



Neutral Citation Number: [2024] EWHC 2244 (Admin)

Case No: AC-2023-LON-000101

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 August 2024

Before :

Jason Coppel KC
(sitting as a Deputy High Court Judge)

Between :

XY

- and -

Appellant

NURSING AND MIDWIFERY COUNCIL

Respondent

The Appellant (in person)
Tom Hoskins (instructed by the Nursing and Midwifery Council) for the **Respondent**

Hearing date: 18 July 2024

Approved Judgment

This judgment was handed down remotely at 14:00pm on 30th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Jason Coppel KC:

Background

1. This is an appeal brought pursuant to Article 38(1) of the Nursing and Midwifery Order 2001 ('the Order') by the Appellant against the decision of the Fitness to Practise Committee ('FTPC') of the Respondent ('the NMC') on 13 July 2023 that the Appellant's fitness to practise as a nurse was currently impaired by reason of her health, and that she should be suspended from the NMC's register for a period of 12 months.
2. In so deciding, the NMC was exercising functions conferred upon it by Part V of the Order. Article 22(1)(a)(iv) of the Order provides for the referral to the FTPC of allegations made to the NMC that the fitness to practice of a registrant is impaired by reason of their physical or mental health. Article 22(6) provides for the NMC to refer a matter to the FTPC where an allegation has not been made, but it appears to the Council that there should be an investigation into the fitness to practise of a registrant, on one of the grounds set out in Article 22(1)(a), which include their physical or mental health. Article 29 confers powers upon the FTPC to make various orders when it considers that such allegations or concerns are well-founded, including a suspension order (whereby the registrant is suspended from the register for up to a year) and a conditions of practice order (whereby restrictions are imposed for up to three years upon the registrant's professional practice).
3. In the Appellant's case, the "Details of charge" which were considered by the FTPC were that she has, or has had in the past, the health condition of "*Acute and Transient Psychotic Disorder – F23.0*" and "*in light of the above, and/or any associated and/or consequential health condition, your fitness to practise is impaired by reason of your health*". The FTPC commissioned a report from a consultant psychiatrist, Dr Robert Sammut, who interviewed the Appellant and provided a report dated 29 September 2022. Dr Sammut's report describes a series of incidents where the Appellant had been unwell, and admitted to psychiatric hospital, in 2011, 2015, 2019 and 2020. In the Summary and Opinion section of the report (§§16.1, 16.3), Dr Sammut stated:

"In my opinion [the Appellant] has suffered with several episodes of an acute and transient psychotic disorder ('acute polymorphic psychotic disorder without symptoms of schizophrenia', ICD-10: F23.0). .. At the time of interview [the Appellant] reported symptoms consistent with a Mixed Anxiety & Depressive Reaction (ICD-10 F43.22) to her current adverse circumstances. There is no indication that she was at that time suffering with a psychotic or major affective (mood) disorder, but she has no insight into her past illness episodes and she firmly refuses to accept any medication".
4. Dr Sammut then made the following recommendations (§§17.1-17.2):

"The prescription of a low dose of an antipsychotic medication as prophylaxis is generally recommended in cases of acute and transient psychotic disorder but the Appellant's lack of insight into her condition means that this is not an option at present. A course of cognitive behavioural therapy (CBT) aimed at

fostering her insight into her condition would, in theory, may also be of considerable benefit, but she is not willing to accept this at the present time.

The number (at least 5), unpredictability and severity of the illness episodes suffered by [the Appellant], albeit short-lived but with an overall trend of decreasing periods of wellbeing in between, and the absence of insight into her condition or acceptance of treatment, makes the risk of early relapse sufficient for me to consider her unfit to practise as a nurse at the present time.”

