Social Workers Registration Board
Kāhui Whakamana Tauwhiro

Complaints and Disciplinary Tribunal

DECISION NUMBER:	RSW5/D2/SWDT/2016
IN THE MATTER	of a charge laid under the Social Workers Registration Act 2003
BETWEEN	A Complaints Assessment Committee appointed pursuant to section 66 of the Social Workers Registration Act 2003 **Complainant**
AND	**RSW X** a registered social worker of Northland **Respondent**

BEFORE THE SOCIAL WORKERS REGISTRATION BOARD COMPLAINTS AND DISCIPLINARY TRIBUNAL

Present:	Catherine Garvey (Chairperson) Phil Comber, Toni Hocquard, Peter McGurk, Darryn Russell (Members) Fleur Nicholas (Hearing Officer) Adele Garrick and Alex Mills-Wallis (Counsel for the Complaints Assessment Committee) No appearance for RSW X
Hearing	**12 September 2016, in Whangarei**
Decision	**11 October 2016**

Introduction

1. On 29 February 2016 the Complaints Assessment Committee ("the CAC") appointed by the Social Workers Complaints and Disciplinary Tribunal ("the Tribunal") pursuant to section 66 of the Social Workers Registration Act 2003 ("the Act") laid a disciplinary charge against a registered social worker, referred to within this decision as Ms X.

2. The charge reads as follows:

> "*Pursuant to section 72(3) of the Act, the Complaints Assessment Committee charges that [Ms X], registered social worker, of Northland:*
>
> *Breached the Code of Conduct issued by the Social Workers Registration Board pursuant to s 105 of the Act by:*
>
> *(a) To uphold high standards of personal conduct and act with integrity a social worker is expected to refrain from any professional or personal behaviour that puts at risk the individual's and/or the profession's reputation and compromises the social worker's ability to work with the client in a fully professional and caring manner; and*
>
> *(b) To respect and uphold the civil, legal and human rights of clients a social worker is expected to respect the client's right to privacy and the confidentiality of any information provided in the course of the professional relationship;*
>
> *by accessing and/or inputting case notes on client files for children related to her and not allocated to her on CYRAS (the Child Youth and Family Service confidential record management system).*
>
> *The specific files and the dates they were alleged to have been accessed are as follows:*

(a) [Child A] on 22 July 2010, 14 January 2011, 17 January 2011, 13 June 2011, 12 March 2012 and 2 May 2012 and the file for his caregivers [Caregivers X and Y] on 27 October 2009, 16 November 2009, 17 November 2009 and 24 November 2009;

(b) [Child B] on 17 January 2011 and 21 March 2011;

(c) [Child C] on 12 March 2012, 2 May 2012, 3 July 2012, 18 December 2012 and 7 March 2013;

(d) [Child D] on 5 June 2013; and

(e) [Child E] on 21 November 2011

And that this conduct considered individually and/or cumulatively constitutes:

(a) professional misconduct pursuant to section 82(1)(a) of the Act; or in the alternative

(b) conduct that is unbecoming of a social worker and reflects adversely on her fitness to practise as a social worker pursuant to section 82(1)(b) of the Act."

3. The hearing took place on 12 September 2016 in Whangarei. Ms X did not take part in any pre-hearing matters and did not attend the hearing either in person or by representative. The hearing was originally scheduled for 25-26 July 2016 but due to a conflict of interest declared shortly prior to that hearing by one of the Tribunal members, the hearing was adjourned. Information including the disciplinary charge, the Tribunal membership, the original hearing date and the reconvened Tribunal and new hearing date was personally served on Ms X in accordance with section 145(1)(a) of the Act. Ms X also acknowledged to the process server that she received correspondence from the Tribunal addressed to her PO Box address.

Non publication orders

4. Prior to the hearing, the Tribunal of its own motion made an interim order suppressing the names of Ms X and the other persons named in the charge. This order was not opposed by the CAC. The primary ground for suppressing Ms X's name was her relationship to the children and caregivers named in the charge. The Tribunal considers that there was, and remains, a significant risk that those persons and confidential information about them will be identified if Ms X is named in the context of these proceedings.

5. At the hearing, counsel for the CAC advised that there was no opposition to permanent non-publication orders. Counsel submitted that if Ms X was named it would not be possible to publish her relationship with the other persons named in the charge, making it difficult to outline the facts of this case.

6. The name of one witness who gave evidence to the Tribunal is not published the basis that the witness worked at the same Northland site as Ms X.

The evidence

7. The hearing proceeded by way of evidence from four witnesses called by the CAC, and a small bundle of relevant documents. The witnesses were:

    a. Lorraine Hoult, currently a Principal Advisor Auckland Region for the Ministry of Social Development ("the Ministry"), and at the relevant time employed by the Ministry as Care and Protection Regional Practice Advisor Auckland Region;

    b. Elizabeth Grove, currently a Practice Leader at the Child Youth and Family ("CYF") Pukekohe site, and in 2009 employed in a Caregiver Social Work role at the Auckland site where Ms X was based. At the end of 2009, all caregiver assessments at Ms X's site were undertaken by two designated social workers, one of whom was Ms Grove;

c. Jolene Pascoe, CYF Senior Advisor, Regional Operations, based in Whangarei;

d. [name redacted] ("Ms G"), a supervisor at the Northland CYF site where Ms X worked.

