

Complaints and Disciplinary Tribunal

DECISION NUMBER: RSW5/D1/SWDT/2015

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

BETWEEN A Complaints Assessment Committee
Complainant

AND Rachel Haswell
Respondent

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

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

Hearing Held in Auckland on Tuesday 24 November 2015

Introduction

1. Mrs Haswell registered with the Social Workers Registration Board in August 2009. She is employed as a Regional Manager Intensive Services with Youth Horizons Trust, having taken on this role on 1 August 2013. Mrs Haswell previously held the role of Waikato Manager for the same organisation. From the time of her registration with the Board until 19 August 2013 Mrs Haswell held a practising certificate.
2. For the period August 2013 to October 2015 Mrs Haswell did not hold a current practising certificate.
3. A Complaints Assessment Committee appointed under the Social Workers Registration Act 2003 ("the Act") laid a charge as follows:

"Pursuant to section 72(3) of the Act the Complaints Assessment Committee charges that Rachel Haswell, registered social worker, of Hamilton:

(a) Between 21 January 2014 and 1 September 2015 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 Mrs Haswell was a registered social worker; and
 - b. That at all material times she was employed or engaged as a social worker; and
 - c. That Mrs Haswell’s conduct in failing 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 as, or practising as a social worker, is a factual matter. Counsel for the CAC referred us to a Crown Law opinion jointly obtained by the Board and Ministry of Social Development to define these terms. The opinion commends that a broad approach be taken and 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.
- 4. Extrapolating on the second point, we consider that all people for whom being a registered social worker is an important aspect of their role, or of the way in which they perform their role, are required to hold practising certificates pursuant to s 25.”

11. 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

¹ Unreported,...High Court, Elias J.

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 in assessing whether Mrs Haswell's failure to renew her practising certificate amounts to conduct unbecoming.
14. The Tribunal must also be satisfied that Mrs Haswell's conduct reflects adversely on her fitness to practise. This does not require the Tribunal to find that in fact Mrs Haswell is not a fit or proper person to practise social work.²
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 Mrs Haswell. The Tribunal finds the following facts established.
17. Mrs Haswell registered with the Board on 20 August 2009. She obtained an annual practising certificate for the 2009/2010, 2010/2011, 2012/2013 years.
18. On 18 August 2013 Mrs Haswell's competence certificate expired. Mrs Haswell did not give any evidence that she had taken steps to arrange a competence assessment. She explained that she was uncertain as to how her managerial role might form the basis of that assessment of her core competencies. She did not seek

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

advice or clarification of this from the Board. The Tribunal notes that Mrs Haswell did renew her practising certificate while in her current role.

19. On 21 January 2015 the Board emailed Mrs Haswell regarding her expired Annual Practising Certificate and the need to recertify her competence. The Board advised:

“Our preference is to work with you to ensure your competence certificate is valid so that we can issue you a replacement APC ID card.

We look forward to receiving your updated competence assessment information so as to ensure that you are practising in compliance with the Social Workers Registration Act and do not put you or your employer at risk.”

20. The Board received a failure notice in relation to this email and immediately followed up with Mrs Haswell by telephone contact from the Board’s Registration Administrator. It is apparent from a second email, sent on 22 January 2014 to Mrs Haswell, that the telephone discussion included Mrs Haswell advising that she was no longer practising as a social worker in her current role. Mrs Haswell was provided with information setting out what the Board considers constitutes practising as a social worker.

21. By email dated 31 January 2014 Mrs Haswell advised:

“Thank you for your email. Having read your pamphlet it certainly would be difficult as a Manager to not at times within my role utilise my Social Work knowledge and of course commit to the values and ethics so I would have to agree that I need to renew my competencies.”

22. Mrs Haswell asked for a copy of the relevant paperwork to complete, which was sent the same day by the Board’s Registration Administrator together with an invitation to request assistance if required.

23. Mrs Haswell did not then complete her recertification.

24. Mrs Haswell was sent electronic reminders of the need to renew her APC on 24 May 2014 and 2 July 2014. A Final Notice was sent on 29 July 2014, advising Mrs Haswell that she was required to update her status with the Board whether she was practising or non-practising, and noting that a failure to renew her practising certificate or advise the Board of her current status would result in disciplinary action. There is no evidence before the Tribunal that Mrs Haswell responded to any of these notices.

25. The next communication was correspondence from the Board dated 27 November 2014 advising Mrs Haswell that the Board had referred her matter to a Chair of the Tribunal to consider referral to a CAC. On 24 March 2015 the Board advised Mrs Haswell that a CAC had been convened to investigate whether she had been practising without a valid APC.

26. Mrs Haswell renewed her practising certificate on 1 September 2015.
27. The CAC determined to lay a disciplinary charge, notice of which was given to Mrs Haswell on or about 18 September 2015.
28. In her oral evidence to the Tribunal Mrs Haswell acknowledged that she was working in a social work role. Mrs Haswell accepted that she ought to have maintained a current practising certificate and competence certification. Mrs Haswell did continue to express that she had been confused about the need to renew her certificate of competency, despite the clear acceptance that this was so in her email correspondence with the Board on 31 January 2014. Mrs Haswell stated that she did not recognise the seriousness of not holding a current practising certificate, and that she did not prioritise the Board's recertification requirements.

