

Complaints and Disciplinary Tribunal

BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

DECISION NO: RSW2SWDT2017

UNDER the Social Workers Registration Act 2003

IN THE MATTER of a disciplinary charge laid against **MARK
KELVIN NASH** of Wellington, registered social
worker

Hearing Held in Wellington on 1 June 2018

TRIBUNAL: Ms J C Hughson (Chairperson)

Ms L Cooper, Mr P McGurk, Mr P Comber, Mr B Marra (Members)

IN ATTENDANCE: Ms G J Fraser (Executive Officer)

Ms J Kennedy (Stenographer)

APPEARANCES: Ms R Kos for the Complaints Assessment Committee (CAC)

Mr N S P Laing for Mr Nash

Introduction

1. Holding a current annual practising certificate (“APC”) is a mandatory requirement for any registered social worker who is employed or engaged as a social worker.¹
2. It is the registered social worker’s primary responsibility to ensure that a current APC has been issued before he or she is employed or engaged as a social worker.
3. Although there may be views held by a registered social worker’s employer about whether or not a registered social worker who is employed by them is employed or engaged as a social worker that does not relieve the registered social worker from the primary responsibility to ascertain whether the Social Workers Registration Board (“the Board”) requires him or her to hold one, and if so, to obtain one.

Mr Nash

4. Mr Nash was first registered as a social worker with the Board on 9 May 2013. He holds a Diploma of Social Work qualification which he obtained in the United Kingdom in 2003. Prior to beginning his employment at the Ministry of Social Development (“MSD”) (as discussed below), from 2006 until 2011 Mr Nash had worked in various roles including as a social worker, a Supervisor, and an Advisor for Child Youth and Family (CYF), a functional division of MSD.
5. Since 2014 and over the relevant time period Mr Nash has worked as a Senior Adviser -Youth in the Service development team at Community Investment in the MSD in Wellington. Following a restructure, the Community Investment functions were divided between MSD and Oranga Tamariki (MVCOT) in April 2017. Mr Nash’s team and role transferred to MVCOT.²
6. The position description for the Senior Advisor - Youth role does not require Mr Nash to be a registered social worker. Nor does the role require Mr Nash to carry a clinical caseload or supervise other social workers. There was no evidence before the Tribunal that Mr Nash engaged in casework decisions at any level.
7. Mr Nash’s Competence Certificate expired on 11 October 2015 and his APC therefore expired on the same day. From 11 October 2015 until 12 April 2016 Mr Nash did not hold an APC but continued to work in his Senior Advisor - Youth role.
8. In April 2016 Mr Nash spoke informally to the then Registrar of the Board and stated that he had not renewed his Competence Certificate since he had commenced in the role of Senior Advisor -Youth at MSD. The Registrar informed Mr Nash that he was practising social work in

¹ Section 25 Social Workers Registration Act 2003

² which was renamed to Oranga Tamariki – Ministry for Children (OTMC) on 18 January 2018

this role and as such he was required to hold an APC. On 12 April 2016 the Board issued him with an Interim Practising Certificate (IPC) until 30 June 2016 to enable him to submit his Competence Certificate documentation. Mr Nash did not submit his Competence Certificate documentation and his IPC expired.

9. Between 6 May 2016 and 14 June 2017 Mr Nash was contacted several times by the Board. Mr Nash was granted several extensions of time to submit his Competence Certificate documentation but he did not do so until 6 April 2017, although that paperwork was incomplete.³
10. On 11 May 2017 Mr Nash advised the Board by telephone that he did not believe he was practising as a social worker.⁴
11. From 1 July 2016 to 5 September 2017 Mr Nash did not hold an APC when he worked in the Senior Advisor- Youth role at MVCOT. He was not issued with another IPC until 6 September 2017.⁵
12. A Complaints Assessment Committee (“CAC”) appointed under section 66 of the Social Workers Registration Act 2003 (the Act) investigated the matter of Mr Nash allegedly having been employed or engaged as a social worker and laid a charge under section 82(1)(b) of Act.

The Charge and the hearing

13. The charge against Mr Nash read as follows:
“Pursuant to section 72(3) of the Act the Complaints Assessment Committee charges that Mark Nash, registered social worker, of Wellington:
 - (a) Between 12 October 2015 and 11 April 2016 and from 1 July 2016 to 5 September 2017, was employed or engaged as a social worker without a current practising certificate; and*
 - (b) this conduct amounts to conduct that is unbecoming of a social worker and reflects adversely on his fitness to practise as a social worker pursuant to s82(1)(b) of [the Act].”*
14. At the hearing both the CAC and Mr Nash were represented by Counsel. An agreed statement of facts signed by Mr Nash was produced to the Tribunal. In that agreed statement facts Mr Nash partially admitted the charge in that he admitted that during the relevant periods he had been employed or engaged as a social worker without an APC. However he did not admit that this conduct amounted to conduct unbecoming which reflected adversely on his fitness to practise as a social worker.

³ Part Admission of Charge and Agreed Statement of Facts (ASOF) (Document 1) at [27]

⁴ ASOF at [28]

⁵ ASOF at [36]

15. A bundle of documents was produced by consent which contained a copy of the charge, documents concerning Mr Nash's registration and his APC history, Mr Nash's position description for the role of Senior Advisor - Youth, relevant correspondence between the Board and Mr Nash and other relevant information including Mr Nash's competence documentation which he submitted to the Board in mid-2017, and the Board's Code of Conduct for Social Workers (V3 January 2014 and V4 14 March 2016). All of this material was considered carefully by the Tribunal.
16. No oral evidence was given by any witnesses.

Legal principles

17. In any charge before the Tribunal the onus is on the CAC to prove the charge. That onus is on the balance of probabilities and the more serious the charge, the greater the level of proof required.
18. The purpose of the Act is set out in section 3(a) and includes the protection of the safety of the public by prescribing or providing for mechanisms that ensure that social workers are both competent to practise, and accountable for the way in which they practise. Section 3(d) provides that the Act is to "*enhance the professionalism of social workers.*"
19. The requirement to hold an APC is a fundamental mechanism by which the purposes of the Act are achieved. This requirement persists unless the social worker is recorded by the Board as non-practising or is otherwise removed from the register.
20. In charges under section 82(1)(b) of the Act where it is alleged that a registered social worker has been employed or engaged as a social worker without holding a current practising certificate the Tribunal has on many occasions found there needs to be proven:
 - That the social worker was registered during the dates set out in the charge; and
 - That the registered social worker was employed or engaged as a social worker during those dates; and
 - That the registered social worker did not hold an APC during those dates; and
 - That the registered social worker's conduct in continuing to be employed or engaged as a social worker without an APC during those same dates, amounts to conduct unbecoming of a registered social worker which reflects adversely on the registered social worker's fitness to practise as a social worker.
21. To answer the question whether the registered social worker was employed or engaged as a social worker at the relevant times it is necessary to find that the registered social worker was engaged in social work duties that fall within the Board's authority.

