

ENGLAND AND WALES / JUDGMENT

Sharp v Nursing and Midwifery Council

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Neutral Citation Number: [2011] EWHC 2174 (Admin) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION THE ADMINISTRATIVE COURT CO/9395/2010 Royal Courts of Justice Strand London WC2A 2LL Wednesday, 20 July 2011 B e f o r e: MR JUSTICE HOLMAN

- ----- Between: SHARP v NURSING AND MIDWIFERY COUNCIL
 - ----- Computer-Aided Transcript of the Stenograph Notes of WordWave International Limited A Merrill Communications Company 165 Fleet Street London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7404 1424 (Official Shorthand Writers to the Court)
 - ----- Claimant Defendant Mr P Stott (Direct Access) appeared on behalf of the Claimant Mrs A Thompson (instructed by Nursing and Midwifery Council) appeared on behalf of the Defendant
 - ----- J U D G M E N T MR JUSTICE HOLMAN: This is an appeal pursuant to Article 38 of the Nursing and Midwifery Order 2001, SI [2002] No 253 from a decision of the Conduct and Competence Committee of the Nursing and Midwifery Council reached on 4 August 2010. The appellant is a registered nurse, Matthew Alan Sharp. In very brief outline, the facts and circumstances which gave rise to these disciplinary proceedings were as follows. During 2006 and until the middle of March 2007, the appellant nurse was employed as the Clinic Manager of the Orthopaedic Outpatient Department of the Greater Glasgow and Clyde NHS Authority. Between 27 November 2006 and 14 March 2007, when his employment terminated, he claimed to be sick and unable to work and did not in fact work. It was later to emerge, however, that on three consecutive nights, namely the nights of 19/20, 20/21 and 21/22 December 2006, he actually worked shifts as a bank nurse for which he was paid. The short and obvious point was that if he was in fact well enough to work shifts as a bank nurse, he was on the face of it well enough to work in his employed job. There was an investigation by the Investigating Committee of the Nursing and Midwifery Council. The investigation seems to have taken place during 2008 and
2009. One of the sources of evidence that was provided to the Investigating Committee was a witness statement dated 3 December 2008 (I stress, 2008), with some attached exhibits. Alison Sannachan is or was a Payroll Team Manager with the NHS Greater Glasgow and Clyde Authority. She stated in her statement that Mr Sharp had worked bank shifts over the nights which I have mentioned. She exhibited as AS1 a printout of the relevant Bank Staff Management System and gave a narrative explanation of the entries in the exhibited printout in the body of her statement. I will return to that later. The investigation resulted

in the appellant being formally charged with two substantive charges. In brief, the first charge was to the effect that he had acted dishonestly by working shifts as a bank nurse while claiming to be off sick on the three nights in question in December 2006, which were expressly pleaded and charged. The second charge was to the effect that in various stated ways he had failed to adhere to his employer's sickness absence policy during the period November 2006 to March

2007. The overall charge was that: "In light of the above, your fitness to practise is impaired by reason of misconduct." It is not necessary for the purpose of this judgment and my decision today to describe the subsequent course of the proceedings, although I mention that the appellant clearly did not help himself by not fully participating in the proceedings, or attending the final hearing in August 2010, or making the admissions which his counsel, Mr Philip Stott, asserts today that he now makes. So the substantive hearing occupied two full days before the Nursing and Midwifery Council. Two witnesses were called to give oral evidence. Other written evidence and material, including the witness statement of Alison Sannachan, was considered by the committee; and ultimately the charges were found proved. No complaint of any kind has been made with regard to any part of the course of the proceedings up to the point where the committee did find both charges proved. On the second day of the resumed hearing, the committee had to proceed through two discrete steps or stages. First, they had to consider whether, as a result of the facts that they had found proved, the fitness of the appellant to practise was, as of that day, impaired; secondly and discretely, if so, what sanction to impose. They did conclude that his fitness to practise was impaired as of that day and there is no appeal as such from that conclusion. They then had to consider, and did consider, the range of possible sanctions as provided for in Article 30 of the 2001 Order. There is an important and well known document which was adopted by the Nursing and Midwifery Council in June 2004, known as the "Indicative Sanctions Guidance for Panels of the Conduct and Competence Committee..." The purpose of the Indicative Sanctions Guidance is to assist individual committees in approaching the question of sanction in a logical and legally correct way; and to assist in achieving uniformity of approach, whilst respecting that the final choice of sanction to impose in any given case must necessarily be discretionary. Paragraph 9 of the Indicative Sanctions Guidance makes quite clear that the range of available sanctions must be considered in an ascending order of severity. One such sanction is the possibility of imposing conditions of practice, but the committee considered that that sanction was not relevant or in point in the present case, since the conduct and dishonesty in point did not relate to the actual clinical practice or competence of the appellant. It is common ground on this appeal that the committee were right for those reasons not to impose a conditions of practice order. It is not suggested in the present case that they realistically could have taken no further action. Accordingly, in the present case, the available sanctions and the order in which the committee were required to consider them were: first, a caution order; second, a suspension order; or third, a striking-off order. The actual order finally selected and imposed by the committee was a suspension order. It is part of the case of the respondent