The facts

8. Ms X was employed by CYF for 8 or 9 years (the exact date on which her employment ended was not advised to us). She worked at an Auckland site before transferring to a Northland site in 2010. In 2009, Ms X was employed by CYF as a care and protection social worker, and was designated a senior practitioner. We were advised that as a senior practitioner Ms X was required to have had several years' experience within CYF, a thorough knowledge of policy and best practice at the site, and would have been considered senior within her team meaning that she was able to assist with professional development, mentoring and coaching.

9. Ms Hoult referred to the MSD Code of Conduct, which includes the following:

> "**Code of Conduct**:
>
> Fair/Respecting Others
>
> - Remember that everyone has the right to privacy and confidentiality.
>
> Responsible/Accessing information
>
> - You must only access client information or records for legitimate work purpose
> - You must not access your own record or the record of a friend, relative, colleague or acquaintance for any reason, even if the person asks you to.
>
> **Standards of Integrity & Conduct**
>
> Responsible
>
> - We must treat information with care and use it only for proper purposes."

10. Ms Pascoe confirmed that every Ministry employee must read and sign the Code of Conduct.

11. In the discussion that follows we have treated the facts relating to each child and the caregivers named in the charge as a separate particular of the charge although they have not been set out as such.

Child A

12. In February 2009, there was a report of concern about Child A, and the file was allocated to Ms X. Ms X was not immediately aware that she had a whanau relationship with the child. When this relationship was established after Ms X made inquiries of her extended whanau, the file was re-allocated. This occurred within two weeks of the file being opened.

13. In October 2009 Ms X either attended or became aware of a Family Group Conference ("FGC") relating to Child A. Between 27 October and 24 November 2009 Ms X undertook tasks associated with a caregiver assessment in relation to Child A.

14. The caregivers the subject of the caregiver assessment were Ms X's whāngai daughter ("caregiver Y") and her daughter's partner ("caregiver Z"). According to Ms Grove and Ms Hoult, Ms X's assessment included:

    a. Two home visits to the home of caregivers Y and Z to check such matters as vehicle registration, car seats, bedrooms, home hygiene smoke alarms and pets;

    b. Receipt of a caregiver application;

    c. Request for and receipt of a Police check on caregivers Y and Z. Information received included details of caregiver Z's criminal history including convictions for violence;

d. Authorisation forms for the approval process;

e. Other details regarding financial matters (bill payments and credit card information) of the proposed caregivers;

f. Writing comments on the file that referees were not required for the caregivers.

15. This information was held on a paper file and an electronic file in the CYRAS (CYF record management) system. In November 2009 Ms Grove noticed the paper file for the caregiver assessment on Ms X's desk, and because Ms X's role did not require her to complete caregiver assessments Ms Grove took the file and read it through. She observed the above-listed documents and Ms X's name or signature on some of those documents. Ms Grove raised the matter with Ms X, and took over responsibility for the file. Ms Grove said that at this time, Ms X stated that she would like to be the caregiver for Child A if caregivers Y and Z were not approved.

16. Ms Grove closed the CYRAS caregiver record created by Ms X, and created a new caregiver assessment record. This was transferred to a Northland site. Ms Grove explained that both records on the CYRAS system were accessible to the allocated social worker. The transfer of the file was accepted on 18 December 2009. Approval for caregivers Y and Z was given on 23 December 2009.

17. In response to questions from the Tribunal about who had opened the caregiver assessment record and whether it had been allocated, Ms Pascoe obtained further information. She was re-sworn, and gave the following evidence:

a. Ms X created the CYRAS caregiver record on 27 October 2009, and then undertook the documentary checks involved to assess the application;

b. Ms X was never allocated to the file as a social worker;

c. The file was allocated to a social worker only after it had been transferred to the Northland site;

d. There were no supervision notes on the caregiver assessment record created by Ms X;

e. While Ms X had not completed each step of the assessment, and in spite of concerns about caregiver Z she had requested that the caregiver application be approved. Ms Pascoe could not identify who the request for approval had been sent to;

f. Ms Pascoe observed that the information gathered by Ms X included a "*really concerning Police history for one of the carers*" which ought to have resulted in the assessment and approval process being escalated to more senior staff, either to the regional or national office[1];

g. Ms Pascoe said there was no indication that such escalated approval was sought.

18. The child's file was held on the same Northland site. As a result of concerns about the caregivers' situation, Ms X became Child A's caregiver in mid-2013. It was only after this occurred that the child's file was transferred away from the site where Ms X was a staff member.

19. When Ms Grove transferred the caregiver assessment file it was made confidential given Ms X's relationship to Child A and the caregivers. The Tribunal heard that this meant that only the Site Supervisor and the social worker allocated to the child could access the file.

20. Confidential status may be lifted to allow access by authorised persons (other than the allocated social worker and supervisor), such as a member of the in-

[1] The Family/Whanau Caregiver Assessment and Approval Policy outlines the approval process including the circumstances in which approval must be sought off-site and a regional or general level.

house legal team, a resource assistant dealing with financial matters or when a new report of concern is entered. The confidential status may not be immediately placed back on the record. Each witness was clear that it is the responsibility of each social worker not to access a record without proper reason.

