Nkosana Brian Lusinga v Nursing and Midwifery Council

Case No: CO/5078/2016

High Court of Justice Queen's Bench Division Administrative Court

23 June 2017

[2017] EWHC 1458 (Admin)

2017 WL 02672208

Before: Mr Justice Kerr

Date: 23/06/2017

Sitting at Leeds Combined Court

Hearing date: 12th May 2017

Representation

Penny Maudsley (instructed by Keith Lomax , Minton Morrill) for the Appellant.

Aja Hall (instructed by Nursing and Midwifery Council) for the Respondent.

Approved Judgment

Mr Justice Kerr:

Introduction

1 The appellant (Mr Lusinga) is a nurse. He has been struck off the register by the respondent (the NMC) for misconduct. Through counsel, Ms Maudsley, he says that was unfair and wrong. He does not suggest there was any procedural unfairness at his disciplinary hearing. He does not challenge the findings of misconduct, nor the finding that his fitness to practise was impaired. He says the decision to strike him off was disproportionately harsh; mitigating factors were not properly evaluated; findings relevant to sanction were unjustified on the evidence; and suspension should be substituted for striking off.

2 The NMC has responsibility for bringing disciplinary charges against nurses and midwives for alleged misconduct. Its rules provide for a "conduct and competence committee" such as the panel in this case to sit and determine such charges. The NMC opposes the appeal and, through Ms Hall, defends the panel's treatment of the evidence and its reasoning and conclusions. The NMC says the sanction was fair, reasonable and justified on the evidence and that the court should respect the panel's judgment and not interfere with it.

The Facts

3 The way in which the disciplinary proceedings against Mr Lusinga unfolded was, I hope, unusual. There was no written chronology available to me and if one was available to the panel, I have not seen it. I have had to piece together the following chronological account of events mainly from references within the detail in the transcripts of the disciplinary proceedings. Nor is there any succinct chronological account of the facts in the determination letter of 8 September

2016; it mixes procedural history and background with findings and determinations on individual issues.

4 The NMC has no rules limiting the number of hours per week (or per month, or year) a nurse may work. It is apparently content to leave the issue to be regulated by individual employment contracts and regulation 4(1) of the Working Time Regulations 1998 , which provides for a maximum 48 hour working week (of seven days), including overtime, unless the employee concerned has agreed in writing to perform more than 48 hours per week of work.

5 A nurse working more than 48 hours per week or any higher weekly number of hours, therefore, would not thereby become subject to any disciplinary action unless he transgressed in some other way. There is no legal limit to the number of hours he could work, so far as the NMC's disciplinary regime is concerned. The NMC does not prescribe mandatory contract terms for employers of nurses. The issue of working hours is left to be determined as a private matter between the nurse and his employer.

6 Mr Lusinga qualified as a mental health nurse in 2008. There is no finding of misconduct against him, other than in these proceedings. Although he has been accused of medication errors, no such error has ever been found to amount to misconduct. He was, until this case, without any disciplinary blemish on his record. He was subject to the NMC's rules and standards of conduct, like any other nurse. This included the code that includes the requirement to "act with honesty and integrity at all times" and to uphold the reputation of the profession.

7 Mr Lusinga was under domestic financial pressure to work long hours, to maximise his earnings. In 2008, his sister unfortunately died, leaving five children for whose upbringing Mr Lusinga became responsible in addition to his immediate family. As I have said, there was nothing unlawful *per se* about him working long hours, provided he could do his job properly and subject to duties owed in private law to any employer under a contract.

8 In 2011, Mr Lusinga started working full time for a care provider called the Jeesal Group. His personnel manager was Mr Steven James. He is not medically qualified. Mr Lusinga's contracted normal working week was 36 hours. It was a full time appointment. His written terms of employment, signed by him, stated that he would not without the employer's written permission undertake other employment. The employer's permission could not be unreasonably withheld.

9 On 21 November 2011, the Jeesal Group issued a form to Mr Lusinga for him to sign and date, which he did. By signing the form, Mr Lusinga consented to opt out of the provision in the Working Time Regulations 1998 limiting his working hours to 48 hours per week. Although the evidence on this point is not clear, I infer that the Jeesal Group needed his consent so it would have the option of requiring him to work overtime amounting to a weekly total of over 48 hours per week without falling foul of the law.

10 Mr Lusinga's contract did not, therefore, limit the number of hours he could work, nor the number of jobs he could take on (whether in nursing or otherwise) or the number of employers he could work for; it merely gave his "primary" employer a veto over additional work without the written consent of that employer, which could not be unreasonably withheld. Although the contract of employment did not so state expressly, Mr Lusinga was clearly obliged to inform the Jeesal Group of any proposed additional employment.

11 At some point during the period from late 2011 to about early 2013 (it is not clear when), Mr Lusinga was also working for an employer described in a later letter from Mr James as "Walsham Grange". He did not tell the Jeesal Group about this. While he was working for (or at) Walsham Grange, an allegation concerning his fitness to practise was made to the NMC. At some point before 14 June 2013 (again, it is not clear when) Mr Lusinga resigned from his work at Walsham Grange.

12 On 14 June 2013, Mr Lusinga told his manager and the director of operations at the Jeesal Group, a Mr Ncube, about the allegation made during his (by then) former employment at Walsham Grange. He said he denied the allegation. It was agreed at the meeting that he would complete his medications training course, meet ongoing professional development requirements, keep the Jeesal Group informed about the referral to the NMC, work days only with a senior nurse on duty and not give out medication until completion of the training course.

