

**Complaints and Disciplinary Tribunal**

**DECISION NUMBER:** RSW6/D1/SWDT/2015

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

**BETWEEN** a Complaints Assessment Committee  
**Complainant**

**AND** Alastair Russell  
**Respondent**

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

**Present:** Catherine Garvey, (Chairperson)  
Tim O'Donovan (Member)  
Phil Comber (Member)  
Lareen Cooper (Member)  
Yvonne Crichton-Hill (Member)  
Amanda Mounla (Hearing Officer)  
Dale La Hood (Counsel for the CAC)  
Alastair Russell (Respondent)

**Hearing Held in Auckland on 25 November 2015**

## Introduction

1. Mr Russell holds a Diploma in Applied Social Studies, and has been a registered social worker with the Social Workers Registration Board (“the Board”) since 2008. Mr Russell has extensive experience as a social worker. Mr Russell is an Advocacy Coordinator for Auckland Action Against Poverty (“AAAP”).
2. From June 2008 until 30 June 2014 Mr Russell held a current practising certificate. In the circumstances described below, Mr Russell did not hold a practising certificate from 1 July 2014 until 1 April 2015. He continued practising as a social worker during this period. He then had a further period of over 7 weeks between 6 May and 30 June 2015 during which he did not hold a current practising certificate as his competency certificate expired.
3. A Complaints Assessment Committee (“the CAC”) appointed under the Social Workers Registration Act 2003 (“the Act”) laid a disciplinary charge against Mr Russell. The charge was amended at the hearing (with minor alterations to the dates relied upon) to allege:

*“Pursuant to s72(3) of the Social Workers Registration Act 2003 (“the Act”), the Complaints Assessment Committee (“the CAC”) charges that Alastair Russell, Registered Social Worker of Auckland:*

*(a) Between 1 July 2014 and 1 April 2015 and between 6 May 2015 and 30 June 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 his fitness to practise as a social worker pursuant to s 82(1)(b) of the Act.”*

4. The hearing proceeded on the basis of an Agreed Summary of Facts (with no admission of the charge), and an agreed bundle of documents. The CAC also adduced an affidavit of Dr Janet Duke, the content of which Mr Russell accepted.
5. Mr Russell gave evidence, and called evidence from four witnesses.

## Legal Principles

6. The standard of proof required for the charge to be established is the balance of probabilities. The onus of proving the charge rests with the CAC.
7. The purpose of the Act is set out in section 3. Of particular relevance to disciplinary proceedings, the Act is to ensure that social workers are competent to practise and accountable for the way in which they practice: s3(a)(i) and (ii). The Act is also intended to enhance the professionalism of social workers: s3(d).
8. Section 25 of the Act states:

*“No registered social worker may be employed or engaged as a social worker unless he or she holds a current practising certificate.”*
9. Pursuant to section 44 of the Act, all registered social workers who wish to retain their practising certificate are required to complete a competence assessment every five years. If a certificate of competence expires then the practitioner’s practising certificate immediately becomes invalid.
10. The Tribunal must be satisfied that the following elements of the charge are proved:
  - a. That Mr Russell was at all material times registered with the Board;
  - b. That Mr Russell was at all material times employed or engaged as a social worker;
  - c. That at all material times Mr Russell did not hold a current practising certificate;
  - d. That Mr Russell’s failure to renew his practising certificate while continuing to practise social work amounts to conduct unbecoming; and
  - e. That Mr Russell’s conduct reflects adversely on his fitness to practise.
11. The phrase *“employed or engaged as a social worker”* is not defined in the Act; nor is *“social work”*. The Tribunal was referred to a Crown Law

opinion jointly obtained by the Board and Ministry of Social Development, which commends a broad approach be taken to the interpretation of these terms. 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.”*

12. With regard to the legal test under s82(1)(b), the Tribunal must first be satisfied that the facts establish conduct that is unbecoming of a registered social worker when viewed objectively against the standards of the profession. In *B v Medical Council*<sup>1</sup> Elias J outlined what continues to be the test for conduct unbecoming:

*“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 invariably one of degree. Negligence may or may not (according to degree) be sufficient to constitute professional conduct or conduct unbecoming....  
...The structure of the disciplinary processes set up by the [Medical Practitioners] Act, which rely in large part upon acceptable professional conduct is the standards applied by competent, ethical, and responsible practitioners.”*

13. The Tribunal adopts this approach to assessing whether Mr Russell’s failure to renew his practising certificate amounts to conduct unbecoming.

