Reasons for the substantive hearing of the Conduct and Competence Committee panel
held at
NMC, Centrium, 61 Aldwych, London
On
25-28 November 2008 and 14-16 April 2009

Name:	**Margaret Haywood**
PIN:	**84D0811E**
Part of register:	**Sub Part 1 – Adult** **Sub Part 2 – Adult**

Facts proved:	1ii
Facts not proved:	1i, 2
Fitness to practise:	Impaired
Sanction:	Striking Off order
Interim Order:	Interim Suspension Order

Charges read as follows:
Between 3 November 2004 and 5 May 2005, whilst working as a Registered Nurse on acute medical wards Vallancia, Chichester, Peel and Stewart at Brighton and Sussex University Hospitals NHS Trust, you:

1. Participated in covert filming to examine nursing care resulting in:

   (i) Raising concerns about patient care in the BBC Panorama documentary "Under Cover Nurse" when you should have reported the concerns in accordance with Trust policy;

   (ii) Breaching patient confidentiality.

2. On or about 20 April 2005, failed to assist or offer to assist Staff Nurse Rajendra Chooarmun and Martin Johnson when a patient was having a grand mal seizure on Peel and Stewart Ward, when it would have been appropriate to do so.

And in light of the matters set out above your fitness to practise is impaired by reason of misconduct.

Reason following the application of no case to answer in respect of charges 1(i) and 2:
The panel has considered the submissions of Dr Johnson of no case to answer in relation to charges 1(i) and 2 and Miss Birks replies very carefully. It has reached the decision that the registrant has no case to answer in respect of both those charges. The reasons are as follows:

Charge 1

Under the registrant's contract of employment, the registrant was obliged to comply with all the policies of the Brighton and Sussex University Hospitals NHS Trust. That Trust had a Public Interest Disclosures Policy known as the Whistle Blowing Policy. Under that policy an employee, in this case a bank nurse, the registrant, was

protected if she made disclosures to an external body (e.g. the media)

if in addition to the tests for regulatory disclosure, (such disclosure) was reasonable in all the circumstances and (was) not made for personal gain.

In addition there were a number of preconditions to win protection for wider disclosure. They included:

Your concern had already been raised with the Trust …… or
Your concern is of an exceptionally serious nature.

In this case there was evidence from Mr Kemp, Head of Matrons, that patients and their relatives had made complaints and raised concerns about fundamental basic nursing failures which were occurring on Peel and Stewart Ward in summer and Autumn 2004. In addition there were staff complaints. In consequence of those complaints the BBC had engaged the registrant to seek employment as a bank nurse in the Hospital and to film the conditions on that ward for the Panorama Programme. The NMC adduced no evidence of any personal gain made by the registrant in respect of her disclosures. The evidence was that the nature of the complaints was consistent with the sort of concerns revealed in the registrant's film. In those circumstances the registrant was entitled to raise concerns under the Whistle Blowing policy.

The questions which therefore arise are whether there was an obligation on the registrant under the policy to raise the concerns internally, and if there was, whether there was evidence that the registrant did not discharge that obligation. As will become clear, the panel is not satisfied that the evidence can establish that the registrant did not complain about the conditions on the ward internally.

In any event the policy imposes no hard and fast obligation upon the registrant to raise her concerns internally. Step one of that policy is expressed in this way:

If you have a concern about any malpractice (including fraud), we hope you will feel able to raise it first at the earliest possible stage with your manager.

If the registrant was not happy with raising it with her manager, likewise she was invited to raise the matter with a number of Executive Directors there listed. If those channels had been followed, and she still had concerns, or if she felt the matter was so serious that she could not raise it with any of those persons, she was invited to contact the Chief Executive. She also had the option of raising it with the NHS Counter Fraud Line and the Department of Health.

