

Appeals Circular A04/24

7 June 2024

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Nursing and Midwifery Council v Persand [2023] EWHC 3356 (Admin)

Learning points

- ▶ A reminder that an interim order on public interest grounds is only justifiable in a relatively rare case.
- ▶ An interim order should only be imposed if it is *necessary* for the protection of the public; there is a high bar that needs to be surmounted:
 - ▶ there must be features of the case which mean that matters are so serious that it is justifiable to restrain the exercise of professional skills by a registrant at a stage when the allegations are unproven;
 - ▶ there needs to be an intense focus on precisely how and why the evidence demonstrates that patients may be at risk and how serious that risk is;
 - ▶ if some form of order meets the necessity test, the tribunal must be satisfied that no lesser form of order can be justified;
 - ▶ there should be no such thing as a 'standard set of conditions'. The necessity test has to be satisfied with regard to each condition, on the facts of each case.

Background

This was an application by the Nursing and Midwifery Council ('the NMC') pursuant to Article 31(8) of the Nursing and Midwifery Order 2001 ('the Order') to extend the period to which Mr Persand ('Mr P') should be subject to (interim) conditions on his ability to practice as a nurse.

Following a referral on 20 October 2021, the NMC commenced an investigation into concerns that Mr P failed to provide and oversee safe and effective care for a resident at a care home ('Care Home A'). This also led to a safeguarding referral being made in respect of the care the resident received at Care Home A. Mr P then went on to work at Care Home B, where according to information available to the NMC, it was suggested that he had bullied colleagues and did not talk to residents. Further concerns were raised that when Mr P applied to work at Care Home C, he provided incomplete and misleading information about his career history, including concealing his employment at Care Home A, where the safeguarding enquiry had been raised. There were also reports of conduct issues at Care Home C.

On 30 June 2022, the NMC Practice Committee ('the Committee') imposed an interim suspension order on Mr P's registration for a period of 18 months. At this hearing, the Committee determined that it was difficult to find material to support the clinical concerns at Care Home A and did not make the order on the basis of those allegations. In relation to the dishonest application made to Care Home C, whilst Mr P accepted that he had not provided accurate information on his job application, the Committee felt that the acceptance did not sufficiently mitigate the risk of repetition. Therefore, and in light of the conduct allegations, the Committee still considered it necessary to impose an interim order. The Committee noted that given the concerns about bullying and the effect on patient care, along with dishonesty, this may suggest wider attitudinal concerns and therefore an order was necessary on the grounds of public protection and public interest.

The order of suspension was reviewed and maintained on one occasion, and then on 20 June 2023 was replaced with an order of conditions. The Committee considered that an order remained necessary on the grounds of both public protection and public interest but took into account Mr P's training in relation to the concerns, his reflective piece and positive testimonials.

Judgment

The application was heard by Mr Justice Lock KC.

Mr Justice Lock agreed with Justice Davis in *R (Sheikh) v General Dental Council* [2007] EWHC 2972 that "an order on public interest grounds is only justifiable in a relatively rare case" because of the impact on that person's right to earn a living [22]. He criticised the initial interim suspension order, as it was imposed in part because the panel was concerned that sanctions were justified because '*an informed member of the public would be concerned if a registered nurse facing such allegations was allowed to practise without restriction whilst an investigation is carried out*'. Mr Justice Lock stated that this approach is inconsistent with the notion that sanctions on public interest grounds should be relatively rare, as this would justify suspension on public interest grounds in almost every case where a nurse faces serious allegations [22]. He indicated that there must be something in the evidence of the individual case which was far more substantial than anything arising in the case of Mr P, to justify a public interest suspension. He said "[T]hat must be far more than a concern that a hypothetical member of the public might have a concern if no interim sanction was imposed" [22]. Mr Justice Lock concluded that the Committee were wrong to have relied on public interest grounds to make the orders in the case; therefore the case was now "solely about

whether conditions on Mr P's right to practice as a nurse can be justified on the grounds of public protection" [22].

Mr Justice Lock noted the case of *GMC v Hiew* [2007] EWCA Civ 369 in which the Court confirmed that the criteria was the same when considering whether to extend an interim order as when considering whether to impose the original interim order [25] and the strict condition in Article 31(2); that an interim order should only be imposed if it is 'necessary' (for the protection of members of the public or is otherwise in the public interest or in the registrant's own interests) [38]. He explored case law regarding the meaning of the word 'necessary'. *R (Hussain) v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin) described it as 'more than desirable but less than indispensable or absolutely necessary' [39]. Mr Lock concluded that "[t]here is thus a high bar which needs to be surmounted" and that in every case, the Committee or Court "has to ask itself precisely why it is said to be necessary to impose an interim sanction" [40-41].