22. The terms “social work” and “employed or engaged as a social worker” used in section 25 are not defined in the Act. However in previous decisions the Tribunal has held that it is clear on the face of the section that the requirement to hold a current practising certificate is not restricted to employment in a role titled “social worker.” It envisages circumstances in which a registered social worker may not be formally employed as a “social worker” but nonetheless is engaged in tasks and undertaking responsibilities that can properly be considered social work. This is consistent with the broad purpose of the Act.⁶
23. In *CAC v Angelo*⁷ the Tribunal adopted the approach set out in a Crown Law opinion which was referred to by counsel for the CAC. This opinion was jointly obtained by the Board and the MSD in November 2013 and recommended a broad approach be taken to what constitutes social work. The opinion concluded that a registered social worker is “employed or engaged as a social worker” and required to hold a current practising certificate if he or she:
- “3.1 is engaged with casework decisions at any level; and/or*
- 3.2 in the context of performing his or her role, expressly or implicitly holds himself or herself out as a registered social worker, or is held out in that way by his or her employer or colleagues.”*
24. In assessing whether or not a person is employed or engaged as a social worker this Tribunal has in previous cases also considered whether or not a person is using his or her “social work skills and training” (*CAC v Kuruvilla*,⁸ *CAC v Hungahunga*⁹).
25. In essence, to determine whether the registered social worker was employed or engaged as a social worker the Tribunal must assess, on a case by case basis, the nature of the role which the registered social worker is undertaking. This assessment is made with reference to factual evidence including any admitted facts, the job/position description of the registered social worker as well as evidence of the day to day tasks the person undertakes in the performance of their work (or confirmation that the tasks set out in the job description were in fact performed by the registered social worker).
26. In this case the Tribunal was able to be assisted by the facts admitted by Mr Nash, by his position description and by relevant material included in the Competence Certificate documentation which Mr Nash submitted to the Board about his work in the Senior Advisor - Youth role (which enabled him to meet the Board’s competencies).

⁶ Section 3, Social Workers Registration Act 2003

⁷ RSW9/D1/SWDT/2015

⁸ RSW1/D1/SWDT/2016

⁹ RSW6/D1/SWDT/2016

27. As for the test of conduct unbecoming of a social worker and which reflects adversely on a registered social worker's fitness to practise as a social worker, there are a number of decisions of this Tribunal where charges of this nature brought under section 82(1)(b) have been considered. In those cases the Tribunal adopted the approach of the Medical Practitioners Disciplinary Tribunal and High Court appeals from that Tribunal in which a charge of conduct unbecoming which reflects adversely on a medical practitioner's fitness to practise was considered under the Medical Practitioners Acts 1995 (now repealed). The Tribunal as presently constituted had no reason to depart from that approach.
28. In essence, whether there has been conduct unbecoming and which reflects adversely on a registered social worker's fitness to practise as a social worker, is to be assessed by objective standards.
29. In *B v Medical Council*,¹⁰ Elias J discussed the test as follows:
- “There is little authority on what comprises “conduct unbecoming.” The classification requires assessment of degree. But it needs to be recognised that conduct which attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public...
- The structure of the disciplinary processes set up by the Act, which rely in part upon judgment by a practitioner's peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that usual professional practice, while significant, may not always be determinative: the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards not be permitted to lag. The disciplinary process in part is one of setting standards.”
30. The Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal*¹¹ endorsed the earlier statements which had been made by Elias J in *B v Medical Council* where Her Honour made the important point that the threshold (in cases of professional misconduct and conduct unbecoming under the Medical Practitioners Act 1995) is “inevitably one of degree”. The Court of Appeal expressed the issue in this way at paragraph [80]:

¹⁰ [2005] 3 NZLR 810

¹¹ [2005] 3 NZLR 774

“In cases of both professional misconduct and conduct unbecoming it will be necessary to decide if there has been a departure from acceptable standards and then to decide whether the departure is significant enough to warrant sanction.”

31. Importantly in *F v Medical Practitioners Disciplinary Tribunal* the Court of Appeal went on at paragraph [80] to hold that in order to determine that the conduct is significant enough to warrant disciplinary sanction the Tribunal must satisfy itself that the conduct reflects adversely on the practitioner’s fitness to practise.
32. In *CAC v Hungahunga*¹² the Tribunal adopted the approach of the Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal* as does this Tribunal as presently constituted.
33. As such, in cases where a charge is laid under s 82(1)(b) alleging conduct unbecoming of a social worker, the Tribunal must first decide on the basis of an objective assessment of the facts, whether there has been a departure from acceptable standards and that departure was conduct unbecoming of a social worker. If the Tribunal is satisfied that the first step is met then the Tribunal needs to go on and decide (also objectively) the threshold step being whether the established departure “reflects adversely on a practitioner’s fitness to practise as a social worker” (and therefore is significant enough to warrant disciplinary sanction for the purposes of protecting the safety of the public and/or enhancing the professionalism of social workers).
34. In relation to the “reflects adversely on fitness to practise” rider, in *Zauka*¹³ the Health Practitioners Disciplinary Tribunal held:

“It is not necessary that the proven conduct should conclusively demonstrate that the practitioner is unfit to practise. The conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine. Not every divergence from recognised standards will reflect adversely on a practitioner’s fitness to practise. It is a matter of degree.”
35. Accordingly, when satisfying itself that the conduct reflects adversely on fitness to practise, the Tribunal accepts that it is not required to find that the registered social worker is not a fit and proper person to practise social work.
36. For the avoidance of doubt there was no suggestion or evidence in this case that Mr Nash was not (and is not) a fit and proper person to practise social work.

¹² RSW6/D1/SWDT/2016, 8 November 2016

¹³ *Re Zauka*, 236/03/103C, Health Practitioners Disciplinary Tribunal; this case was a referral of convictions under the Health Practitioners Competence Assurance Act 2003.

Charge - discussion

Part A – Practising social work without holding a current practising certificate

37. The facts as agreed between the parties and accepted by the Tribunal included:

- That Mr Nash was registered as a social worker during the time periods referred to in the charge;
- That Mr Nash did not have an APC during those dates; and
- That Mr Nash practised social work duties during that period in his employment as Senior Advisor -Youth and therefore he was required to hold an APC for this role.

38. Despite these admissions it was nonetheless for the Tribunal to determine for itself that this part of the charge was established.

39. In relation to the extent of Mr Nash's practice as a social worker, it was agreed between the parties that:

- Mr Nash's position description sets out the key responsibilities of the role of Senior Advisor including:¹⁴
 - i. Providing advice on quality practice in the youth area.
 - ii. Providing an overview of the effectiveness of Community Investment spend in the youth area.
 - iii. Assisting in the design and development of quality programmes and services in the youth area.
 - iv. Working closely with the regional teams across MSD to identify and promoting opportunities to improve outcomes for young people and their families, and
 - v. Maximising the outcomes that can be achieved from the Government's spend in this sector; and
- that examples of the Key Accountabilities as set out in the position description for the Senior Advisor – Youth role are to¹⁵
 - i. Provide advice and support for the management of community-based programmes and services to achieve positive outcomes for youth and their families;
 - ii. Monitor client impacts and outcomes from investment in programmes and services, to report on performance as required;

¹⁴ Agreed Bundle of Documents (ABOD) (Document 3), document 52

¹⁵ ABOD, document 52

- iii. Provide advice on programmes and performance enhancement to maximise the outcomes for the Government’s spend in the sector;
- iv. Respond to written and verbal inquiries as required, including requests from staff and providers to ensure the smooth running of services and programmes; and
- v. Gather information on “best practice”, patterns, trends, potential areas of improvement and identify youth development gaps, and provide support and advice to youth service providers.

