Neutral Citation Number: [2019] EWHC 3326 (Admin)

Case No: CO/2161/2019 and CO/2163/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2019

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL HEALTH CARE	**Appellant**
- and -	
(1) NURSING AND MIDWIFERY COUNCIL	
(2) KHANYISILE LEMBETHE	**Respondents**
And between :	
PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL HEALTH CARE	**Appellant**
- and -	
(1) NURSING AND MIDWIFERY COUNCIL	
(2) MONICA ZANDILE MKHIZE	**Respondents**

- -

- -

Professional Standards Authority v NMC and Lembethe:
Peter Mant (instructed by **Browne Jacobson LLP**) for the **Appellant**
Christopher Scott (instructed by **the Nursing and Midwifery Council**) for the **First Respondent**
Michael Standing (instructed by **Kingsley Napley LLP**) for the **Second Respondent**

Professional Standards Authority v NMC and Mkhize:
Peter Mant (instructed by **Browne Jacobson LLP**) for the **Appellant**
Christopher Scott (instructed by **the Nursing and Midwifery Council**) for the **First Respondent**
The **Second Respondent** attended part of the hearing in person

Hearing date: 7 November 2019

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Approved Judgment

Mrs Justice Steyn :

A Introduction

1. The Professional Standards Authority for Health and Social Care ("the Authority") brings a joined appeal against the decisions of a panel of the Fitness to Practise Committee of the Nursing and Midwifery Council ("the Panel") concerning two registered nurses, Khanyisile Lembethe and Monica Zandile Mkhize (collectively referred to as the "Registrants").

2. Ms Lembethe has worked as a nurse for 33 years. She worked at Fairlie House nursing home between 24 April 2006 and 14 August 2017. She began working there as a staff nurse and, following several promotions, by 2017 she was a deputy manager, holding the post of Quality, Clinical and Governance Manager. Ms Mkhize began working at Fairlie House, as a staff nurse, on 14 February 2017.

3. The Panel heard the Registrants' cases together on Monday 8 April to Thursday 11 April 2019. In short, it was alleged that Ms Lembethe dishonestly produced and signed a certificate of completion of in-house Basic Life Support ("BLS") training and Ms Mkhize dishonestly sought to rely on that certificate by submitting it to an employment agency, Nursing 2000 ("the Agency"). The Panel found that the BLS certificate was not produced or submitted to the Agency in January 2017 (i.e. before Ms Mkhize had begun working for Fairlie House and undertaken the in-house training) and the Registrants had not acted dishonestly.

4. The Authority brings this appeal pursuant to s.29 of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act") as it considers that the Panel's decisions that Ms Lembethe and Ms Mkhize were not dishonest, and the subsequent findings of impairment, were not "sufficient for the protection of the public".

5. The Authority's grounds of appeal, which are identical in the two cases, are in these terms:

    i) The Panel erred in refusing to admit in evidence an email sent by Ms Mkhize to the Agency in January 2017 attaching the BLS certificate.

    ii) The Panel's finding that the Registrant was not dishonest in respect of the BLS certificate and/or that it could not be satisfied on the balance of probabilities that the Agency received the BLS certificate in January 2017 was wrong.

    iii) The way in which the case against the Registrant was charged and/or prosecuted meant that important aspects of the Registrant's conduct were not considered adequately or at all.

    (I have reversed the order in which grounds 1 and 2 appear in the application notices to reflect the order in which the grounds were argued at the hearing.)

6. I have had the benefit of written submissions and oral argument on behalf of the Authority and Ms Lembethe. The Nursing and Midwifery Council ("the NMC") was also represented at the hearing but, having conceded the appeals, made no

submissions. I am grateful to those representing both the Authority and Ms Lembethe for their excellent submissions, but I particularly wish to record my gratitude for the assistance of Mr Michael Standing of Counsel and Kingsley Napley LLP who have represented Ms Lembethe *pro bono*.

B Application to proceed in Ms Mkhize's absence

7. At the outset of the hearing Mr Mant applied, on behalf of the Authority, to proceed in the absence of Ms Mkhize. It was demonstrated that the Authority had properly served the application notice and other case papers on Ms Mkhize.

8. Although Ms Mkhize had not responded to the appeal, given the position she had taken before the Panel, the absence of a response was not an indication that she had not received the documents. The Panel hearing had been adjourned from December 2018 to April 2019 to enable Ms Mkhize to obtain representation. She had not been able to do so and Ms Mkhize was not represented at the hearing before the Panel. Ms Mkhize attended by telephone for the afternoon of the first day of the hearing before the Panel. She did not attend thereafter, in person or by telephone, or make submissions or submit evidence. Ms Mkhize informed a case officer by telephone and by email on the first day of the hearing that she was happy for the Panel to proceed without her and asked the Panel to excuse her absence.

9. There was no application by Ms Mkhize to adjourn the appeal to enable her to attend and doing so would have caused substantial prejudice to the other parties who were present and ready to proceed, as well as being a waste of court time and resources.

10. In the circumstances, I was satisfied that it was fair for the appeal hearing to proceed in Ms Mkhize's absence.

11. After the short adjournment, at 2pm, I was informed that Ms Mkhize had in fact been in court during the morning, although she was no longer present. Unfortunately, although there had been a brief adjournment (to sort out bundles) after I decided that the appeal hearing should proceed in her absence, Ms Mkhize only made her presence known at lunchtime, when she spoke to those representing the Authority. The Authority's representatives told Ms Mkhize that, if she wished to say anything in response to the appeal, she should return to court at 2pm. I indicated that, if Ms Mkhize returned to court, I would interpose any submissions she might wish to make. However, Ms Mkhize did not return to court before the end of the hearing. I remained satisfied that it was fair to continue and complete the hearing in Ms Mkhize's absence.

