

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

Claim No. CO/1594/2016

THE PROFESSIONAL STANDARDS AUTHORITY
FOR HEALTH AND SOCIAL CARE

Appellant

-and-

1. THE NURSING AND MIDWIFERY COUNCIL

First Respondent

2. MS ZAIGA UDRE

Second Respondent



ORDER

UPON the Appellant and the First Respondent having agreed to the terms of this Order and the matters set out at **Schedule 1**;

AND UPON no party being either a child or a protected party and the appeal not being an appeal from the Court of Protection;

AND UPON the First Respondent conceding that the decision of its Conduct and Competence Committee ('the Panel') dated 22 January 2016 ('the Decision'), which is the decision under appeal, is not sufficient for the protection of the public within the meaning of Section 29 of the National Health Service Reform and Health Care Professions Act 2002 (as amended);


AND UPON the Court having considered the correspondence sent by the Appellant and First Respondent to the Second Respondent at her registered address since the lodging of the appeal, as set out and annexed to this Order at **Schedule 2 and Annex 2** and having concluded that the Second Respondent does not intend to participate in the proceedings;

AND UPON the Second Respondent being granted leave to apply to set aside or vary the terms of this Order, such an application to be made on notice within seven days of service of the Order;

IT IS ORDERED THAT:


1. The Appeal is allowed;
2. The Decision is quashed and substituted with an order for striking-off;
3. The First Respondent shall pay the Appellant's reasonable costs of the appeal up to the date of this Order, to be assessed if not agreed;
4. The hearing listed for 5 July 2016 is vacated.

Dated this 12th day of May 2016


.....
KATHERINE ANNA STEELE
SOLICITOR

CAPSTICKS SOLICITORS LLP
1 St George's Road
Wimbledon
London
SW19 4DR

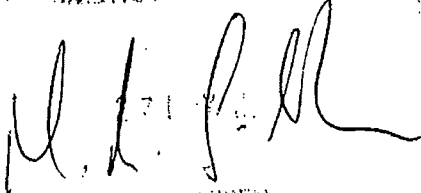
Solicitors for the Appellant


.....
KRISHNA GOPAL
IN-HOUSE COUNSEL

NURSING AND MIDWIFERY COUNCIL
1ST Floor
1 Kemble Street
London
WC2B 4AN

For the First Respondent

ADMINISTRATIVE COURT OFFICE



RESIDEN
ADMINISTRATIVE COURT

By the Court

Schedule 1

1. The Second Respondent is a registered nurse.
2. On 22 January 2016, the Panel of the First Respondent reached the Decision, which included a finding that the Second Respondent fitness to practise is impaired by reason of misconduct and the imposition of a 12 month suspension order on the Second Respondent's registration.
3. The Second Respondent did not attend the hearing before the CCC and was not represented. The Second Respondent did not make written submissions to the Panel.
4. The Appellant appealed against the Decision. The Appellant's Grounds of Appeal are attached to this Schedule as **Annex 1**.
5. The First Respondent concedes the appeal and agrees that the Decision should be quashed and substituted with an order for striking-off.

Schedule 2

Correspondence with the Second Registrant as follows:

1. Letter from the Appellant to the Second Respondent dated 21 March 2016, notifying of decision to appeal
2. Letter from Capsticks on behalf of the Appellant to the Second Respondent dated 24 March 2016, enclosing Appellant's Notice and Grounds of Appeal
3. Letter from Capsticks on behalf of the Appellant to the Second Respondent, dated 15 April 2016, enclosing letter from the Court in relation to listing
4. Letter from the First Respondent to the Second Respondent, dated 19 April 2016 notifying of the Second Respondent's position in relation to the appeal and seeking a response by 3 May 2016
5. Letter from Capsticks on behalf of the Appellant to the Second Respondent, dated 21 April 2016, requesting the Second Respondent's position in relation to the appeal by 3 May 2016
6. Letter from Capsticks on behalf of the Appellant to the Second Respondent, dated 5 May 2016, enclosing letter from the Court confirming listing date