council at this appeal, as expressed in paragraph 12 of the written skeleton argument of Mrs Anupama Thompson, their counsel, that: "...[the appellant] was fortunate to receive a period of suspension rather than erasure. It is arguable that his case should have been dealt with more severely rather than more leniently." However, the appeal is that of the appellant nurse who argues that the committee imposed too severe a sanction by making a suspension order for one year, and that a sufficient and therefore the correct or appropriate sanction was a caution order. This appeal was initiated by an appellant's notice, filed on 3 September 2010. It was accompanied by written grounds of appeal by counsel, Mr John Lynch, dated 2 September 2010; an advice on appeal against sanction, also by Mr Lynch dated 2 September 2010; and a commendably short skeleton argument by Mr Lynch dated 16 SMITH BERNAL WORDWAVE September 2010, which largely referred back to, and relied upon, the arguments in his more detailed advice on appeal against sanction. The formal grounds of appeal, which were lodged about 10 1/2 months ago and have subsisted from that day until this very day, are commendably succinct. They allege that the sanction imposed was "disproportionate and unreasonable" because the committee

- (a) did not have sufficient regard for the Indicative Sanctions Guidance, and in particular the provisions thereof on caution orders; and (b) made a decision which was inconsistent with decisions made in similar cases heard by the Council. The grounds continued: "Alternatively, even if the sanction imposed by the [committee] was not disproportionate in the circumstances at that time, the appellant now admits the factual allegations, misconduct and impairment of his fitness to practise. Consequently, the sanction imposed on the appellant is disproportionate and unfair." Within paragraph 4 of his written skeleton argument of 16 September 2010, Mr Lynch wrote: "It is of note that the appellant, having had the benefit of legal advice, now makes full admissions to the factual allegations against him, and admits that his fitness to practise is impaired by reason of his misconduct." At paragraph 8, Mr Lynch wrote: "Even if a caution order was not the appropriate sanction at the time of the [committee's] decision, it is now a fair and proportionate disposal, given the appellant's admissions, and the further evidence that he shall present to the High Court." At paragraph 3, Mr Lynch wrote: "Prior to the hearing, the appellant intends to provide further evidence to the court, as outlined in paragraph 23 of the advice of 2 September 2010..." At paragraph 23 of that advice, Mr Lynch trailed that there would be further evidence as to the appellant's admissions and insight; as to the duress under which he said he was placed at the material time, due, as I understand it, to the illness of his wife and mother of his children; and "further positive testimonials shall be placed before the High Court". Very recently, there has been a change of counsel and Mr Philip Stott appears today on behalf of the appellant. I wish to stress very clearly that what I am about to say is not intended in any way whatsoever as a criticism of Mr Stott, who has come into this case effectively at the last minute. Nor is it necessarily any criticism whatsoever of Mr SMITH BERNAL WORDWAVE Lynch, for I have no idea of the extent, if any, to which Mr Lynch has been instructed in, or engaged in, this case at any time subsequent to those documents which he prepared in September 2010. But, in the light of the passages which I have quoted from those documents, it is frankly very

