

DECISION NUMBER: RSW1/D1/SWDT/2015

IN THE MATTER of a charge laid under the Social Workers Registration Act 2003

BETWEEN the Complaints Assessment Committee
Complainant

AND Gordon James Ham
Respondent

BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Present: Ms V Hirst (Chairperson)
Ms S Dyhrberg, Mr D Russell, Ms Yvonne Crichton-Hill,
Ms Toni Hocquard (Members)
Ms Rachel Kent (Hearing Officer)
Mr Dale La Hood (Counsel for the CAC)

Hearing Held in Wellington on Monday 22 June 2015

Introduction

- 1 Mr Ham is a registered social worker of Huntly. Until 22 March 2013 he was employed as a social worker with the Ministry of Social Development (“**MSD**”).
- 2 On 5 December 2013 Mr Ham pleaded guilty and was convicted in the District Court in Hamilton on two counts of arson. He was sentenced to 8 years, one month imprisonment.
- 3 On 18 March 2015 a CAC filed a notice of disciplinary charges with the Social Workers Complaints and Disciplinary Tribunal (“**Tribunal**”). Mr Ham indicated he would not oppose the charges. He responded in writing dated 20 April 2015 and did not attend the hearing, and was not represented.
- 4 The charges laid by the CAC pursuant to Section 72(3) of the Act are:
 - a. professional misconduct pursuant Section 82(1)(a) of the Act; or in the alternative;
 - b. that Gordon Ham was convicted by a court of an offence punishable by a term of imprisonment for 3 months or longer and the offence was committed in circumstances that reflect adversely on his fitness to practise as a social worker pursuant to Section 82(1)(c).

Particulars

- 5 Gordon Ham was convicted of two charges of arson and sentenced to 8 years, 1 month imprisonment;
- 6 the nature and extent of Gordon Ham’s offending breached the Code of Conduct issued by the Social Workers Registration Board pursuant to Section 105 of the Act, in that he failed to uphold high standards of personal conduct and act with integrity.

Factual background of the complaint – affidavit of CAC Convener and District Court Sentencing notes

- 7 On 18 February 2013 Mr Ham went to the house of family H. They were a family known to Mr Ham for many years. He had a level of animosity toward the family. Mr Ham set fire to the house knowing there were occupants in the house.
- 8 The occupants of the house were able to escape the house without injury. Mr Ham made comments to the effect that he had lit the fire and was disappointed that the occupants had escaped. He also made abusive and threatening comments to another family member who arrived.

- 9 Mr Ham then set fire to a shed on the property, which was also destroyed. The fire damaged stock feed and property. In total the estimated value of the lost property exceeded \$800,000.00.
- 10 Mr Ham pleaded guilty to both charges. Before the Court, Mr Ham said his drug and alcohol use was the reason for the offending, which the Court accepted. The Court considered that although there was evidence of remorse, aggravating factors included premeditation and a grim determination to visit retribution on family H. The Court found Mr Ham exhibited callousness and total disregard for people's safety.
- 11 Mr Ham had previously offended and had undergone alcohol and drug rehabilitation, from 1985. He had been compliant with previous sentences and had undergone alcohol and drug rehabilitation while on parole for previous imprisonment sentences. Evidence before the Court showed Mr Ham had been involved with drugs including methamphetamine, and had a problem with alcohol use.
- 12 In sentencing Mr Ham to 8 years 1 month imprisonment, the Court took into account aggravating and mitigating factors set out above. In light of the callousness, the extent of the offending, and the danger the Court considered Mr Ham presented to the community, a minimum term of one half of the sentence was imposed on Mr Ham.