40. The Tribunal noted that the Position Description:

- i. Specified that in terms of external working relationships Mr Nash was required to have a working relationship with “young people and organisations working with young people (including service providers)” and with “Asian, Iwi/Maori, Pacific peoples, and other cultural organisations, including migrant and refugee communities, and related support organisations”,¹⁶ and
- ii. Other key accountabilities include having responsibility for the identification of needs, objectives, outcome options and appropriate programme delivery and implementation issues relating to the development of programmes (Programme Development and Implementation); and identifying and implementing initiatives to raise the performance and profile of youth services as well as providing advice and support to youth service providers to ensure ‘best practice’ and increased positive outcomes for youth (Strategic Perspective and Advice).

41. At the hearing Counsel for Mr Nash, in answer to a question from the Tribunal, confirmed that Mr Nash accepted that he was performing the responsibilities and accountabilities set out in the position description,¹⁷ although with the rider that what he was performing was advisory in nature in a policy advisor sense rather than as a frontline social worker.¹⁸

42. It was agreed that Mr Nash was referred to the Board for a competence assessment at which time he provided reflections on his role as Senior Advisor-Youth in line with the 10 core competencies.¹⁹ He also undertook a face-to-face-competence assessment.

¹⁶ ABOD, page 128

¹⁷ Transcript, Question from member P McGurk, page 65 L21-24

¹⁸ Transcript, page 65 L 24- 34 and page 66 L7-17

¹⁹ ABOD, document 49, page 94 (confirmation from Mr Nash’s Counsel that he had undergone a competence review before the Board on 11 August 2017 and a face to face competence assessment on 21 September 2017). See also ABOD, document 50, page 95-98 where Mr Nash’s engagement with the competence review process is outlined by his Counsel.

43. A recertification competence assessment is a requirement for eligibility to renew a practising certificate. Pursuant to section 44 of the Act all registered social workers who wish to retain their practising certificate are required to complete a competence assessment every five years. A competence assessment is required to enable the Board to determine whether the person's competence to practise social work is satisfactory for the purposes of the Act. If a practitioner fails to complete a competence assessment within the required timeframe then the practitioner is no longer eligible to retain his or her practising certificate. The practitioner's APC, if one is held, immediately becomes invalid.
44. It was clear from his application form that Mr Nash relied on his Senior Advisor – Youth work in support of his application for Competence Certification.
45. That the discharge of Mr Nash's functions and accountabilities in the Senior Advisor - Youth role involve the application of his social work knowledge and skills was evident in his Ten Core Competence: Critical Reflections document which Mr Nash submitted to the Board in support of his application for Competence Certification (dated 31 July 2017). In this document Mr Nash noted, relevantly:
- i. His role requires him to work with organisations and communities to support, develop and promote interventions that meet government objectives in reducing social harm;²⁰
 - ii. He has developed and implemented a number of whanau-focused pilots to reduce social harm;²¹
 - iii. He is engaged in a wide range of work across the government to explore issues and opportunities to address need for different groups in New Zealand. His work develops responses and effective service models;²²
 - iv. He seeks to employ as an overarching model a Constructive and narrative-based social work approach;²³
 - v. His role often requires him to work with disenfranchised, disengaged and vulnerable individuals/groups. He gives the examples of working with adult gangs (eg. The Mongrel Mob and Black Power) to develop responses that reduce immediate harm and reduce the multigenerational impact of "gang life". He completed a literature review, and field research including face-to-face meetings with gang members, their whanau , non-gang members, and organisations;²⁴

²⁰ ABOD at 114

²¹ ABOD at 116

²² ABOD at 116

²³ ABOD at 118

²⁴ ABOD at 119

- vi. He described the focus of his work as being “to engage with individuals and communities to promote social change through understanding the systematic and psychosocial barriers to individuals achieving positive outcomes.”²⁵
46. On the basis of the material Mr Nash submitted to the Board and his face to face interview, the Board assessed Mr Nash as having achieved competencies 1 through 8 but he did not achieve competencies 9 and 10. The Board issued Mr Nash with an IPC with conditions that he remain working at OTMC, and attend supervision. He was also required to (and did) provide a report from his supervisor to the Board. He continues to work in his Senior Advisor –Youth role at OTMC and currently holds a full APC which was issued on 28 February 2018.²⁶
47. In his Record of CPD Activities²⁷ in October 2015 Mr Nash had referred to one of his identified needs for the Senior Advisor-Youth role as to “increase my ability to supervise social work staff to deliver safe practice and promote growth and development of supervisee”. His supervisor’s comment when signing off this goal was “Although Mark has no supervision responsibilities in his current role he has demonstrated that he has an extensive knowledge of social work practice and uses this knowledge to apply these models to the service development work he undertakes.” Further, Mr Nash referred to “the management support and interventions for individuals that present complex and challenging behaviours”²⁸ and “increasing understanding and effectiveness working with Maori youth”.²⁹
48. Mr Nash admitted that on 14 July he had confirmed through his Counsel that he considered that his Senior Advisor -Youth role did not require him to undertake “frontline” social work, carry a clinical caseload, supervise other social workers or be a registered social worker. Further, that he considered transition to his current Senior Advisor-Youth role was “one away” from practising social work, and that continued maintenance of his practising certificate was therefore not required. However, he accepted he was mistaken in his view that he was not required to continue to hold an APC for his role at MVCOT.³⁰
49. At the hearing, through his counsel Mr Nash submitted that he honestly and reasonably believed that he was not practising social work at the material times in his role and therefore

²⁵ ABOD at 120

²⁶ With one condition that Mr Nash provide evidence of 10 hours of CPD specific to Competencies 9 and 10 to have been submitted on the SWRB CPD log by 30 June 2018 and this CPD log is to be assessed as to whether it meets the required standard by the SWRB assessor. Supervision is no longer specified as a condition and there are no other conditions on his APC; ASOF [40]-[42].

²⁷ SWRB CPD Log, 30 October 2015

²⁸ ABOD at [61]

²⁹ ABOD at [63]

³⁰ ASOF at [35] and ABOD, document 47

he did not need to maintain his practising certificate. Further, that the basis for his honest and reasonable belief was the nature of his “policy advisory role as a “Senior Advisor – Youth” at the Ministry” and his employer’s view that an APC was not required. The Tribunal accepted these submissions as to Mr Nash’s explanation for why he did not take steps to renew his Competence Certification prior to its expiry on 11 October 2015.