surprising indeed to me that even today, the day of the hearing of this appeal, there is no document of any kind whatsoever written or signed by Mr Sharp, the appellant. Mr Stott merely tells me today, on instructions and admittedly in the presence of the appellant who is in court as I speak, that he does now make full admissions of the factual allegations, and does now admit that his fitness to practise was impaired, and does now admit that he was dishonest. But there is, frankly, as yet no evidence that Mr Sharp really does admit and face up to his wrongdoing and the dishonesty, and no evidence yet that he displays insight into that misconduct. As to the further evidence as to duress and further testimonials which Mr Lynch held out over ten months ago, a very small clip of documents was finally and for the first time faxed to the office of this court at 4.27 pm yesterday, when the office of the court is in fact closed; only emailed to Mrs Thompson on behalf of the NMC sometime yesterday; and only shown to me personally very shortly before the hearing this morning. That material consists of a short letter dated 18 July 2011 (ie two days ago) from Mrs Elaine Sharp, the appellant's estranged wife; an emailed testimonial, dated 15 July 2011, from Andy Willcocks, Theatre Manager at the Harley Street Clinic, at which it is said (although the dates are completely unspecified) that the appellant worked at the Portland Hospital in London; and the briefest of notes, emailed on 19 July 2011, from somebody called Amanda Closier, Deputy Head of Compliance with HCL Medical Technical, referring to some recent employment by the appellant with that organisation and describing him as "an excellent employee ... without any issues." That is the totality of the material that has been produced up to this moment to support the second limb of this appeal, namely that even if the sanction imposed was not disproportionate at the time, new facts and evidence make it now disproportionate. I make very little observation or comment upon the grounds of appeal that were originally advanced. Today, however, orally and for the very first time, Mr Stott has raised and identified a completely new point, which simply did not feature at all in the appellant's documents drafted by Mr Lynch during September 2010, nor, as I understand it, in any document or correspondence (if any) between September 2010 and today. The point, however, seems to me to be one of considerable substance; and I cannot, in the end, allow Mr Sharp, the appellant, to suffer possible injustice simply because the point has been raised at so late a stage. When, on the second morning of the hearing, the committee announced their decision on the issue of fitness to practise, they said (now at page 8 letters A to B of the official transcript of the hearing on 4 August 2010): "The panel noted that in the information it had before it and produced by Ms Sannachan, there was evidence that the Registrant had worked four additional shifts for the Trust's nurse bank in January 2007. These shifts precede the Registrant's written notice of resignation on 14 March 2007. SMITH BERNAL WORDWAVE There had therefore been a repetition of the misconduct which formed the basis of charge 1(i). This evidence contradicted the Registrant's assertion in his communication of 2 August 2010 that 'if I was being dishonest why only work three shifts and why not work any more for personal gain?'" Pausing there, I emphasise within that passage the phrase "There had therefore been a repetition of the misconduct..." As I have already said, the panel concluded that his fitness to practise was still impaired and, notwithstanding the passage which I have just quoted, there is no challenge on this appeal to

that finding and conclusion. The panel then proceeded to consider the question of sanction and there were a number of exchanges between the panel and Ms Hannah Fellows, who was the case presenter on behalf of the Council at the hearing, and also with the legal assessor at the hearing, who was Ms Karen Aldred. Nowhere during those exchanges was there any reference by anybody, including the chairman (who appears to have been a lady, Ms Judith Way) or any member of the committee, to the point that the committee had recently referred to, namely that the evidence produced by Ms Sannachan appeared to indicate "a repetition of the misconduct". That seems to me with hindsight to have been unfortunate. At all events, the committee then retired again for a long time, between 1.00 pm and 4.30 pm, before returning to announce their sanction. They correctly approached the matter in the ascending order that the Indicative Sanctions Guidance requires. Paragraph 12 of the Indicative Sanctions Guidance lists a number of factors that are relevant to considering whether or not to make a caution order as follows: "12. This sanction may be appropriate where most of the following factors are present. This list is not exhaustive. "12.1 There is evidence that behaviour would not have caused direct or indirect patient harm. "12.2 There was early admission of facts alleged and/or: "12.2.1 an insight into failings "12.2.2 it was an isolated incident which was not deliberate "12.2.3 there is a genuine expression of regret or apology. "12.3 The registrant was acting under duress. "12.4 The registrant has previous good history. "12.5 There has been no repetition of the behaviour since the incident. "12.6 Appropriate rehabilitative or corrective steps have been taken. "12.7 Relevant and appropriate references and testimonials have been received." It is patent from the passage at pages 11 and 12 of the transcript of the hearing on 4 August 2010, as well as from the subsequent written reasons of the committee (which I believe substantially repeat verbatim the transcript of the oral hearing), that the committee had conscientiously and systematically considered one by one the factors there mentioned in paragraph 12 of the Indicative Sanctions Guidance. They referred to "positive mitigating factors" and to the absence of any patient harm. They said that there had been no early admission of the facts and that the registrant had not demonstrated insight as evidenced by him still maintaining his innocence and not accepting his actions were dishonest. They said there was no evidence of any rehabilitative measures having been taken. There was no evidence of remorse or genuine or timely expressions of regret. They then said as follows, which clearly echoed and drew upon what they had earlier said at page 8A to B, when announcing their decision in relation to fitness to practise, which I have quoted above: "This was not an isolated incident and in addition to the three shifts referred to in Charge 1(i) there were four further known occasions when the Registrant has repeated this dishonest behaviour." They then went on to consider a case called Tichard, which they described as having some factual similarities but also some fundamental differences from the present case. Their overall conclusion was that a caution order was not an appropriate or a proportionate measure, and accordingly they moved to the next more severe sanction, namely the suspension from practice order which they imposed.