Mr Ham's feedback to the CAC

- 13 Mr Ham participated in the CAC process on 4 December 2014.
- 14 He admitted he was guilty of the offence and outlined a history of alcohol and drug addiction. Mr Ham chose not to take any further part in the proceedings but provided a letter dated 26 November 2014 to the CAC.
- 15 In his letter Mr Ham noted his long association with family H. He knew they were at home the night of the offences. He categorised the family as anti-social, often at odds with the community and suggested an element of racial disharmony with local Māori.
- 16 Mr Ham admitted to being extremely intoxicated on the night of the offending, on a mixture of Rivotril, alcohol and cannabis oil. Mr Ham claims his behaviour on the night was out of character and whilst he does not claim this as an excuse, offered that his intoxication was an underlying cause. He also claimed the crime was not premeditated and was more spur of the moment. He stated he did not have a clear recollection of the events but acknowledged his intent was to cause family H harm.

- 17 Mr Ham said he was a drug addict as a teenager, prior to 1989 when he got into recovery. In 2011, while a social worker, Mr Ham said he became reacquainted with a past associate who was a drug dealer.
- 18 Mr Ham relapsed and used methamphetamine and alcohol for the next year. He mixed with people who enabled his addiction and supported his substance abuse. Mr Ham said he had isolated himself from anyone who might have challenged his conduct or helped him.
- 19 In 2012 Mr Ham sought assistance. He began seeing a psychologist and stopped using methamphetamine but continued to abuse alcohol until February 2013 when he stopped drinking.
- 20 Mr Ham stated he had been drug and alcohol free since being imprisoned (23 February 2013). Mr Ham's offender plan includes attending a six-month drug treatment unit, and he expressed commitment to his drug treatment rehabilitation.
- 21 Mr Ham said he intended to go into business on release from prison, and had no intention of returning to social work. However, he said he wanted to know what his options are in that regard, as his feelings may change.

Submission for the CAC

- 22 Based on the District Court Judge's Sentencing notes and Mr Ham's letter to the CAC, Mr La Hood submitted the nature of Mr Ham's convictions amounted to professional misconduct. His actions breached the Code of Conduct because the nature and severity of the convictions put Mr Ham's and the profession's reputation at risk. The behaviour represents a significant departure from the standards reasonably expected of a social worker. It was submitted that Mr Ham's ability to work with clients in a fully professional manner in the future had been severely compromised. Mr Ham's conduct, it was submitted, amounts to gross and severe misconduct.
- 23 Aggravating features included the seriousness of the convictions, including the maximum penalty of 14 years of imprisonment for arson, the utter callousness noted by the Court and the fact that the offending involved endangering the lives of the occupants.
- 24 Mitigating factors were that Mr Ham chose not to defend the disciplinary proceedings and the mitigating features of the offending recognised by the Court:
- Personal circumstances: Mr Ham had a history of addiction and had been seeing a psychologist to address this. The Court gave Mr Ham some credit for the history and his letters acknowledging responsibility.

— An early guilty plea.

The Law

Burden and Standard of Proof

25 The CAC bears the burden of proving the particulars of the charges, in this case both separately and cumulatively. The standard of proof is the civil standard, that is proof, to the satisfaction of the Tribunal on the balance of probabilities, rather than the criminal standard. The degree of satisfaction called for will vary according to the gravity of the allegations. The greater the gravity of the allegations the higher the standard of proof that will be required.¹

Professional Misconduct

26 The principle purpose of the Social Workers Registration Act 2003 (“**the Act**”) is “to protect the safety of members of the public, by prescribing or providing for mechanisms to ensure that social workers are competent to practise and are accountable for the way in which they practise.”² In addition, the Act has as a purpose “to enhance the professionalism of social workers”.³

27 Accordingly, when considering this matter the Tribunal should keep at the forefront of its deliberations the fact that the primary purposes of its professional disciplinary powers are the protection of the public and enhancing professionalism by providing for mechanisms to ensure that social workers are competent to practise, and are accountable for the way they practice.