C The legal framework

12. The functions of the NMC and its committees are governed by the Nursing and Midwifery Order 2001 ("the 2001 Order"). Article 3(4) of the 2001 Order provides:

> "The over-arching objective of the Council in exercising its functions is the protection of the public."

13. Article 3(4A) of the 2001 Order states:

> "The pursuit by the Council of its over-arching objective involves the pursuit of the following objectives –
>
> (a) to protect, promote and maintain the health, safety and wellbeing of the public;
>
> (b) to promote and maintain public confidence in the professions regulated under this Order; and
>
> (c) to promote and maintain proper professional standards and conduct for members of those professions."

14. In exercising its functions, the Fitness to Practise Committee is required to have regard to the over-arching objective: paragraph 18(10A) of Schedule 1 to the 2001 Order.

15. The Nursing and Midwifery Council (Fitness to Practise) Rules 2004 ("the 2004 Rules") provide that the NMC is required to disclose documents relating to an allegation:

    i) when the allegation is referred to the Case Examiners: rule 6A(2)(a);

    ii) when it is referred to the Fitness to Practise Committee: rule 9(2)(a); and

    iii) when notice of the hearing is served (rule 11(3)(b)).

16. Rule 31 of the 2004 Rules provides:

> "Upon receiving the advice of the legal assessor, and subject only to the requirements of relevance and fairness, a Practice Committee considering an allegation may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings (in the appropriate Court in that part of the United Kingdom in which the hearing takes place)."

17. Rule 32(2) of the 2004 Rules provides:

> "A Practice Committee considering an allegation may, of its own motion or upon the application of a party, adjourn the proceedings at any stage, provided that –
>
> (a) no injustice is caused to the parties; and
>
> (b) the decision is made after hearing representations from the parties (where present) and taking advice from the legal assessor."

18. The decision of the Panel, in respect of each Registrant, not to take any disciplinary measure against her (as a consequence of the Panel's finding of no misconduct), was a "relevant decision" for the purposes of s.29(4) of the 2002 Act: see s.29(2)(b). Section 29(4) provides:

> "Where a relevant decision is made, the Authority may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public."

19. Section 29(4A) provides that consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

    i) To protect the health, safety and well-being of the public;

    ii) To maintain public confidence in the profession concerned; and

    iii) To maintain proper professional standards and conduct for members of that profession.

20. Where a case is referred to the High Court, it is treated as an appeal: s.29(7) of the 2002 Act. In accordance with CPR 52.21(3) the appeal will be allowed if the decision of the Panel was:

    i) Wrong; or

    ii) Unjust because of a serious procedural or other irregularity in the proceedings before the Panel.

D The Charges

21. Ms Lembethe was charged as follows:

> "That you, a registered nurse
>
> (1) Produced and signed a moving & handling training certificate for colleague B [i.e. Ms Mkhize], dated 15/02/17,
>
> (2) Were dishonest in relation to charge 1 above in that:
>
> (a) You knew that you did not have the authority to sign the certificate,
>
> (b) You knew that you had not delivered the training,
>
> (c) You deliberately sought to mislead others into believing that the training had been delivered by you and completed by colleague B.
>
> (3) Produced and signed a Basic Life Support certificate for colleague B, dated 25/01/17,
>
> (4) Were dishonest in relation to charge 3 above in that:
>
> (a) You knew that you did not have the authority to sign the certificate,
>
> (b) You knew that you had not delivered the training,

(c) You deliberately sought to mislead others into believing that the training had been delivered by you and completed by colleague B.

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

22. Ms Mkhize was charged as follows:

"That you, a registered nurse,

1. Provided Nursing 2000 with a moving & handling certificate dated 15/02/17, signed by colleague A [i.e. Ms Lembethe],

2. Were dishonest in that you knew colleague A had not delivered moving & handling training and intended to mislead Nursing 2000 that the moving & handling certificate was genuine and that you had completed the training with colleague A.

3. Provided Nursing 2000 with a Basic Life Support certificate dated 25/01/17, signed by colleague A,

4. Were dishonest in that you knew colleague A had not delivered training in Basic Life Support and intended to mislead Nursing 2000 that the Basic Life Support certificate was genuine and that you had completed the training with colleague A.

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

23. Ms Lembethe admitted the factual charges (1 and 3), but she denied dishonesty (charges 2 and 4). Similarly, although there was no formal admission from Ms Mkhize in respect of charges 1 and 3, there was no dispute about those factual charges, which were found proven: the argument centred around the charges of dishonesty.

24. Counsel for Ms Lembethe made a submission of no case to answer, after the NMC's witnesses had given evidence, in respect of charge 2. The NMC conceded that there was no case to answer on charge 2(c) and the Panel found, in respect of both Registrants, there was no case to answer in respect of charge 2 in its entirety. Having found for the Registrants on charge 2, the Panel determined that their actions in relation to charge 1 did not amount to misconduct. There is no appeal against the Panel's decision in respect of the two charges concerning the Moving and Handling certificate (i.e. charges 1 and 2).

25. The appeal concerns charge 4 which the Panel found not proved against each Registrant. There is no appeal against the Panel's decision that, if dishonesty is not proved (i.e. ground 4), charge 3 does not amount to misconduct.

26. In essence, the allegation was that Ms Lembethe had signed the BLS certificate for Ms Mkhize, and Ms Mkhize had provided it to the Agency, in January 2017, when they both knew she had not undertaken BLS training at Fairlie House where Ms Lembethe worked, as Ms Mkhize only began working there on 14 February 2017.