21. Ms G stated that the confidential status of the record for Child A was removed permanently, although she could not recall when. This occurred because the electronic records for other related children were merged with Child A's, meaning that the confidential status impeded proper access to those other files.

22. The next events relevant to Child A and the charge occurred in July 2010 and January 2011.

23. Ms Pascoe undertook an analysis of access to Child A's CYRAS records using Ms X's unique user name. Records for Child A were read on these dates. The analysis identified that in January 2011, edits were made to a Court report prepared pursuant to section 128 of the Children, Young Persons and Their Families Act 1989[2] ("the s128 report"). The s128 report was open for over 30 minutes at a time on two occasions and accessed for briefer periods also. The report was signed by a social worker who was not the social worker or supervisor allocated to the file. Ms Pascoe's analysis of the CYRAS records showed that the signatory had accessed and read the report under his own username, but had not edited it under that username. The signatory was not interviewed as he had left CYF by the time these concerns regarding Ms X were investigated by Ms Hoult.

24. Ms Pascoe explained that it was not possible to specifically identify what edits had been made to any CYRAS record including the s128 report. We observe that there would seem to be obvious value in having access to a detailed audit trail (as is the case with modern electronic medical record-keeping systems).

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[2] A s128 report sets out a plan prepared for a child or young person preparatory to the making of certain orders by the Court relating to that child.

25. In March and May 2012, the CYRAS records for Child A were again accessed using Ms X's username. The records opened included notes relating to Child A's need for a birth certificate. On two occasions Ms X completed Visit to Children in Care casenotes and signed her name to these. It was suggested that this was done at the request of the allocated social worker or supervisor as Ms X had access to Child A, who was known to stay with her from time to time. The casenotes were not provided to the Tribunal; Ms Pascoe had read them and described them as "*familial*." This is consistent with the evidence from Ms G, who acknowledged that communications between Ms X and CYF staff about Child A generally did not maintain a clear distinction between Ms X's professional role as a social worker within the office and her whanau role which involved her in caregiving responsibilities for Child A.

26. Ms X was also involved in obtaining a birth certificate for Child A. Only insofar as Ms X accessed records relating to Child A's need for a birth certificate does this conduct form part of the charge.

Child B

27. Child B is a sibling to Child A, and also shares Ms X's surname. Child B's CYRAS records were held at two sites, neither of which were Ms X's workplace and nor was she the allocated social worker. Evidence provided to the Tribunal established that the CYF audit identified that certain CYRAS records for Child B including a Family Whanau Agreement, Family Group Conference records and other case notes were accessed (read only) using Ms X's username on 13 June 2011 and 9 September 2011.

Child C

28. Child C is a sibling of Child A and Child B, and also shares Ms X's surname. The file for Child C was held at a site at which Ms X was not a staff member, and she was not the social worker allocated to this child. CYF evidence confirmed that access to the CYRAS records using Ms X's username occurred on five dates between 12 March 2012 and 7 March 2013. Ms X attended FGCs for this child in

her capacity as whanau including on 13 March 2013, which was the week that the last access to Child C's CYRAS record occurred.

Child D

29. Child D is not a sibling to the above children but is identified as being related to Ms X, who is recorded on the child's file as a family member non-household. Ms X was not the social worker allocated to Child D. The CYF audit identified that the CYRAS records for the child were accessed using Ms X's username on 5 June 2013. The case notes read related to contact with the child's family members and a FGC to be convened.

Child E

30. Child E shares a maternal grandmother with Child D. The CYRAS notes for Child E were very briefly accessed using Ms X's username on 21 November 2011, by which time the child's file had been closed. Ms X was not the social worker allocated to Child E.

Investigation by the Ministry of Social Development

31. The CAC's evidence relied heavily on details of the investigation carried out into the above matters by Ms Hoult in 2014. The Tribunal was not told how these matters came to the Ministry's attention in late 2013 other than reference to a previous unrelated investigation. Ms X was given notice in December 2013 of concerns regarding access to the CYRAS records of the children named in the charge. During Ms Hoult's inquiries she came across the caregiver assessment file, and incorporated this into her investigation. Ms Hoult interviewed Ms X while Ms X was on extended sick leave. Ms X was supported at the interview by a representative from the Public Service Association.

32. Ms Hoult's report is the only record of Ms X's response to the allegations the subject of the charge. We have no reason to doubt that Ms Hoult has reflected

Ms X's responses accurately and in good faith. Her report contains the following information, which Ms Hoult confirmed in her evidence:

a. Ms X said she had no recollection of completing any documentation on the caregiver assessment file for caregivers X and Y in relation to Child A;

b. Ms X stated she had no recollection of reading the s128 report pertaining to Child A, and denied writing the report;

c. Ms X said she was asked to complete the visits to children in care casenotes by another social worker. Ms Hoult reported that Ms X said she "*did not think about*" any conflict of interest at the time;

d. Ms X denied accessing Child B's records and denied knowing this child;

e. Ms X denied accessing Child C's records;

f. Ms X acknowledged accessing Child D's case notes and said that this was done because another social worker contacted her for assistance looking for whanau of the child;

g. Ms X could not explain why Child E's records were accessed using her username.