13 As regards the issue of failure to inform the Jeesal Group about working for a different

employer, Mr James told Mr Lusinga at the meeting that this was a matter of concern, as the latter's contract stated that he must seek prior permission for any other employment and this had not been done. According to Mr James' (undisputed) later letter of 25 June 2013 confirming the outcome of the meeting, Mr Lusinga said that he was "not aware of this contractual requirement."

14 In January and February 2014, Mr Lusinga was working for the Jeesal Group at a private hospital in Norwich. An allegation was made that he made medication errors in relation to "Patient A" between 20 January and 3 February 2014. That allegation was referred to the NMC on 16 July 2013. It later became the subject of a charge ("charge 1") which Mr Lusinga denied. The panel later found no case to answer on that charge, as appears later in the sequence of events.

15 In October 2014, unbeknown to the Jeesal Group, Mr Lusinga began working as a nurse at Amberley Hall, working three 12 hour shifts weekly on top of the work he was doing for the Jeesal Group. His hours at Amberley Hall subsequently declined when more permanent staff were taken on. He did not inform the Jeesal Group about the work he was doing at Amberley Hall. He told the employment agency, KK Healthcare, about the first NMC investigation (which, it appears, came to nothing), and also about his job with Jeesal Group.

16 Mr Kenneth Kamiri, of KK Healthcare, later made a written statement to the panel. He was evidently unconcerned about Mr Lusinga having two jobs. His evidence was that feedback on Mr Lusinga was very positive as he was "very committed to his job" and the management "had repeatedly requested him for further shifts". His acting manager at Amberley Hall was Mr Rob Hammond, who made a statement to the panel including that his "impression of him was positive as I found him to be polite, positive, caring in nature and he had a good rapport with patients."

17 Also in October 2014, Mr Lusinga was given a further form to fill in by the Jeesal Group, according to his later evidence to the panel, not disputed on this point. He said "we were given some forms to fill in to confirm that we were willing to work over and above our working hours". It is not clear, but it is likely that this was a further written consent to waive the limit of 48 hours per working week set by Working Time Regulations 1998 . A copy of the actual document was not before the panel, nor before me.

18 In April 2015, Mr Hammond learned of further medication errors allegedly committed by Mr Lusinga at Amberley Hall. Mr Hammond informed Mr Kamiri and the matter was investigated. These matters later became the subject of two further charges ("charge 2" and "charge 3") relating to, respectively, "Resident A" and "Resident B". I find the panel's later decision letter dealing with these charges opaque: at one stage, the panel (at page 6) appears to confuse charge 2 with charge 3, referring to "charge 2" as if it related to Resident B rather than Resident A.

19 The NMC did not seek before me to argue that anything materially adverse to Mr Lusinga resulted from the determination of charges 2 and 3. Ms Hall in her skeleton argument attempted to bring clarity to what the findings were, none being provided by the decision letter. Ms Hall accepted that in relation to charge 2, "with the agreement of the NMC, the panel found the charge not proved"; and that in relation to charge 3 "the panel acknowledged that there was no harm to the patient and therefore went on to find there was no misconduct."

20 Actually, the panel's later finding on charge 2 was contrary to the submissions of Mr Derek Zeitlin, for the NMC, who submitted that Mr Lusinga was guilty of misconduct under charge 2 and that it should be found proved (see transcript day four, at page 5B-D) in that Mr Lusinga had been guilty of an error that "gives rise to a risk of harm to a patient" and a "lack of communication with a colleague". The panel found this incident was a "single act of negligence" which was a communication error, not a medication error, and not misconduct.

21 In May 2015, news of the alleged medication errors reached Mr James at the Jeesal Group. As I understand the evidence he gave to the panel, he and another manager, Catriona Matheson, were given the news by Mr Lusinga during or shortly before a meeting on 27 May 2015. He said he was no longer working at Amberley Hall. Asked by Ms Matheson why he had not asked permission, he replied that he "did not think about it". Mr James asked Mr Lusinga to put in a written request to continue the second job and commented to Mr Lusinga that it "must not impact on your job here."

22 Mr James wrote a confirming letter on 29 May 2015. He said Mr Lusinga would be put on day

shifts only for the time being. He said non-disclosure of the second job and the absence of a request for permission was "of concern and we are considering the way forward". He did not say in the letter that Mr Lusinga could not do that (or any other) second job, but did ask for (what appears to be a retrospective) formal request for permission to work at Amberley Hall be made and said that permission would not be unreasonably withheld.

23 Mr James did not express concern about endangering patient safety or suggest that if permission had been sought, it would have been refused; however, he would want to check on the total hours as mistakes are more likely when a worker is tired. His evidence was that the Jeesal Group "would need to total up the hours he worked elsewhere with the hours he worked with us, but had actually signed an opt out", i.e. a waiver of the limit of 48 hours in a working week. He told the panel: "I don't think you can morally stop somebody having a second job."

24 According to the panel's decision letter, the two alleged medication errors were formally referred to the NMC on 7 July 2015 by a consultant with "NHS Norfolk". The Jeesal Group convened a disciplinary hearing on 30 July 2015 for not having sought permission from the Jeesal Group before taking the job with KK Healthcare, at Amberley Hall. Mr Lusinga accepted the allegations, said he had been wrong not to inform the Jeesal Group, said he was very sorry and explained in mitigation about his financial pressures and family situation. He was not dismissed.