50. Mr Nash stated that with the benefit of hindsight and after taking advice, he accepted that he was in fact employed as a social worker in his role without holding an APC and that his honest and reasonable belief held at the time was mistaken.³¹
51. In the end, the Tribunal was satisfied that all of the facts when drawn together indicated that in the relevant period Mr Nash used his social work qualification, skills and training to discharge the functions and accountabilities of the Senior Advisor – Youth role and as such was engaged in social work.
52. Put another way, the Tribunal was satisfied it had sufficient evidence before it as to the nature of Mr Nash’s Senior Advisor – Youth role to enable it to make a finding that Mr Nash was engaged in social work in the relevant time period and that the work described in his job description and key accountabilities involved him being “employed or engaged as a social worker”. This is notwithstanding that Mr Nash’s job title is not “Social Worker” and that his role is primarily advisory in nature.
53. As Counsel for Mr Nash stated “he’s implementing programmes that will then be rolled out and implemented by other social workers at the coal face, at the frontline”.³² The Tribunal considered that it followed that a registered social worker in the Senior Advisor-Youth role should therefore be held to the same standards which apply to the registered social workers at the frontline who are implementing the programmes which Mr Nash is creating or having an influence over at a policy and programme development level.
54. Satisfied that Mr Nash was engaged as a social worker at the relevant times, it followed that Mr Nash was required to hold an APC at those times, pursuant to section 25 of the Act. As above, it was not in dispute that Mr Nash did not hold an APC in the periods from 12 October 2015 to 11 April 2016 and from 1 July 2016 to 5 September 2017.
55. Accordingly, the Tribunal found that the CAC had proved the first part of the charge as admitted by Mr Nash; namely that in the relevant periods Mr Nash was employed or engaged as a social worker without a current practising certificate.

³¹ Submissions and Bundle of Authorities of Counsel for Mr Nash – Liability (Document 4), pages 1-3

³² Transcript, page 49 L27-30

Part B - Conduct unbecoming which reflects adversely on fitness to practise

56. As above, Mr Nash denied that this conduct was conduct unbecoming which reflects adversely on his fitness to practise social work. He defended the charge on this basis.
57. For the CAC it was submitted (including with reference to the agreed evidence):³³
- There are two steps to assessing what constitutes conduct unbecoming of a social worker³⁴ with reference to the test in *F v MPDT*;
 - The High Court in *B v Medical Council* held that the relevant conduct must be measured against the standards of “competent, ethical and responsible practitioners”;³⁵
 - Previous decisions of the Tribunal provide helpful guidance on the general principles,³⁶ many of which involved the social worker not having the support of their employer to renew his or her APC and/or where the social worker was under the impression that they were not employed or engaged as a social worker. In previous decisions the Tribunal has found a charge of conduct unbecoming proved notwithstanding these factors;
 - Applying the general principles, Mr Nash’s continued practise as a social worker without an APC amounted to conduct unbecoming pursuant to section 82(1)(b). Personal stressors were a factor relevant to penalty not liability³⁷ and personal responsibility is key;³⁸
 - In the period 12 October 2015 to 11 April 2016 Mr Nash practised as a social worker without an APC. Holding a practising certificate and a current Competence Certificate is vital to upholding the purposes of the Act and was a significant responsibility afforded to Mr Nash which meant it was important he understood and met the statutory obligations;
 - In April 2016 Mr Nash was told by the then Registrar of the Board that his new role did amount to him practising social work and he was issued with an IPC to resubmit Competence paperwork. He was reminded to renew his APC multiple times³⁹ but failed

³³ Submissions and Bundle of Authorities for the CAC – Liability (Document 7); and oral submissions

³⁴ *F v MPDT* [2005] 3 NZLR 774 (CA) at [79]

³⁵ Above n 39, at 811

³⁶ *CAC v WT* 25WAPC 05/13/SWDT, 22 March 2013; *CAC v Sanders* 05/13/SWDT, 20 May 2013; *CAC v Nelson* RSW4/D1/SWDT/2015, 18 December 2015; *CAC v Russell* RSW6/D1/SWDT/2015, 18 December 2015, *CAC v Estall* RSW8/D1/SWDT/2015, 18 December 2015; *CAC v Angelo* RSW9/D1/SWDT2016, 19 April 2016; *CAC v Kuruvilla* RSW1/D1/SWDT/2016, 19 April 2016; *CAC v Haswell* RSW5/D1/SWDT/2015, 19 April 2016; *CAC v Hunghunga* RSW6/D1/SWDT/2016, 8 November 2016; *CAC v G* RSW8/D1/SWDT/2016, 20 December 2016

³⁷ *CAC v Hunghunga* fn. 34

³⁸ *CAC v Angelo*; *CAC v G*

³⁹ ASOF at [16]; ABOD at 14, 16, 17, 19 and 20

to submit his Competence paperwork by the required time. He was again advised his APC had expired, but continued to practise social work.⁴⁰ He was warned he may face disciplinary action⁴¹. Mr Nash did not respond to the Board;⁴²

- Mr Nash did not attempt to resubmit a renewal application until 6 April 2017⁴³ and he then failed to engage with the Board's request for further information;
- It was not until 11 May 2017 that Mr Nash advised the Board he did not consider he was practising social work.⁴⁴ The Board requested a job description and offered to discuss further how his role amounted to practising social work.⁴⁵ Mr Nash then failed to provide a job description to the Board when requested⁴⁶. Having provided a CPD log and had further information requested, on 14 June 2017 Mr Nash then requested further explanation of the definition of "social work" and "practising social worker";⁴⁷
- This case is similar to *CAC v Haswell* (Ms Haswell was a registered social worker who worked as a Regional Manager Intensive Services with Youth Horizons Trust. In January 2014 Ms Haswell accepted she was in a social work role but then failed to renew her APC until 1 September 2015 on the basis that this was because of uncertainty about the process in the context of her managerial position); while Mr Nash may have felt uncertainty about whether his role amounted to social work, the Board position was made clear to him from April 2016;
- Mr Nash had a period of sustained leave from work between December 2016 and March 2017;⁴⁸ this did not obviate his responsibilities as a registered social worker to engage with the Board. He was made aware of the Board's concerns prior to that time;
- Mr Nash's manager at Oranga Tamariki confirmed on 23 May 2017 that Mr Nash had "child care issues to sort through which has yet to be resolved";⁴⁹
- This failure to engage with the Board about the renewal of his Competence Certification and APC represents a significant departure from the standards reasonably expected of a social worker and therefore reflects adversely on Mr Nash's fitness to practise as a social worker.