33. Ms Hoult clarified that she asked Ms X about the possibility of another person using her computer and access code (logging in under Ms X's username), but that Ms X did not claim this had happened.

Submissions of the Complaints Assessment Committee as to Liability

34. Ms Garrick acknowledged that the burden of proof rests with the CAC and that the standard of proof is "*proof to the satisfaction of the Tribunal on the balance of probabilities, rather than the criminal standard*."

35. The purpose of disciplinary proceedings includes the protection of the public and enhancing professionalism, in accordance with the purposes of the Act. That there is also a punitive element to disciplinary proceedings was acknowledged.

36. Ms Garrick outlined the facts underlying the charge. She confirmed that Ms X did not engage in the CAC investigation. Ms X took no part in the preparations for the disciplinary hearing. Ms Garrick referred to efforts by counsel to contact Ms X about the proceedings (and as above, we are confident that service of all necessary documents occurred).

37. The CAC submitted that in light of the CYRAS audit records and the investigation carried out by the Ministry, the sole explanation for the access to the records identified in the charge using Ms X's username is that Ms X personally accessed and read or edited these notes.

38. In circumstances where Ms X is said to have relied upon a request for information or permission from others to access the records in question, the CAC submitted that this does not excuse her conduct.

39. The charge pleads that Ms X's conduct amounted to professional misconduct, or alternatively, to conduct unbecoming which reflects adversely on Ms X's fitness to practise. In submissions, Ms Garrick focused on professional misconduct arising from Ms X's alleged breaches of the Code of Conduct. The following principles of the Code were relied upon:

> 1. *To uphold high standards of personal conduct and act with integrity a social worker is expected to:*
>
> . *refrain from any professional or personal behaviour that puts at risk the individual's and/or the profession's reputation and compromises the social worker's ability to work with the client in a fully professional and caring manner;*

…

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

…

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

40. The CAC submitted that:

> "*Ms X's repetitive and deliberate access to the CYRAS files of family members has endangered the reputation of the social work profession. Moreover, Ms X was a senior practitioner, which denotes that she had been through professional development and had moved up to that level of senior social work practise."*
>
> And:
>
> *"…Ms X's processing of the caregiver application also breaches the Code of Conduct. Ms X made social work decisions in relation to family members, where there was an obvious risk that her relationship to [caregiver Y, caregiver Z and Child A] would affect her judgment and therefore compromise her ability to assess the application in a fully professional manner.*"

41. It was submitted that Ms X's conduct was a significant departure from the standards reasonably expected of a social worker, taking into account her seniority and that accessing records of persons not allocated to Ms X was a breach of the Code whether or not there was a family relationship.

Findings - Liability

42. The Tribunal gave an oral indication that the CAC had discharged the burden of proof and the charge was made out. The reasons for this are now set out.

43. The relevant part of section 82 reads:

Grounds on which Tribunal may make order

…

(2) A registered social worker is guilty of professional misconduct if he or she –

(a) breaches the code of conduct; or

(b) while employed or engaged as a social worker, claims or holds himself out to be registered while not holding a current practising certificate.

44. We accept that the test for professional misconduct involves a two-step process. We are required to make an objective assessment of whether or not the acts or omissions the subject of the charge can reasonably be regarded as constituting a breach of the code and secondly, we must be satisfied that the acts or omissions meet the threshold to warrant a disciplinary sanction.

45. The code of conduct referred to in section 82(2) is the code issued and updated from time to time by the Board.[3] It is a guide and is intended to cover the "*minimum professional standards of behaviour, integrity and conduct that apply to registered social workers and that should apply generally in the social work profession.*"[4]

46. We are required to consider the charge separately and cumulatively, but first make some general comments.

47. We find that there has been a breach of Principles 1 and 3 of the Code in relation to each of the particulars of the charge.

48. Ms X was an experienced social worker. She failed to recognise, or failed to act upon conflicts of interest, and to seek appropriate supervision and assistance. Ms X accessed records for CYF clients where she had no proper purpose for doing so, and dealt with third parties who assumed that her actions were authorised.

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[3] Section 105 of the Act

[4] Preamble to the Code of Conduct v2.0 September2008 (as applied at the relevant time)

Child A

49. In relation to the Child A and the caregiver assessment we find that individually this conduct amounts to professional misconduct.

50. Ms X should not have taken any part in the caregiver assessment of her whāngai daughter and daughter's partner; however, she undertook numerous steps including opening their CYRAS caregiver record, and obtaining confidential information from sources including the Police. The close relationship between Ms X and the caregiver applicants made it entirely inappropriate for her to have any role in their assessment. Ms X commenced the assessment without consultation and without seeking supervision. Caregiver assessments were not part of her role and she failed to ensure that the file was allocated to another social worker. Having carried out a preliminary assessment of the applicant information that she had received, Ms X requested approval of the caregiver application by referring her request to a staff member with decisionmaking authority. This step was taken in spite of there being concerning aspects of these caregivers' situation that ought to have triggered escalation and a process of closer scrutiny.