Annex 1

Grounds of Appeal

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

CO/

BETWEEN:-

THE PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE

Appellant

-and-

(1) THE NURSING AND MIDWIFERY COUNCIL

(2) MS ZAIGA UDRE

Respondents

GROUNDS OF APPEAL

Introduction

1. This is an appeal under section 29 of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act") against a decision of the Conduct and Competence Committee ("the Committee") of the Nursing and Midwifery Council ("the NMC").
2. Ms Zaiga Udre, the Second Respondent ("the Registrant"), is a nurse. The Registrant came before the Committee on 20 – 22 January 2016. It found that while employed as a registered nurse at a care home and carrying out a night shift there on 3 March 2013 the Registrant allowed a non-staff member unrestricted access to the home, to drink alcohol there, to view and/or enter residents' rooms, view personal care being carried out and have the opportunity to view confidential information. It also found that the Registrant consumed and/or was under the influence of alcohol at the material time. The Committee found that the Registrant's fitness to practise was impaired by reason of her misconduct and imposed on her an order for suspension for 12 months. It is that decision which is the subject of this appeal.

Summary grounds of appeal

3. The Professional Standards Authority for Health and Social Care (“the Authority”) has referred this case to the High Court on the grounds that:
 - a. the Committee gave insufficient consideration to the aggravating features of the case, in particular, the Registrant’s failure to engage with the disciplinary process, and the emotional harm caused by her misconduct;
 - b. the Committee placed undue or disproportionate weight on factors which they characterised as mitigating, for example, the non-staff member’s inability to read English, which was not, properly analysed, significant;
 - c. the Committee took an inconsistent and/or irrational approach to the issue of whether the Registrant had insight and posed a risk of repetition of her misconduct, alternatively failed to give sufficient reasons;
 - d. the Committee failed to act in accordance with, or give sufficient regard to, the NMC’s Indicative Sanctions Guidance (“ISG”), in particular, the presence of three features of the case that were indicators for striking off, and the presence of two features of the case that were indicators that suspension was insufficient;
 - e. the Committee failed to give adequate reasons for its departure from the ISG, such departure requiring the giving of reasons;
 - f. the Committee irrationally relied on what it appeared to consider could be the outcome of a subsequent review hearing, namely, striking off, while only imposing a suspension upon the Registrant.

Background

The NMC’s Code

4. The NMC’s Code includes the following:

You must treat people as individuals and respect their dignity ...

You must respect people's right to confidentiality ...

You must deliver care based on the best available evidence or best practice ...

You must uphold the reputation of your profession at all times

The ISG

5. The NMC's ISG includes the following:

[A striking-off order] is likely to be appropriate when the behaviour is fundamentally incompatible with being a registered professional, which may involve any of the following ...

Serious departure from the relevant professional standards ...

Doing harm to others or behaving in such a way that could foreseeably result in harm to others, particularly patients ... Harm may include ... emotional ... harm ...

Abuse of ... trust ... violation of the rights of patients, particularly in relation to vulnerable patients ...

Persistent lack of insight into the seriousness of actions or consequences

...

[An order for suspension would be appropriate where] ...

No evidence of harmful deep-seated personality or attitudinal problems

...

The panel is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour ...

The disciplinary proceedings and the Committee's decision

6. The Registrant did not participate in the NMC's disciplinary process and did not attend the hearing. However, the Committee made no reference in its reasons as to sanction to the Registrant's lack of engagement with the NMC over the course of the disciplinary process, nor to the fact that when the NMC had made contact with her she had been "abusive".
7. The circumstances of the Registrant's misconduct included the fact found by the Committee that a patient suffered emotional harm as a result of her misconduct in that she screamed at the man whom the Registrant had allowed to enter her room.

The Committee however did not identify this as an aggravating factor when considering sanction.