⁴⁰ ASOF at [17]; ABOD at 22

⁴¹ ASOF at [18] ABOD at 23

⁴² ASOF at [19]

⁴³ ASOF at [27]; ABOD at 39

⁴⁴ ASOF at [28]

⁴⁵ ASOF at [30]; ABOD at 55

⁴⁶ ASOF at [31]

⁴⁷ ASOF at [34], ABOD at 80

⁴⁸ ASOF at [21]

⁴⁹ ABOD at 57

58. Counsel for Mr Nash submitted:⁵⁰

- If the Tribunal was satisfied that Mr Nash practised as a registered social worker without an APC, the Tribunal must consider whether this amounted to conduct unbecoming that reflects adversely on his fitness to practise;
- The Tribunal ought to adopt the two stage test set out in *lakimo*⁵¹ namely first decide whether there has been a departure from acceptable standards and was conduct unbecoming; if that step is met then the Tribunal must go on and decide the threshold step being whether the established departure reflects adversely on a practitioner's fitness to practise as a social worker and therefore is significant enough to warrant disciplinary sanction;
- With reference to Mr Nash's honest and reasonable belief, the circumstances of Mr Nash's case are unique and highly material to considering whether Mr Nash's conduct was acceptable;
- Mr Nash's employer is acutely relevant; it was submitted that it was not unreasonable for Mr Nash to have formed his belief that he was not required to maintain his competency or annual practising certificate given the "size and sophistication" of Mr Nash's employer as the largest employer of social workers in New Zealand⁵² (there was reference to no employment processes having been taken when the Board made the employer aware of the need for Mr Nash to obtain his Competence Certificate; and to the employer having received legal advice);⁵³
- Despite these factors Mr Nash accepts he was obliged to "take a measure of personal responsibility to maintain his registration" but asks the Tribunal to take into account his unique circumstances that informed his honest and reasonable belief that he was not practising social work and thus not required to maintain the requirements of his registration;
- Mr Nash regrets his lack of communication with the Board about the issue of his continued registration but he placed a lower priority on this correspondence because of his belief (held until 14 June 2017) that he was not practising social work;
- It was not accepted that Mr Nash had failed to engage with the Board. Mr Nash referred to what was said was the equivocal position of the Board until as late as in December 2016 as to whether Mr Nash was practising as a social worker, to Mr Nash's period of

⁵⁰ Document 4 paras [41] and oral submissions

⁵¹ *lakimo* RSW9/D1/SWDT/2016

⁵² Transcript, page 28 L 24-26

⁵³ The Crown Law opinion referred to above

extended leave between December 2016 and March 2017, to the steps he took in March to May 2017 to update his competency portfolio and meaningfully engage with Board staff to resolve the issue. He provided his job description after taking legal advice. He identified as a factor slowing his responses, the stresses of balancing a high workload and a young family. Further, Mr Nash has engaged proactively with his competency recertification process and there was no question that Mr Nash was in fact competent and fit to practise at the relevant times;

- When matters were unequivocally brought to Mr Nash’s attention he meaningfully engaged with the Board and has done since as part of the CAC process. He was issued with an IPC on 6 September 2017 while he underwent a competency process and has complied with conditions on his practising certificate, including engaging in supervision, which has now been lifted;⁵⁴
- As to whether the conduct reflects adversely on Mr Nash’s fitness to practise, there can be no suggestion the conduct amounts to a serious level of deliberate or improper conduct which would pose a risk to public safety or to the reputation of the profession (which would allow the Board to find a person not a fit and proper person to practise under section 47); nor can there be any suggestion Mr Nash lacks competence or otherwise poses a danger to the safety of the public (his work is not client facing and not “high risk”);
- Taking into account his belief that he was not practising social work, which was informed by his employer not requiring him to hold a practising certificate, failing to renew his APC cannot be held to reflect adversely on his fitness to practise; and
- Mr Nash has an unblemished record and his employer had chosen not to sanction him in any way; he remains in his current Senior Advisor-Youth role, supported by his employer.⁵⁵

The Charge – findings

59. As above, the purpose of the Act includes the protection of the public, ensuring that social workers are accountable, and enhancing the professionalism of social workers. Registered social workers have a responsibility to meet the statutory requirements of registration in terms of practising certificates in order to practise legally. Non-compliance with these requirements is therefore a serious matter.

⁵⁴ ASOF, para 42

⁵⁵ Document 4, page 12.

60. The Tribunal was satisfied that at the material times Mr Nash was a registered social worker. The first element of the charge was met on the evidence.
61. The Tribunal was also satisfied the evidence established that Mr Nash's role as a Senior Advisor-Youth involved him engaging in social work in the relevant period, for the reasons given. The second element was also met.
62. As Mr Nash was engaged in social work in the relevant period, he was required to hold an APC. The Tribunal was satisfied that the evidence established Mr Nash failed to renew his practising certificate and that in the period covered by the charge Mr Nash practised social work without an APC. On this basis the Tribunal found that the third element of the charge was established.
63. The Tribunal considered that when viewed objectively, Mr Nash's conduct in continuing to be engaged in social work over two periods of six months and fourteen months respectively despite not holding an APC is entirely inconsistent with what might be expected for a practitioner who acts in compliance with the standards normally observed by those who are fit to practise as a registered social worker. The second period of non-compliance with the statutory requirements followed Mr Nash having received advice from the Board that he was required to renew his Competence Certificate and obtain an APC. This was quite unacceptable. The Tribunal was satisfied therefore that the conduct was a significant departure from accepted and expected standards and was 'conduct unbecoming' of a registered social worker.
64. The Tribunal was also satisfied that Mr Nash's conduct in practising social work in breach of this mandatory legal requirement across two separate time periods (one of which was in excess of a year and after he had been told by the Board that he was required to hold an APC) reflected adversely on his fitness to practise as a social worker. As the conduct involved Mr Nash failing to comply with a statutory obligation for a significant period of time the Tribunal considered that the conduct was unacceptable and reflected adversely on his fitness to practise. The requirements for practitioners who have chosen to register to apply in time for the renewal of their APC is fundamental to the professionalism of a registered social worker. As the Tribunal has stated in other cases, this is a requirement that is one of the cornerstones of the regulatory regime which registered social workers choose to participate in to assure employers, clients and the public that they are professional and fit and competent to practise. The fact that the regime is voluntary does not remove the personal responsibility for registered social workers to comply with the legal requirement to hold an APC if they are continuing to practise social work. An employer's view that their employee is not practising

social work and does not require an APC does not obviate the practitioner's personal responsibility to ascertain whether a practising certificate is required by the Board, and if so, to obtain one.