51. The confidential information Ms X gathered about caregiver Y and caregiver Z from a variety of sources was only available to her because of her position as a social worker. This was a breach of the trust of her employer and of the agencies from whom the information was gathered (notwithstanding that caregivers Y and Z signed their authorisation for each of these checks to be done, knowing that Ms X was the person carrying out the checks).

52. We cannot be satisfied that all of Ms X's conduct in relation to the caregiver assessment was innocuous, and there appears to have been a deliberate attempt to circumvent usual processes. We have no evidence explaining why Ms X opened and retained the caregiver assessment record in October and November 2009. Ms X could not act in a fully professional manner in dealing with that assessment, and appears to have tried to circumvent proper process. The fact that the caregiver approval was granted within days after the transfer

of the file, and apparently without being escalated for any further scrutiny is a cause for concern.

53. Child A was related to Ms X and the conflict of interest that arose out of Ms X having any social work role for this child was identified in February 2009.

54. In relation to Child A's CYRAS records accessed under Ms X's unique username we are satisfied that these actions were undertaken by Ms X. Access to the s128 court report and the audit finding that this access involved the editing function was particularly concerning.

55. In relation to Ms X entering visits to child in care notes for Child A, we accept that this may well have been requested of her by a colleague, and there was no attempt to hide these entries. However Ms X ought to have refused. At this time, she was a staff member with an ongoing family connection with Child X. There was an obvious conflict of interest that meant she would not be able to provide an objective assessment.

The four further children/particulars

56. In relation to the four other children and what are effectively four further particulars of the charge, we also find that Ms X was responsible for the access to the CYRAS records using her username on the stated dates. These particulars cumulatively meet the threshold for discipline.

57. In relation to Child B, Ms X accessed the CYRAS record on two occasions three months apart. Access was brief, but long enough to glance over the chosen records and read confidential information. The documents selected to be viewed included a record of a Family Group Conference, a Family Whanau Agreement record and related casenotes.

58. In the case of Child C, access to the records occurred on five dates spread over the course of one year. Access to the records was generally brief with exceptions including the opening of an Assessment Record for the child for nearly 20 minutes. Access, even brief, allowed for case notes including records

of telephone conversations and home visits to be scanned through giving confidential detail of family members and caregivers involved with the child.

59. In the case of Child D Ms X accessed the CYRAS record on six occasions during the course of one day, for a period of less than two minutes. Likewise with Child E, we find that Ms X on one day looked at records for a period of approximately one minute. This still constitutes an inappropriate opportunity to view confidential information about the children, their whanau and caregivers.

60. In considering Ms X's conduct in relation to the access to the records for the four children identified as B, C, D and E in this decision, we find that each incident was not an appropriate use of Ms X's position and ability to access confidential records, and is certainly misconduct which considered cumulatively reaches the threshold for disciplinary sanction as we discuss below.

61. However when considered individually, these matters do not warrant a disciplinary sanction. We have had regard to the HPDT's decision in *Zabala*[5] in which a Medical Laboratory Scientist accessed laboratory results for her immediate family members, a paediatric patient to whom she was related, and members of her Church. The Tribunal found the allegations relating to the young patient and Church members proved, warranting penalty. In relation to the practitioner's immediate family the Tribunal found that the practitioner was negligent by acting in breach of clear guidelines about not accessing records, and was a departure from acceptable standards "*but in all the circumstances was not a significant departure*." The Tribunal went on to say:

> "[57] *In making this finding, we are mindful that there will be other cases of accessing family patient records that could amount to professional misconduct. This may arise where there was some ill motive, misuse or the access was known at the time to likely to (sic) be against the wishes of the family member*."

[5] Decn No 826/MLS16/344P

62. While we prefer the position taken in *Raju* (discussed below at paragraphs 75-6) that ill motive (etc.) represent aggravating features but are not necessary to prove a charge involving improper access to confidential information, we accept that the threshold may not be reached with every breach of confidentiality. The fact Ms X acted at the request and apparent sanction of supervisors on occasion is relevant. So too in relation to Child D and E is the small number of incidents and very brief access to their records.

63. Ms X showed a disregard for the privacy and confidentiality of the children identified in the charge, as well as the privacy of the caregivers and whanau whose information appeared within those records.

64. There was a breach of trust on each occasion that Ms X accessed the CYRAS records for persons whom she was not the allocated social worker, or in some other way professionally responsible for. This access was only able to be gained as a result of her employment with CYF. Likewise, when Ms X requested and was provided with confidential information about caregivers Y and Z, this information was provided to her on the basis that she was assumed to be authorised to seek it as an employee of CYF with responsibility for the agency's formal caregiver assessment process.

Penalty

65. Having found that the charge is made out as set out above, we are required to determine the appropriate penalty.

66. Ms Garrick referred to the well-established penalty principles set out in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand.*[6] These principles are, in summary:

    a. To protect the public, which includes deterring others from offending in a similar way;

[6] High Court Wellington CIV-2012-404-003916 [12 December 2012], Collins J.

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;

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.