The policy does not therefore require her to raise her concerns internally. It does refer to tests for regulatory disclosures but none are set out in the policy. As mentioned the policy goes on to make provision for raising concerns externally (including to the media). Under the policy for making external contact with the media she has to act reasonably. In this case there was no evidence that she was ever made aware of the fact, as was the case, that the NHS Trust had in fact started its own internal investigation of the complaints which it had received in the period summer and Autumn 2004. The evidence did not suggest that that investigation was proceeding apace. The first occasion when that investigation was activated was when Mr Kemp, the Head of Matrons, carried out an inspection of the ward on 17th December 2004. The report which he ultimately came to produce, the Clinical Governance Investigation into the Standards of Care and Nursing Management on Peel and Stewart Ward was not published until April 2005. In fact that report and

recommendations therein contained was in the view of the panel not very impressive. According to the Director of Nursing, Alison Robertson, much more significant recommendations were made following the showing of the Panorama Programme. It seems to the panel that in view of the fact that there was no evidence that the complaints which were made by the public and staff in summer and Autumn 2004 were being addressed, it was reasonable for the registrant to make disclosures to an external body, in this case the media.

But of course she was not able to make those disclosures unless she met the preconditions set out above. In the panel's view there was evidence that those preconditions were met. The concerns which she raised had already been raised with the Trust. To say otherwise would be to pick out the plums and ignore the duff. The complaints were about basic nursing care, feeding and hydrating elderly patients, enabling them to feed, placing them on commodes or taking them to the lavatory, drawing up care plans, completing fluid balance charts, administration of pain relief on time etc. And in the view of the panel the concerns were also of an exceptionally serious nature. The failure to deliver basic nursing care to these patients, many of whom were in the last stages of their lives, rendered many of their lives miserable. It was so serious especially because it was so fundamental. There was a failure to meet basic human needs.

The panel does not therefore find that there was any or sufficient evidence upon which it could conclude that there was any reason why she should not report her concerns externally.

This is also a case where there was in fact evidence that the registrant did report her concerns to her Ward Manager after the holder of that post changed on 15th March 2005. Carol Harris, the new manager, explained that the registrant did come to her to raise valid concerns relating to patient care.

It seems to the panel therefore quite possible that the registrant would have made similar observations about the ward in the period from November 2004 (when she started) to 15th March 2005. The NMC did not call the manager who was in control of the ward during that period. There was therefore no evidence that she did not make similar internal complaints and observations during that period. Miss Birks' only way of dealing with that submission by Dr Johnson was to say that the majority of the concerns in the film were drawn from the filming of the ward in the period after 15th March 2005, and that the registrant did not make complaint to Carol Harris in respect of all those matters in that period. The panel does not accept Miss Birks' argument. It seems to the panel that most of the film related to the earlier period. In any event it could not reach a conclusion to the effect that the film related to the period after 15th March 2005 on the balance of probabilities.

Charge 2

So far as charge 2 is concerned, the panel does not consider that there is any or sufficient evidence upon which it could find that the registrant failed to assist or offer to assist either of the nurses. The panel is quite satisfied that the evidence in fact establishes that she did offer to assist by entering the relevant part of the ward when Student Nurse Martin Johnson called for help.

In fact shortly after she arrived Staff Nurse Raj Chooarmun likewise entered the room and was in fact standing in front of the registrant, between her and the patient who was fitting and Student Nurse Johnson. Staff Nurse Chooarum was concerned to obtain a hoist in order to lift the patient as he suffered from a bad arm. All the nurses

who spoke to this proposition regarded that as inappropriate.

In fact Student Nurse Johnson went to obtain assistance from his mentor Nurse Alison Woodward. This was at a time when Staff Nurse Chooarum was in the room as Nurse Woodward mentioned that he was still there when she entered the room with Student Nurse Johnson. The panel found her evidence to be credible.

At a later time Staff Nurse Chooarum may have left the room to collect the hoist (the evidence is conflicting as to whether in fact he left the room or it was obtained by a Nursing Auxiliary), but in any event there was no evidence that if he did, the registrant was left alone with the patient. At that time Student Nurse Johnson was there. It is common ground that the Student Nurse was coping with the situation. There was no criticism of his conduct. Nor did the evidence suggest that there was any room for the engagement of a further nurse either when Staff Nurse Chooarum was purporting to assist Student Nurse Johnson, or when Nurse Alison Woodward was assisting him.