28 Section 82 of the Social Workers Registration Act 2003 (**the Act**) defines the grounds on which a registered social worker may be disciplined. Section 82 provides:

82 Grounds on which Tribunal may make order

- (1) The Tribunal may make an order under section 83 in respect of a registered social worker if, after conducting a hearing on a charge laid against the social worker, it is satisfied that the social worker—
 - (a) has been guilty of professional misconduct; or
 - (b) has been guilty of conduct that—
 - (i) is unbecoming of a social worker; and
 - (ii) reflects adversely on the social worker's fitness to practise as a social worker; or

¹ *CAC v Curson* 01/08/SWDT, 30 July 2008. For further comment on the standard and onus of proof in professional disciplinary proceedings, see *Z v Complaints Assessment Committee* [2009] 1 NZLR. The Health Practitioners Disciplinary Tribunal has followed the principles enunciated in *Z* in its decisions, including for example *Professional Conduct Committee v Dawson*,¹ and *Professional Conduct Committee v Karagiannis* 181/Phar08/91P; 3/10/08.

² Social Workers Registration Act 2003, s 3(a).

³ Social Workers Registration Act 2003, s 3(d).

- (c) has been convicted by a court (in New Zealand or elsewhere) of an offence that—
 - (i) is punishable by imprisonment for a term of 3 months or longer; and
 - (ii) was committed in circumstances that reflect adversely on the social worker's fitness to practise as a social worker; or
 - (d) has failed to comply with restrictions on his or her registration, or restrictions stated under section 77(1)(b). ...
- (2) A registered social worker is guilty of professional misconduct if he or she—
- (a) breaches the code of conduct; ...

Code of Conduct

29 The Code of Conduct for Social Workers was formally adopted by the Social Workers Registration Board in May, 2005. The following sections are relevant to the current charges.

1 To uphold high standards of personal conduct and act with integrity a social worker is expected to:

- refrain from any professional or personal behaviour that puts at risk the individual's and/or the profession's reputation and compromises the social worker's ability to work with the client in a fully professional and caring manner;...
- not enter into a sexual relationship with a client. This applies to a client's family or relatives, or a former client, when there is a risk the relationship will adversely affect the service provided to the client and/or the social worker's ability to fulfil his or her professional obligations.

3 To uphold the civil, legal and human right of clients a social worker is expected to:

b) Right to privacy

- respect the client's right to privacy and the confidentiality of any information provided in the course of the professional relationship.

Case Law

30 Counsel referred the Tribunal to its previous finding of professional misconduct in *Curson v CAC*⁴, *CAC v Sanders*⁵ and the discussion of the Code of Conduct in

⁴ *CAC v Curson* 01/08/SWDT, 30 July 2008

⁵ *CAC v Sanders* 05/13/SWDT, 20 May 2013

that case. Counsel also referred the Tribunal to comparable cases from the Health Practitioners Disciplinary Tribunal (“HPDT”) and High Court.⁶

2. The Tribunal was referred to the leading case relating to the purpose of professional disciplinary proceedings. In *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720 Eichelbaum CJ described the purpose of professional disciplinary procedures as follows at pages 724-725:

The disciplinary procedure: Although in respect of different professions the nature of unprofessional or incompetent conduct, which will attract disciplinary charges, is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself, against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of its members conform to the standards generally expected of them; see generally, In *Re A Medical Practitioner* [1959] NZLR 784 at pp 800, 802, 805 and 814.

- 31 Counsel also referred the Tribunal to comparable cases involving serious criminal convictions in other disciplinary tribunals but was not able to locate a case involving arson.

Findings

- 32 The Tribunal finds Mr Ham guilty of professional misconduct pursuant, first:
 - (a) to Section 82(1)(a) of the Act. Mr Ham breached the Code of Conduct in that he failed to uphold high standards of personal conduct and to act with integrity in that as a social worker he did not refrain from personal behaviour that put at risk his reputation and the profession’s reputation, and compromised his ability to work with clients in a professional and caring manner; and
 - (b) secondly, Mr Ham was convicted by a court of an offence punishable by a term of imprisonment for 3 months or longer and the offence was committed in circumstances that reflect adversely on his fitness to practice as a social worker pursuant to Section 82(1)(c).
- 33 The Tribunal considers taken separately and together, the 2 breaches of the Act clearly compromised Mr Ham’s reputation, ability to work with clients

⁶ 23/Nur05/13P, 12 January 2006, and 473/Nur12/209P, 24 August 2014

professionally, and reflect adversely on his fitness to practice. Mr Ham relapsed into drug use and alcohol abuse whilst a social worker. He did not raise this with anyone who could have challenged or assisted him. In particular, he failed to advise his employer and his supervisor, which shows a lack of insight and professional self-responsibility. Given Mr Ham's previous history of addiction, offending and recovery, and particularly as a registered social worker he should have recognised the risks he was taking in associating with a drug dealer, and the signs of relapse, and sought help.