5. The charge against the Appellant was considered by the FTPC at a virtual hearing which ran between 25-27 and 30-31 January 2023, before adjourning until 10-13 July 2023. In its decision promulgated the day after the hearing concluded, the FTPC found the charge against her to be proven in its entirety. In its view, the Appellant had in the past suffered from Acute and Transient Psychotic Disorder (‘ATPD’) and, on the balance of probabilities, currently suffered from ATPD. It stated:

“The panel accepted the expert evidence of Dr [Sammur]. It concluded you have the inability to recognise factors in your past which caused you to display symptoms of ATPD, which in turn present risks and uncertainty about the likelihood of a relapse occurring. Moreover, you have shown a reluctance to engage with your GP. In his oral evidence, Dr [Sammur] was particularly concerned about your failure to acknowledge that you have had mental health issues in the past, and that you could become unwell again. Whilst this is a risk that is difficult to quantify, alongside the fact that it has received no up-to-date medical information on the current status of your mental health, again due to your lack of engagement with medical professionals, the risk remains.

Having already reached a finding in relation to whether you have had in the past suffered from Acute and Transient Psychotic Disorder, based on all the evidence above, the panel concludes that on a balance of probabilities, it is likely that you also currently suffer from Acute and Transient Psychotic Disorder.”

6. The FTPC noted that there were “no known reports of [the Appellant’s] health condition affecting her nursing practice to date” but that her first admission to hospital had related to concerns about her behaviour which had been raised by work colleagues and that, according to Dr Sammur, her ATPD can be triggered by stressors at work. It continued:

“In light of this and taking into account that there is no evidence of [the Appellant] demonstrating how she manages her health, the panel determined that the stresses that come with working within the nursing profession will likely cause her ATPD to relapse in the future.

On the basis of the medical evidence before it, and in the absence of anything to contradict the evidence, the panel determined [the Appellant’s] fitness to practise is currently impaired by reason of her health on the grounds of public protection and is also otherwise in the public interest.

This finding is made to protect the public from harm which might be caused by [the Appellant] practising without restriction whilst unwell, which would otherwise involve a breach of a fundamental tenet of the profession and result in her bringing the nursing profession into disrepute, albeit that this would be involuntary on her part.

For all the above reasons, the panel finds [the Appellant's] fitness to practise currently impaired."

7. The FTPC proceeded to make a suspension order for a period of 12 months.
8. The Appellant appeals against the FTPC's decision on 16 different grounds, procedural and substantive. In his helpful submissions for the NMC, Mr Hoskins grouped, and addressed, the grounds of appeal under five headings, and I will follow, broadly although not exactly, the scheme that he proposed.
9. In considering the grounds of appeal, I apply the following principles (in line with the analysis of Cranston J in *Cheatle v General Medical Council* [2009] EWHC 645 Admin, §§12-15):
 - i) The appeal is not confined to a point of law, but neither at the other end of the spectrum is it a *de novo* hearing, where the court hears the witnesses giving evidence again;
 - ii) The Court's function is not limited to review of the panel decision, and in relation to findings of fact, it is entitled to exercise its own primary judgment on whether the evidence supported such findings. However, it will not interfere with a decision unless persuaded that it was wrong;
 - iii) In considering whether the decision of a fitness to practise panel was wrong, the focus must be calibrated to the matters under consideration. In relation to findings which reflect a professional judgement concerning standards of professional practice and conduct, and potential risk to patients, the court will exercise distinctly secondary judgment and give special place to the judgment of the professional body as the specialist tribunal entrusted with the maintenance of the standards of the profession.

Challenge to the jurisdiction of the NMC to bring proceedings based on the Appellant's health

10. The Appellant complains that the charge against her sought to punish her for past ill health and that what should have been treated as a health matter was treated as going to her fitness to practice (Ground 3). This ground is misconceived as a matter of law: the NMC is specifically empowered by the Order to consider allegations that a registrant's fitness to practice is impaired by reason of their health. In accordance with Article 22(1)(a)(iv) of the Order, the charge against the Appellant was not simply that she had a health condition but that that condition impaired her fitness to practice and those two aspects of the charge were considered separately by the FTPC. If, as was found to be the case here, a registrant's fitness to practice is impaired by

reason of their health, it cannot, in principle, be in breach of their human rights, as the Appellant also contends, for restrictions to be imposed upon their practice as a result.