The Disciplinary Proceedings

25 The NMC brought five charges against him:

> (1) administering medication to Patient A that was no longer prescribed, in January and February 2014, at Jeesal Group's hospital in Norwich;
>
> (2) failing to hand over or record a dosage reduction in Resident A's insulin, while working at Amberley Hall on 17 April 2015;
>
> (3) failing to sign for administration of medication on a chart in the case of Resident B, at Amberley Hall, on or about 17 April 2015;
>
> (4) that "[b]etween 16 October 2014 and 22 April 2015 you did not inform your employer the Jeesal Group that you were undertaking additional nursing employment at Amberley Hall Care Home"; and
>
> (5) that "[y]our actions in charge 4 above were dishonest in that you sought to conceal your additional nursing employment from the Jeesal Group."

26 In charge 5, the NMC did not elaborate on what the alleged dishonesty consisted of, beyond the allegation that Mr Lusinga "sought to conceal" his second job. What charge 5 did not say was that Mr Lusinga took any positive step, such as telling a lie or writing false information on a document, with the deliberate aim of deceiving the Jeesal Group into believing he had only one job, when in truth he had two. The sting of the dishonesty allegation was the withholding of information which, according to charge 4, he should have disclosed.

27 Mr Lusinga was left to work out, as best he could, what was meant by the word "dishonest" in charge 5. Its meaning has troubled greater legal minds than his. It may be clear enough where the substantive charge alleging the *actus reus* is as plain and straightforward as, for example,

stealing money, claiming sick pay while working, or forging a prescription. But here the *actus reus* in charge 4 was withholding information in breach of contract by not seeking permission to do work which it would be lawful to do and permission to do which could not be unreasonably withheld.

28 Mr Lusinga's way when accused of wrongdoing is invariably to own up and apologise. He admitted more wrongdoing in this case than he was guilty of, as shown by what happened to charges 2 and 3, which were both dismissed even though he admitted them. He wrote a "reflective piece", as it has become known in the regulatory jargon. This is a document prepared, no doubt often on advice, intended to show insight, remorse, contrition and absence of risk of repetition of the wrong. His reflective piece was dated 30 April 2016.

29 It was a remarkably self-deprecating document, in which he began by apologising for committing the wrongs in the subsequently dismissed charges 2 and 3. He went to great lengths to explain his understanding of the importance of correctly administering medication, saying he accepted that he had "breached the Code and Standards" when, as it turned out, he had not done so, or not to an extent amounting to misconduct. He explained the training he had undergone and castigated himself for "misconduct" he had not committed, which, he said, "tarnishes the image of the profession."

30 That occupied the first 38 paragraphs of the reflective piece. His reaction to charges 4 and 5 in the remaining paragraphs, 39-56, was similar. They dealt with the subject of "secondary" employment. He explained his financial and family responsibilities, including responsibility for his deceased sister's five children. He said he "thought it was fine to work secondary employment… to seek new challenges and extra money". He referred to the warning he had been given in 2013 and the "waiver" he had signed.

31 In paragraph 44, he then stated: "[i]n hindsight, not informing my employer that I was working elsewhere was dishonest". He appeared to accept charge 5 as bearing the meaning that the failure to inform, without more, meant that he had been dishonest. He went on to castigate himself for the risk of undermining trust and endangering patient safety through overwork. He assured that he would not do so again and would "inform any employers" if he wished to take "secondary" employment. He also referred to seeking "overtime" from his employer.

32 At the time of the disciplinary hearing, he had started working for an organisation called Quattro Healthcare as a staff nurse in a medium secure hospital for men and women detained under the Mental Health Act 1983 , a position he had held since 8 May 2016. His manager wrote a favourable testimonial letter dated 23 August 2016. He was also able to produce other favourable written testimonials which were looked at by the panel convened to hear the disciplinary charges, and which I too have read.

33 The disciplinary hearing took place in East London from 30 August to 5 September 2016. The NMC was represented by Mr Zeitlin, a barrister; Mr Lusinga, by Ms Maudsley as he was before me. On the first day, witnesses were called on the charges that were subsequently dismissed. Written statements from Mr Hammond, Mr Kamiri, Mr James and a Mr Philimon Wakabikwa (of KK Healthcare) were read.

34 Ms Maudsley then made a submission of no case to answer on charge 1. The panel considered it on the morning of the second day. The submission succeeded and the panel announced that there was no case to answer on charge 1. Mr Lusinga was then called to deal with charges 2, 3, 4 and 5. These charges and the facts alleged in them were admitted; the issue was whether his fitness to practise was thereby impaired.

35 Mr Lusinga was taken through his reflective piece and asked many questions relevant to charges 2 and 3. Eventually, he got to the subject of "secondary" employment. He reiterated the emphasis on being trustworthy and added that vulnerable patients could be at risk of physical or financial abuse – not wrongs of which he stood accused - from someone who is not trustworthy. In answer to Mr Zeitlin, he agreed it was important that Jeesal Group should know the total number of his weekly working hours.

36 After that, the hearing got into difficulty, not surprisingly in view of the way charges 4 and 5 were framed. Mr Zeitlin asked Mr Lusinga in what way he, Mr Lusinga, had been dishonest. Mr Lusinga admitted not having informed the employer about the second job, and said he had been misled by the "waiver" he had signed. That waiver, it will be recalled, gave the law's blessing to

the working of unlimited hours each week, without any objection or prohibition from the NMC, the Jeesal Group or anyone else.