E The hearing and the Panel's decisions

27. The charges were heard before the Panel on 8-11 April 2019. Ms Lembethe attended and was represented by Counsel. As I have said, Ms Mkhize attended part of the hearing by telephone and was content for the hearing to proceed in her absence. She was not represented.

28. Ms Mkhize was not present on the morning of the first day of the hearing. The NMC's representative made an application to proceed in her absence. The application was supported by Ms Lembethe. The Panel decided to proceed in Ms Mkhize's absence and also to call her to establish if she wished to attend via telephone. In reaching this decision,

> "the panel considered the submissions of the case presenter and the advice of the legal assessor. It had regard to the overall interests of justice and fairness to all parties. It noted that:
>
> - No application for an adjournment has been made by Ms Mkhize;
> - Whilst Ms Mkhize has indicated that she is currently experiencing difficult circumstances relating to her family life, she has also indicated that she is content for the hearing to proceed in her absence;
> - Two witnesses were attending today to give evidence;
> - Not proceeding may inconvenience these witnesses;
> - Further delay may have an adverse effect on the ability of these witnesses to accurately recall events and their willingness to attend a future hearing;
> - There is a strong public interest in the expeditious disposal of the case, given the charges relate to incidents which occurred in 2017;
> - There was no information and indeed no evidence that could satisfy the panel that Ms Mkhize would engage with proceedings at a later date;
> - Ms Mkhize is clearly aware of the process underway, however has engaged only a limited basis."

29. The NMC called two witnesses. The first witness was Mr Joe Netimah, a recruitment manager at Nursing 2000. In Ms Mkhize's case, Mr Netimah had signed a witness statement on 13 April 2018 in which he said:

> "4. I first became aware of the incident involving the resident in July 2017 when we received an email reply from Daisy Selvakumar ("Daisy") the home manager of Fairlie House care home. As part of our processes, when we receive training documentation we are supposed to verify the documents upon receipt. On 20 July 2017 we sent an email to Fairlie House to check the training was accurate.
>
> 5. On 23 July 2017, [Nursing] 2000 received an email from Daisy informing us that the Manual Handling certificate we had received from the registrant was not valid.
>
> 6. The sequences that led to this event are as follows, the registrant filed in the application to work for us in January 2017. …
>
> 7. In order to complete the registrant's application we required the verification requested for the certificates provided. We consistently requested the certificate's from the registrant as due to our company policy there are specific requirements she needed to fill, one is a reference and the other is up to date certificates of training. This process was prolonged due to the residents delay. She was not forthcoming with the references and did not comply with the providing of the certificates.
>
> 9. The registrant initially provided her MH certificate to us in January and it came from care UK, then we received another MH certificate in July from Fairlie House, the document was stamped by our organisation on 14 July 2017. … Policies at the agencies are such that documents we receive have to be stamped to show when received, and then this was forwarded to team leader Nikita Grant.
>
> 10. Regarding the basic life support training ("BLS") this was sent to Nikita Grant on 27 January 2017 and was from Fairlie House. This was date stamped that same day. I exhibit a copy of the certificate at EXHIBIT JN/02.
>
> 11. As this was the last documentation we required, as stated above, an email was sent on 20 July to Daisy regarding the MH and BLS to verify them both. It was then that we received an email reply on 23 July 2017 from her stating that the certificates were not valid." (sic; emphasis added)

30. In Ms Lembethe's case, Mr Netimah had signed a witness statement dated 24 May 2018 in which he said:

> "4. Nikita Grant (ex Nursing 2000 recruitment team leader) received a Basic Life Support certificate (BLS) and Manual Handling certificate (MH) from Monica Mkhize (agency employee) on 24 January 2017. Nikita date stamped the BLS as 27 January 2017 and MH as 24 January 2017 with the Nursing 2000 stamp. The BLS certificate was an original document and it was reviewed by Nikita. …
>
> 5. … As part of our recruitment process, we are required to verify any training documentation upon receipt. On 20 July Nikita requested Fairlie House to confirm if the MH and BLS certificates we had received for Monica were valid. …" (emphasis added)

31. During the course of examination-in-chief by the NMC's representative, Mr Netimah explained that he had not had any direct involvement with Ms Mkhize's application; it had been handled by a former employee of Nursing 2000, Nikita Grant. He said he believed the certificates were sent by email. The examination-in-chief continued:

> "Q. How do you know that they were received on the 24th January, both of those certificates?
>
> A. We would have looked at the date on the email (inaudible).
>
> …
>
> [Q.] … It may be that you can't answer this, you weren't the one that date stamps the documents, but do you know why there might be a difference in the dates from when they were received, when they were date stamped?
>
> A. As I said – mentioned earlier, the date on the email received by Nikita was the 24th January. However, Nikita herself printing the document and then putting a stamp on would, to my mind, have been different. Knowing the (inaudible) as I did, it's simply a question of when she printed the document and then affix a stamp. That's what I believe led to the discrepancy.
>
> Q. You've said that the documents were submitted by email. Did you see that email yourself?
>
> A. During the course of, you know, the investigation I received – I was approached by the NMC investigation team. I had access to Nikita's emails, so yes I did see the correspondence coming through." (emphasis added)

32. Mr Netimah was then cross-examined. With regard to his former colleague, Ms Grant, who had dealt with Ms Mkhize's application, he said she "*did not wish to be a witness. She didn't wish to be involved in this*." Questioned about the date she had stamped on the BLS certificate he said:

> "A. …my assertion is that Nikita Grant, as was her way, didn't always act when she should – ought to have. …
>
> Q. Okay. So you said in there Nikita was someone who didn't always act the way she ought to with the documents?
>
> A. That's correct, yes.
>
> Q. So was she known to be someone who wasn't particularly good at putting the right dates on documents, is that fair to say?
>
> A. That's fair to say, yes."