- Jones The short, but in my view powerful, point that Mr Stott takes today is that when deciding what sanction to impose (and drawing on what they had earlier said when deciding the issue of fitness to practise) the panel wrongly took into account what appeared to them to be four further and later occasions of dishonest behaviour during January 2007. This, submits Mr Stott, could have been the subject of an additional charge, but was not. He submits that the apparent four further occasions during January 2007 should not have been taken into account at all, and that it is not possible to discern how significant an impact consideration of those incidents had upon the overall decision of the committee not to make a caution order. As I have said, nowhere in any part of the transcripts of the whole of this two-day hearing was there any reference by the committee to either Ms Fellows, the case presenter, or Miss Aldred, the legal assessor, to these apparent four further occasions. There had been no reference to them in the narrative of the witness statement of Alison Sannachan of 3 December 2008 to which I have referred. What appears to have happened is that a sharp-eyed member of the committee had studied exhibit AS1. Ms Sannachan in her statement referred only to the bottom three entries on that exhibit, which relate to 19, 20 and 21 December 2006, and it is only those which were the subject of charge. One can see on exhibit AS1 that the four entries immediately above SMITH BERNAL WORDWAVE the December entries relate to 16, 17, 19 and 22 January 2007 at two different hospitals; first, the Southern General Hospital, and second, the Victoria Infirmary. The committee seem to have made an assumption, which frankly may or may not be correct, that that simply evidences four further occasions upon which the appellant worked as a bank nurse whilst still in employment and claiming to be sick. It seems to me that this detective work by the committee had the potential to aggravate, and may in fact have considerably aggravated, their overall view of the misconduct and dishonesty in point in this case. Indicative Sanction 12.2.2 refers to "an isolated incident". The misconduct charged on 19, 20 and 21 December may have been viewed as three separate "incidents", or one "incident" sustained over three consecutive nights of bank working. But clearly, if account was taken of further working during January 2007, it is less easy to regard the nights of working during January as a separate but nevertheless single "incident", since the nights were not consecutive. The first two nights were 16 and 17 January, but then there was a gap before 19 January and a longer gap before 22 January. So if regard is simply had to the nights of working, then by taking account of the January working, the committee more than doubled the number of nights from three to seven. If the various episodes are regarded as "incidents", then as a minimum they doubled the incidents from one to two, and arguably from one or three to seven. Mrs Thompson has said that in any event even the behaviour charged did not fall within 12.2.2 of the Indicative Sanctions Guidance which refers to "an isolated incident which was not deliberate". As Mrs Thompson submits, even if there was only an isolated incident here, it could not be said to have been "not deliberate". Nevertheless, it seems to me clear that in that part of the reasons the committee were in part addressing 12.2.2 when they clearly and firmly said "this was not an isolated incident". But they went further than that and said "and in addition to the three shifts...there were four further known occasions when the Registrant had repeated this dishonest behaviour". (My emphasis). I agree with Mr Stott that at that

point the committee were moving from consideration of whether "it was an isolated incident" within 12.2.2, to the separate question, whether "there has been no repetition of the behaviour since the incident" in 12.5. Overall, I am left with the clear impression that, having done their detective work, the committee were, or may have been, considerably influenced in their consideration of whether or not to make a caution order by their view that the incident was not isolated and that there were four further known occasions when the registrant had repeated the dishonest behaviour. Mrs Thompson submits, by reference to two authorities which she has rapidly found today, that all of this makes no difference. She has referred me, first, to the case of Nicholas