14. The Tribunal must also be satisfied that Mr Russell’s conduct reflects adversely on his fitness to practise. As counsel for the CAC submitted, and we accept, this does not require the Tribunal to find that in fact Mr Russell is not a fit or proper person to practise social work.<sup>2</sup> Mr Russell’s competence or current fitness to practice was not called into question.

15. Under the Health Practitioners Competence Assurance Act 2003 (“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). This

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<sup>1</sup> Unreported, High Court ...

<sup>2</sup> *F v Medical Practitioners Disciplinary Tribunal and Anor*

emphasises the significance that attaches to registration and the obligations attaching to it in serving the purposes of the legislation to protect the public and to enhance professional standards.

### **Facts**

16. The Tribunal considered the Agreed Summary of Facts, Dr Janet Duke's affidavit, the agreed bundle and the oral evidence heard from Mr Russell and his witnesses. The Tribunal finds the following facts established.
17. Mr Russell registered with the Board in June 2008. He renewed his practising certificate each year until June 2014.
18. Mr Russell commenced employment as an Advocacy Coordinator with AAAP in March 2014, being employed for 30 hours per week. This has been increased to 35 hours. Mr Russell called evidence from a former employer confirming his role at AAAP meant a near 50% pay reduction from his prior employment.
19. The Job Specification for the role of Advocacy Coordinator required Mr Russell to be registered. As part of his role, Mr Russell provides supervision to students studying in the Unitec's Department of Social Practice.
20. On 24 May 2014 the Board emailed Mr Russell a notice reminding him to renew his practising certificate. This notice advised:

*"We invite you to renew your Annual Practising Certificate (APC for the 2014/2015 practising year. You can do this on our secure online platform.*

*You **must** update your status whether you are practising or non-practising (e.g. parental leave, overseas, no longer employed in the social work sector)."*
21. Mr Russell received a second emailed notice dated 2 July 2014 which noted that he had attempted to renew his APC but had not paid the fee for this. The notice confirmed that practising without a practising certificate is in breach of the Act. A Freephone number was provided for any queries. Mr Russell did not respond to this notice.
22. By a final notice to Mr Russell dated 29 July 2014 the Board stated:

*"It is a legal requirement to update your status whether you are practising or non-practising...."*

*Failure to renew your practising certificate or advise of your current status will result in disciplinary action.*

*Please urgently contact the Board on Freephone..."*

23. Mr Russell made no contact with the Board following receipt of this notice.
24. Mr Russell did communicate with a co-Chair of AAAP, Dr Sue Bradford, regarding the need to renew his practising certificate. Both Mr Russell and Dr Bradford confirmed that Mr Russell was told that AAAP was unable to pay the fee on his behalf, due to dire finances.
25. Mr Russell also approached a senior staff member at Unitec, John Stansfield (whose students Mr Russell supervised) to seek assistance with the payment. No financial assistance was forthcoming.
26. Between the final notice on 29 July 2014 and 27 November 2014 there was no communication between the Board and Mr Russell. By letter dated 27 November 2014 the Board advised Mr Russell that (following the processes required under the Act) he had been referred to a Chair of the Tribunal to consider a referral to a Complaints Assessment Committee.
27. Mr Russell responded by email dated 8 December 2014. He stated that neither he nor his employer had the funds to pay the cost of his practising certificate.
28. The next communication was by letter dated 24 March 2015 notifying Mr Russell that he had been referred to a CAC. Within one week of this letter Mr Russell applied to renew his practising certificate, paid the accompanying fee, and was issued with his practising certificate on 1 April 2015.
29. Mr Russell's competency certificate then expired on 6 May 2015. He completed a competence assessment in June and his practising certificate was revalidated on 29 June 2015. A practising certificate for the 2014/2015 practising year was issued on 14 July 2015.
30. Dr Duke's affidavit explained the basis on which the CAC considered Mr Russell was practising social work in his role as Advocacy Coordinator. Mr Russell did not dispute this. The Tribunal accepts that Dr Duke (and Mr Russell) have accurately characterised his role as social work. In brief, Mr Russell co-ordinates advocacy training for volunteers, directly supports

people to access benefit entitlements, has contact with various agencies for networking and advocacy purposes, and supervises students from the Unitec Bachelor of Social Practice which is a recognised social work qualification.