8. There was limited, and conflicting, evidence before the Committee as to whether the non-staff member who had the opportunity to view confidential material was able to read English. The Committee apparently failed to consider that the gravamen of this aspect of the Registrant's misconduct was the creation of a risk of disclosure rather than whether or not the person to whom personal information was made available could read English.
9. The Committee noted that: "Ms Udre has not provided the panel with any evidence whatsoever of insight or remediation". It stated that it "was unable to identify evidence of any real insight on Ms Udre's part or an appreciation of the seriousness of her conduct". The Registrant, when asked about the events in the context of an internal disciplinary process, a transcript of which was before the Committee, displayed a real failure to understand the seriousness of her misconduct and the Committee found that she did not accept personal responsibility for the incident. The Committee also stated that: "the risk of repetition remains very high indeed". However, the Committee later stated when considering sanction that there had "not been any evidence to suggest that Ms Udre has any deep seated or attitudinal problems".
10. The Committee considered the ISG and identified the presence of three factors, any of which, the ISG provides, would justify striking off. However, it did not explain why the Registrant should nevertheless not be struck off. It also identified the presence of two factors, either of which, the ISG provides, would make suspension inappropriate. However, it did not explain why the Registrant should nevertheless be suspended.
11. The Committee stated that: "A period of 12 months [suspension] would allow Ms Udre possibly her last and final opportunity to engage with the regulatory process. The panel wished to make it clear that by failing to engage, and by failing to provide evidence of her insight and any remediation she has undertaken since the incident, there remains a very real risk of Ms Udre being struck-off the register when the suspension order is reviewed prior to its expiry". The Committee did not explain why, in the case of a Registrant who displayed no insight and provided no evidence of an

intention to develop such insight, she should be given a “last chance” to demonstrate it when its absence is a fundamental indicator for striking off.

The law relating to this appeal

12. The Committee’s decision was a “relevant decision” under section 29(1)(i) of the 2002 Act.

13. Pursuant to section 29(4) of the 2002 Act (as amended by the Professional Standards Authority for Health and Social Care (References to Court) Order 2015), the Authority may refer a case to the High Court where it considers that:

“the decision is not sufficient (whether as a finding or a penalty or both) for the protection of the public.”

14. By section 29(4A) of the 2002 Act consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

*“(a) to protect the health, safety and well-being of the public;
(b) to maintain public confidence in the profession concerned; and
(c) to maintain proper professional standards and conduct for members of that profession.”*

15. Where a case is referred to the High Court, it is to be treated as an appeal (section 29(7) of the 2002 Act). Under section 29(8) of the 2002 Act, the Court may:

*“(a) dismiss the appeal,
(b) allow the appeal and quash the relevant decision,
(c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or
(d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court,
and may make such order as to costs... as it thinks fit.”*

16. The Court may also allow an appeal where there has been serious procedural or other irregularity such that it is not possible to determine whether the decision as to

sanction was unduly lenient or not; and this may include failure to provide adequate reasons for a decision (*CRHP v (1) GDC (2) Marshall* [2006] EWHC 1870 (Admin) at [31] – [32]).

17. A committee that departs in its approach from its indicative sanctions guidance should give reasons for doing so (*R (Jackson) v GMC* [2013] EWHC 2595 (Admin) and *Professional Standards Authority v HCPC and Williamson* [2015] EWHC 2420 (Admin) at [26] – [32]).

Grounds of appeal

18. The Committee gave insufficient consideration to the aggravating features of the case when deciding upon sanction. Firstly, the Registrant had wholly failed to engage with the disciplinary process, save only to be verbally abusive to an NMC staff member. Secondly, the Committee had found that the Registrant had caused emotional harm by her misconduct, but failed to mention it when identifying the aggravating factors that were relevant to sanction, even though such a factor is expressly identified in the ISG.
19. The Committee placed undue or disproportionate weight on factors which they characterised as mitigating, for example, the non-staff member's inability to read English, which was not, properly analysed, significant. The key issue was whether the Registrant had exposed patients to a risk of harm, not whether the harm had in fact crystallised. Further, and in any event, the evidence as to whether or not the non-staff member could read English was far from clear and did not justify an express finding that the breach of confidentiality was only "technical".
20. The Committee took an inconsistent approach to the issue of whether the Registrant had insight and posed a risk of repetition of her misconduct. As set out above, the Committee found that there was no evidence of insight, a failure to take responsibility when confronted with the misconduct and a very high risk of repetition. Despite that constellation of findings, the Committee concluded that there was no evidence of deep-seated or attitudinal problems. This was inconsistent and irrational. Alternatively the Committee's reasons were inadequate.