37 The legal assessor attempted without success to clarify matters by interventions and even questioned whether Ms Maudsley could continue to represent Mr Lusinga. The chairman soon realised that Mr Lusinga's admission was not of dishonesty in the sense of the word developed in case law. Mr Zeitlin moved on to the subject matter of charges 2 and 3 for the rest of the day. Mr Lusinga remained under oath and therefore could not speak to Ms Maudsley about the case overnight.

38 The next day started with Mr Zeitlin suggesting Mr Lusinga might like to change his plea to charge 3 to one of not guilty and that the NMC would accept charge 3 should be dismissed. Mr Lusinga gave further evidence in chief on charges 4 and 5. Ms Maudsley tried to help him by giving him an approximate paraphrase of the two stage *Ghosh* test of dishonesty: "it has to be seen by the general reasonable person as being dishonest, but you also have to know it was dishonest."

39 The legal assessor again intervened in a further unsuccessful attempt to help. Mr Lusinga stuck to his admission of dishonesty. The chairman then came to his assistance by helpfully telling him what charge 5 did not: that "[n]ot informing somebody of something does not necessarily make it dishonest". When Ms Maudsley asked Mr Lusinga if he was "trying to hide" his second job from the Jeesal Group, he replied after a short pause: "I wasn't trying to hide it" and "at the time I never thought about it that much."

40 So Mr Lusinga's "admission" of "dishonesty" was an admission that he had not informed his employer about having a second job. Unsurprisingly, the panel became (in the chairman's words) "satisfied that there is enough confusion about the evidence we have heard that means we do not think it would be safe and proper to accept your admission at this stage" and "we are going to treat it, even though you do not want us to, as a denial". This ruling meant that the hearing had to be reset back to the factual stage. Mr James then gave oral evidence as explained above, by telephone.

41 The chairman then invited submissions. Mr Zeitlin submitted that Mr Lusinga's plea of guilty to dishonesty should have stood: he had, argued Mr Zeitlin, known full well that he had an obligation to disclose his second job, did not do so and thereby acted dishonestly. Ms Maudsley submitted that Mr Lusinga had merely overlooked his obligation to disclose his second job and had not dishonestly omitted to disclose it. She referred to refinements of the *Ghosh* test developed in later case law. The legal assessor then directed the panel in accordance with the *Ghosh* test.

42 On the fourth day, the panel announced at about 12 noon that charge 5 was found proved, and gave reasons which were subsequently set out in the decision letter, to which I am coming. The panel went on to consider submissions on the issues of impairment and sanction. Mr Zeitlin submitted that charge 2 was proved. On charges 4 and 5, he referred to "the Jeesal Group's role… of protecting its patients from nurses who are unable to give of their best, perhaps because they are tired."

43 He also referred to dishonesty which, he argued, had the effect of putting Mr Lusinga's own interests above those of the patients in his care. He accepted that Mr Lusinga had not committed a crime, but suggested he "may well" have acted in "breach of the law of the land" by breaking his employment contract. He submitted that dishonesty is "very difficult to remediate" and strongly hinted, though without actually saying, that Mr Lusinga should be struck off the register rather than suffer any lesser penalty.

44 Ms Maudsley pointed to the frankness and openness Mr Lusinga had shown, himself informing his employer of the NMC's investigations and consequently the second job; and the contrition he had shown, then and later in his reflective piece. She referred extensively to case law. On charge 2, she accepted there had been a medication error but not that it amounted to misconduct. She pointed to the mitigation afforded by financial pressures on him and his successful employment with Quattro Healthcare, which had raised no concerns. She urged that there was no risk of repetition.

45 On the fifth and final day, the panel announced its decision orally, in similar terms to its subsequent decision letter dated 8 September 2016. The latter deals with the issues but not in a

way that makes them easy to understand. I have already referred sufficiently to what happened in relation to charges 1, 2 and 3. They were decided in Mr Lusinga's favour, as Ms Hall accepts. The decision letter also made the following points on charges 4 and 5.

46 The hours worked in the second job were considerable, not just few. Mr Lusinga had been warned in 2013 and had been given a "stern talking to". He therefore knew he needed permission. The Working Time Regulations make no mention of any second employer. The "waiver" form opting out of the 48 hour limit was "specific to your work with the Jeesal Group". It did not authorise a second job.

47 The panel said Mr Lusinga' evidence was "far less clear" than Mr James's evidence. He had "changed [his] position" in relation to dishonesty, originally accepting it and then changing it "through your responses to questioning", and changing it again "when the panel put questions to you". His evidence was "inconsistent" and "lacked credibility". The inconsistency referred to is not clear but appears to be on the issue of admitting dishonesty and then the admission not being accepted.

48 The panel found that Mr Lusinga had financial problems and that he believed if he asked for permission to do a second job, it would not be granted and that he had for that reason decided not to ask for permission. He had "concealed" his second job "intentionally", "in order to earn extra money" and "this was dishonest". Charge 5 was therefore proved.