[2009] EWHC 1048 (Admin) in which Mitting J said at paragraph 16:

- Pillai v GMC "The Fitness to Practise Panel is not determining what sanction to impose upon a doctor by way of punishment, but to determine whether or not his fitness to practise is impaired, and if so, and in the public interest, what SMITH BERNAL WORDWAVE sanction should be imposed upon him... Given that purpose, the panel are, in my view, clearly entitled to take into account, at the stage at which they determine whether fitness to practise is impaired, material other than the allegations which they have considered which suggest that it is either is not impaired [sic] or that it is impaired." In that case, however, the subsequent material that the panel were considering was their own view, formed at the hearing, that the doctor in question had made notes of the procedure in question which were not only "inaccurate" as charged, but were also in fact "dishonest" as found by them. There seems to me to be a world of difference between a panel taking into account, when deciding fitness to practise, the view which they have formed as to the honesty or otherwise of a piece of conduct which was the subject of a charge, and taking into account quite separate behaviour on quite separate occasions which was not the subject of charge at all and which had never been raised with the registrant. The other authority to which Mrs Thompson referred is that of Shankar v General Medical Council [2006] EWHC 2503 (Admin). That case concerned the competence with which a doctor had examined a baby's right foot. The essence of the matter was that the doctor had failed separately to examine the baby's left foot so as to compare the two. There was a conflict in the evidence between the doctor and the baby's mother as to what had happened. As a result of hearing the evidence, the panel concluded that in fact the doctor had falsified the patient notes in relation to the examination. This in turn bore upon the ultimate view that the panel took of the reliability of the evidence of the doctor on the disputed facts. A complaint was made on appeal that it was "unfair for allegations of that gravity to be levelled against the doctor for the first time during the course of the hearing". But Munby J said, at paragraph 39 of his judgment: "In my judgment, the Panel was more than entitled to conclude as it did in relation to these matters. And having concluded as it did, the Panel was equally, in my judgment, entitled to take these serious matters into account as going to the doctor's veracity in deciding where the truth lay on the central or core issue." That seems to me to be no more than the obvious proposition that when, at a fact-finding stage, a court or tribunal concludes that a witness has falsified some material records or evidence, that may bear upon the court or tribunal's view as to the

veracity of the witness in question. It says nothing at all about the appropriateness or otherwise of taking into account when imposing a sanction matters which have never been the subject of any charge or raised with the doctor or registrant in question.

Notwithstanding Mrs Thompson's reliance on those authorities, it is my view that there was a serious error by the committee in this case when they did their own detective work, which they did not discuss at all with the case presenter or their legal assessor, and clearly took the result of that detective work into account in deciding upon sanction. SMITH BERNAL

WORDWAVE The last and overarching submission of Mrs Thompson is that in any event it cannot or should not have made any difference. In support of that submission, she returns to the and what he said in the last judgment of Mitting J in the case of Nicholas paragraph, namely paragraph 27. He said there:

- Pillai "In cases of actual proven dishonesty, the balance ordinarily can be expected to fall down on the side of maintaining public confidence in the profession by a severe sanction against the practitioner concerned. Indeed, that sanction will often and perfectly properly be the sanction of erasure, even in the case of a one-off instance of dishonesty." I observe, however, that that observation was made in the context of a case in which the panel had concluded that the doctor's record-keeping in relation to the medical procedure in point (a circumcision) had been not only inaccurate nor contemporaneous, but dishonest. Clearly, in any case where a doctor, a nurse or other medical professional makes dishonest records of medical procedure, very grave issues of public confidence and public safety are engaged. Any dishonesty by a professional person is a serious matter, but it does seem to me that dishonesty in the relationship between a nurse and his employers with regard to his own health is in a different category from dishonesty on the job, as it were, with regard to the care given to actual patients. The overall conclusion that I have reached is that the existing decision of the committee simply cannot stand, because it does seem to have been significantly influenced by a factor that they should not have taken into account at all, namely the so-called "repetition" of the behaviour. There are two courses now open to me by Article 38(3) of the 2001 Order. I could, by Article 38(3)(c), substitute for the decision appealed against my own decision from the range of sanctions that the committee could have imposed; or, by 38(3)(d), remit the case to the Council to be disposed of in accordance with the directions of the court. I regret the further delay and expense that will inevitably result from remitting this case to be further considered by, and disposed of by, the committee, but it does seem to me that it would be unwise and dangerous of me simply to substitute my own decision. The Statutory Instrument and the general approach of this court to this sort of disciplinary procedure rightly treats the expert disciplinary body as the primary body, not only to find the facts but also to identify and impose the sanction. In any event, the appellant now wishes to place reliance on other matters, namely his alleged admission, contrition and insight, and to more recent testimonials which, as I have said, have only been deployed in, frankly, a very half-baked and last-minute way at this hearing. So my overall conclusion is that I must allow this appeal and remit the case to the Conduct and Competence Committee of the Nursing and Midwifery Council for them to dispose of it