21. The Committee failed to act in accordance with, or give sufficient regard to, the NMC's Indicative Sanctions Guidance ("ISG"). First, at least three features of the case that were indicators for striking off were present – departure from professional standards set down in the Code, doing harm to others, abuse of trust and persistent lack of insight - but the Registrant was not struck off. Second, two features of the case that were indicators that suspension was insufficient were present – deep-seated personality or attitudinal problems and a significant risk of repetition - but the Registrant was suspended.
22. The Committee failed to give adequate reasons for its departure from the ISG, such departure requiring the giving of reasons as set out above.
23. The Committee irrationally relied on what it appeared to consider could be the outcome of a subsequent review hearing, namely, striking off, while only imposing a suspension upon the Registrant.

Relief

24. For the reasons set out above, the Authority respectfully asks the Court to allow this appeal, quash the decision of the Committee, and:
 - a. Substitute an order for striking off; or
 - b. Alternatively, remit the matter to the Committee with such directions as the Court thinks fit; and
 - c. In any event, order the First and/or Second Respondents to pay the Appellant's costs.

FENELLA MORRIS QC
Counsel on behalf of the Authority
39 Essex Chambers
23 March 2016

Annex 2

Copy correspondence listed at Schedule 2 with proof of postage
(excluding enclosures)

Zaiga Udre
3 River Road
Littlehampton
West Sussex
BN17 5BN

21 March 2016

Dear Ms Udre

Referral to the High Court under Section 29 (4) of the National Health Service Reform and Health Care Professions Act 2002

I am writing to you on behalf of The Professional Standards Authority for Health and Social Care (The Authority). We oversee the work of the nine regulatory bodies that regulate health professionals in the UK and social workers in England. We review the regulators' performance and audit and scrutinise their decisions about whether people on their registers are fit to practise, including the Nursing and Midwifery Council.

The Authority has decided to refer the decision in your case by the Conduct and Competence Committee of the Nursing and Midwifery Council on 22 January 2016 to the High Court in accordance with Section 29(4) of the National Health Service Reform and Health Care Professionals Act 2002. This power allows us to refer a regulatory body's relevant decision to court if it has been deemed by the Authority that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public. Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

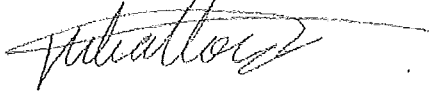
- (a) to protect the health, safety and well-being of the public;
- (b) to maintain public confidence in the profession concerned; and
- (c) to maintain proper professional standards and conduct for members of that profession.

The referral process will be commenced with the issue of an Appellant's Notice on or before 24 March 2016.

Please let me know as soon as possible if you would like The Authority's solicitors, Capsticks, to correspond with you in person, or with your representative on this matter.

I am writing today to the Nursing and Midwifery Council to inform them of the referral.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Julia Lloyd', with a long horizontal flourish extending to the right.

Julia Lloyd
Senior Scrutiny Officer
Professional Standards Authority

Strictly Private and Confidential

Ms Zaiga Udre
3 River Road
Little Hampton
West Sussex
BN17 5BN

24th March 2016

Your ref:
Our ref: NXB/JZM/105417/15783800

Your contact:
Jamie Miller
T 020 8780 4908
F 020 8780 4603
E jamie.miller@capsticks.com

**By First Class Post & Special Delivery:
AE984095092GB**

Dear Ms Udre

**Professional Standards Authority for Health and Social Care -v- (1) Nursing and
Midwifery Council and (2) Ms Zaiga Udre
Court Reference: CO/1594/2016**

We are the solicitors for the Appellant in this matter, the Professional Standards Authority for Health and Social Care ("the Authority").

A. The Role of the Authority

The Authority is responsible for overseeing the UK's nine health and care professional regulatory bodies, including the Nursing and Midwifery Council. Its oversight and scrutiny of the regulators is important for protecting users of health and social care services and the public.

The Authority reviews all final decisions made by each regulator's Fitness to Practise Committee. The Authority can then refer those decisions to Court if it considers they are unduly lenient and do not protect the public.

The Authority has reviewed the decision of the Conduct and Competence Committee of the Nursing and Midwifery Council (the "CCC"), which considered allegations in relation to your conduct at a hearing which took place on 22 January 2015.