33. In relation to receipt of the BLS certificate, it was put to Mr Netimah that he had said in his witness statement that it was an "original document":

> "Q. …If it's an original document it surely hasn't come in an email, has it, because an original means the original?
>
> A. Yes, that's correct, yes.
>
> Q. So the evidence you gave a moment ago when you were asked questions by the barrister for the NMC, stated that it was attached to an email, not an original document. Which one is it?
>
> A. … it would appear that the BLS certificate itself was given, given at the face to face registration, whereas the MH document was received by email." (emphasis added)

34. When it was put to Mr Netimah that he had not exhibited to his witness statement any email attaching certificates, Mr Netimah said he gave all the information regarding the email correspondence to the NMC.

35. Following this answer, Ms Lembethe's Counsel asked for an opportunity to speak to the NMC's representative "*to see if this email does exist*". The Panel allowed a brief adjournment following which the NMC's representative stated that the email did not appear to be in the NMC's possession. But she continued:

> "I do think this email is of importance. I appreciate the NMC has not provided it but now that it has been raised I am of the view that it is an important document and perhaps some time should be allowed for an email to be located, if one can."

36. Ms Lembethe's Counsel submitted that he should be allowed to continue the cross-examination of the witness. If a document came to light which the NMC wished to disclose, then he should have an opportunity to see it and make submissions on its admissibility. He observed that "*the production of documents at such a late stage inevitably causes prejudice to my client*".

37. Ms Mkhize was attending by telephone at this stage and, when asked her view by the Panel, she said:

> "Yes, I believe if we can get that document with that email it is of vital importance at this stage."

38. The Panel decided that the NMC should have an opportunity to obtain the email. Following a brief adjournment, the NMC's representative applied to admit the email which Mr Netimah had found ("the email"). The email is dated 27 January 2017, timed at 17:17, from an email address that incorporates the name "*monica mkhize*" to Nikita Grant. The subject is "*BLS certificate*". The text reads, "*Hi there attached is the BLS certificate as discussed*". Attached to it was a copy of the BLS certificate dated 25 January 2017, without an Agency date stamp.

39. In accordance with the process that the Panel had indicated they would follow, the Panel did not receive a copy of the email, but first invited submissions on its admissibility. The NMC representative explained that they had now obtained a copy of the email attaching the BLS certificate and she submitted that it should be admitted by the Panel,

> "You are a panel of enquiry and your function is to obtain all the facts in this case. The email will confirm when the BLS certificate was sent to Nursing 2000, which is a key detail in this case. There is, on the evidence you have before you, some ambivalence as to that date but the email (inaudible) in my submission give a concrete date and time of when Ms Mkhize sent the certificate to the nursing agency and therefore, in my submission, it is clearly relevant to this case."

40. The NMC's representative recognised that there would be some prejudice caused by the late admission of this evidence,

> "However, fairness in proceedings is not just fairness to the parties facing the charges but also the public as a whole and in my submission to allow this email to go before the panel will allow the panel to make the … right decision in this case and for the panel to come to the correct conclusion on the facts in this case and, therefore, I invite the panel to admit the email from Ms Mkhize."

41. Counsel for Ms Lembethe strongly opposed the admission of the email. He acknowledged that it was important but submitted, "*the more important the evidence, the more important it is that we have time to scrutinise it and to deal with it*". He told the Panel that the email stated that it was sent on 27 January. He said that Ms Lembethe was prejudiced by the very late disclosure of this email because there had been no opportunity to challenge it. It would be very easy when forwarding an email to edit its contents and there were such concerns about the date that Ms Lembethe could have instructed "*a computer forensic expert who would be able to provide the metadata and who would be able to show categorically when this email was created*". But there had been no opportunity to do so. He drew attention to the lack of any explanation from the NMC as to why they had not taken steps to deal with the issues which were apparent from the witness statements of Mr Netimah, including looking for the email. He submitted that the public interest in admitting the evidence was outweighed by the prejudice that would be caused and, in any event, the public

interest was met by the fact that the charges did not fall away but remained a matter to be determined by the Panel.

42. Asked by the legal assessor to clarify the prejudice caused, Counsel for Ms Lembethe explained that "*Ms Lembethe's case is this was not sent until July and then what seems to have happened is for some reason it is date stamped with the wrong date*". Ms Lembethe accepted that she had written the wrong date on the certificate, as the training had been delivered on 16 February, but she had completed the certificate after the training, not in January when Ms Mkhize had not yet begun working for Fairlie House. The email was central to the case on dishonesty and Ms Lembethe was not in a position to challenge its correctness or authenticity given its very late disclosure.

43. Ms Mkhize was asked for her comments and whether she had seen the email before. In answer, she expressed concern about not having received the email from the NMC, but her response was otherwise difficult to understand. Ms Lembethe's Counsel added that Ms Mkhize was unrepresented, the prejudice was perhaps even greater for her and she was being ambushed.

44. The NMC's representative responded that if there was prejudice to the Registrants because they had not had an opportunity to have the email examined by an expert,

> "the remedy would be to put this case off to allow Ms Lembethe and Ms Mkhize to conduct that investigation, if they do wish to challenge the date on the email. … date stamps are subject to human error and that email, with its metadata will be able to confirm, one way or another, when this document was sent and therefore, in my submission, if the panel don't wish to allow this because they feel there is prejudice, the remedy would be to allow time for the email to be examined by an expert."

