that is a 2007 case, the panel is centrally concerned with the reputational standing of the profession rather than the punishment of the doctor. Again, that would equally apply to a social care worker.

You have outlined for the Committee today the options that are set out within Paragraph 26 of Schedule 2 of the

Rules, and Ms Kelso has taken you through those again. You may warn the Registrant and direct that the Warning be placed on her entry for a specified period for up to five years; you can impose a Conditions of Practice Order for a specified period not to exceed three years; suspend the Registrant's registration for a specified period; or direct removal.

In reaching your decision you should consider all of the evidence that has been placed before you as well the submissions made by Ms Kelso today. You should take into account the aggravating and mitigating features of the case, and I would commend to you the NISCC Indicative Sanctions Guidance, and you will find the mitigating factors set out at Paragraph 3.2 and the aggravating factors at 3.3. I would remind you that in reaching your decision you must apply the principle of proportionality, that is weighing the public interest with the interests of the Registrant. The public interest does include protection of members of the public and the maintenance of confidence in the profession, in the Council, and the declaring and upholding of proper standards of conduct and behaviour. You should consider each of the options that are available to you starting with the least restrictive and only working up the scale until you find the sanction which is appropriate to the findings that you have already made to date.

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**You have the right to appeal this decision to the Care Tribunal. Any appeal must be lodged in writing within 28 days from the date of this Notice of Decision.**

**You should note that the Fitness to Practise Committee's decision takes effect from the date upon which it was made.**

**The effect of this decision is that your entry in the Register has been suspended for a specified period of six months and you may not practise as a social care worker during the period 08 February 2018 to 07 August 2018 inclusive.**

You are prohibited from working as a social care worker in any of the following positions:

1. A member of care staff at a:
  - a.) Children's home;
  - b.) Residential care home;
  - c.) Nursing home;
  - d.) Day care setting;
  - e.) Residential family centre.
2. A person who is supplied by a domiciliary care agency to provide personal care in their own homes for persons who by reason of illness, infirmity or disability are unable to provide it for themselves without assistance.
3. A manager of a:
  - a.) Residential care home;
  - b.) Day care setting;
  - c.) Residential family care centre; or
  - d.) Domiciliary care agency.

It is **compulsory** for the above social care workers to be registered with the Northern Ireland Social Care Council in order to work. This is pursuant to the Northern Ireland Social Care Council (Social Care Workers Prohibition)

and Fitness of Workers Regulations (Northern Ireland) 2013 and the Northern Ireland Social Care Council (Social Care Workers Prohibition) and Fitness of Workers (Amendment) Regulations (Northern Ireland) 2017.

**Early Review**

The Fitness to Practise Committee may, at your request, review the Order before the end of the period for which the suspension has been imposed if there has been a material change of circumstances since the Order was imposed. The Committee may, after reviewing a Suspension Order, revoke that Order or replace that Order with a Conditions of Practice Order.

**Review at Conclusion of Sanction**

The Council will seek information from you towards the end of the period for which the suspension has been imposed, and may refer the matter for review by the Fitness to Practise Committee. If the Committee reviews the Order and it is satisfied that your fitness to practise remains impaired, it may impose a further Order to commence upon expiry of the existing Order, or it may impose a Conditions of Practice Order to commence upon expiry of the existing Order, or it may revoke the existing Order and impose a Removal Order. You will be contacted by the Council towards the end of your period of suspension.

P. P. M. Stewart  
Committee Manager

09 february 2018  
Date