49 Charges 4 and 5 amounted to misconduct. Mr Lusinga had not been open and honest with his main employer. The hours he worked had been too long and "your actions had placed patients at an increased risk of harm". The signing of the waiver was dismissed as a diversion; it did not mean it was alright to work the additional hours. Mr Lusinga had "placed [his] own needs above those of the patients in [his] care" and "breached fundamental tenets of the nursing profession."

50 The panel considered impairment. It blamed Mr Lusinga for its decision to reject his plea of guilty to charge 5. It considered that in oral evidence Mr Lusinga had "attempted to minimise the level of your dishonesty to the point which resulted in the panel treating your initial admission as a denial. The panel considered that this brought into question your integrity". This meant there was a "significant risk of you repeating your actions."

51 By the same reasoning, the panel found that the "authenticity" of the reflective piece was "undermined" and accordingly the panel did not accept that the remorse and contrition expressed in it was genuine. Ms Hall accepted in argument that the panel's findings amount to a rejection of the reflective piece as a sham and an elaborate charade. There was no convincing evidence, the panel said, of "insight into your dishonesty."

52 Having decided that Mr Lusinga's fitness to practice was impaired, it went on to consider the question of sanction. The decision letter referred to the Indicative Sanctions Guidance adopted by the NMC, and the submissions of counsel for the parties. It considered, first, aggravating features of the case. They were the same as those already highlighted at length earlier in the decision letter, but reduced to bullet points.

53 The panel then set out in six brief bullet points the mitigating features of the case. These had not been discussed earlier in the decision letter, save briefly when referring to Ms Maudsley's submissions. They were: personal circumstances at the time of the misconduct; completion of training to demonstrate continued professional development; some positive comments from colleagues about his nursing practice; having engaged with the disciplinary proceedings; no previous findings of impairment by the NMC; and no repetition following the incident.

54 The panel then proceeded to consider available sanctions in ascending order, as recommended in the Indicative Sanctions Guidance. The panel first ruled out a caution and then the imposition of conditions, before moving to the question of suspension. It cited paragraph 67 of the Indicative Sanctions Guidance, providing a non-exhaustive list of indicators of when suspension would be appropriate. However, it then gave several reasons why suspension would not be an adequate sanction.

55 They were these. First, the panel reasoned that the misconduct, although a single act, was "a course of dishonesty over a protracted period", in that the work for the second employer continued over the period with "full knowledge that you were contractually required to disclose this work". Second, the dishonesty was "compounded by the previous warning". Third, Mr

Lusinga had made "attempts to diminish the level of dishonesty in… oral evidence to the point where you made your own admission to the charge equivocal."

56 Then the panel added that despite comments about him being "a kind and caring nurse", he had not behaved in a way becoming of a nurse. He had "placed [his] own financial interests ahead of the health and wellbeing of those in [his] care" whilst "placing your colleagues and employers at risk". These findings led to the conclusion that he "did demonstrate deep-seated attitudinal problems."

57 The panel then dismissed the reflective piece: "whilst you have addressed some of the points in relation to dishonesty you did not specifically address your own actual dishonest conduct". In any case, as Ms Hall accepted, the panel did not believe the reflective piece was genuine. The decision letter said: "you undermined some of the positive aspects of this reflective piece in your own oral evidence. Your attempts to downplay and diminish your dishonesty demonstrated lack of insight and remorse."

58 The panel then gave an example of dishonesty of a different kind, involving fraudulent claims for monies, mentioned in paragraph 35 of the Indicative Sanctions Guidance; and cited the point that dishonesty "can undermine the trust the public place in the profession"; honesty, integrity and trustworthiness being "the bedrock of any nurse or midwife's practice". The panel said the dishonesty, lack of insight and "convincing remorse" was incompatible with continued practice as a nurse.

59 Mr Lusinga had concealed the second job, "abused the position of trust" and "frustrated the monitoring system to prevent nurses from putting patients at risk by working excessive working hours". The "monitoring system" did not refer to any system administered by the NMC, nor any limit on hours imposed by it or by the general law. It must have referred to the agreement of Mr Lusinga and the Jeesal Group to include the contract term whereby the latter's permission, not to be unreasonably withheld, had to be obtained before other employment (as a nurse or otherwise) should be undertaken.

60 The panel then imposed the usual interim order to prevent Mr Lusinga practising as a nurse pending any appeal. Mr Lusinga appealed to this court on the basis that the panel should have imposed a suspension order, not a striking off order, and that the latter sanction was wrong and unfair.

Applicable Principles

61 The principles applicable in an appeal of this kind are now so well known that the field has become overburdened with hundreds of cases which, as I have commented previously, are often unnecessarily cited. Counsel in this appeal commendably did not indulge in such over-citation. The skeletons, bundles and authorities were proportionate and manageable, while ample to enable the court to determine the appeal. The propositions to be applied were not controversial.

62 They were briefly these. I can only allow the appeal if I am satisfied the decision of the panel was wrong. Dishonesty may well lead to striking off because it is very serious and threatens public confidence in the profession. Lack of insight and remorse makes removal more likely. Appropriate deference is due to the judgment of the tribunal below in view of its special expertise, especially in cases regarding professional practice (which this is not). The court can correct material errors but its judgment on application of principles to the facts is a secondary one.

63 On sanction, the court should not conduct a resentencing exercise, substituting its view for the tribunal's. Ms Hall placed particular reliance on the oft-cited words of Sir Thomas Bingham MR in *Bolton v. Law Society [1994] 1 WLR 512* , CA, on the importance of upholding the reputation of the profession and the need to uphold, save in exceptional cases, decisions to remove dishonest practitioners in order to preserve it, even though the consequences for the individual may be "little short of tragic."