45. Counsel for Ms Lembethe opposed the application to adjourn submitting that it would add to the prejudice and add to the costs. He noted the hearing had been adjourned once already. The right approach was simply to exclude the email.

46. The legal assessor gave the following advice:

> "Madam, the rules say that when deciding whether or not to admit evidence essentially you have to apply consideration to <u>whether it is relevant and fair</u> and they are stated in that order in the rules. So <u>relevance; potentially yes relevant</u> because they address potentially or relate to a paragraph in the witness statement that you've read and have all become familiar with. I don't think either party is necessarily disputing relevance, <u>it's the fairness that is the crucial element</u> and really you have had quoted a bit of guidance about that from the parties, and I think Mr Standing's submissions relate square on to the prejudice that would be caused to Ms Mkhize as well.
>
> I think it is important, and I am not going to seek to rehearse what the parties have said, they have said it quite ably and I

> think you have got the points that have been made but yes there are potentially the options of either allowing the evidence, excluding it or adjourning. You have had submissions about each of those options. I think it is fair to emphasise to you that clearly a charge of dishonesty is a serious one and the case law makes clear that matter. Charges of dishonesty in regulatory proceedings have the potential to affect careers and impact upon them significantly. So, when considering the arguments in respect of the dishonesty charge, my advice would be that it is important to take really great care in making your decision.
>
> There is always the duty on the NMC to disclose relevant matters. Obviously they seek to do that today but we are in the middle of hearing a witness, so that is another matter to bear in mind and essentially you need to be satisfied that you are acting with fairness and taking into account all of the submissions. My advice would be that it is fairness really to the Registrants that needs to take particular weight in your decision because they are the ones who are subject to a dishonesty charge. Clearly you are always going to be mindful of the need to uphold your functions. You are a panel of enquiry, it's true, and you are in a position where you are perhaps more proactive in terms of seeking information to make your decisions on facts but that is also one of many considerations that you have to bear in mind. So I think it is right that I stop there and it is a matter for you." (emphasis added)

47. The chairman invited comments on the legal advice and there were none. The Panel then deliberated overnight and delivered their decision the following morning, refusing to admit the email. The key part of the decision reads:

> "The panel accepted the advice of the legal assessor.
>
> The panel was satisfied that the additional information was relevant to both your case and Colleague B's case, but was concerned that no previous attempts were made by the NMC to obtain this information or secure a witness statement from [Ms Grant].
>
> The panel considered that it would be very difficult for you [Ms Lembethe] or [Ms Mkhize] to challenge the new information, which undermines your position in relation to the charges. The panel noted that the NMC has a duty to disclose material in advance of proceedings in order for registrants to attend their hearing and defend their case, with the expectation that they are challenging evidence which they have had ample opportunity to review and scrutinise. The panel considered that by allowing such information which bolstered the NMC's case at this late stage would go against this principle and would be wholly unfair to both you and Colleague B.

> The panel also noted that if it were not for [Mr Netimah's] answer to a question during cross examination, the NMC would not have sought to obtain such information. Furthermore, the panel noted that [Ms Grant], the individual who received the e-mail had not produced a written witness statement, nor was in attendance to be cross examined about the veracity of this information.
>
> Taking all of the above into account, the panel determined that it would be unfair to admit this information into evidence. The panel therefore rejected Ms Dongray's application to adduce this information into evidence."

48. The Panel then heard the rest of Mr Netimah's evidence and evidence from Valerie McGlinchey, the Senior Human Resources Manager at Fairlie House. That completed the NMC's evidence following which, as I have said, Ms Lembethe's Counsel made an application that there was no case to answer on count 2, to which the Panel acceded in respect of both Registrants. Ms Lembethe gave evidence on the third day of the hearing.

49. Having heard the parties' closing submissions, the Panel determined that charge 4 was not proved. The key part of the Panel's reasons reads:

> "You [Ms Lembethe] conceded that whilst someone may perceive the BLS certificate which you signed as being "misleading", you fully accept that you had made an error in relation to the dates which you entered on the certificate and that this date was factually wrong. You said that it was never your intention to mislead anyone into thinking that the training had been completed prior to [Ms Mkhize] joining the Home or that you were the trainer who carried out the course. You explained that at the time of [Ms Mkhize] asking you to sign the certificate, you felt under significant pressure and stress…
>
> …The panel found you [Ms Lembethe] to be a credible witness. You provided clear and consistent answers to questions. Your version of events remained the same throughout the investigation and your oral evidence, and you were able to explain the cultural connection shared by you and Colleague B. The panel also noted that you took responsibility for the admissions you made at the outset of the investigation and assert that you have learnt from them. The panel found that this went towards your credibility.
>
> …the panel decided that the fundamental question as to whether you were dishonest centred upon when the BLS certificate was received by the Agency. The NMC case is that if it was received in January 2017 before [Ms Mkhize] commenced employment at the Home, there would be clear evidence of dishonesty. …

> The panel first considered the evidence of [Mr Netimah], who told the panel that another employee, namely [Ms Grant], date stamped the certificate as 27 January 2017. However, he also gave evidence that this was received on 24 January 2017 (although that email was not before the panel). The panel noted that in addition to this, a further BLS certificate date stamped 25 January 2017 was also presented in evidence.
>
> The panel took into account that [Ms Grant], the employee who received the certificate and date stamped the 2 copies of the certificates, was not called to give evidence and that [Mr Netimah] was not involved in receiving these documents. [Mr Netimah's] evidence was also that [Ms Grant] was not very good at date stamping in a timely manner and referred to issues regarding her efficiency, although his evidence was that the certificate was received on the dates referred to above in January 2017. The panel considered his evidence carefully but was of the view that it was not reliable due to its inherent inconsistency.
>
> The panel considered that the NMC had not proved its case to the requisite standard. The panel could not be satisfied on the balance of probabilities that the Agency received the certificate in January 2017 due to the inconsistency of the evidence adduced by the NMC. The panel placed greater weight on the inconsistency of the date than the fact that they were all dated within January 2017."