In fact this allegation only found expression in June 2006, some 14 months later when Mr Kemp was seeking information concerning the behaviour of the registrant on the ward. There was no criticism of her behaviour at the time by any of the nursing protagonists in the incident. There was no untoward incident form completed. This allegation seems to have first surfaced when Student Nurse Johnson was reviewing his reflective account of this incident. He thought at that late stage that it was surprising that the registrant had not, at an earlier stage, played a more active part. The evidence was in fact that she took over upon the arrival of the Doctors. Until that time she was in the presence of a Student Nurse who was coping with the situation and / or a Staff Nurse who was senior to herself, Nurse Chooarmun. She was not given any direction as to what she should have done.

The Legal Assessor gave advice to the effect that the panel should consider firstly whether there was any evidence upon which it could rely to establish that there was an obligation upon the registrant to assist the nurses in caring for the patient who was undergoing the Grand Mal fit, and if so, whether there was any evidence which established that she could have been able to assist, and if so, whether she failed to assist. The panel accept that there was evidence upon which it was entitled to rely to establish that the registrant had an obligation to assist if she could, but no or insufficient evidence to establish that there was in fact any opportunity to assist.

Dr Johnson's 2nd objection

Dr Johnson makes a further objection to a question or a line of questioning from Miss Birks which was to this effect:
Do you think that the relatives of the patient had a right to know that a film of him might be going to be broadcast.
Dr Johnson has quite properly drawn to our attention the distinction between disclosing information which is private and disclosing information which is confidential. She argues that if the information is merely private, rather than confidential, as she asserts it is, the issue of whether the relatives of the patient had a right to know that the film might be broadcast is not relevant in the context of the charge.

The relevant footage of film apparently shows the grandfather of the author of the letter in hospital clothes on Peel and Stewart Ward which was an acute medical ward. He is merely in the background.

The panel has to decide whether the information about the patient to be discerned from the film is merely private information or whether it is information imparted to the nursing staff on the ward which has the necessary quality of confidence about it. See A-G v. Guardian Newspapers Ltd (No. 2) [1990] AC 109.

The panel's view is that when the patient caused himself to be admitted onto a ward, which was an acute medical ward, and to make himself available to be treated on that ward he was imparting information to the ward staff and the hospital which imported an obligation of confidence about it. That information was that he was sufficiently unwell to warrant being admitted and treated on that ward. That was information which he was discretely imparting to the ward staff.

In the circumstances the panel considers that it is fair and relevant for Miss Birks to ask questions about whether the relatives were entitled to know that a film which included footage of their relative might be shown because that film disclosed confidential information imparted to the nursing staff.

Reason for the finding of facts:
Charge 1(ii) is found proved as admitted by the registrant.

Reason for the finding of impairment
The admission which the registrant makes in this case, upon which the facts were found is that between 3rd November 2004 and 5th May 2005 whilst working as a registered nurse on acute medical ward Peel and Stewart at Brighton and Sussex University Hospitals NHS Trust she participated in covert filming to examine nursing care resulting in her breaching patient confidentiality.

The patient confidentiality which she broke in so doing concerned the care (or lack of care) which (certain) patients on that ward experienced in that time frame and their suffering in consequence.

The registrant had agreed to act as an undercover nurse for the Panorama Programme before filming started. In fact she worked at a number of hospitals including the Royal Sussex County Hospital ("the Royal Sussex") where she was later to film. All of the hospitals where she worked had been the subject of complaint. But as she took the view that conditions had improved in all but the Royal Sussex County Hospital, filming was not warranted in those hospitals. However, in her opinion, conditions had not improved in the Royal Sussex.