in accordance with the following direction, namely that they must not take into account the supposed "four further known occasions" during January 2007, when the registrant supposedly repeated the dishonest behaviour, unless and until those occasions have been formally and fairly put to the registrant in due time before the hearing and he has had a proper opportunity to deal with them; and unless, if he SMITH BERNAL WORDWAVE denies them, those occasions have been fully and properly proved by evidence to the required standard of proof. Are there any other matters with which I should now deal? MRS THOMPSON: My Lord, notwithstanding that the appeal has been allowed, as your Lordship has indicated this appeal was originally -- MR JUSTICE HOLMAN: What are you getting round to? MRS THOMPSON: My Lord, there is an application for costs. MR JUSTICE HOLMAN: No. Could we leave costs to one side for the moment. Are there any other procedural or substantive matters or directions that I need to give? MR STOTT: No, my Lord. MRS THOMPSON: My Lord, no. MR JUSTICE HOLMAN: Will the two of you be able to draw up an order which adequately and accurately incorporates what I have just said with regard to the direction to the committee? MRS THOMPSON: My Lord, I am sure between us we can come up with something. MR JUSTICE HOLMAN: In any event, a transcript will routinely be made of the judgment, so it will be there for all to see in due course, but I do think there should be a formal recording of the direction. MRS THOMPSON: My Lord, would your Lordship be satisfied if we draw something up and communicate it to the court? MR JUSTICE HOLMAN: Well, I would like it to follow very closely what I have just said. Because I was giving the judgment extemporaneously, I could not myself now precisely repeat what I just said. I do not know if either or both of you were noting it pretty fully and verbatim or, when I have risen, you could get the shorthand writer kindly to read it back to you. But I did formulate the direction with some care, although I could not, frankly, now repeat it. MR STOTT: My Lord, I took a note. MR JUSTICE HOLMAN: Very well. If you are both satisfied that you can find a form of words that accurately records the direction, that is sufficient. Now, before we get into any argument, you are making an application, Mrs Thompson, that in any event Mr Sharp should pay the costs of this appeal. Is that right? MRS THOMPSON: My Lord, I would not be so bold as to say that he should pay our full costs, but in relation to the matters that were initially raised -- SMITH BERNAL WORDWAVE MR JUSTICE HOLMAN: Formulate the application. What is the order that you say I should make? MRS THOMPSON: My Lord, I would seek an order for the appellant to pay the respondent's costs in the preparation of this appeal which were clearly on completely different grounds to those that were successful. My Lord, I have given a schedule of those to my learned friend and I can indicate that the sum of those is £2,636. My Lord, I do not seek any costs for the hearing as such, given the order. MR JUSTICE HOLMAN: What is the preparation, then, to which you are referring? Are you really saying that you went off and did research and prepared a skeleton argument which was not directed to the point that is now raised because it has only just been raised? MRS THOMPSON: My Lord, the point that I make is that the skeleton argument that was prepared and submitted by myself and the authorities and documentation that was placed before the court was clearly in relation to the points that were not dealt with in the appeal. MR JUSTICE HOLMAN: Do you have this costs schedule to