64 Ms Hall also placed special reliance on the words of Cranston J, reviewing numerous authorities in *Cheatle v. GMC [2009] EWHC 645 (Admin)* , a negligent treatment case, at paragraphs 12-15. The judge emphasised at paragraph 15 the reluctance of the court to overturn findings of fact, in particular as to credibility of witnesses where that turns on demeanour and "subtleties of expression which are only evident to someone at the hearing"; and the need to

respect the professional judgment of the panel below, especially in relation to failures in clinical treatment and care.

The Grounds of Appeal

65 There are now four grounds of appeal. In the first, Ms Maudsley asserts an error of approach to mitigating features of the case; the second, third and fifth grounds (the fourth no longer being pursued) attack specific findings of the panel which, cumulatively, contribute to the proposition, on Mr Lusinga's case, that the sanction of striking off was unjustified, too harsh and plainly wrong.

66 In the first ground of the appeal, Ms Maudsley submits that the panel made the same error as made in *O. v. NMC [2015] EWHC 2949 (Admin)* and *Wisniewska v. NMC [2016] EWHC 2672 (Admin)* : failing properly to evaluate the mitigation relied upon by the nurse before deciding to reject the possibility of suspension. Ms Maudsley submitted that mitigation available to Mr Lusinga was inadequately set out in an incomplete list of bullet points, and received no evaluation other than cursory recognition that Mr Lusinga had been described as a "kind and caring nurse."

67 As explained in those cases, because sanctions are considered in ascending order of gravity, consideration of suspension is, though formally the penultimate stage, in reality the last matter to be considered since acceptance or rejection of suspension is determinative of the case: once it is rejected, striking off is then the only possible outcome. Accordingly, the need to evaluate properly the available mitigation at the suspension stage was emphasised in those two cases.

68 Ms Maudsley pointed out that the panel had said nothing about Mr Lusinga having himself disclosed to the Jeesal Group that he had a second job; that he had made no attempt to minimise his responsibility when dealing with the Jeesal Group, including at the disciplinary proceedings; that the panel had given no weight to the positive comments from witnesses such as Mr Kamiri and Mr Hammond and the providers of written testimonials; and that rejection of the insight and remorse demonstrated in the reflective piece was unjustified and unfair.

69 For the NMC, Ms Hall submitted that the mitigation available was minimal because the panel properly rejected the genuineness of his expressions of insight, contrition and remorse. Indeed, the panel was entitled to treat the insincerity of the reflective piece as an aggravating feature. She accepted my suggestion that her proposition was that "false mitigation is aggravation". She said that the panel had listened to Ms Maudsley's submissions in mitigation and the bullet point list of mitigating features or supposed mitigating features fairly reflected her submissions.

70 Ms Hall also pointed out that the panel had referred to paragraph 19 of the Indicative Sanctions Guidance which stated that all aspects of mitigation "should be considered against the backdrop of the fundamental purpose of sanctions", i.e. to protect the public and maintain public confidence in the profession. This paragraph does indeed caution against giving undue weight to personal mitigation, which must yield to the public interest, as explained earlier in the Indicative Sanctions Guidance, at paragraphs 13 and 21.

71 In paragraph 14, the guidance states that the public interest "may include the safe return to practise [sic] of a nurse or midwife"; but "this must be balanced against other public interest considerations." There is a section on dishonesty at paragraphs 35-37. It does not differentiate between different types or degrees of dishonesty, e.g. the differences between forging a prescription, falsely claiming sick pay while working, stealing hospital supplies, and so forth.

72 The only example of dishonesty given is that of "fraudulent claims for monies", the factual position in the only case cited in the Indicative Sanctions Guidance (*Parkinson v. NMC [2010] EWHC 1898 (Admin)* , Mitting J). Paragraph 35, including the example of "fraudulent claims for monies", was cited in the operative part of the panel's decision when rejecting the suggestion that suspension would be sufficient.

73 I come to my reasoning and conclusions on the first ground. I find the decision of Hayden J in *Wisniewska v. NMC* helpful. As Ms Maudsley reminded me, Ms Wisniewska, unlike Mr Lusinga, had previously been suspended for six months for working in a second job while not attending shifts she was rostered to attend: see paragraph 4 of Hayden J's judgment. She thus had a previous disciplinary record, unlike Mr Lusinga. She then failed to mention this in a "return to

work" interview, which she accepted was dishonest.

74 Ms Wisniewska also, before the six month suspension was imposed but while under the investigation that led to it, applied for a job as a nurse and stated in her application that she was not currently subject to fitness to practise proceedings (see paragraph 6 of the judgment). That was simply untrue. She did not put right the untruth in a subsequent interview, nor after starting work having successfully obtained the job.

75 The charges of dishonesty in *Wisniewska v. NMC* were more informative than the charge against Mr Lusinga in this case because they included the helpful words "deliberately" and "intentionally". It was alleged that her actions were dishonest in that "you *deliberately* did not disclose to the Trust that you were under investigation…"; and that "you *intentionally* attempted to conceal the facts referred to…. when you *knew you had a duty to disclose* those facts" (my emphasis).

