

Complaints and Disciplinary Tribunal

DECISION NUMBER: RSW4/D1/SWDT/2015

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

BETWEEN a Complaints Assessment Committee
Complainant

AND Lorraine Nelson
Respondent

**BEFORE THE SOCIAL WORKERS REGISTRATION BOARD COMPLAINTS AND
DISCIPLINARY TRIBUNAL**

Present: Catherine Garvey (Chairperson)
Yvonne Crichton-Hill (Member)
Darryn Russell (Member)
Phil Comber (Member)
Lareen Cooper (Member)
Amanda Mounla (Hearing Officer)
Dale La Hood (Counsel for the CAC)
Lorraine Nelson (Respondent)

Hearing Held in Auckland on 24 November 2015

Introduction

1. Ms Nelson holds a Diploma of Social Work. Ms Nelson registered with the Social Workers Registration Board on 26 August 2010. On 24 November 2014 Ms Nelson commenced a new role with a Needs Assessment and Service Coordination agency. At the time, she did not hold a current practising certificate.
2. Between 24 November 2014 and 1 September 2015 Ms Nelson was a practising social worker, and did not hold a current practising certificate. Her role at that time, and to the present, is as a Service Co-ordinator for Independent Living.
3. A Complaints Assessment Committee appointed under the Social Workers Registration Act 2003 ("the Act") laid a charge pursuant to section 82(1)(b) of the Act in relation to Ms Nelson as follows:

"The substance of the grounds believed to exist, and the particulars of the charge are:

(a) Between 24 November 2014 and 1 September 2015 [Lorraine Nelson] was employed or engaged as a social worker without a current practising certificate;

(b) And this conduct amounts to conduct that is unbecoming of a social worker and reflects adversely on her fitness to practise as a social worker pursuant to s82(1)(b) of the Act."

Legal principles

4. The burden of proving the charge rests with the CAC. The standard of proof is the balance of probabilities.
5. The purpose of the Act is set out in section 3. This includes to protect the safety of the public by prescribing or providing for mechanisms that ensure that social workers are competent to practise, and accountable for the way in which they practise: section 3(a)(i) and (ii).
6. Section 3(d) further provides that the Act is to "*enhance the professionalism of social workers.*"
7. Section 25 of the Act requires all registered social workers who are employed or engaged as a social worker to hold a current practising certificate.

8. Section 44 of the Act requires all registered social workers to complete a competence assessment every five years. If a practitioner's certificate of competence expires, then the practitioner's practising certificate immediately becomes invalid.
9. The Tribunal must be satisfied that the following elements of the charge are proved:
 - a. That at all material times Ms Nelson was a registered social worker; and
 - b. That at all material times she was employed or engaged as a social worker; and
 - c. That Ms Nelson's conduct in omitting to renew her practising certificate amounts to conduct unbecoming a registered social worker; and
 - d. That this conduct reflects adversely on her fitness to practise.
10. The terms "*social work*" and "*employed or engaged as a social worker*" are not defined in the Act. Whether a person is engaged or employed or practising as a social worker is a factual matter. The Tribunal was not required to consider this in detail following Ms Nelson's acceptance during the hearing that her role entails social work. Counsel for the CAC referred us to a Crown Law opinion jointly obtained by the Board and Ministry of Social Development, which commends a broad approach be taken to what constitutes social work. This opinion concludes 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."

11. As set out above, the CAC laid the charge in reliance on section 82(1)(b). This charge is not mirrored in the charges available under the Health Practitioners Competence Assurance Act 2003 ("the HPCA Act"). However there is ample authority for the meaning of the phrase "*conduct unbecoming*" and the threshold test ("*...that reflects adversely*

on fitness to practice”) from cases determined under the Medical Practitioners Act 1968 and 1995.

12. The term “conduct unbecoming” was considered in *B v Medical Council*¹, in which decision Elias J defined the test to involve the following considerations:

“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. Such protection is the basis upon which registration under the [Medical Practitioners] Act, with its privileges, is available. ..I accept ...that a finding of conduct unbecoming is not required in every case where error is shown. To require the wisdom available with hindsight would impose a standard which is unfair to impose. The question is not whether error was made, but whether the practitioner’s conduct was an acceptable discharge of his or her professional obligations. The threshold is inevitably one of degree...”

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.”

13. The Tribunal adopts this approach to assessing whether Ms Nelson’s failure to renew her practising certificate, and delay in renewing her certificate of competency amounts to conduct unbecoming.
14. The Tribunal must also be satisfied that Ms Nelson’s conduct reflects adversely on her fitness to practise. This does not require the Tribunal to find that in fact Ms Nelson is not a fit or proper person to practise social work.²

¹ Unreported, High Court, 11/96, Elias J.

² *F v Medical Practitioners Disciplinary Tribunal and Anor*, CA213/04 [4 May 2005] at [81].