50. The Panel then heard submissions as to whether charges 1 and 3 amounted to misconduct and determined that they did not.

F Ground 1: The Panel's decision not to admit the email

The parties' submissions

51. The Authority contends that the Panel's decision not to admit the email was unlawful. As the Panel recognised in its decision on charge 4, the fundamental question in determining whether the Registrants had been dishonest turned on when the BLS certificate was received by the Agency. If it was received in January 2017, before Ms Mkhize had undertaken the training that was certified, then the Registrants must have been dishonest in producing/submitting the BLS certificate. The email was apparently conclusive documentary proof that the BLS certificate was submitted to the Agency in January 2017.

52. The legal assessor, whose advice the Panel accepted, emphasised the gravity of an allegation of dishonesty from the perspective of the accused, and the importance of fairness to the Registrants, but she did not address the weight to be given to the public interest in receiving such important evidence of dishonesty. In this regard, Mr Mant drew attention to *Zia v General Medical Council* [2012] 1 WLR 504 at [35] and [46]; *R (Rudling) v General Medical Council* [2018] EWHC 3582 (Admin), [2019] PTSR 843 at [43]; and *General Medical Council v Theodoropoulos* [2017] 1 WLR 4794 at

[35], in support of the propositions that the primary function of the 2004 Rules is to protect, promote and maintain the health and safety of the public, and conduct involving deliberate dishonesty on the part of a nurse, in relation to professional qualifications or training, is particularly serious.

53. Mr Mant also submitted that the Panel erred in failing to address the option of an adjournment. It is not apparent whether they considered adjourning or, if they did and decided not to adjourn, why they considered that adjourning would not address the prejudice to the Registrants caused by the late disclosure of the email.

54. Mr Standing submitted that the decision whether to refuse to admit the email was closely intertwined with a case management decision as to whether to adjourn. He contended that the public interest and the possibility of adjourning were clearly matters the Panel had in mind, having regard to the parties' submissions which the legal assessor effectively endorsed. It would have been unfair to have admitted the email without adjourning, and so the Authority has to demonstrate that the case management decision not to adjourn was plainly wrong in the sense of being a decision that no reasonable tribunal could have reached.

Decision

55. The question whether it is fair to admit evidence is an issue of law, to be judged objectively by the Court, rather than by reference to whether the decision of the Panel was a reasonable exercise of its discretion: see *R (Squier) v General Medical Council* [2015] EWHC 299 (Admin) at [23].

56. The Panel were faced with a very late application, in the middle of cross-examination of an NMC witness, to admit the email. There was no explanation, let alone any good reason, for the NMC's failure to adduce the email earlier. It was also the case that the Panel had already considered whether to adjourn, albeit for a different reason, at the outset of the hearing and had concluded that there was a strong public interest in the expeditious disposal of the case. In the circumstances, the Panel's wish to proceed with the case and conclusion that it would not be fair to admit the email is readily understandable.

57. Nevertheless, in my judgment, the Panel's decision not to admit the email was wrong for these reasons:

    i) The email was not merely relevant. It was crucial (and potentially conclusive) evidence on the central question before the Panel, namely, whether the BLS certificate was submitted to the Agency in January 2017.

    ii) It would have been unfair to admit the email without giving the Registrants time to consider and address it, including by obtaining expert evidence if they wished. But if the Panel had admitted the email and adjourned the hearing, there would be no prejudice to the Registrants' ability to challenge the email.

    iii) Adjourning the hearing would have given rise to a different type of prejudice, namely the costs and inconvenience that would flow from having to attend, and pay legal representatives to attend, a further hearing, as well as the ongoing stress for the Registrants of having such proceedings hanging over

them. But this prejudice to the Registrants had to be weighed against the public interest in very important evidence of dishonesty being considered by the Panel. In my judgment, the public interest in the Panel considering this crucial piece of evidence substantially outweighed any prejudice to the Registrants that would have flowed from the hearing being adjourned.

iv) In advising the Panel that the crucial issue was fairness, the legal assessor did not draw any distinction between the prejudice to the Registrants if (a) the email was admitted and the hearing continued immediately or (b) the email was admitted and the hearing was adjourned to give the Registrants time to consider and address the email.

v) Nor is there any indication in the Panel's decision that they recognised that any prejudice to the Registrants that would flow from admitting the email would be quite different depending on whether the Panel adjourned the hearing. The Panel concluded that it would be unfair to admit the email because the late disclosure meant the Registrants had been unable to take steps, such as obtaining expert evidence, to seek to challenge its authenticity. However, their conclusion failed to address the fact that the unfairness to which the Panel referred would not arise if they adjourned the hearing to give the Registrants time to consider and address the email. They did not address the NMC's application to adjourn, if necessary, at all.

vi) The Panel were advised that they should give particular weight to fairness to the Registrants. In giving this advice, the legal assessor did not mention that, first and foremost, the function of the Rules is to protect, promote and maintain the health and safety of the public. Nor did the legal assessor advise the Panel of the need to balance fairness to the Registrants against the important public interest in the Panel reaching a correct determination on the charges of dishonesty.

vii) The Panel failed to give due weight to the public interest or to balance it against such prejudice to the Registrants as would have arisen if the email had been admitted and they had been given time to consider and address it.