76 In the present case, Mr Lusinga had not previously been suspended. Ms Wisniewska had been. Hayden J substituted a 12 month suspension for striking off, a decision with which I respectfully agree. It was a worse case on the facts than Mr Lusinga's. *Parkinson* was also a worse case on the facts than this case: Ms Parkinson had claimed sick pay for shifts she had not worked when, in fact, she was working elsewhere. That was probably criminal conduct as the phrase "fraudulent claims" in the Indicative Sanctions Guidance suggests.

77 The difficulties in this case started with the way in which charge 5 was drafted. As is well known, there are two limbs to the well known *Ghosh* test of dishonesty. The first, objective, limb is whether the conduct was dishonest according to the ordinary standards of reasonable and honest people. If it was, the second, subjective, limb is whether the accused was aware that what he was doing was dishonest by those standards.

78 In the present case, the whole of both those two questions had to be deduced from the three words "sought to conceal" in charge 5. The sting of the charge as expressed was that the conduct was dishonest "in that" Mr Lusinga had sought to conceal the second job. The panel treated "sought to conceal" as meaning "knowing you had a contractual duty to disclose the second job and choosing not to do so."

79 Mr Lusinga's evidence did not indicate acceptance of that interpretation of the charge. He appears to have regarded the sting of the charge as dishonesty by not informing the Jeesal Group about the second job. For a non-lawyer, that is not a particularly surprising interpretation. Mr Lusinga's position in the proceedings was that he admitted what he called "dishonesty" because he had failed to inform the Jeesal Group about the second job.

80 When pressed about what he intended by his admission, it became clear that he did not admit to dishonesty in the sense of the *Ghosh* test. He said he was misled by the waiver. That is not surprising: the waiver made it plain there was no limit to the number of hours he could work. There was no law against him having a second job, no limit on the total hours and the Jeesal Group could not prevent the second job if it would be unreasonable to withhold permission for it to be done.

81 In those confusing circumstances, I am quite satisfied that it was unfair to Mr Lusinga to hold against him what was described as a change of position or inconsistencies in his evidence, as an aggravating feature. What changed was the slow emergence of clarity in the nature of the NMC's case under the poorly drafted charge 5. Mr Lusinga's position remained the same throughout; it was differently characterised at the different stages of the process, but that was not Mr Lusinga's fault; it was the NMC's.

82 Furthermore, on the scale of dishonesty, this was a case at the very bottom end. There was concealment but not active deception. There was no ill-gotten financial gain, nor any attempt at one. Mr Lusinga was merely "moonlighting" without permission which could not have been unreasonably withheld and which was not *per se* unlawful. None of these mitigating features are mentioned in the panel's decision, which does not include any indication of a proper understanding of the employment law position, as I have outlined it earlier.

83 As Mr Lusinga neither made any fraudulent gain, nor told any lie, nor committed any crime, he should not have been treated as if he had been a criminal, as implied by a comparison with the facts of a case such as *Parkinson* . Nor had he been found to have endangered any patient or

acted with professional incompetence. In those circumstances, the public interest in the safe return to practice of a competent nurse would have featured as a consideration in a fair and balanced sanction decision. It did not.

84 The tribunal referred to a "monitoring system" operated by the Jeesal Group to prevent the working of "excessive hours". This is an odd use of language which attributes to the employer a regulatory role it does not possess. The regulatory regime does not include any such monitoring system, nor any limit on hours. The Jeesal Group's contract term was not mandatory. The Group is a commercial provider of private care services. It has no responsibility for the standard of care provision outside its own operation.

85 I do not accept that the Jeesal Group would necessarily have withheld permission if Mr Lusinga had sought it. Mr James' evidence did not go that far. There is therefore no clear evidence that Mr Lusinga would not have done exactly the same work as that which he did do, if he had sought permission. Mr James is not medically qualified but an assessment would have had to be made of whether it was reasonable to withhold permission, if it had been sought.

86 If permission had been sought and refused, given the positive evidence of Mr Lusinga's kind and caring performance, politeness and good rapport with patients, it is far from clear that any patient would have been better served by someone else. And if the NMC had a major concern about the working of excessive hours endangering patient safety, it would presumably set an upper limit to the number of permitted hours instead of leaving the issue to the haphazard incidence of voluntary third party private law contract terms.

87 For those reasons I am satisfied that the first ground of appeal is well founded and that striking off was a disproportionate sanction. The remaining three grounds of appeal can be dealt with more briefly because they address specific aspects of the overall decision to impose the sanction of striking off and therefore overlap with the first ground of the appeal asserting that the sanction was disproportionate overall.

88 The second ground of the appeal is that panel's finding that Mr Lusinga lacked insight, that there was no significant "remediation" (a jargon term meaning the propensity to reform and behave better in future) and therefore a risk of repetition, was irrational and wrong. This ground focusses closely on the rejection of Mr Lusinga's admission of dishonesty and the consequent rejection of the genuineness of his reflective piece.

89 Ms Maudsley submitted that Mr Lusinga had unfairly been denied credit for his constructive engagement with the issues raised in the reflective piece, including his willingness to own up to medication errors and to "dishonesty", in the sense in which he understood the term at the time. His contrition and openness had moved the Jeesal Group to stay its hand and not dismiss him; and the Quattro Group, aware of the allegations in the run up to the panel hearing, remained willing to employ and support him.