67. Section 83 of the Act provides that once a charge is established the Tribunal may make one or more of the following orders:

    a. Cancellation or suspension of registration for a period not exceeding 12 months;

    b. The imposition of conditions, such as supervision or training, for a period not exceeding 3 years;

    c. Censure;

    d. Fine;

    e. A contribution to the costs incurred by the Tribunal and prosecution.

68. This Tribunal has not previously considered a factually similar case. The CAC referred us to three decisions involving a charge of professional misconduct. We refer to two of these briefly, but each is distinguishable from the present case.

69. In *CAC v Curson*[7] the social worker failed to recognise conflicts of interest when providing social work assistance to the family of a friend. His actions extended to arranging for pornographic material to be removed from a computer used by his client. He was censured, ordered to practice under supervision for two years with conditions, and ordered to pay $5,000 in costs. The Tribunal accepted that Mr Curson was well motivated but found:

> "……*once a professional social worker undertakes to provide services to a client, even in an unpaid capacity or, if appropriate, as a favour to a friend, he or she always remains accountable and is required to practice in accordance with the standards and Code of Conduct of the profession*."[8]

70. In *CAC v Surowiez-Lepper*[9], the social worker befriended an elderly client immediately after their professional relationship had ended, and accepted gifts and money from the former client. The Tribunal found professional misconduct. The social worker's registration was cancelled with a prohibition on reapplying for registration for a period of three years, and she was censured. Costs in the sum of $2,500 were ordered.

71. The CAC also referred us to five decisions of the HPDT, in which a health practitioner inappropriately accessed confidential records, or provided services to a family member.

72. In *PCC v Park*[10], the practitioner was an enrolled nurse working as an administrator for a district health board. After inadvertently seeing a Termination of Pregnancy list she recognised a person on the list, and made it

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[7] 01/08/SWDT, 30 July 2008
[8] At [61]
[9] RSW3/D3/SWDT/2015, 3 September 2015
[10] 566/Nur13/239P, 28 August 2013

known to a third party that she was aware of the TOP. She then accessed the woman's medical records on five occasions over two months. The HPDT found that this was professional misconduct by virtue of bringing discredit to the nursing profession.[11] The nurse was censured, and suspended for three months with a condition that she complete a Nursing Council approved course on privacy and confidentiality. No fine or costs were ordered as Ms Park was legally aided.

73. In *PCC v Mrs S*[12], Ms S, a specialist nurse, accessed medical records for her husband's new partner and on several occasions misused the information gained. She also accessed, with verbal consent, medical records of her family members. The offending occurred over the course of several years. Mrs S defended her conduct in relation to access to the records of her family members and was not found guilty of that particular. She pleaded guilty to the particulars relating to the access and misuse of information about her husband, his partner and a large number of other patients whose records had been accessed without professional purpose. The Tribunal suspended Mrs S for five months; in doing so the Tribunal stated that it took into account the seriousness of the offending, but also considered the time elapsed since the matters the subject of the charge and the rehabilitation of the practitioner. On resumption of practice the Tribunal imposed a period of six months supervision. Mrs S was censured and ordered to pay a contribution of 35% of the total costs of the Tribunal and PCC.

74. In *PCC v Mrs L*[13] over a period of nine months and on 19 occasions Mrs L, a nurse, accessed medical records belonging to two married fellow employees and their daughter. This occurred in the context of a very difficult working relationship between the parties. The information obtained was not misused (by way of disclosure to any other person or other use). Mrs L admitted her conduct. She was dismissed. The Tribunal found Mrs L guilty of professional

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[11] Section 100 of the Health Practitioners Competence Assurance Act 2003 defines professional misconduct to be circumstances in which the practitioner is guilty of malpractice or negligence, or of conduct that brings discredit to their profession.
[12] 623/Nur13/256P, 17 April 2014
[13] 640/Nur13/266P, 6 August 2014

misconduct, with her behaviour amounting to a serious abuse of her ability to access patient medical records in the absence of reason relating to the proper care of the patients concerned. Mrs L was censured, fined $6,000, ordered to pay costs amounting to 25% of those incurred, and had a condition imposed that she must disclose a summary of the Tribunal's findings to any employer for a period of two years after being re-employed as a nurse.

75. The Tribunal declined to suspend Mrs L, referring to mitigating factors: these were the fact that she reported her conduct to her employer, that she was under significant psychological distress at the time of the offending and the offending was out of character; that Mrs L had a high level of remorse and regret and had suffered a loss of employment and loss of professional reputation. The fact that Mrs L did not disclose the medical information obtained to any other party was also considered in mitigation.

76. In *PCC v Raju*[14], the practitioner was a registered nurse. Over the course of 12 months Ms Raju accessed medical records of 22 persons on a total of 66 occasions. Some of those whose records were accessed were colleagues of Ms Raju. Ms Raju defended the charge, which was heard over four days. She asserted that she had not received adequate training in privacy and confidentiality issues including access to patient records. The Tribunal found that in order to practise as a registered nurse she was required to be familiar with relevant standards, legislative provisions and applicable codes.

77. The Tribunal found that Ms Raju accessed records out of curiosity, without legitimate cause. While she did not pass information to a third party or otherwise misuse the information obtained through reading the records, these factors were not essential to meeting the threshold for disciplinary sanction. The Tribunal imposed a four month suspension and conditions should Ms Raju resume nursing practice. Costs amounting to 30% of the total costs of the Tribunal and PCC were ordered.