15. Under the HPCA Act, it is an offence in and of itself for a registered practitioner to practise without a current practising certificate: s100(1)(d). The Social Workers Registration Act contains a similar provision in s82(2)(b). These provisions emphasise the significance that attaches to registration. The obligations on registered practitioners to maintain fitness and competence, and the obligations on the Board to be satisfied that registered practitioners are fit and competent, are intended to protect the public, to ensure accountability and to enhance professional standards.

Facts

16. The Tribunal considered the Agreed Summary of Facts, Dr Janet Duke's affidavit, the agreed bundle of documents, and evidence heard directly from Ms Nelson.

17. Ms Nelson first registered with the Board in August 2010. She held different positions over the following four years, and took a period of leave in August 2014. Ms Nelson commenced her current position on 24 November 2014.

18. Ms Nelson received correspondence from the Board dated 27 November 2014 regarding the non-renewal of her practising certificate. Over the following months she corresponded with the Board, stating that she did not consider herself to be practising as a social worker.

19. By letter dated 24 March 2015 Ms Nelson was notified that she had been referred to a CAC. She was advised that following a review of her Job Description the Board continued to view Ms Nelson's role as social work.

20. On 17 May Ms Nelson contacted the Board by email to advise that she had attempted to renew her practising certificate. She was unable to do so because her competence certificate was to expire on 25 June, days prior to the 2015/2016 practising year.

21. By letter to the CAC dated 6 June Ms Nelson acknowledged that she had misunderstood the requirement to renew her practising certificate, and wished to do so. In a letter dated 9 October 2015 Ms Nelson's employer maintained that Ms Nelson was not required to hold an APC to fulfil her role.

22. Ms Nelson successfully completed her competence assessment, with certification effective from 7 October 2015.

23. Ms Nelson renewed her practising certificate on 9 October 2015.
24. In her oral evidence to the Tribunal Ms Nelson acknowledged that her role was social work, and she ought to have maintained a current practising certificate and competence certification.
25. Ms Nelson accepted the position taken by Dr Duke in her affidavit, that her role constitutes social work, and entails initial case management including identifying and planning the supports that her agency would provide in each case. Ms Nelson's role also involves supervision of others making casework decisions.

Findings-liability

26. After hearing submissions from counsel on behalf of the CAC, and evidence from Ms Nelson the Tribunal retired to consider whether the charge was proved. An oral decision was delivered upholding the charge. The reasons for that decision are now set out.
27. As above, the purpose of the Act includes the protection of the public, ensuring that social workers are competent, accountable and that the professionalism of social workers is enhanced. Section 25 is mandatory, and is a fundamental mechanism for meeting these purposes of the Act.
28. It is established that Ms Nelson was registered in August 2010 and remained registered since that time.
29. At 24 November 2014 when Ms Nelson commenced her current role, she took the stance that she was not practising as a social worker. As such Ms Nelson did not renew her practising certificate. Nor did she take steps to arrange her competence assessment until the CAC had determined to lay this charge. Unfortunately Ms Nelson did not seek to clarify the position with the Board prior to commencing her job. It is apparent from correspondence before the Tribunal that Ms Nelson's employer did not consider a practising certificate to be required.
30. The Tribunal finds that a failure to renew the practising certificate, either prior to commencing her new job, or shortly after the Board's correspondence dated 27 November 2014 amounts to conduct unbecoming.
31. The Tribunal also considered Ms Nelson's failure to take steps to ensure she completed her competence assessment in a timely manner, as had

this occurred, then her practising certificate could have been issued at a much earlier time.

32. When the period of time over which Ms Nelson practised without a current practising certificate is considered together with the delay of several months in completing her competency certification (both mandatory requirements of a registered social worker) the Tribunal finds that this conduct does reflect adversely on Ms Nelson's fitness to practise.

Findings - Penalty

33. The Tribunal heard submissions on penalty from the CAC. Ms Nelson gave evidence as to her financial situation and made brief submissions in which she was remorseful and apologetic.
34. The Tribunal considers that the relevant principles are those set out by Collins J in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*.³ That case deals with the disciplinary regime under the HPCA Act. There is sufficient conformity between the purposes of the HPCA Act and the SWR Act, and between the disciplinary sanctions available under these Acts to confidently accept that the principles outlined in *Roberts* are applicable to cases heard by this Tribunal.
35. The principles relating to penalty are, in summary:
- a. To protect the public, which includes deterring others from offending in a similar way;
 - b. To set professional standards;
 - c. Penalties have a punitive function, both directly (such as a fine) and as a by-product of sanctions imposed;
 - d. Rehabilitation of practitioners, where appropriate;
 - e. To impose penalties that are comparable to those imposed in similar circumstances;
 - f. To reserve the maximum penalties for the worst offending;

³ High Court Wellington CIV-2012-404-003916 [12 December 2012].