- 34 The evidence before the Tribunal showed Mr Ham had formed negative and unhealthy views about the H family. He persisted in these views and acted negatively towards them over a period of time, culminating in the arson attack. Mr Ham's explanation for his offending, including his letter to the CAC, implied there was some rational basis for his views, although acknowledging it could never excuse his offending. The offending was serious and Mr Ham demonstrated a callous disregard for human life. He acknowledged in his letter that on the night, heavily intoxicated though he was, he intended to cause the people harm. It was a matter of mere luck no one was seriously injured or killed.
- 35 These actions put Mr Ham's reputation and the profession's reputation at very significant risk. The community would no longer have trust and confidence in Mr Ham as a registered social worker being able to assist them, and able to show good sense and judgement in helping people in difficult circumstances. This is particularly so as the actions occurred in a small rural community.
- 36 The Tribunal gave consideration to the wording of the code of conduct; in particular the wording "compromises the social worker's ability to work *with the client* in a fully professional and caring manner". The Tribunal accepted Mr La Hood's submission that it adopt a purposive interpretation, reading "the client" as referring to clients in general. The purpose of the Act and the Code is to impose on registered social workers high standards of personal conduct and integrity and to ensure the protection of the public.
- 37 The Tribunal found both charges established and they were serious enough to warrant a disciplinary sanction. Further, the Tribunal concludes the conduct was gross misconduct.

Penalty

- 38 Counsel for the CAC helpfully summarised the applicable principles set out by the High Court in *Roberts*⁷, a judgment of Collins J:

⁷ *Roberts v PCC* [2012] NZHC 3354, at [44]-[51].

- a. the first consideration requires the Tribunal to assess the penalty that most appropriately protects the public;
- b. the Tribunal must be mindful of the fact that it plays an important role in setting professional standards;
- c. the penalties imposed by the Tribunal may have a punitive function, although protection of the public and setting professional standards are the most important factors;
- d. where appropriate, the Tribunal must give consideration to rehabilitating professionals;
- e. the Tribunal should strive to ensure that any penalty it imposes is comparable to other penalties imposed in similar circumstances;
- f. the Tribunal must assess the professional's behaviour against the spectrum of the sentencing options available;
- g. the Tribunal should endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances; and
- h. the Tribunal must assess whether the penalty imposed is fair, reasonable and proportionate in the circumstances.

39 The CAC submitted that the Tribunal, having found the offences amounted to gross or severe misconduct, should cancel Mr Ham's registration pursuant to section 83(1)(a)(i) and censure Mr Ham.

40 The CAC referred the Tribunal to a number of relevant authorities including CAC v's *Curson* and concluded taking into account the inherent seriousness of the convictions, the need to protect the public and the requirement to enhance the professionalism of social workers, cancellation was the only appropriate penalty.

41 The Tribunal concurs. The seriousness of Mr Ham's offending and the gravity of the departure from the standard expected of a registered social worker was at the highest level. The Tribunal was mindful of the need to protect the public and the reputation of all other registered social workers as a profession.

42 The Tribunal also accepts the submission that Mr Ham's conduct requires censure.

Orders

- 43 The Tribunal orders that the registration of Gordon James Ham, registered social worker of Huntly, be cancelled forthwith.
- 44 Pursuant to section(83)(1)(b) the Tribunal orders that Mr Ham be censured in the following terms:
- Gordon James Ham has been found guilty by the Social Workers Complaints and Disciplinary Tribunal of two charges of gross misconduct. The Tribunal censures Mr Ham for failing to uphold the standards of a registered social worker and for endangering public safety.