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[14] 712/Nur134/302P, 17 July 2015

78. Finally, we were referred to *PCC v Dr E*[15], in which the doctor diagnosed and treated his partner for various conditions including depression. This conduct took place over a number of years. The Tribunal imposed a censure, an order that Dr E was to undertake education with regard to professional boundaries, a fine of $7,500 and a contribution towards costs totaling $3,000. The Tribunal also recommended that the Medical Council consider undertaking a competence assessment of Dr E's practice.

79. Having reviewed the authorities, the CAC submitted that the following are aggravating factors:

    a. Ms X repeatedly accessed the CYRAS records without authorisation on 19 dates and numerous incidents within those dates;

    b. Ms X's misconduct was sustained over almost four years;

    c. That in relation to Child A and the caregiver assessment Ms X's conduct was wilful, as she was aware of the conflict of interest in dealing with matters relating to Child A;

    d. There was a breach of trust as Ms X abused her position to access CYRAS records for personal purposes.

80. The CAC identified no mitigating factors.

81. The CAC submitted that censure, suspension and conditions upon Ms X's return to practice were appropriate, as well as a contribution towards the costs incurred by the CAC and Tribunal. A four month suspension was submitted to be appropriate but for the period of time Ms X had been away from work. That is, the CAC did not seek a period of suspension to be imposed upon Ms X.

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[15] 136/Med07/76D, 3 December 2007

82. In support of the CAC's position regarding a suspension, we were referred to *McCaig v A Professional Conduct Committee*[16]. Dr McCaig forged a letter and the signature of a senior colleague and provided this to the Medical Council of New Zealand in support of her application for general registration, which registration she required to embark on vocational training. This was done at a time of significant stress in the practitioner's personal life. The HPDT found Dr McCaig guilty of professional misconduct and imposed penalties including a four month suspension. The HPDT gave 'credit' for a nine month period during which Dr McCaig had not practised, equating this to a credit for three months' suspension that the Tribunal would otherwise have additionally imposed. On appeal against penalty, the four month suspension was upheld. In relation to the concept of a 'credit' to be factored into a suspension period, His Honour held:

> "[48] *However, I do not agree with the Tribunal's decision in giving only three months credit against the suspension. The Tribunal's decision to restrict to three months the credit given for nine months off work as a practitioner appears to have proceeded from its determination that Dr McCaig be given time for reflection. It took into account that Dr McCaig lost her employment as a doctor after the offending and was out of work as a doctor for nine months. It considered her rehabilitation and the fact that no matters of professional competence arise in respect of the charges. And it encouraged Dr McCaig to continue with her practice as a medical practitioner. However it weighed those factors against "the need for Dr McCaig to have time for reflection and an appropriate further period of suspension would take that into account."*
>
> *[49] In this regard, I consider the Tribunal was wrong. Its reasoning for crediting Dr McCaig with only three months off her suspension because she had nine months off work as a practitioner is arbitrary. It is not supported by the principles by which penalties are set and it is contrary to the principles of rehabilitation and the imposition of the least*

[16] [2015] NZHC 3063, 4 December 2015, Palmer J

restrictive penalty that can reasonably be imposed in the circumstances…"

Penalty - Findings

83. Ms X's conduct warrants disciplinary sanction. We have found that on the balance of probabilities, Ms X did create and/or access the CYRAS records for the persons named in the disciplinary charge. In doing so, Ms X acted in breach of the Code of Conduct on multiple occasions between October 2009 and June 2013.

84. We agree with the CAC that there are several aggravating features, namely the persistent nature of the misconduct, the editing of a court report, and undertaking tasks where there was a clear conflict of interest that ought to have made it obvious to Ms X that her involvement was inappropriate.

85. In terms of mitigating features, without having any material from Ms X it is difficult to weigh the matters that may well have been significant to our assessment of penalty. We take into account that Ms X has not previously had a disciplinary charge before this Tribunal. We also note that Ms X has not held an annual practising certificate since 2014, meaning that she must not be employed or engaged in social work until such time as she has satisfied the Board that she is fit to hold a practising certificate.

86. The Tribunal understands that Ms X was unwell at the time of the investigation by the Ministry in 2014, and remained unwell in the lead up to the hearing.

87. We find that Ms X's conduct warrants the penalties set out below. These findings are made in relation to the individual particular relating to Child A, and when all particulars are considered cumulatively. While the circumstances do warrant a suspension, in reliance on *McCaig* and the principles outlined above, we have taken into account the period of time Ms X has been away from work and do not impose a formal suspension.

88. The Tribunal orders:

   a. Conditions - On resumption of social work practice, Ms X is to undertake education or training approved by the Board in professional boundaries and confidentiality.

   b. Ms X is also to have supervision. This supervision is to be external and additional to any supervision provided by her employer. This supervision is to be at Ms X's cost, for a period of 12 months, and should include reference to current cases and issues arising in the course of Ms X's practice, as well as having a specific focus on confidentiality and privacy.

   c. Ms X is censured.

   d. Ms X is ordered to pay a fine in the sum of $1500. This is a reflection of the seriousness of the conduct, involving a significant breach of trust and breach of confidentiality over a sustained period of time.