- g. To impose the least restrictive penalty that can reasonably be imposed in the circumstances;
 - h. To assess whether the penalty is a fair, reasonable and proportionate one in all the circumstances.
36. Counsel for the CAC referred to two cases involving social workers practising without a current practising certificate, and considered by this Tribunal (differently constituted), both on 22 March 2013.
37. In *Sanders*⁴ the social worker was charged in relation to a failure to hold a practising certificate from 1 July 2012. Other than to state an inability to pay the fee and to seek removal from the register, the social worker did not engage with the process and did not appear at the hearing. The Tribunal found the social worker guilty under s82(1)(b) and imposed a censure and suspended the social worker's registration.
38. In *WT*⁵, the social worker was found guilty of a charge laid in reliance on s82(1)(b), having practised without a practising certificate between 1 July 2012 and 26 November 2012. The Tribunal imposed a censure.
39. In both cases the Tribunal emphasised that section 25 is a "cornerstone" of the Act, and that the requirement to hold a practising certificate and to maintain a current competency certificate are "*fundamental to the professionalism of a registered social worker.*"
40. It does not appear that the Tribunal was provided with full submissions as to the principles relevant to penalty.
41. Counsel for the CAC also relied upon several cases involving charges laid under s100(1)(d) of the HPCA Act. The Tribunal accepts the principles applied in these cases are helpful. However we also note that s100(1)(d) creates an absolute offence, and in considering cases under that section the Health Practitioners Disciplinary Tribunal is not required to consider whether the conduct amounts to conduct unbecoming that reflects adversely on fitness to practise.
42. Further, the maximum fine available under the Act is \$10,000. This is in contrast to the maximum fine of \$30,000 available to the Health Practitioners Disciplinary Tribunal. The Tribunal considers that when

⁴ Decn 11NAPC 05/13/SWDT

⁵ Decn 25W APC 05/13/SWDT

these maximum fines are considered, this must influence the level of fine reasonably able to be imposed in a case such as this. The Tribunal considers that the fines to the Health Practitioners Disciplinary Tribunal for a failure to hold a current practising certificate cannot be the yardstick for fines imposed under this Act without adjustment to reflect the lower maximum fine available to this Tribunal.

43. The CAC urged the Tribunal to “*send a message*” to the profession and submitted that the Tribunal should impose a censure, a fine in the order of \$500-\$1000, and a costs order of 30% of the total costs of the CAC and Tribunal.
44. Ms Nelson acknowledged that a censure is appropriate. She stated that a financial penalty would be difficult but acknowledged if such order was made she would accept that.
45. The Tribunal makes the following findings on penalty:
 - a. That Ms Nelson is censured;
 - b. A fine of \$200 is imposed.
 - c. Costs of \$750.
46. The fine sought by the CAC was at the lower end of the scale in terms of those applied in similar cases under the HPCA Act. The Tribunal accepts that in light of the circumstances of this case, and Ms Nelson’s conduct prior to and at the hearing a fine at the lower end is appropriate. The fine imposed is also a reflection of Ms Nelson’s financial circumstances, details of which were provided.
47. With regard to costs, we accept as Mr La Hood submitted that a reasonable starting point is a contribution of 50% of the costs of the CAC and the Tribunal. We also accept that this figure can be reduced when the Tribunal takes into account Ms Nelson’s co-operation with the CAC including the production of an Agreed Summary of Facts and agreed bundle of documents; Ms Nelson’s attendance at the hearing and her conduct which minimised the hearing time.⁶ Ms Nelson’s financial circumstances have also been taken into account and the costs order is less than the Tribunal might otherwise have imposed.

⁶ See for eg *Winefield*, 83/Phar06/30P, Health Practitioners Disciplinary Tribunal.

48. The Tribunal is mindful of the penalties imposed in *WT* and *Sanders*, however there is no discussion in those decisions as to why a fine and costs were not imposed, although some suggestion of orders being considered in the future. In this case, the Tribunal considers it appropriate that a fine is imposed to act as a deterrent to others who might choose not to prioritise the renewal of their practising certificate, or to organise their competence assessment to ensure they do not put a current practising certificate in jeopardy.
49. It is appropriate for social workers who are the subject of a disciplinary charge to contribute to the costs incurred where that charge is proved; the costs are otherwise borne by the profession as a whole.
50. Finally, with regard to both the fine and costs orders made, the Tribunal took into account Ms Nelson's financial situation and the cumulative effect of the orders.

Conclusion

51. The charge of conduct unbecoming that reflects adversely on Ms Nelson's fitness to practise is proved.
52. The Tribunal orders that Ms Nelson be censured.
53. The Tribunal orders that Ms Nelson pay a fine in the sum of \$200.00.
54. The Tribunal orders that Ms Nelson pay costs in the sum of \$750.00.
55. The Tribunal directs that the Executive Officer ensure that this decision is published on the Board's website.

DATED this 18th day of December 2015



Catherine Garvey.
Chairperson
Social Workers Complaints and Disciplinary Tribunal