which you have referred? MRS THOMPSON: My Lord, yes, I have. Can I indicate that it was prepared on the basis of that appeal and deals with the costs of the hearing which I am now not seeking. MR JUSTICE HOLMAN: Has Mr Stott seen your schedule? MRS THOMPSON: He has, my Lord. MR JUSTICE HOLMAN: Well, if I can see that. That is the application that you make, so you are saying that he should pay the costs of the preparation you quantify in that amount and that there should otherwise be no order as to costs? MRS THOMPSON: My Lord, indeed. MR JUSTICE HOLMAN: What application do you make, Mr Stott? MR STOTT: My Lord, the appeal having been allowed, Mr Sharp's costs amount to £1,800. I have been instructed under the Direct Access Rules of the Bar Council. MR JUSTICE HOLMAN: What do you say it has cost? £1,800? MR STOTT: £1,800. Those are his costs. The appeal has been allowed. MR JUSTICE HOLMAN: What are you going to say, that they should pay his costs? MR STOTT: My (Inaudible) costs should follow the event. MR JUSTICE HOLMAN: The point is if you had identified, or Mr Lynch had identified this point, ten months ago, they might have thrown their hand in. Today Mrs SMITH BERNAL WORDWAVE Thompson, she is here, she only learnt of it when she got here today and she has, with the utmost skill and cogency and valiance, tried to meet it. But if they had been faced with it ten months ago and you said to them, "Look, they really went wrong, look at page 12A," I seriously wonder whether we would have been here. MR STOTT: My Lord, the power that you have is under Article 38 of the 2001 Order, costs as your Lordship sees fit. I framed my submissions with some care. MR JUSTICE HOLMAN: The court may make such order as it or he thinks fit. Well, that is a very, very wide discretion. MR STOTT: I framed my submissions with some care. The point that has been successful has obviously been rendered late and I cannot get round that. Your Lordship is in as full possession of the reasons for that as I think I can properly put before the court, and it is not for me to go any further as I can see as to why it has been made late. (Inaudible). MR JUSTICE HOLMAN: The way it strikes me is I came into court this morning, I had not frankly spotted that point myself because I homed in on the points that were relied upon. I came in thinking this appeal was dead in the water. Within a very short while of you developing the point, quite frankly it seemed to me it was bound to succeed, it was a knock-out point. So you have a whole lot of weak points taken by Mr Lynch, you have one knock-out point raised orally today. Meantime, these nurses have incurred in total £4,000, your client has incurred nearly £2,000. I just seriously wonder whether any of that, or most of that, would have been incurred if the correct point had been identified on day one. They did go badly wrong. MR STOTT: My Lord, obviously I agree, because it is a point I have made. I am in some difficulty addressing you fully on that point, because obviously I was not involved at that stage and that is the reason I am in some difficulty. It is a wide discretion and I would simply urge leniency to Mr Sharp, who is not a wealthy man by any stretch of the imagination. MR JUSTICE HOLMAN: I am not imagining for one moment that he is. MR STOTT: Your Lordship also knows the serious strains on his resources by his own undeniably tragic personal situation. MR JUSTICE HOLMAN: Well, I think the only way I can do justice in this situation is to say no order. I really cannot make them pay your costs on the proposition that you have been successful, when you have been successful on a ground that is only raised for the first time a year later on the morning of the hearing. MR STOTT: My

Lord, I agree. MR JUSTICE HOLMAN: So I am afraid Mr Sharp will have to bear all his own costs. So far as the Council is concerned, it is hard for them that Mrs Thompson not unreasonably has laboured away and produced a skeleton argument largely dealing with points which had no substance and are not the point that has now been successful. On SMITH BERNAL WORDWAVE the other hand, ultimately it is the Council itself which made the error and I am afraid they will just have to bear the cost consequences on their own budget that follows. So I am going to say there is no order as to costs. Is there anything else that anybody now wishes to raise or say. MRS THOMPSON: May I just clarify whether your Lordship wishes us to draft the order before we leave court this afternoon? MR JUSTICE HOLMAN: That is, frankly, a matter as far as I am concerned between the two of you and today's associate. This does not have the sort of urgency about it that a lot of the work of the administrative court has, and if the associate is happy to wait a day or two to get it then I am happy. MR STOTT: We will do it within seven days. MR JUSTICE HOLMAN: Well, unless you are incredibly busy, would it be possible to have done it by the end of this week? MR STOTT: Certainly. MR JUSTICE HOLMAN: I think by the end of this week. It is only Wednesday afternoon, I think it should be lodged by close of Friday. MR STOTT: Thank you very much. MR JUSTICE HOLMAN: Do you want to ask the shorthand writer just to go back over those two or three sentences at the end? She is here and if you wish to, you may. There we are. Thank you all very much indeed. SMITH BERNAL WORDWAVE

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CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/sharp-v-nursing-and-midwifery-council-2011>

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