89. Ms X is to notify any future employer of the outcome of these proceedings.

90. The CAC sought a contribution towards costs but did not quantify this. We have considered the cases referred to above and the level of costs imposed. We acknowledge the starting point in disciplinary cases is well established to be 50%, with adjustment reflecting the circumstances of each case.[17] We also acknowledge the prosecution of professional disciplinary matters can be costly and time consuming, and the ability to impose costs is intended to alleviate the burden on the profession.[18]

91. In the absence of similar cases determined by this Tribunal, there is little guidance as to costs however we note the following for completeness:

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[17] *Cooray v Preliminary Proceedings Committee* (unreported) AP23/94, 14/9/95 Doogue J.
[18] *O'Connor v Preliminary Proceedings Committee* Wellington HC, AP280/89, 23/8/90 Jeffries J.

a. There are numerous cases involving social workers who were found guilty of practising without a current practising certificate, many of whom did not appear before the Tribunal. In those cases by and large the Tribunal did not impose costs. We do not find these of assistance in this case.

b. In *PCC v Ham*, Mr Ham accepted the charge and otherwise took no part in the proceedings. His incarceration for 8 years and his financial situation led the Tribunal to not impose costs however the following comments were made:

> *"[As] a matter of principle, Mr Ham should be contributing a minimum of 50% to the costs of disciplinary proceedings (with some allowance for his cooperation and decision not to defend the proceedings)*."

92. We have also considered the approach taken by the HPDT in instances where the health practitioner has not appeared before the Tribunal to defend a charge, and has been found guilty. Some examples are:

a. *Streat*[19] - Dr Streat was disciplined in relation to a driving offence, and breach of an undertaking to abstain from drugs and alcohol (in the course of her employment). Other than one email, she did not take engage with the PCC or take part in the hearing. The Tribunal noted that while the doctor did not 'inappropriately defend' the charge, she did not assist the matter to a speedy conclusion either. A contribution towards costs approximating 30% of the total costs incurred by the PCC and Tribunal was ordered ($15,600).

b. *Powell*[20] - the nurse did not take part in the disciplinary proceedings. The charge related to misappropriating drugs of abuse from her workplace over two months. (There were related criminal charges, the

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[19] 630/Med13/269P
[20] 731/Nur15/306P

nurse obtained a discharge without conviction). The Tribunal cancelled nurse Powell's registration and ordered costs amounting to 40% of the costs incurred. The Tribunal acknowledged that the practitioner did not extend the hearing by defending the charge, but also that her lack of cooperation meant costs relating to the hearing could not be avoided. The Tribunal noted that although there was no harm to patients, the practitioner's actions necessitated substantial time and effort investigating what had occurred. The Tribunal referred to *Kilbride*[21] (20% of total costs), *Condon*[22] (40% of total costs) and *Adair*[23] (50% of total costs).

93. In the present case, an order that Ms X pay a contribution towards costs is consistent with relevant authorities and the expectation that professionals who face a disciplinary charge will bear some of the costs associated with this. We are not aware of Ms X's financial circumstances and must base our decision on the information before us.

94. The costs of the CAC (taking into account the investigation by the CAC, and the prosecution costs) are $21,383.39. The costs of the Tribunal are $11,859.56. Having considered the authorities referred to above, and the circumstances of this case we consider that a contribution to these costs amounting to approximately 40% is appropriate and make an order accordingly.

Conclusion

95. The Tribunal finds the charge of professional misconduct is proved. The charge in relation to Child A individually amounts to professional misconduct. The particulars of the charge considered cumulatively amount to professional misconduct.

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[21] 161/Nur08/83P; penalty decision 183/Nur08/83P – misappropriation of drugs for personal use; censure, 12 months suspension. Costs order 20% (of $40,108.53) – reduction in costs to allow for fact not all charge established and nurse's poor financial situation.
[22] 23/Nur05/13P – discipline following conviction for fraud (using colleague's credit card).
[23] 126/Nur07/69P – discipline following conviction on two charges of theft of controlled drugs. Registration cancelled.

96. The Tribunal orders:

    a. That Ms X undertake a course of education or training approved by the Board in professional boundaries, privacy and confidentiality.

    b. That for a period of 12 months after recommencing practice as a social worker Ms X is to have supervision by a professional peer approved by the Board in addition to supervision provided in the course of Ms X's employment, and at Ms X's cost.

    c. Ms X is fined $1500.

    d. The Tribunal censures Ms X pursuant to section 83(1)(b) of the Act.

97. Ms X is ordered to pay a contribution towards the costs of the Tribunal and CAC in the sum of $13,000.

98. The non publication orders in respect of the name of Ms X and the names of the persons identified in the charge are now permanent. The name of Ms X's colleague, Ms G is also not to be published. The locations where Ms X worked for CYF and the locations where the files of those named in the charge were held come within this order.

99. The Tribunal directs that the Hearings Officer publish a copy of this decision on the Board's website.

DATED this 11th day of October 2016

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Catherine Garvey

Deputy Chairperson

Social Workers Complaints and Disciplinary Tribunal