It is of the view that the decision of the CCC to impose a 12 month suspension order was an unduly lenient sanction. The Authority therefore lodged an Appeal at the High Court of Justice on 24 March 2016.

From the enclosed documents, you will see that the Authority has requested that the Court quash the decision of the CCC and substitute an order for Strike Off. The reasons for this are set out in the attached document entitled "Grounds of Appeal".

B. Service of Documents

Please find enclosed the following documents by way of service upon you:

1. A sealed copy of the Appellant's Notice (Form N161);
2. A copy of the Grounds of Appeal;
3. A copy of the decision of the Conduct and Competence Committee, dated 22 January 2016; and
4. A copy of HM Courts & Tribunal Service Protect Note to Defendant and Interested Parties.

Please note that these documents have also been served on the Nursing and Midwifery Council.

C. Next Steps

We should be grateful if you would please acknowledge safe receipt of the above documents.

A Skeleton Argument, which is a written document setting out the Authority's position in more detail, and bundle of relevant documents, will follow in due course.

We strongly recommend you seek independent legal advice as a matter of urgency.

If you have any queries in relation to these proceedings, please do not hesitate to contact us, although we should be clear that we cannot provide you with legal advice.

Yours faithfully



Capsticks Solicitors LLP

Encs Please see above.



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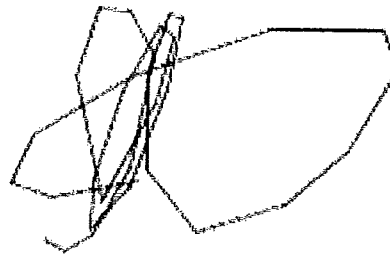
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Ms Z Udre
3 River Road
Little Hampton
West Sussex
BN17 5BN

15th April 2016

Your ref:
Our ref: KQS/JZM/105417/15939281

By Post Only

Your contact:
Jamie Miller
T 020 8780 4908
F 020 8780 4603
E jamie.miller@capsticks.com

Dear Ms Udre

**Professional Standards Authority for Health and Social Care -v- (1) Nursing and
Midwifery Council and (2) Ms Zaiga Udre
Court Reference: CO/1594/2016**

We write further to our previous correspondence in relation to the above matter.

Please find enclosed a copy of a letter we have received from the Court.

Yours faithfully



Capsticks Solicitors LLP

Enc.

Private and confidential

Miss Zaiga Udre
3 River Road
Littlehampton
West Sussex
BN17 5BN

19 April 2016

Our ref: 041466/2013
Senior Lawyer: Kristian Garsed
Direct line: 020 7681 5672
Email: kristian.garsed@nmc-uk.org
Paralegal: Ryan Jeffs
Direct line: 020 7681 5569
Email: ryan.jeffs@nmc-uk.org

Recorded Delivery

Dear Miss Udre

**Professional Standards Authority for Health and Social Care (PSA) v
(1) Nursing and Midwifery Council (NMC) and (2) Zaiga Udre**

Case Number: CO/1957/2016

I write in relation to the above appeal by the PSA, brought in respect of the decision of the NMC's Conduct and Competence Committee ("CCC") in the respect of your case that concluded on when you were made subject to a 12 months suspension order on 22 January 2016.

NMC's position regarding the PSA Appeal:

We have now had the opportunity to consider the PSA's grounds of appeal. After careful consideration, it is the view of the NMC that we will concede the appeal in full and agree to an order quashing the decision of the CCC to impose a 12 month suspension order and substituting that order with a striking-off order.

Please note that our position in relation to the costs of this appeal is as follows:

We are willing to pay the costs incurred by the PSA, up until 3 May 2016. This is in order to give you time to consider your position in relation to the PSA appeal and to obtain legal advice if appropriate.

First Floor, 1 Kemble Street, London WC2B 4AN
T +44 20 7462 5800/5801 F +44 20 7580 3410
DX 37970 Kingsway
www.nmc.org.uk

The nursing and midwifery regulator for England,
Scotland, Wales and Northern Ireland

Registered charity in England and Wales (1091434) and in Scotland (SC038362)

If you do not agree to concede the appeal on the terms above by this deadline, or if matters in relation to this appeal are unreasonably protracted for any other reason, our position will be that the NMC should not be held liable for the costs of any party incurred beyond this date. It will also be our position that any further costs incurred by us beyond this date should be paid by you.