58. In view of my conclusion on Ground 1, I shall take the remaining grounds relatively shortly.

G Ground 2: The Panel's decision on charge 4 was wrong

59. The Authority put this ground in two ways. First, I should admit the email on this appeal and, taking it into account, I should find the Panel's conclusion that the Registrants were not dishonest was wrong. Secondly, on the evidence before the Panel (i.e. excluding the email) the Panel's conclusion was wrong.

60. In *Council for the Regulation of Health Care Professionals v General Medical Council and Ruscillo* [2004] EWCA Civ 1356, [2005] 1 WLR 717 ("*Ruscillo*"), Lord Phillips of Worth Matravers MR, giving the judgment of the Court, observed at [83]:

> "Where an application is made to the court to adduce additional evidence pursuant to CPR r52.11(2) the court should not apply

> the principle in *Ladd v Marshall* [1954] 1 WLR 1489. The principles in that case have no application to a reference under section 29. The fact that the evidence could have been, but was not, placed before the disciplinary tribunal can have no bearing on whether it should be admitted by the court. The court will, however, be concerned, just as the council should be, to be sure that the introduction of such evidence is truly in the public interest."

61. In addressing Ground 1, I have explained my reasons for concluding that the Panel was wrong to refuse to admit the email. However, it would have been unfair for the Panel to have admitted the email without adjourning the hearing. The Registrants have not yet had an opportunity to take steps, such as obtaining expert evidence, with a view to seeking to challenge the email. Accordingly, I reject the first way in which the Authority put Ground 2. It would be unfair to take into account the email on this appeal, in determining whether the Panel's conclusion was wrong, as the Registrants must first be given a proper opportunity to challenge it, including by admission of expert evidence.

62. I also reject the Authority's submission that (taking no account of the email) the Panel was wrong to conclude that charge 4 was not proven against each of the Registrants. In my judgment, the Panel was plainly entitled to reach the conclusion it did for these reasons:

    i) Ms Lembethe gave evidence that she had completed both the Moving & Handling certificate and the BLS certificate, at Ms Mkhize's request, on the same day in July 2017. Ms McGlinchey's evidence confirmed that the Moving & Handling certificate had been produced by Ms Lembethe, with the help of a member of the office staff, on Fairlie House's computer system on 11 July 2017. As the BLS certificate was produced using a blank "in house" certificate, there was no comparable evidence from the computer system of the date on which the BLS certificate was produced.

    ii) It was proper to date the certificate from the date of the training, not the date on which Ms Lembethe signed them, as such training certificates expire after one year from the date of the training. The Moving & Handling certificate was properly dated 15 February 2017, although produced on 11 July 2017.

    iii) Ms Lembethe's evidence was that she had looked up Ms Mkhize's training on the computer before producing the Moving & Handling certificate, but she had not realised Ms Mkhize was asking for the BLS certificate, too. When Ms Mkhize reminded Ms Lembethe that same day that she also needed the BLS certificate, Ms Lembethe did not consider it necessary to return to the office to check Ms Mkhize's training record as she had already seen that Ms Mkhize had completed BLS training (albeit it was called CPR, but there was no material difference). Ms Lembethe's evidence was that she misremembered the date of the BLS training and, for that reason, wrongly dated the certificate 25 January 2017.

iv) Ms Lembethe's account of what had occurred had been consistent from the outset of the investigation by Fairlie House and throughout the hearing before the Panel.

v) It was also consistent with Ms Mkhize's signed note produced on 1 August 2017, during the investigation by Fairlie House, in which she stated that the documents had been submitted to the Agency on 14 July 2017.

vi) Mr Netimah's evidence was that Agency staff are required to verify any training documentation upon receipt. Ms Grant only sent the BLS certificate to Fairlie House for verification on 20 July 2017. There was no explanation as to why it was not sent to Fairlie House in January 2017, or shortly thereafter, if it had been received then.

vii) Mr Netimah's evidence was that although Ms Mkhize applied to the Agency in January 2017, the process of completing her registration with the Agency was very prolonged. This was because Ms Mkhize had taken many months to provide certificates and references, despite repeated requests from the Agency. There was no explanation as to why Ms Mkhize would ask for and submit a false BLS certificate in January 2017 in circumstances where she had had an offer of employment from Fairlie House in January 2017 and she had not pursued her application to join the Agency with any urgency.

viii) There was no written or oral evidence from Ms Grant, the Agency employee to whom it was alleged that the BLS certificate was provided in January 2017. Mr Netimah's evidence was that she was not willing to be involved in the proceedings.

ix) There were two copies of the BLS certificate which had been date stamped by Ms Grant. One bore the date 25 January 2017 and the other 27 January 2017. Mr Netimah was questioned extensively about Ms Grant, who he described as "not the most efficient employee". His evidence was that the date stamp she put on a document did not necessarily reflect the date on which it was received. He was aware of this because there had been other occasions where the date stamp was inaccurate. He was not able to say how large the discrepancy had been on those other occasions. In light of Mr Netimah's evidence, it was reasonable for the Panel to consider that no weight could be placed on the Agency's date stamps as evidence of when the Agency received the BLS certificate.

x) Although Mr Netimah's evidence was that the BLS certificate had been received by the Agency in January 2017, he had not been the employee dealing with Ms Mkhize's application, and his evidence was inconsistent both as to whether Ms Mkhize had handed the BLS certificate to Ms Grant in person or sent it to her by email and as to the date on which he said it had been submitted by Ms Mkhize.