31. Mr Russell provided written material setting out his position for the Tribunal in advance of the hearing. He also gave oral evidence. Mr Russell acknowledged that he was aware of the requirement to renew his practising certificate, but that he did not prioritise this. He stated that his failure to renew his practising certificate was a consequence of his inability to pay the renewal fee. Mr Russell believed that the disciplinary charge (and the Board's approach) was discriminatory because of his and his employer's financial circumstances.
32. Mr Russell approached Dr Bradford and Mr Stansfield for assistance with the payment of his practising certificate fee. There was no clarity around the timing of these approaches, but the Tribunal accepts that they occurred. There was no evidence that Mr Russell was encouraged by Dr Bradford or Mr Stansfield to approach the Board to explain his situation, or that he was urged to renew his practising certificate.
33. Mr Russell stated that he did not pursue discussion with the Board about payment of his fee because he "*knew what the answer would be.*" He therefore let the seriousness of his situation worsen. By the time Mr Russell did raise his difficulty with payment with the Board on 8 December 2014, he had knowingly been practising without a current practising certificate for approximately four months.
34. Mr Russell called Mr John Stansfield, Head of the Department of Social Practice at Unitec. Mr Stansfield is responsible for the teaching of students who are to attain a Bachelor in Social Practice, a qualification which entitles them to registration with the Board. Mr Stansfield confirmed that Mr Russell approached him in his professional capacity at some point in "*early*" 2014 regarding payment of the fee for his practising certificate. He stated that he was unable to assist.
35. Mr Stansfield referred to the Board's policy that supervision of students on placement must be undertaken by a registered social worker<sup>3</sup>. He considered this "*aspirational*". Mr Stansfield told the Tribunal that there is now a contractual agreement underlying the supervision arrangement

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<sup>3</sup> SWRB policy "Placement within a recognised social work qualification."

and implied that this would provide funds for payment of Mr Russell's practising certificate fee in the future.

36. Mr Stansfield also expressed his opinion that the Board ought to apply a fee structure allowing for variation of the fees payable to it, or waiver of fees.
37. Mr Russell then called Dr Sue Bradford, co-Chair of AAAP. Dr Bradford confirmed her awareness that Mr Russell's practising certificate had expired; that he complained of an inability to meet this cost and sought her assistance, but that AAAP did not have funds to pay the fee.
38. Dr Bradford spoke of her membership of the parliamentary select committee that considered the Social Workers Registration Bill. Despite this involvement at the early stages of the Act's life, Dr Bradford stated that she had not been clear about the significance of Mr Russell not holding a current practising certificate until the disciplinary process. Like Mr Russell she did not take steps to clarify the position, which one might reasonably expect a responsible employer to do. When asked what steps she would have taken had she fully understood the seriousness of Mr Russell practising without a current practising certificate, Dr Bradford responded that she would have paid the fee.
39. Dr Bradford endorsed the importance of registration. She noted the importance of education to ensure there is no confusion between registration and the requirement for yearly renewal of a practising certificate.
40. Mr Russell also called a representative of his former employer, who confirmed a statement that was provided in advance of the hearing. Mr Russell also called a former colleague whose role at AAAP was made redundant, leaving Mr Russell exceptionally busy in mid-2014. Both of these witnesses attested to Mr Russell's commitment and competence. So too did a number of referees who provided written references for the Tribunal.