11. The Appellant also complains that she should not have been sanctioned on health grounds when her symptoms were in remission (Ground 6). However, the reasoning of the FTPC was that the Appellant was liable to relapse, given her history, the stress that practice would cause to her, her lack of insight into her condition and her refusal to take medication or undergo therapy. The situation of a registrant who is currently well but likely to suffer health problems in the future falls well within the power of the NMC to take action where fitness to practice is impaired “*by reason of .. physical or mental health*” pursuant to Article 22(1)(a)(iv) of the Order.

Challenges to the FTPC’s findings of fact

12. The Appellant complains (Grounds 1 and 5) that the FTPC erred in accepting the evidence of Dr Sammut that she was suffering from ATPD under classification ICD-10 (that is, the International Statistical Classification of Diseases and Related Health Problems, 10th Revision) 23.0. ICD-10 classification F23 denotes Acute and transient psychotic disorders of various types. F23.0 denotes “Acute polymorphic psychotic disorder without symptoms of schizophrenia”. This was Dr Sammut’s diagnosis, on which the charge was based. However, previous diagnoses of the Appellant had referred to F23.9, which denotes “Acute and transient psychotic disorder, unspecified”.
13. The mere fact that previous psychiatrists had diagnosed the Appellant under a different sub-category of F23 is insufficient to establish that the FTPC was wrong to accept Dr Sammut’s diagnosis. He was aware of the previous diagnoses and referred to them in his report, yet reached his own, slightly different conclusions based on more up-to-date information than had been available to those diagnosing the Appellant in the past. In his oral evidence to the FTPC, he was asked about certain conditions which the Appellant had been diagnosed with previously and confirmed that he stood by the diagnosis made in his report. He is recorded at a later stage as agreeing that the Appellant was “now settled with a diagnosis of acute and transient psychiatric disorder” (as opposed to “psychotic disorder”) which was either a typographical error in the transcript or an infelicity of language which Dr Sammut did not pick up at the virtual hearing. In my judgment, the FTPC was entitled to accept Dr Sammut’s diagnosis, based on his report and his oral evidence on the issue.
14. There is one matter of concern under this ground, which is that the Legal Assessor to the FTPC, who questioned Dr Sammut and gave advice to the FTPC at the conclusion of his evidence, appears to have been labouring under the misapprehension that Dr Sammut’s diagnosis and the charge against the Appellant was based on her condition being F23.9. At one point, the Legal Assessor stated to the Appellant that there was a typographical error in the charge, and that it should have stated F23.9; at another, the Legal Assessor puts to Dr Sammut literature which questions whether F23.9 is ever a valid diagnosis. The Legal Assessor’s closing advice to the FTPC also referred to

the charge being based on F23.9 and set out principles for the FTPC to apply when deciding whether or not to accept Dr Sammut's evidence.