65. Further, Mr Nash was involved in the supervision of students who include the next generation of social workers. The Tribunal accepted the CAC's submission that this meant that Mr Nash was expected to act professionally and to provide good role-modelling which included complying with mandatory professional obligations and in a timely fashion.⁵⁶ That did not occur in this case.
66. There was evidence before the Tribunal in the agreed statement of facts and in the bundle of documents of the Board's attempts to engage with Mr Nash about the renewal of his competence certification and annual practising certificate in the relevant time periods. This evidence has been traversed above, in the context of referring to the submissions made by the parties. The Tribunal did find that there was a lengthy period of time when Mr Nash did not engage with the Board after having been contacted about his APC situation; and that when he did engage with the Board he took an extended period of time to submit his Competence Certificate paperwork (having been granted several extensions of time to submit this). That it took Mr Nash until 11 May 2017 to advise the Board that he did not believe he was practising as a social worker was quite unacceptable. On balance, the Tribunal did not consider Mr Nash discharged his professional and legal obligations to comply with the Board's requirements to obtain Competence Certification and an APC, to an acceptable standard and that this reflected poorly on his professionalism.
67. For these reasons, the Tribunal determined that Mr Nash's conduct reflected adversely on his fitness to practise as a social worker.
68. The Tribunal acknowledges that in his correspondence with the Board and in the submissions which were made on his behalf before the Tribunal, Mr Nash raised several factors which were submitted to be relevant to his failure to apply for an annual practising certificate at the relevant times. Some of those were subjective considerations (including personal stressors) which the Tribunal considered were relevant to the question of penalty but not to the objective assessment the Tribunal was required to make of whether the conduct was a falling short of accepted standards and was "conduct unbecoming" and which reflected adversely on Mr Nash's fitness to practise as a social worker. On that basis the subjective factors relating to the personal circumstances of Mr Nash were considered as part of the Tribunal's consideration of penalty (discussed below).

⁵⁶ Transcript, page 25 L19-27

69. If in every case the Tribunal was required to take into account subjective considerations relating to the registered social worker in a charge of this kind then the purpose of the disciplinary procedures under the Social Workers Registration Act 2003 could not be met.
70. Satisfied that all the elements of the charge were proved, the Tribunal found that the Charge was established.
71. That finding having been announced orally at the hearing, the Tribunal heard submissions from both Counsel for the CAC and Counsel for Mr Nash on matters relevant to penalty and costs.

Penalty

CAC Submissions:

72. Counsel for the CAC submitted:⁵⁷
 - i. The relevant penalty principles which have been applied in other cases before the Tribunal applied in Mr Nash's case (these are referred to below);
 - ii. In considering the appropriate penalty there are two aggravating features; the first is that in the period from 1 July 2016 to 5 September 2017 Mr Nash practised as a social worker without holding an APC, despite being told by the Board that he was required to hold one; and secondly his failure to engage with the Board over the period from April 2016 to September 2017 was aggravating;
 - iii. That Mr Nash now has a current Competence Certificate and an APC is a mitigating factor;
 - iv. Taking into account the seriousness of practising without an APC, its importance in maintaining the principal purposes of the Act, and that Mr Nash is in a position of seniority within his role as a Senior Advisor – Youth at OT, a censure and a fine are appropriate penalties;
 - v. In *Hunghunga* a fine of \$300 was imposed to reflect the length of time over which Ms Hunghunga was engaged in social work without an APC (almost one year) and without taking any steps to undertake a competence assessment;⁵⁸
 - vi. In *Haswell* a fine of \$400 was imposed and Ms Haswell was ordered to pay 25% of the total costs of the Tribunal and the CAC;⁵⁹

⁵⁷ Penalty Submissions for the CAC (Document 5); and oral submissions

⁵⁸ *CAC v Hunghunga* fn.34

⁵⁹ *CAC v Haswell* RSW5/D1/SWDT/2015

- vii. The Tribunal may make an order of costs in accordance with the usual principles (discussed below) and any such order should take into account Mr Nash's financial circumstances.

Submissions for Mr Nash

73. For Mr Nash it was submitted (in summary):⁶⁰

- i. The public were not in any way adversely impacted by Mr Nash's conduct; at no time was Mr Nash a danger or posed a risk to the public;
- ii. Mr Nash has fallen foul of a "gap" in the legislation concerning persons who are not practising in "common social work roles". Mr Nash does accept a measure of personal responsibility and has fully engaged with the Board's processes in regaining his annual practising certificate;
- iii. Mr Nash accepted he placed a lower priority on the Board's correspondence because of his belief that he was not practising social work;⁶¹
- iv. This was not a situation where Mr Nash deliberately flouted the requirements applying to him or simply ignored, without reason, correspondence from his professional body;
- v. Mr Nash did engage with the Board when he returned from extended leave, from March 2017 including as part of the competency renewal process, and with the CAC and with the Tribunal;
- vi. This is not a particular case where significant punishment of Mr Nash is warranted;
- vii. This is an appropriate case where the penalty should prioritise the rehabilitation of Mr Nash and as such the Tribunal should enter the equivalent of a conviction and discharge, without penalty (which was submitted would be the least restrictive penalty);
- viii. The Board has no competence or fitness to practise concerns as evidenced by the Board not having placed any restrictions on Mr Nash's practice and it having signalled to him its preference to support him continuing in his role; and the Board has recognised his cooperation and engagement in the process;
- ix. Mr Nash has already taken significant steps in terms of rehabilitation;
- x. There is lack of the "risk factor" which has been present in other cases the Tribunal has considered because although he accepts he was practising social work, Mr Nash is not in a client-facing role with a client caseload;
- xi. the penalties imposed in previous cases involving the same charge may for the basis of a tariff;

⁶⁰ Submissions and Bundle of Authorities for Mr Nash – Penalty (Document 7); and oral submissions

⁶¹ ABOD, document 47

- xii. There are several mitigating factors:
- Mr Nash’s understanding he did not have to renew his APC, by reference to his employer’s position;
 - Cooperation with the CAC which shows his level of insight;
 - Mr Nash has not previously been the subject of disciplinary processes;
 - Mr Nash attended the hearing;
 - There is no evidence that Mr Nash or his employer held himself out to be a registered social worker;⁶²
 - The steps Mr Nash took to fulfil the requirements of a registered social worker in 2017 including attending a face to face competence assessment and completing supervision;
 - The fact that Mr Nash was given an IPC from September 2017.
- xiii. There were the following “potentially” aggravating factors;
- Mr Nash accepted he had received a number of notifications from the Board about the requirement to renew his practising certificate; however because of his honest and reasonably held belief that he was not required to hold a practising certificate in his current role this led him to place a lower priority on responding to these as he should have;
 - Mr Nash practised without an APC across two periods of time; although again this was because of his belief which was informed by his employer’s belief that he was not required to hold an APC;
 - Mr Nash accepted he was aware of the renewal process for practising certificates. However his belief was that he was not required to renew;
- xiv. This is not a case concerning the worst offending and deserving of maximum penalties;
- xv. The least restrictive penalty that can reasonably be imposed should have particular regard to the following circumstances:
- a. Mr Nash’s position with a “sophisticated employer” who employs many social workers did not consider Mr Nash’s role to be one that required him to hold an APC;
 - b. Mr Nash’s role is a policy role and he had never been required to hold an APC in the role before;

⁶² CAC v Batin RSW4/D1/SWDT/2016

- c. Parliament is presently considering “a safe harbour for practitioners who are not practising as a social worker”;⁶³ this could mean that other persons in Mr Nash’s position may not be considered social workers because their primary function is as a policy advisor and not, it was submitted, as a social worker;
- d. Mr Nash’s financial circumstances are precarious and he would be unable to meet a significant fine or an award of costs.
- e. The penalty to be imposed should be proportionate to the departure from acceptable standards which has been established;
- f. Mr Nash’s conduct is at the lower end of the scale;
- g. In these circumstances the proportionate response is to decline to impose a penalty or alternatively, a small fine and decline to make an award of costs.