#### **Finding - liability**

41. The Tribunal did not reach a unanimous decision on the charge. A majority of four members of the Tribunal was satisfied that the elements of the charge were made out. That is:
  - a. At all material times Mr Russell was a registered social worker;

- b. At all material times Mr Russell was employed or engaged as a social worker;
  - c. Between 1 June 2014 and 1 April 2015, and 6 May and 30 June 2015 Mr Russell did not hold a practising certificate while continuing to practise as a social worker;
  - d. This conduct amounts to conduct unbecoming; and
  - e. This conduct reflects adversely on Mr Russell's fitness to practise.
42. It was apparent from Mr Russell's evidence and demeanour that he is dedicated to his work as an advocate with AAAP. He also travels long hours each day to and from work, and frequently works much longer hours than he is remunerated for.
43. It was accepted by the CAC, and acknowledged by the Tribunal that there is no question mark over Mr Russell's competence.
44. Mr Russell was unapologetic in his decision to prioritise his daily work over renewing his practising certificate and subsequently applying himself to completing his competence assessment. The period of time over which he practised without current certification was significant, and in breach of mandatory requirements under the Act. While Mr Russell was emphatic that his role and the work he does is singular in nature, the Tribunal considers that there are likely to be many social workers whose professional and personal circumstances contain significant challenges and stressors. To make a finding that such circumstances excuse the need to fulfil a statutory obligation over a prolonged period of time would lead the Tribunal into subjectivity and error.
45. Correspondence from the Board advised Mr Russell of the consequences of non-renewal of his practising certificate, but after initial efforts (which did not extend to contacting the Board) he did not act on this. The Tribunal was not unsympathetic to Mr Russell's position, and was concerned at the lack of appreciation by senior figures of the requirement to hold a current practising certificate, and apparent lack of support for Mr Russell to approach the Board or to support him to ensure that he met his statutory obligations. Adequate supervision ought to include guidance in matters such as this. This does not however obviate Mr Russell's personal responsibility.

46. The Tribunal's view is that where a social worker is registered, is practising as a social worker, is aware of the need to renew their annual practising certificate, but fails to take appropriate action this will on most occasions amount to conduct unbecoming. Additional factors may be required to elevate the matter to one warranting disciplinary sanction and the Tribunal cannot be prescriptive about this. However in this case the majority considered that Mr Russell's conduct reflects adversely on his fitness to practise for these reasons:

- a. Mr Russell received multiple reminders from the Board;
- b. He spoke to knowledgeable colleagues (who ought to have known what registration entails);
- c. He made a deliberate decision not to act;
- d. He was involved in the supervision of students who include the next generation of social workers. In a supervisory capacity it is expected that any social worker will act professionally and provide good role modelling;
- e. He did not take timely steps to ensure he met the competence requirements under the Act, thereby leading to a second period of time in which he did not hold a practising certificate but continued to practise.

47. With regard to the suggestions that the Board should either have waived the fee payable by Mr Russell and/or provided for categories of fee enabling a lesser fee to be paid, this was not a matter the Tribunal could consider. The ability to prescribe fees payable for a practising certificate is set out under section 108(1). Section 108(2) provides that the Board may exempt people of any kind or description from liability to pay any fee, and may provide for the waiver, or refund of any fee. The Board has not made any provision for exemption, waiver or refund that could have been applied to Mr Russell. Mr La Hood for the CAC submitted (and reference to the Gazette notice confirms) that the Board has chosen to set a standard fee without exception.

#### **Findings - Penalty**

48. Having found the charge proved, the Tribunal considered section 83 and the penalties that may be imposed on a practitioner who has been found

guilty of a disciplinary charge. An oral decision was given, the reasons for which are set out below.

49. The Tribunal accepts that the relevant considerations when determining penalty are those set out by Justice Collins in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*<sup>4</sup>. That decision refers to the disciplinary regime under the HPCA Act 2003. The Tribunal accepts that there is sufficient conformity of principles, both in terms of the purposes of the respective Acts and in terms of the disciplinary charges and sanctions available, to confidently accept that the principles in *Roberts* are applicable to matters heard by this Tribunal. These principles are summarised as follows:

- a. The protection of the public, which includes deterring other from similar culpable behaviour;
- b. Setting (and maintaining) professional standards;
- c. Inevitably there is a punitive element to any penalty imposed;
- d. Where appropriate, the rehabilitation of the practitioner;
- e. To ensure that penalties imposed are comparable to that imposed on others in similar circumstances;
- f. Ensuring that the worst penalties are reserved for the worst offending;
- g. Imposing the least restrictive penalty in the circumstances;
- h. Assessing whether the penalty is fair, reasonable and proportionate in the circumstances.