If you are unrepresented and require further independent advice in relation to this appeal, you may wish to inquire at your local Citizens Advice Bureau. If you are based in the London area, the Royal Courts of Justice run a Citizens Advice Bureau which provides free guidance to those with cases in the High Court, who lack legal representation. There is also detailed advice on the Royal Courts of Justice website: please see <http://www.rcjadvic.org.uk/civil-law/>.

Please contact me or Kristian Garsed by 3 May 2016 to inform us of your position. Our contact details can be found at the top of this letter.

Yours sincerely



Ryan Jeffs
Paralegal
Regulatory Legal Team
Nursing and Midwifery Council

Strictly Private and Confidential

Ms Zaiga Udre
3 River Road
Little Hampton
West Sussex
BN17 5BN

21st April 2016

Your ref:
Our ref: KQS/JZM/105417/15980879

Your contact:
Jamie Miller
T 020 8780 4908
F 020 8780 4603
E jamie.miller@capsticks.com

By Special Delivery and First Class Post
AF485934979GB

Dear Ms Udre

Professional Standards Authority for Health and Social Care -v- (1) Nursing and Midwifery Council and (2) Ms Zaiga Udre
Court Reference: CO/1594/2016

We write further to our letter of 24 March 2016, a further copy of which is **enclosed** for your ease of reference. As you are aware, we act for the Authority, who is the Appellant in this matter.

As previously detailed in our letter of 24 March 2016, the Authority reviewed the decision of the Conduct and Competence Committee of the Nursing and Midwifery Council (the "CCC"), which considered allegations in relation to your conduct at a hearing which took place on 22 January 2016.

The Authority is of the view that the decision of the CCC to impose a 12 month suspension order is not sufficient to protect the public. The Authority therefore lodged an Appeal at the High Court of Justice on 24 March 2016. A hearing has not yet been listed for this Appeal.

Please find **enclosed** a letter from the Nursing and Midwifery Council confirming that they will be conceding the Appeal in full and that they agree to an Order quashing the decision of the CCC to impose a 12 month suspension order and substituting that order with a striking-off order.

We should be grateful if you would please contact us on or before **3 May 2016** to confirm your position in relation to the Appeal. We should also be grateful if you would confirm if you are represented.

We strongly recommend you seek independent legal advice as a matter of urgency.

If you have any queries in relation to these proceedings, please do not hesitate to contact us, although we should be clear that we cannot provide you with legal advice.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Capsticks', written in a cursive style.

Capsticks Solicitors LLP

Enc.



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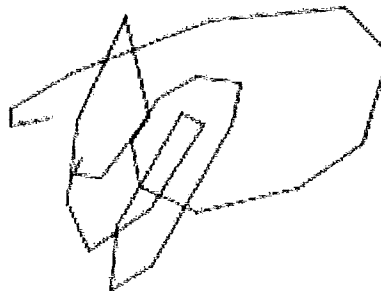
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Ms Zaiga Udre
3 River Road
Little Hampton
West Sussex
BN17 5BN

5th May 2016

Your ref:
Our ref: JZM/105417/16082832

Your contact:
Jamie Miller
T 020 8780 4908
F 020 8780 4603
E jamie.miller@capsticks.com

By Special Delivery: AF485936175GB

Dear Ms Udre

**Professional Standards Authority for Health and Social Care -v- (1) Nursing and
Midwifery Council and (2) Ms Zaiga Udre
Court Reference: CO/1594/2016**

We write further to our previous correspondence in relation to the above matter.

Please find **enclosed** a copy of a letter we have received from the Court.

Yours faithfully



Capsticks Solicitors LLP

Enc.



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Let us look after your mail until you return.

[Find out more about Keepsafe™ >](#)

Moving house? Then it's time to redirect your mail



Redirection will forward your mail and protect you from fraud.

[Why Redirection Is Important to you >](#)