Mr Justice Lock said that "[I]f the case is that it is necessary to protect patients, then there needs to be an intense focus on precisely how and why the evidence demonstrates that patients may be at risk from [the registrant] and how serious that risk is". He went on to state that "[A] case where patients can be shown to have suffered harm will clearly have more potency than a case, such as the present case, where there is very limited if any evidence that any patient has come to harm. However, even if there is cogent evidence that a patient is at risk, a suspension will not usually be justified unless the imposition of conditions cannot reasonably protect patients from that risk" [41].

Mr Justice Lock noted that in working out the level of continuing risk posed by Mr P, it was deeply unfair to [for the Committee or the Court] to rely on the fact that despite doing remediation courses, Mr P cannot show that any risk has proven to be reduced because he had not worked as a nurse since he completed the courses. However, he had been unable to work as a nurse because of the interim orders and so completion of the courses was the most he could do to demonstrate a reduction in risk. Mr Justice Lock said that argument "is wholly circular and cannot justify continuing sanctions against Mr P [44].

Mr Justice Lock said that "[T]he real question is whether, given that there is a risk...it is "necessary" for sanctions to be imposed". He concluded that "there needs...to be something specific or particular about the circumstances of this case to explain why they are so serious that the test of necessity is met. Simply saying that, if a nurse was free to practise without being subject to conditions, such a circumstance would raise concerns in the minds of a member of the public is, in my judgment, wholly insufficient. Equally, saying that there is some limited risk to patients from a nurse's clinical practice if he or she is allowed to continue to practice without restrictions is equally insufficient. It seems to be that the necessity test requires the NMC to show that, on the particular facts of a case, there are features of the case which mean that matters are so serious that it is justifiable to restrain the exercise of professional skills by a nurse at a stage when the allegations are unproven. The test is something close to saying that an interim order is essential, in the sense that a responsible regulator would not be acting properly in failing to act on a proven risk to the public"¹. Mr Justice Lock concluded that it did not seem that this was the approach taken by the

¹ Which he indicated was the message from cases such as *R (Sheikh) v General Dental Council and Houshian v General Medical Council* [2012] EWHC 3458.

Committee in this case “where interim orders were imposed without an exacting inquiry being conducted to see whether they could really be said to meet the test of necessity” [45].

Mr Justice Lock doubted that a suspension order was ever justified and that the most that the allegations supported is a case that unsupervised nursing practice by Mr P could give rise to some level of risk to patients due to his attitude to both fellow members of staff and patients. However, Mr Justice Lock stated that he found it very difficult to get a feel as to how serious that risk actually was, and had some doubt as to whether it could be said the risk was so great that the “necessity” test was met [46].

Mr Lock confirmed that he was told the precise conditions imposed by the Committee were a “standard” set of conditions. However, he opined that they are so extensive and so restrictive that it was nearly impossible to envisage how any employer would be prepared to employ Mr P as a nurse under those conditions, and he noted that in practice Mr P had only been able to secure work as a nursing assistant. Mr Justice Lock concluded that there should be no such thing as a “standard” set of conditions because the test of “necessity” has to be satisfied with regard to each condition on the facts of each individual case before it can be lawfully imposed. He noted that some of Mr P’s conditions plainly did not satisfy that test [47 and 52].

Mr Justice Lock noted that the evidence in this (and a number of similar cases he had considered) case had a number of worrying features, and that it was not clear from all those cases “that the high bar imposed by the legislation before an interim order is made is, in practice, being generally applied, particularly in the context of cases that are taking far too long to resolve”. He went on to state that “[A]n interim order should not be imposed because the [Committee] have a concern that, if no order were to be made and there is a later patient safety incident, the NMC may be criticised” [51]. He accepted that whilst the Committee have a difficult job in balancing risks, the Order “sets a deliberately high test of necessity. An interim order can only be imposed if, on the evidence for that individual case, a strict test of necessity for the imposition of an interim order is established. The “necessary” test means that the [Committee] has to be satisfied to a civil standard that it is really necessary to impose the order for one of the stated purposes and, if some form of sanction meets the necessity test, that no lesser form of sanction can be justified. That is a higher test than it being desirable for such an order to be made, albeit the test is not one as high as being absolutely essential”.

Outcome

Mr Justice Lock concluded that whilst not all of the existing conditions were necessary, he was ‘just persuaded’ that some limited conditions were appropriate to prevent Mr P working where he is the only nurse on duty, and that these conditions would be sufficient to protect the public. He therefore imposed a varied, relaxed order of conditions on Mr P’s registration.

Kind regards

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