50. Which and to what extent these principles apply will depend on the facts of each case.

51. Counsel for the CAC referred us to two earlier decisions of this Tribunal (differently constituted) involving similar charges.

52. In *WT*<sup>5</sup> the social worker practised without a practising certificate for four months, but by the time of the hearing had renewed this. There was

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<sup>4</sup> High Court Wellington CIV-2012-404-003916, 12 December 2012.

<sup>5</sup> 25W APC 05/13/SWDT

no issue as to the practitioner's competence. The Tribunal censured the social worker.

53. In *Sanders*<sup>6</sup> the practitioner was uncooperative and did not participate in the disciplinary process. The social worker did not attempt or intend to renew his or her practising certificate. The Tribunal imposed a censure and suspended the social worker's registration.
54. Counsel for the CAC also referred to a number of cases involving charges laid in reliance on s100(1)(d) of the HPCA. These are helpful in a number of respects. However the Tribunal is mindful of the construction of s100(1)(d), and the fact that the present case was a charge of conduct unbecoming. The Tribunal is also mindful that the maximum fine available under the HPCA Act is \$30,000, three times greater than the maximum fine available to this Tribunal under s83(1)(c), being \$10,000.
55. Counsel for the CAC submitted that censure, a fine and a contribution towards costs was appropriate. A fine in the range of \$1000-\$2000 was sought. A contribution towards costs in the order of 30% of the total costs of the CAC and the Tribunal was sought in reliance on the principles established in a number of cases heard before the HPDT, and in particular the principles set out in *Winefield*<sup>7</sup>. Mr La Hood identified that a reasonable starting point for costs is 50% but in Mr Russell's case could appropriately be reduced taking into account his cooperation with the CAC by way of preparation of the agreed summary of facts and bundle; his non contest of Dr Duke's affidavit, and his appearance at the hearing.
56. Counsel for the CAC noted Mr Russell's decision to defend the charge. This was his right. So too was his decision to call witnesses, and to his credit Mr Russell did provide written statements in advance of the hearing for each of the witnesses called and had prepared questions for these witnesses, which he kept to a minimum. Mr Russell did not unduly extend the hearing.
57. Mr Russell did not accept that any penalty was appropriate. He provided the Tribunal with oral evidence of his financial situation and was specifically questioned about this. Mr Russell stated that any monetary order, whether a fine or costs, would have a significant impact on him. He stated that he would be forced to leave his job as he would be unable

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<sup>6</sup> 11N APC 05/13/SWDT

<sup>7</sup> 83/Phar06/30P (Health Practitioners Disciplinary Tribunal).

to pay any costs award based on his current salary and outgoings. The Tribunal was satisfied from the details given of Mr Russell's financial situation that he is of limited financial means and any fine or costs would cause substantial hardship.

58. In the usual course the Tribunal would expect to receive a formal statement of financial position from any person intending to rely on their financial circumstances when making submissions about a potential fine and costs.

59. The Tribunal delivered an oral decision on penalty which is confirmed as follows:

- a. Mr Russell is censured.
- b. Given Mr Russell's financial circumstances no fine is imposed. But for those financial circumstances, a fine would have been imposed.
- c. Given Mr Russell's financial circumstances no costs are awarded. Had the Tribunal not held sufficient concern for Mr Russell's inability to meet any costs award and the implications this would hold for him, a contribution towards costs would have been ordered.

### **Conclusion**

60. A majority of the Tribunal finds the disciplinary charge of conduct unbecoming that reflects adversely on Mr Russell's fitness to practise is proved.

61. The Tribunal orders that Mr Russell be censured.

62. 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**



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Catherine Garvey.  
Chairperson  
Social Workers Complaints and Disciplinary Tribunal