Findings - liability

29. After hearing submissions from counsel on behalf of the CAC, and evidence and submissions from Mrs Haswell the Tribunal retired to consider the charge. An oral decision was delivered upholding the charge. The reasons for that decision are now set out.
30. 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 sets out the mandatory requirement for a person who is employed or engaged as a social worker to hold a current practising certificate. The requirement of a practising certificate is a fundamental mechanism for meeting these purposes of the Act.
31. Mrs Haswell was registered in August 2010 and has remained registered since that time.
32. The Tribunal finds that in her role Mrs Haswell was at all times "*employed or engaged as a social worker.*" Mrs Haswell accepted this, and the content of Dr Duke's affidavit to this effect. Mrs Haswell acknowledged that her role includes working within the Code of Ethics, requires her to practise competently and involves role modelling to a significant number of reporting staff.
33. The Tribunal finds that Mrs Haswell's failure to renew her practising certificate, in the context of reminders from the Board and a clear opportunity to seek advice and support from the Board to renew her competency certification even months after its expiry, amounts to conduct unbecoming.
34. The Tribunal considers that Mrs Haswell's failure to renew her practising certificate until 1 September 2015 despite her acknowledgment on 31 January 2014 of the requirement to do so, amounts to conduct that meets the threshold warranting disciplinary sanction.

35. The Tribunal acknowledges Mrs Haswell's uncertainty about the recertification process in the context of her managerial position, in which regard she is not unique. That is, similar concerns were raised by other practitioners who appeared before the Tribunal in the same week. However, the Board's position was made clear as was the invitation for Mrs Haswell to seek advice from the Board in January 2014.
36. We accept that Mrs Haswell holds a busy role with significant responsibility. The Tribunal was provided with evidence of positive 360 feedback on Mrs Haswell's performance. She also adduced references (although these were not directed to the Tribunal). In a role that involves the supervision of other registered social workers, it is important that a practitioner has an understanding of statutory obligations under the Act, and meets those obligations. The Tribunal was satisfied that when all the circumstances of this matter were considered, Mrs Haswell's conduct reflects adversely on her fitness to practice.

Findings - Penalty

37. The Tribunal heard submissions on penalty from the CAC and Mrs Haswell. When requested by the CAC to provide evidence of her financial circumstances Mrs Haswell sought time to do so. With the consent of the CAC, the hearing was adjourned and Mrs Haswell prepared a declaration of her assets and liabilities. The Tribunal records that it is expected that any person appearing before the Tribunal who intends to rely on their financial circumstances to make submissions about a potential fine and costs, should attend the Tribunal with relevant financial information to hand.
38. With regard to penalty 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 a case dealing with the disciplinary regime under the HPCA Act. There is sufficient conformity between the purposes of the HPCA Act and the Social Workers Registration Act, and between the disciplinary sanctions available under both Acts to confidently accept that the principles outlined in *Roberts* are applicable to cases heard by this Tribunal.
39. 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;

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

- e. To impose penalties that are comparable to those imposed in similar circumstances;
 - f. To reserve the maximum penalties for the worst offending;
 - 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.
40. 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.
41. 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.
42. 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.
43. 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.*"
44. Counsel for the CAC also relied upon several cases heard under s100(1)(d) of the HPCA Act, and submitted an approach consistent with these cases could be adopted. The Tribunal accepts 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.
45. 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 these different maximum fines are considered, this must influence the level of fine reasonably able to be imposed in a case such as this. The fines imposed by the Health Practitioners Disciplinary Tribunal for a failure to hold a current practising certificate cannot be the yardstick

⁴ Decn 11NAPC 05/13/SWDT

⁵ Decn 25W APC 05/13/SWDT

for fines imposed under this Act without adjustment to reflect the lower maximum fine available to this Tribunal.

46. 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 \$1000-\$2000, and a costs order in the order of 30% of the total costs of the CAC and Tribunal. Counsel for the CAC identified that mitigating factors in this case were Mrs Haswell’s co-operation including with the preparation of an Agreed Summary of Facts, and her attendance at the hearing; as well as the absence of concern about her competence. It was submitted that the length of time Mrs Haswell practised without a current practising certificate and the failure to seek clarification and advice from the Board or senior colleagues were aggravating factors.
47. Mrs Haswell submitted that she had “needed help” to understand what was required of her in terms of recertification, and submitted that the Tribunal ought to take into account only the six month period between March and September 2015 once the CAC had been convened. She acknowledged a censure was appropriate in the circumstances.
48. With regard to a fine, Mrs Haswell stated that this would have “huge implications” for her and her family. The financial statement subsequently provided to the Tribunal sets out Mrs Haswell’s financial circumstances in detail, and we have taken this into account.
49. With regard to costs, the Tribunal accepts 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 ought to be reduced when the Tribunal takes into account factors including Mrs Haswell’s co-operation with the CAC (including the production of an Agreed Summary of Facts and agreed bundle of documents) and her attendance at the hearing.
50. 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.
51. 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.
52. The Tribunal has taken into consideration Mrs Haswell’s financial situation and the cumulative effect of the orders that have been made.
53. Finally, prior to the hearing Mrs Haswell sought name suppression. However when making submissions as to penalty Mrs Haswell no longer sought suppression and advised the Tribunal that she would be using her experience to educate others.

Conclusion

54. The charge of conduct unbecoming that reflects adversely on fitness to practise is established. The Tribunal orders the following penalties:
- a. Mrs Haswell is censured.
 - b. Mrs Haswell is fined \$400.00.
 - c. Mrs Haswell is to pay costs of \$1735.74, amounting to 25% of the total costs of the Tribunal and Complaints Assessment Committee.
55. No orders as to non-publication are required.
56. The Tribunal directs that the Executive Officer publish a copy of this decision on the Board's website.



Dated this 19th day of April 2016

C Garvey
Chairperson
Social Workers Disciplinary Tribunal