The filming which the registrant undertook in the Royal Sussex was under a protocol which was included in exhibit 7. The panel heard that the registrant participated in the drafting of that protocol along with the programme producer Liz Bloor who gave evidence. There was no such protocol in existence at that time and the panel has been told that the protocol drafted constitutes something of a template for use in similar situations. The protocol includes the following paragraphs:

EVIDENCE we will not begin filming in any hospital until we are sure that there is a sufficient evidence to warrant an undercover investigation. First, we will endeavour to find testimony from former patients and / or families and / or nursing staff. M will go to work on the ward and look for both sets of bad practice as listed above. There will then be an editorial decision about whether filming is warranted.

PRIVACY There are going to be major problems with privacy. M will be recording patients at their most vulnerable and compromised. She will attempt

wherever possible not to record any highly personal or intrusive procedures, however if she feels she needs to record evidence of bad practice she will continue to record but will try to capture medical staff faces wherever practical.

TAPES We will inform patients and / or their families that we have been recording on the ward. Our aim will be to wipe tapes which do not need to be preserved for various reasons but not wiped until senior member prod team has agreed.

FAMILIES Unless families have explicitly alerted programme teams to bad practice, they will not be informed about filming until we have finished and reach the consent stage. Once filming is completed, we will seek the consent of every patient filmed or where they are too ill or incapable of giving informed consent, families or where appropriate, a close friend will be contacted and given time to come to a decision without pressure.

It is apparent that the protocol provided and therefore the registrant agreed for filming to take place without any consent being obtained from the persons being filmed, or their families or friends. The films taken by the registrant were to be and in fact were handed to the Panorama team consisting of a number of individuals. That process therefore represents a breach of the code of practice. Under paragraph 5.1 of the code of professional conduct, information about patients shall be confidential. Moreover there was a breach of paragraph 5.2 of the code since patients' wishes should be sought regarding the sharing of information. If a patient is considered incapable of giving permission, a nurse should consult relevant colleagues.

But paragraph 5.3 of the Code sets out certain circumstances whereby information may be disclosed outside the team (of nurses and carers). If consent cannot be obtained for whatever reasons, disclosures may be made only where they can be justified in the public interest (usually where disclosure is essential to protect the patient or client or someone else from the risk of significant harm).

The registrant relies on that sub - paragraph to justify her action in disclosing the confidential information to the Panorama team. Moreover, by reference to the paragraph in the protocol relating to FAMILIES she can say that no patients would be shown in the Panorama programme unless they or their families had given their consent. She says she was justified in carrying out the filming and breaching patient confidentiality because of the awful conditions on the ward.

It seems to the panel that the registrant's stance must be tested by reference to the words in parentheses. Was disclosure of the confidential information essential to protect the patient from the risk of significant harm?

The panel is sensible to the fact that there may be instances where disclosure of confidential information may be essential to protect a patient from significant harm. But it addresses the issue of whether it was essential in this case. The panel has concluded that, for it to be "essential" for the registrant to breach confidential information, she must first have exhausted all other avenues of addressing the inadequacies on the ward; alternatively there must be an immediate need. So far as the latter is concerned, there was no immediate need since the Panorama programme would not be screened for some time, that is until after the editorial process had been completed.

As to the matter of whether all other avenues had been exhausted, the panel cannot so find. The registrant did not exhaust the process of making representations as to

conditions on the ward to management or senior management. She did not make disclosures to any external bodies in such a way as not to disclose confidential information. Effectively she bought into the concept of making the film, and suspended her obligations under the Code to protect and support the health of individual patients and clients by not making (sufficient) representations internally or externally in a way which would preserve patient confidentiality. She relies on the paragraph in the Protocol entitled FAMILIES set out above. But that does not absolve her from her duty to preserve confidentiality. Moreover by relying on that paragraph, she relies not on her own integrity to obtain the consent of a patient / relative / friend but on the integrity of the makers of the Panorama programme.