Tribunal’s consideration of penalty

74. Where the Tribunal has made a finding under section 82(1)(b) of the Act it may make any of the following orders under section 83(1):
 - i. Suspension of registration for a period not exceeding 12 months;
 - ii. Conditions on practice, for a period not exceeding three years;
 - iii. Censure;
 - iv. Fine; and
 - v. Costs
75. The penalty which is imposed must fulfil the functions connected to the purpose of the Act which are to protect the public⁶⁴ and enhance the professionalism of social workers.⁶⁵
76. The principles relevant to penalty in the disciplinary context were not in dispute. These principles are comprehensively set out by Collins J in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*.⁶⁶ In summary the Tribunal’s role in determining the appropriate penalty in any case involves consideration of the following eight factors:
 - The protection of the public, which includes deterring other social workers from offending in a similar way;
 - To set professional standards;

⁶³ Select Committee Report of the Social Services and Community Committee on the Social Workers Registration Legislation Amendment Bill at pages 2-3 and clause 6AAB.

⁶⁴ Social Workers Registration Act 2003, section 3(a)

⁶⁵ Social Workers Registration Act 2003, section 3(d)

⁶⁶ High Court Wellington CIV 2012-404-003916 [12 December 2012]

- That penalties have a punitive function, both directly (such as a fine) and as a by-product of sanctions imposed;
- Rehabilitation of the social worker, where appropriate;
- To impose penalties that are comparable to those imposed in similar circumstances;
- To reserve the maximum penalties for the worst offending;
- To impose the least restrictive penalty that can reasonably be imposed in the circumstances;
- To assess whether the penalty is a fair, reasonable and proportionate one in all the circumstances.

77. Williams J in *Katamat v Professional Conduct Committee*⁶⁷ stated that of all these factors the primary factor is what penalty is required to protect the public and deter similar conduct. However the need to punish the practitioner can be considered, but this is of secondary importance. The objective seriousness of the misconduct, the need for consistency with past cases, the likelihood of rehabilitation and the need to impose the least restrictive penalty that is appropriate will all be relevant to the inquiry. Williams J went on to state that *“it bears repeating, however, that the overall decision is ultimately one involving an exercise of discretion.”*
78. The Tribunal was satisfied this was a case of sufficient significance for it to exercise its discretion to impose penalties, notwithstanding the particular circumstances highlighted in the submissions of Counsel for Mr Nash.
79. The Tribunal considered with care all of the submissions made on behalf of both the CAC and Mr Nash.
80. This Tribunal has considered a number of charges laid pursuant to section 82(1)(b) in circumstances where a registered social worker has not renewed their APC and has continued to practise or be engaged as a social worker. While each case has turned on its own facts, there are also a number of similarities that arise with this case. The similarities are the fact that there had been notification to the social worker by the Board of the requirement to renew their practising certificate; relatively lengthy periods of time during which the practising certificate was not held, and prior awareness of the renewal processes for practising certificates.⁶⁸ The cases highlight that conduct of the nature the Tribunal has reviewed in this

⁶⁷ [2012] NZHC 1633, 21 December 2012

⁶⁸ *CAC v Nelson* RSW4/D1/SWDT/2015, 18 December 2015; *CAC v Russell* RSW6/D1/SWDT/2015, 18 December 2015; *CAC v Estall* RSW8/D1/SWDT/2015, 18 December 2015; *CAC v Angelo* SW9/D1/SWDT/2015, 19 April 2016; *CAC v Haswell* RSW5/D1/SWDT/2015, 19 April 2016; *CAC v Kuruvilla* RSW1/D1/SWDT.2016, 19 April 2016.

case is serious. In this case the Tribunal has focused on the lengthy period of time when Mr Nash practised without an APC, aggravated by the deficiencies in the way in which he engaged with his professional body (in particular the period of time when he did not engage with the Board, the Tribunal having accepted that there was engagement 'later in the piece'⁶⁹).

81. By way of aggravating features, the Tribunal accepted the CAC's submission that it was aggravating that Mr Nash practised as a social worker over the period from 1 July 2016 to 5 September 2017 without holding an APC, despite having been told by the Board that an APC was required. The Tribunal also considered that the manner in which Mr Nash engaged with the Board (including his failure to do so for at least part of) the period from April 2016 to September 2017 was an aggravating feature. The Board's attempts to engage with Mr Nash in this period provided him with the opportunity to clarify what was required of him under the legislation, well before he eventually responded to the Board and took steps to undertake his competence recertification and obtain a practising certificate. The reality was that there was a significant period of time which elapsed before Mr Nash began properly engaging with the Board. The Tribunal does not consider it acceptable for any registered social worker to give low priority to correspondence received from his or her professional body (the Board), regardless of the view he or she (or their employer) holds about their present circumstances.
82. The Tribunal considered very carefully and took into account the mitigating factors identified by Counsel for Mr Nash including Mr Nash's unblemished disciplinary record.
83. The Tribunal accepted that the views of Mr Nash's employer that he was not employed or engaged as a social worker and therefore did not require an APC influenced Mr Nash's approach to this issue and that this partly explained his conduct.
84. The Tribunal accepted the CAC's submission that a mitigating factor in this case was that Mr Nash now has a current Competence Certificate and an APC. This indicated to the Tribunal that Mr Nash is aware of his legal and professional obligations to hold a current practising certificate if he is employed or engaged in social work and that Mr Nash has insight into the nature of his offending and is unlikely to reoffend in a similar way.
85. The Tribunal also accepted that a further mitigating feature was Mr Nash's cooperation with the CAC in preparation for the hearing including agreeing a statement of facts, consenting to the admission of the bundle of documents, and partially admitting the charge. This is relevant because it indicates that Mr Nash has insight into his offending. The Tribunal considered that Mr Nash deserved some credit for this, as well as for the effort he made to attend the hearing.

⁶⁹ Transcript, page 77 L 32-34 and page 78 L 3-9

86. When deciding whether to exercise the discretion which section 83 affords to the Tribunal and when imposing penalties in this case the Tribunal had regard to the need for general deterrence to the social work profession as well as whether there was any need for specific deterrence to Mr Nash.
87. The Tribunal has imposed a penalty in respect of the conduct charged and which the Tribunal is satisfied has been established. As such when considering comparable cases the Tribunal has considered cases where the length of time involved has been at the higher end of the range of time periods the Tribunal has considered, and the circumstances including whether the registered social worker had been advised by the Board that he or she was required to hold an APC.