xi) The Panel heard Ms Lembethe's evidence and found her to be a credible witness. They considered her evidence to be clear and consistent and it was to her credit that she had admitted, and taken responsibility for, the mistakes she had made.

xii) Ms Lembethe had worked as a nurse for 33 years and she had worked at Fairlie House for more than 11 years, being promoted on several occasions. There was no record of Ms Lembethe committing any misconduct throughout her lengthy career. The evidence of the NMC's witness, Ms McGlinchey, was that to the best of her knowledge Ms Lembethe's integrity and professionalism had never been called into question before.

xiii) Ms Mkhize's career was not as lengthy, but she too had no record of misconduct.

xiv) The Panel's evaluative judgment should be given substantial weight because it had the advantage of seeing the witnesses give evidence over several days.

H Ground 3: Mistakes in the way the case was prosecuted

63. The Authority's final ground of appeal is that "the way in which the case against the Registrant was charged and/or prosecuted meant that important aspects of the Registrant's conduct were not considered adequately or at all". Put in that way, the ground is without foundation. The Authority has not raised any concern about the adequacy of the charges laid against the Registrants. Nor can it be said that the way in which the cases were prosecuted meant the Panel did not consider the key aspect of the Registrants' conduct, namely whether they had been dishonest.

64. However, Mr Mant submitted that the NMC's failure to obtain and exhibit the email, disclosing it in good time before the hearing to the Registrants, amounted to a form of "under-prosecution" equivalent to the prosecutorial failings in *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and Jozi* [2015] EWHC 764 (Admin) ("*Jozi*") and *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and X* [2018] EWHC 70 (Admin) ("*X*").

65. In *Jozi* Singh J allowed an appeal on grounds including a failure by the regulator to put crucial evidence before the panel [30]-[32] and a failure by the panel to intervene where the evidence was insufficient [33]. In *X* a decision of the NMC to offer no evidence was overturned on various grounds including the regulator's flawed approach to evidence gathering. Elisabeth Laing J observed:

> "65…I nonetheless record my unease at the superficial approach which the NMC took to gathering evidence. The NMC recognised that evidence about the proceedings in the Family Court was relevant, but took no proper steps to get that evidence. It simply gave up when it received HMCTS's reply to its inquiry, and then, wrongly, decided that it would be disproportionate to do more. It does not seem to have considered whether it could get relevant and more direct evidence to support the allegation from other sources, such as from various medical professionals who had dealt with the case. I consider that such an approach does not in any way recognise the public interest in the thorough investigation of allegations of misconduct by registrants, and the need to maintain public confidence by investigating such allegations

> properly. The NMC has express powers to require evidence, and they have been given to the NMC to enable it to investigate allegations properly.
>
> 66. I also therefore consider that the NMC's approach to gathering evidence in this case was flawed. …"

66. Mr Standing submitted that the threshold is high for the court to allow an appeal on the basis of mistakes by the regulator in prosecuting disciplinary proceedings. He emphasised that in *Ruscillo* at [83] the Court of Appeal said that, on appeal, the court would be concerned to determine whether the introduction of new evidence is "*truly in the public interest*" (emphasis added). He submitted that the mistakes made in this case did not reach that level.

67. I accept that for this ground to succeed the mistakes on the part of the regulator must be shown to be serious.

68. In this case, it was clear that a crucial issue was when Ms Mkhize submitted the BLS certificate to the Agency. The NMC obtained two witness statements from Mr Netimah. In the first of these he said the BLS certificate was "sent" to Ms Grant on 27 January 2017. In the second he said Ms Grant "received" the BLS certificate on 24 January 2017 and that it was an "original" document. It was readily apparent on the face of these witness statements that there was a question as to how and when the BLS certificate was provided by Ms Mkhize to Ms Grant. If the original had been provided to Ms Grant, it would have had to have been delivered (e.g. by post) or handed over in person, in which case the NMC needed to take steps to adduce evidence of when and how it was received. It appears that if the NMC had taken the necessary steps to clarify how and when the BLS certificate had been received, they would have been told that it was received as an attachment to an email, which the NMC should have found and disclosed together with evidence of its provenance.

69. During the hearing the NMC disclosed a second copy of the BLS certificate with a different date stamped on it by the Agency. No explanation was given for the late disclosure of this document. The NMC should have been aware earlier that it had two copies, with different date stamps, of this key document, and it should have investigated how that came to be.

70. On the other hand, although the NMC's approach to gathering evidence can fairly be criticised, they had sought and obtained two witness statements from Mr Netimah and in neither of them had he said that the BLS certificate had been sent by email, nor had the Agency provided the email to the NMC. Moreover, the NMC may have felt confident prior to the hearing that the combination of the handwritten date on the BLS certificate and the Agency date stamp would be sufficient to establish that it was produced and submitted to the Agency in January 2017. It would be understandable if the NMC did not anticipate that the reliability of the date stamp as evidence of when the Agency received the BLS certificate would be so effectively demolished.

71. In my judgment, although I regard this issue as finely balanced, it has not been established that the way in which the NMC investigated and prosecuted this case was so seriously flawed that the appeal should be allowed on that ground.

I Conclusion

72. For the reasons given above, in respect of each Registrant, the appeal is allowed and charge 4 will be remitted to be considered afresh. I will hear from the parties as to the precise terms of the order and any directions that may be necessary to ensure that the email is admitted in evidence and the parties have an opportunity to adduce evidence, including expert evidence, in respect of it.