15. This was an unfortunate error on the part of the Legal Assessor. It is also unfortunate that the FTPC did not, at least in the open sessions, notice the error and investigate with the Legal Assessor and/or Dr Sammut what the correct position was. However, there was no confusion about the classification of the Appellant's condition, on which the charge was based, in Dr Sammut's report, or in his oral evidence or in the FTPC's decision, and no basis for thinking that the Legal Assessor led the FTPC into error such as to give rise to a good ground of appeal. I also would not accept that the Legal Assessor's erroneous indication to the Appellant that the charge was based on F23.9 constituted a procedural irregularity sufficient to vitiate the FTPC's decision. There was no doubt about Dr Sammut's diagnosis being based on F23.0 but by the time of his oral evidence, the Appellant had absented herself from the hearing and so was unable to question him about it. There is every indication that the FTPC carefully considered whether to accept his diagnosis. Before accepting it, the FTPC referred to Dr Sammut as having supported the previous diagnoses of the Appellant as suffering from ATPD. I understand that to mean that Dr Sammut supported the diagnosis that the Appellant suffered from ATPD within the F23 classification, albeit that his view was that the Appellant's ATPD was better classified under F23.0 rather than under the "unspecified" category F23.9.
16. Further and in any event, I would, if necessary, accept the fall-back submission of the NMC that even if the FTPC had considered that the appropriate diagnosis was F23.9, as the Appellant appears to contend it should have done (at least under this ground), this would still have been within the charge against the Appellant as a condition associated with F23.0 (see the charge wording in paragraph 3 above). One matter which comes across clearly from Dr Sammut's evidence is the difficulty of drawing firm lines between different classifications under the F23 category, so that one condition within F23 may fairly be said to be associated with another, similar or overlapping condition.
17. The Appellant makes various complaints about errors in Dr Sammut's report (Ground 5), as to the date it was completed, as to her being "arrested" when she was in fact "detained" in a secure hospital and as to the number of her previous episodes of ill-health. These issues were immaterial to the decision of the FTPC.
18. Under Ground 8, the Appellant complains that the FTPC placed undue weight on information provided by her GP. The FTPC relied upon a letter from the Appellant's GP in conjunction with Dr Sammut's evidence. It was entirely a matter within the FTPC's discretion to do so, and to decide what weight should be placed on the GP's opinion (which had noted the Appellant's lack of insight into her condition). There is no plausible basis for arguing that the FTPC was wrong in its approach.
19. Under Grounds 11 and 13, the Appellant complains that the NMC deliberately created documents so as to misrepresent the circumstances of her admission to

Langley Green Hospital in 2019 and presented to the FTPC fraudulent documents from staff at that hospital. There is no evidence to support these serious allegations. The NMC obtained the Appellant's medical records with her consent, and I am unable to discern the basis on which it was said that they relied upon those records other than fairly and honestly. There is an allegation that when presenting its case to the FTPC the NMC conflated events on two separate days – 8 and 9 April 2020 – after which the Appellant was admitted to hospital once again. Even if this happened, of which there is no firm evidence, I do not accept that this could possibly have led the FTPC into an error which could be challenged on appeal.

Challenge to the FTPC's finding of impaired fitness to practice

20. The Appellant challenges the FTPC's finding that her fitness to practice was impaired, arguing (Grounds 6 and 12) that it was a breach of her human rights and rights under the Equality Act 2010 to be found unfit to practice at a time when her symptoms were in remission and that the NMC created evidence of unfitness. In fact, the FTPC's decision in this regard was carefully reasoned. In accordance with the evidence of Dr Sammut, it acknowledged that her symptoms were currently in remission but found that they were likely to recur in light of her failure to engage with treatment and the stress which she would likely be put under at work, with a consequent risk to patients. There is no basis on which I could find that that reasoning was wrong.

Challenge to the FTPC's imposition of a suspension order

21. Under Ground 9, the Appellant complains about the sanction which was imposed by the FTPC. The premise for this complaint is that the diagnosis of ATPD was "*made solely by the panel*" after Dr Sammut had not confirmed that diagnosis when he interviewed her. This is incorrect: the FTPC's conclusion that the Appellant had suffered and continued to suffer from ATPD F23.0 was consistent with Dr Sammut's report and with the oral evidence that he gave to the FTPC. The Appellant also submits that the sanction of a 12 month suspension was disproportionate given her "*unblemished nursing career with no evidence of harm to patients/staff*". I do not accept that: the sanction of a suspension was in accordance with guidance given by the NMC to the FTPC and, although the maximum length for a suspension, was calibrated so as to give the Appellant time "*to reflect on the matters raised in this case, specifically to develop self-awareness and insight into her health condition and to begin taking the necessary steps to work on improving and managing her health*". There was no error in this approach.