Orders as to Restoration of Registration and Conditions under section 84

- 45 Counsel for the CAC referred the Tribunal to precedents, particularly *McMillan*, in relation to conditions the Tribunal may choose to impose when imposing conditions under s84. The Tribunal has also had regard to *Davis and Baker*.
- 46 The Tribunal has considered whether it should make an order exercising its discretion under section 84(1)(a) to impose a minimum period during which Mr Ham cannot reapply for registration. Counsel confirmed that the discretion under s84(1) is unfettered, and the Act provides no guidance as to the exercise of the discretion. Counsel noted the Act provides a period of 3 years as the maximum period for which conditions may be imposed. It was suggested 3 years would therefore be a minimum period for an order that a practitioner not reapply after being struck off.
- 47 The Tribunal requested further written submissions from counsel for the CAC in relation to the law and factors relevant to the consideration of its discretion under s84(1)(a). Mr La Hood provided further helpful submissions.
- 48 No relevant case law was located in relation to comparable disciplinary jurisdictions, despite a number of similar discretionary powers being noted.
- 49 Counsel noted Mr Ham was sentenced to 8 years and one month's imprisonment, making his sentence expiry date 21 October 2021 (although he would be eligible for release before that date). Counsel for the CAC submitted any non-reapplication period should extend beyond this date. However, the Tribunal ought not unreasonably to limit the discretion of the Board to consider a future application for re-registration. The Board's process and requirements for registration provide a significant protection for the public.

50 Given the seriousness of the breaches by Mr Ham and the underlying drug and alcohol problems which contributed to his offending, the Tribunal makes the following orders:

- pursuant to section 84(1)(a) Mr Ham may not apply for registration again before 5 January 2026, i.e. 5 years after his sentence expiry date. This reflects the Tribunal's intention for there to be a 5 year period of rehabilitation after the conclusion of Mr Ham's full sentence;
- pursuant to section 84(1)(b) the Tribunal imposes the following conditions that Mr Ham must satisfy before he may apply for registration again:
 - he must successfully complete a Board approved drug and alcohol rehabilitation programme.
 - he must successfully complete a Board approved education programme on the Code of Conduct and ethics of the social work profession.
 - with his consent, that he undergo cognitive testing and an examination by a Clinical Psychologist approved by the Board to assess:
 - his competence for practising with the complex issues faced by social workers;
 - his realisation, awareness, acceptance and insight into the issues which were involved in his offending to which the charges related;
 - whether or not he is still vulnerable to the influences which effected his offending; and
 - whether there are any, and if so the nature and extent of, cognitive or neurological consequences of his long term substance abuse.
- That he agree to have such supervision for a period as is required by the Board as a consequence of the outcome of any psychological examination as set out above.

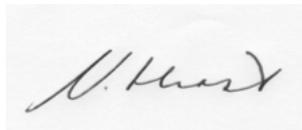
Costs

- 51 The total cost for the disciplinary proceedings is in excess of \$13,000.00.
- 52 The CAC referred the Tribunal to the applicable legal precedents⁸ where in imposing costs on social work and health professionals the starting point was fifty percent of total reasonable costs, with discretion to be exercised either increasing or decreasing that amount in the particular circumstances of the case.
- 53 The CAC noted, however, that in the unique circumstances (Mr Ham serving a lengthy term of imprisonment) an award of costs would be unrealistic.
- 54 The Tribunal holds the view that as a matter of principle, Mr Ham should be contributing a minimum of fifty percent to the costs of disciplinary proceedings (with some allowance for his co-operation and decision not to defend the proceedings). However, given that the sentencing notes of the District Court judge noted Mr Ham had no financial ability to pay reparation and Mr Ham's lengthy incarceration, the Tribunal makes no order for costs.

Publication of Order

- 55 The Tribunal directs that a copy of this decision be published on the Board's website.

Dated this 4th day of August 2015



V Hirst

Chairperson
Social Workers Complaints and Disciplinary Tribunal

⁸ *Curson and Cooray v Preliminary Proceedings Committee* AP23/94, 14 September 1995, Doogue J.