Censure

88. The Tribunal considered that the appropriate penalty order in this case was an order of censure under section 83(1)(b) of the Act. A censure was considered to be an appropriate way in which to deter other registered social workers from offending in a similar way (and thereby protect the public), as well as to maintain professional standards. In addition, as discussed below Mr Nash is to pay \$1750.00 towards the costs of the Tribunal and CAC to be divided evenly between the Tribunal and the CAC (section 83(1)(e)(ii),(iii) and (iv)).
89. The Tribunal considered these orders were fair, reasonable and proportionate in all the circumstances and they were the least restrictive penalty orders that could reasonably be imposed in this case.
90. The Tribunal took into account the fact that there are no ongoing competence issues or concerns held about Mr Nash's fitness to practise as a social worker such that public safety protection is significantly less of an issue than it has been in other cases.
91. A censure was considered to be an appropriate penalty to reflect the seriousness of the failure to comply with a mandatory requirement which flows from registration as a social worker, and to mark the Tribunal's disapproval of Mr Nash's conduct. The censure will remain on Mr Nash's disciplinary record with the Board and therefore is not an insignificant penalty.
92. The Tribunal decided that in the circumstances of this case it was not necessary to impose a fine. That was notwithstanding that in other similar cases a fine has been imposed, particularly in cases where the practitioner had continued to be engaged in social work without an APC over a lengthy period of time. The Tribunal considered that having a censure on his disciplinary record would have a sufficient deterrent (and secondary punitive) effect. The Tribunal also took into account that Mr Nash will bear the burden of costs to be paid in this proceeding (as discussed below).

93. Mr Nash did not seek interim or permanent name suppression. In itself that his name will be published may have some penal consequences for him in terms of any adverse publicity that publication of his name may attract. This was factored in to the Tribunal's consideration of the penalties to be imposed and in particular, to the decision not to impose a fine.

Costs

94. The Tribunal also has the power to make an order of costs. The costs incurred by the CAC when conducting its investigation, and when prosecuting the charge need to be considered as well as the Tribunal's costs.
95. The costs and expenses (excluding GST) incurred by the CAC were indicated to be in the region of \$18,121.00 (including for the hearing). The Tribunal's costs and expenses in this case were estimated to be \$13,418.00.⁷⁰
96. The principles relating to the imposition of an order for costs in disciplinary proceedings are well settled and have been referred to in previous decisions of the Tribunal.
97. A useful statement as to the applicable principles when considering the issue of costs, which the Tribunal adopted in *CAC v Hungahunga*, is contained in the decision of *Vatsyayann v PCC*⁷¹ when Priestley J said:

[34] "So far as costs orders were concerned, the Tribunal correctly addressed a number of authorities and principles. These included that professional groups should not be expected to bear all the costs of a disciplinary regime and that members of the profession who appeared on disciplinary charges should make a proper contribution towards the costs of the inquiry and a hearing; that costs are not punitive; that the practitioner's means, if known, are to be considered; that a practitioner has a right to defend himself and should not be deterred by the risk of a costs order; and that in a general way 50% of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards. The Authority went on to consider High Court judgments where adjustments were made when GST had been wrongly added to costs orders".

98. Mr Nash provided an affidavit as to his financial position⁷² which annexed a Statement of Financial Position. Having considered this information and taken into account the submissions which were made by Mr Nash's Counsel as to his ability to contribute to costs were the Tribunal minded to impose a costs order, the Tribunal was satisfied that Mr Nash does have financial means, although limited, to meet a costs order.

⁷⁰ Estimated Costs of the Tribunal (Document 6)

⁷¹ [2012] NZHC 1138

⁷² Affidavit of Financial Position for Mark Kelvin Nash affirmed on 15 May 2018

99. The Tribunal proceeded on the basis of the figures indicated by Counsel for the CAC and the Tribunal's Executive Officer and accepted that the total reasonable costs of the CAC's investigation and prosecution of the charge, and the hearing were in the vicinity of \$31,500.
100. Taking into account Mr Nash's financial circumstances as disclosed to the Tribunal, the Tribunal considered that Mr Nash should at least be required to pay a token contribution towards costs in the sum of \$1750.00 (to be divided evenly between the CAC and the Tribunal).
101. Had financial circumstances not been such a feature in this case, the Tribunal would have made an order on the basis of the applicable principles set out above; that more fairly apportioned the costs of the proceedings between Mr Nash and the registered social work profession as a whole. Any such order would have reflected a deduction from the guide of 50% of total reasonable costs to take into account any saving from Mr Nash's participation and cooperation other than the fact that the costs were lower in any event because he agreed a statement of facts and at least partially admitted the charge.

Comment

102. As above, the Tribunal had regard to Mr Nash's honestly held belief, informed by the views of his employer, that he was not required to hold a current practising certificate in the relevant periods.
103. However the Tribunal wishes to send a message that registered social workers, including Mr Nash, need to understand that under the current legislative regime ultimately it is not for the employer to determine whether a registered social worker is practising or engaged as a social worker in their role, and as such whether an APC is required. That is a matter for the Board as the professional regulator of registered social workers. If these were matters for an employer then the purposes underpinning the professional regulation of social workers (including the protection of the public and enhancing the professionalism of social workers including through the maintenance of appropriate standards) would be undermined.
104. In cases where a registered social worker is unclear about whether they are required in their role to hold a practising certificate, it is his or her personal responsibility to raise this with the Board at the appropriate time to ensure that he or she does not fall foul of the statutory requirements under the Act. While an employer's view may well be given weight by the Board, ultimately it is for the Board to assess and determine whether a registered social worker is employed or engaged as a social worker for the purposes of the Act.

Result and orders

105. The charge against Mr Nash has been established under section 82(1)(b) of the Social Workers Registration Act 2003.
106. The Tribunal's formal orders are as follows:
- i. Pursuant to section 83(1)(b) of the Social Workers Registration Act 2003 the Tribunal censures Mr Nash to mark the Committee's disapproval of his conduct and also to maintain professional standards;
 - ii. Pursuant to section 83(1)(e)(ii)(iii) and (iv) of the Social Workers Registration Act 2003 the Tribunal orders Mr Nash to pay \$1750.00 towards the costs and expenses of, and incidental to, the inquiry made by the CAC in relation to the subject matter of the charge, the prosecution of the charge by the CAC, and the hearing;
 - iii. The Tribunal directs that a copy of this decision and a summary be placed on the Social Workers Registration Board's website. The Tribunal further directs that a notice as to the effect of its decision be placed in the Board's newsletter.
 - iv. Pursuant to section 79(2)(c) of the Social Workers Registration Act 2003 the Tribunal makes an order permanently suppressing from publication the Affidavit of Financial Position sworn by Mark Kelvin Nash on 15 May 2018 and any details relating to that affidavit that were discussed at the hearing.

[Note: Mr Nash is advised of his right to appeal against the above orders pursuant to section 88 of the Social Workers Registration Act 2003. An appeal must be brought within 20 working days after the notice of this final decision and orders are served on Mr Nash, or within any further time a District Court Judge allows on application⁷³ made before or after the period expires⁷³].

DATED this 24th day of July 2018



Jo Hughson
Chairperson
Social Workers Complaints and Disciplinary Tribunal

⁷³ Section 88 (4)(b), Social Workers Registration Act 2003