90 Ms Hall opposed that ground of appeal, saying the tribunal had been entitled to reject the genuineness of the reflective piece and, having done so, was entitled to treat it as "false mitigation" and as such an aggravating feature. The panel had heard Mr Lusinga's evidence which included his evidence that he had been misled by the waiver; that evidence was inconsistent with the admissions of "dishonesty" in the reflective piece, which was therefore rightly rejected.

91 In my judgment, the panel unfairly held against Mr Lusinga its own rejection of his admission of dishonesty, which arose not because of a change in his position, but because of a belated clarification of what was meant by dishonesty, as I have already said. That error invalidates the panel's rejection of the content of the reflective piece. I uphold the appeal also on the second ground.

92 In my judgment, the proposition that "false mitigation is aggravation" must be applied with extreme caution. To hold against a person expressions of remorse, contrition and insight into wrongdoing on the ground that they were not sincerely meant, is a very strong thing which would have to be supported by convincing reasoning that is conspicuously absent here. Mr Lusinga admitted more than he was guilty of, as already noted.

93 The third and fifth ground of the appeal can be taken together. The third is that the panel's finding that Mr Lusinga had a "deep seated attitudinal problem" was unfair, irrational and wrong.

The foundation for this finding was that Mr Lusinga had been warned once about not asking for permission to work for a second employer, that he had done so over a considerable period, and that his expressions of regret were not genuine.

94 Ms Maudsley relied on evidence that, far from having a deep seated attitudinal problem, Mr Lusinga was described as kind, caring, committed and having a good rapport with patients, for example by providing clear and accurate handovers. Ms Hall relied on the panel's findings, which are those already mentioned, as well as the finding that Mr Lusinga had put his financial interests ahead of the health and well-being of those in his care while placing his colleagues and employers at risk.

95 The fifth and final ground of appeal attacks the finding that Mr Lusinga's dishonest conduct put others at risk. As noted above, the decision letter said: "your actions had placed patients at an increased risk of harm". Ms Maudsley submitted that there was no evidence that any patient had been put at risk; on the contrary, the evidence was that Mr Lusinga treated his patients' interests as paramount. Ms Hall submitted that financial motivation for the "moonlighting" had been conceded at the hearing, in that Mr Lusinga had relied on financial pressures on him due to his family responsibilities.

96 I do not think the panel was justified in saying that Mr Lusinga had put his financial interests above the health and well-being of his patients or exposed his colleagues and employers to any risk. It is irrelevant that Mr Lusinga's motivation was the lawful one of earning a living. The panel made no finding that Mr Lusinga had endangered any patient. The Jeesal Group might well have permitted him to work in the second job, had it been asked. If it had done so, it would not have been acting wrongly in granting permission and Mr Lusinga would not have acted wrongly by acting on it.

Remedy

97 The third and fifth grounds of the appeal are therefore well founded, as are the first and second grounds. The fourth is not pursued. The question then arises what remedy should ensue from those conclusions. I have the power to remit the matter back to a panel for further determination, or to exercise the powers of the panel myself. I have considered carefully which course I should follow in this case.

98 This court on appeal exercises sparingly the jurisdiction to substitute its view on sanction for that of the panel below, out of respect for the expertise and professional judgment of that specialist panel. The errors made here are such that it would be necessary in fairness to Mr Lusinga for the panel to be differently constituted panel, if the matter were remitted. The result would be further delay followed by, in all probability, a decision to suspend Mr Lusinga for a period of up to 12 months.

99 In my judgment, it would be inappropriate to remit the case. It is not one requiring professional judgment on alleged substandard conduct in a clinical setting. Any suspension decision I impose will run from the date of my decision. Mr Lusinga has been unable to practise as a nurse since the panel's decision was announced orally on 5 September 2016. His conduct is, in my judgment, clearly less serious than was Ms Wisniewska's who, Hayden J decided, should be suspended for 12 months and not struck off.

100 I have decided to take the same course as the judge did in that case. Mr Lusinga did fail to perform his contractual obligation and in circumstances that many would consider dishonest. It was not heinous criminal dishonesty; it was attenuated dishonesty by breaking his contract, but it was still dishonesty of a kind and admitted to be such by Mr Lusinga.

101 If the panel had imposed a suspension for the maximum period of 12 months, that period would have commenced 28 days after service of the decision letter and expired at the end of 6 October 2017. If that sanction had been imposed, I would not have interfered with it on appeal. But if the panel had imposed a suspension of six months, that would not have been too lenient.

102 In all the circumstances, I have decided the right course is to impose a period of suspension expiring one year from the date of the orally announced panel decision, 5 September 2016. The suspension will therefore expire at midnight on 4 September 2017. This is in my judgment *par excellence* a case where the public interest requires the safe return to practice of a competent

nurse.

Postscript

103 I hope the Indicative Sanctions Guidance will be looked at again in the light of this judgment. The guidance does not differentiate between different forms of dishonesty, and takes one of the most serious forms of dishonesty (fraudulent financial gain) as the paradigm, without alluding to the possibility that dishonest conduct can take various forms; some criminal, some not; some destroying trust instantly, others merely undermining it to a greater or lesser extent.

104 The guidance, in my respectful opinion, needs to be more nuanced in that respect. It should not lump the thief and the fraudster together with the mere contract-breaker. I also hope the NMC will look again at the question of excessive hours. If there is a widely held view among the experts that it is normally unsafe to work more than a specified number of hours in a particular week, or day, or month, it could be made the subject of a direct obligation not to exceed a permitted maximum.

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