Appealing a Nursing and Midwifery Council 'striking off' order

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BJM legal column **Andrew Symon** **December 2017**

Appealing an NMC 'striking off' order

The NMC's prime function is to protect the public, and in the light of recent scandals about maternity care (see Kirkup's [2015] report on the Morecambe Bay investigation) it is understandable that the regulator is keen not to allow midwives to practise if they are not able to perform their duties satisfactorily. In such cases, when an allegation of impaired fitness to practise is brought to the NMC's attention, it can, having followed due process, and as a last resort, strike a practitioner's name from the register.

NMC hearings are constituted as formal legal procedures, with witnesses brought forward and evidence heard. The process it follows in such cases must be capable of withstanding scrutiny, but its decisions can be appealed on factual or procedural grounds. Indeed, this column has previously noted legal challenges to some NMC Panel decisions (Symon 2010, 2013).

A recent court case concerned a midwife who lodged an appeal against her striking off order (Annon v NMC [2017]). The midwife had qualified in 2003, but as early as 2004 her failure "to demonstrate skill and judgment" was raising concern. Learning contracts were put in place over the next few years as it was felt that her practice could be improved to an acceptable level. Of note here is the fact that colleagues did not shy away from taking action, unlike in the Morecambe Bay case where a group of midwives became known as 'the Musketeers' because of their protective 'One for all' mentality (Kirkup 2015: 17). Supportive teamwork is desirable, even essential; covering up for your friends is a real problem.

In the Annon case, those supervising her felt she had not satisfactorily completed her learning contracts, or demonstrated consistent standards of care, and in 2010 she found herself before a Panel of the NMC's Conduct and Competence Committee (CCC). This imposed a Conditions of Practice Order, which was in turn reviewed by the NMC in 2013, when the decision was made to remove Annon from the register. She appealed on the grounds that the Panel had exceeded its powers in reaching this decision. This followed the recent case of Okeke v NMC [2013] (see Symon 2013) which established that if the original Panel did not have the power to strike off a registrant, then a review of the order made by that Panel cannot impose a striking off order either.

While rather complicated, this illustrates the mechanisms by which legal decisions are made. In Okeke, it was held by the judge that when a Panel reviews a sanction imposed under Article 30 of the 2001 Nursing and Midwifery Order, the review Panel cannot exceed the powers exercised by the original Panel. The 2001 Order is the legislation which brought the NMC into being, and which provided its legal constitution. Under Article 29(6) of the Order, a registrant cannot be struck off on competence grounds unless he/she has been continuously suspended or subject to conditions of practice for two years. Okeke had been subject to an *interim suspension* order, which had replaced an interim Conditions of Practice Order. That might appear to be a technicality, but Okeke won her appeal, and the same situation applied to the midwife in Annon: the Panel had not been entitled to impose a striking-off order. Consequently, it was agreed that a new committee would review Annon's case, and on review, a new NMC Panel imposed a new Conditions of Practice Order in 2014, which was the subject of several reviews over the next three years.

A summary timeline of this case is shown in Box 1.

Box 1	**Timeline summary**
2003	Qualified as a midwife
2004	Concerns raised about practice; leaning contracts imposed
2005-06	Not felt to meet requirements of three leaning contracts
2010	NMC: Conditions of Practice Order
2013	NMC: striking-off order
Appeal made; striking-off order quashed	
2014	NMC: new Conditions of Practice Order
2015-16	Reviews of Conditions of Practice Order
2017	NMC: striking-off order
Appeal made; striking-off order quashed	

In 2016, the review Panel concluded:

> "[the Appellant must] successfully complete a NMC approved return to practice course, with both academic and clinical components, notifying the provider of this conditions of practice order."

On review in 2017 the NMC Panel heard that she had not attended such a course, despite more than thirty attempts to get a place on one. The NMC's solicitor was reported by the judge as having claimed that

> "the findings of the Appellant's lack of insight and understanding were sufficiently serious to merit a striking off in the wider public interest" (*per McGowan J @ 9).*

Although the NMC Panel had concluded that the midwife's attempts to get on a Return to Practice course were 'tentative', the court appeared to believe the midwife's claim that these were "genuine efforts" and that therefore "the striking-off order made was disproportionate and unfair" (Thompson 2017). Whether her attempts were believed to be genuine or not is crucial. Thompson goes on to note that:

> "This decision is unlikely to carry any weight in circumstances where the Registrant has not taken proper steps to engage and comply with conditions regarding training" (ibid).

The NMC was criticised for taking a long time to take action in the case of the Morecambe Bay midwives, and may have felt that it needed to show the public that it was safeguarding their interests by taking a firm stance in this case. Whether or not that is so, as in 2014, the Panel's decision was overturned on appeal. The main ground was that the public would be adequately safeguarded by a further Conditions of Practice Order, since the midwife would not be able to practise unsupervised. The various reports of this case do not record whether the practical implications of having to provide a supervisor at all times were discussed, but it is recorded that the judge felt that the Conditions of Practice Orders could not continue indefinitely:

> "[The judge] opined that the *status quo* was very unsatisfactory as it essentially left the Appellant in *'professional limbo'* for 10 years" (Thompson 2017).

It is understandable that the regulatory body may want to draw a line under a case that had trundled on for such a long time, but the fact that the midwife had not been continuously suspended for two years prior to the hearing meant that the NMC's own legally constituted rules did not permit a striking-off order. The judge's rather terse comment in concluding the case summed up her view that very time-consuming and expensive litigation could have been avoided by applying what might be seen as common sense:

> "It is entirely a matter for the NMC, but it may be that a repetition of this appeal could be avoided if consideration is given by panels dealing with this sort of case to a realistic time limit by which a course must be completed." *(per McGowan J @ 11)*

With a national shortage of midwives no one wants to see practitioners leaving the profession early, but practice must be at least competent. Professional responsibility does require speaking up when colleagues are felt to be failing; nobody has suggested that the midwives in this case

shirked their responsibility. Poor practice was thought to be remediable, but the fact that it took so long to go through the various hoops of supervised practice and still not have confirmation of safe practice is very unfortunate.

In seeking to safeguard the public, the NMC is in a difficult position if a registrant is believed to be incompetent, but, as noted at the start of this article, it must follow its own formal legal procedures.

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