In the circumstances, the panel find the registrant is guilty of misconduct. She followed the behest of the film makers who were concerned "to portray the truly appalling care given to some elderly patients" to quote from the Record of Secret Filming and Recording application for permission to film, rather than her obligations as a nurse. There was a conflict of interests here and the registrant followed her role as a person engaged by the Panorama programme rather than her duties as nurse.

Further the panel finds that the registrant's fitness to practice is impaired by reason of her misconduct. There has been no indication from her that the misconduct of which she is guilty has been remedied. Rather she relies on the justification of exposing the conditions on the ward to the public not the need to discharge her duties as a nurse.

Reason for the sanction:
When considering what if any sanction to impose the panel has had regard to the indicative sanction guidance published by the NMC. It has taken into account the public interest and the registrant's own interests. By the public interest the panel is referring to the need to protect the public, to maintain standards of nursing in this country and to maintain public confidence in the profession and the NMC. The panel has sought to strike a proportionate balance between those interests and the aggravating and mitigating factors of the case.

First the panel considered whether to take no action but decided that the misconduct was too serious.

Next the panel has considered whether it should impose a caution. Such a sanction is available to the panel under the 2004 Rules provided it does not exceed 5 years. The panel took into account that no patients were directly harmed during the filming and that she has a previous good history. The panel read the two testimonials submitted by the registrant both of which were relevant and appropriate. It took account of the fact that there had been no repetition of her behaviour since although it would be hard to conceive whether an opportunity for this would have been possible since the airing of the programme and her identity was known.

However, the panel consider that her misconduct was not an isolated incident in the sense that filming took place on only one occasion but was concerned that breaches of confidentiality took place on many occasions with hours of filming being collected.

In addition the panel decided that she was not acting under duress but had accepted the role of undercover nurse knowing that this would entail breaking confidentiality. In fact, in an interview she had said that she was "worried that the patients or their relatives would feel I had been a double agent and that I had betrayed them or betrayed their confidence……" Nevertheless she went ahead with the filming.

The panel is not satisfied that the registrant has demonstrated any real insight into her misconduct. Although she admitted the facts of the charge, she did not admit that they amounted to misconduct. When initially asked by one of the members of the panel would she make that film again she explained she would not do so because of the troubles she had experienced by being brought before the NMC. It was only when pressed that she indicated that now that she knew about whistle blowing policies she would not make another film.

Taking all these matters into account, the panel does not consider that a caution order is an appropriate or adequate sanction in this case.

Next the panel has considered whether or not it is appropriate to impose a Conditions of Practice Order. The panel rejects that course. This was a deliberate decision by the registrant, a decision whereby patient confidentiality was compromised. Moreover, Conditions of Practice would be impractical as they have to have measurable and achievable aims and outcomes.

Next the panel has considered whether or not to impose a suspension order. A suspension order is appropriate if the misconduct is not fundamentally incompatible with being a nurse. The panel is of the view that the misconduct found is fundamentally incompatible with being a nurse. The registrant embarked upon filming many vulnerable, elderly patients in the last stages of their lives knowing that it was unlikely that they would be able to give any meaningful consent to that process, in circumstances where their dignity was most compromised. The registrant could have attempted to address shortcomings by other means. But this was never a course of action which she fully considered. She was intent of capturing the realities of life on the ward by means of filming.

In the view of the panel this was a major breach of the code of conduct. A patient should be able to trust a nurse with his/her physical condition and psychological wellbeing without that confidential information being disclosed to others. Only in the most exceptional circumstances should the cardinal principle of patient confidentiality be breached. Those circumstances did not pertain here. Although the conditions on the ward were dreadful, it was not necessary to breach confidentiality to seek to improve them by the method chosen. In any event, this method was unlikely to benefit the patients that were on the Ward at the time of filming and under her care.

The panel has therefore decided to strike the registrant off the register.

Reason for the interim order

Given the seriousness that led the panel to order the Registrant's name to be struck off the register, it would not be in the public interest for her to be able to practice as a nurse pending an appeal. In the panel's view it is necessary in the public interest for an interim suspension order to be made.