Challenge to the procedural fairness of the hearing before the FTPC

22. A number of the Appellant's grounds of appeal impugn the procedural fairness of the proceedings before the FTPC (Grounds 2, 4, 10, 14, 15 and 16).
23. There were two occasions during the hearing when the FTPC proceeded in the absence of the Appellant. On 30 January 2023, after sending to the panel written submissions on the admissibility of evidence, the Appellant informed the NMC's Case Officer that she no longer wished to participate in the

hearing. An email from the Appellant of 13.39 on that day states “*I can confirm that I do not wish to attend the hearing any further*”. It is well-established that registrants are expected to engage with the regulatory process and should not be able to delay or frustrate the process by absenting themselves from it (*GMC v Adeogba* [2016] EWCA Civ 162, [2016] 1 WLR 3867, §§19-20). Absent a good reason to adjourn, the FTPC is entitled to proceed in the absence of a registrant who has deliberately absented herself. It was fully entitled to proceed without the Appellant on 30 January 2023. The Appellant submits that she only intended to absent herself from the hearing about admissibility of evidence but that is not what she communicated to the Panel at the time and if that truly had been her intention she would surely have got back in touch with the NMC when she heard nothing further from the Panel for the remainder of that day and the following day.

24. The Appellant re-engaged with the hearing on 10 July 2023. The FTPC considered and rejected an application by her to find that the proceedings were an abuse of process, in part because of the FTPC proceeding in her absence on 30 January 2023. The following day, the Appellant told the FTPC that she wished to be excused from the hearing because it was impossible for her to have a fair trial and the FTPC had breached her Article 3 ECHR and other rights. She left the hearing shortly afterwards and the hearing proceeded without her. Again, I cannot fault the decision of the FTPC to proceed in the Appellant’s absence when she had communicated a clear choice not to attend the hearing.
25. Under Ground 10, the Appellant makes various complaints, as she did at the hearing before the FTPC, to the effect that certain evidence ought to have been excluded because it was obtained as a result of her unlawful detention and torture or, in the case of her medical records, without her consent and in breach of data protection legislation. A large proportion of the Appellant’s submissions at the hearing before me were directed to the point that she had brought to the attention of the FTPC an allegation of breach of Article 3 ECHR which the FTPC had a duty to investigate before proceeding to hear the charge against her.
26. I reject that submission of the Appellant which was based on absolutely no concrete evidence of torture or any other breach of her Article 3 or other Convention rights. I have already rejected the allegation that her medical records were obtained unlawfully: there is documentary evidence of her giving consent to the disclosure of those records to the NMC. I can identify no error in any decision of the FTPC with regard to admissibility of evidence, and certainly none which could call into question the legality of its ultimate decision.
27. Under Ground 4, the Appellant complains that submissions were made on her behalf to the FTPC by persons who had not been appointed by her. It is certainly the case that the panel members, the Case Presenter and the Legal Assessor between them took care to test the points against the Appellant in order to seek to ensure fairness in her absence. There was nothing irregular about this.

Approved Judgment

28. Under Ground 14, the Appellant complains that the NMC placed certain information regarding her health in the public domain for three months up to August 2020. The NMC admits that that occurred and that it erred in disclosing that information as part of its published records of the proceedings against the Appellant. But it submitted – and I accept – that this did not lead to any error in the decision of the FTPC. The FTPC specifically considered the impact of the data breach upon the Appellant, as Dr Sammut gave evidence that it may be a contributory stressor for the Appellant, but there were many reasons other than the NMC’s error for Dr Sammut’s conclusion, and the FTPC’s conclusion in agreement with him, that the Appellant was liable to relapse.
29. Under Ground 15, the Appellant makes a generalised complaint of actual bias on the part of the FTPC, which is said to have caused the panel to give weight to the evidence on behalf of the NMC and insufficient weight to her evidence. There is no specific evidence to support the allegation of bias and I reject it. There was ample justification for the panel to adopt the approach to the evidence that it did and complaints about the weight attributed to different aspects of the evidence do not give rise to a viable ground of appeal.

Other allegations of breach of human rights

30. Under Grounds 7 and 16, the Appellant complains of various breaches of her human rights, under the Universal Declaration of Human Rights, which is not enforceable in the domestic courts, and the Human Rights Act, which is. I have already addressed and rejected the allegations of breach of Convention rights which were particularised by the Appellant. This is no substance behind any of the other, unparticularised allegations.

Conclusion

31. For the reasons set out above, I dismiss the appeal.