

DECISION RSW6/D1/SWDT/2016

BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

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

BETWEEN the Complaints Assessment Committee

AND **Nani Hungahunga** registered social worker of Napier

Hearing Held in Napier on 17 October 2016

Present: Jo Hughson (Chairperson)
Peter McGurk, Phil Comber, Bernard Marra, Sue Jarvis (Members)
Fleur Nicholas (Hearing Officer)
Adele Garrick (Counsel for the Complaints Assessment Committee)
Jacqui Kennedy (Stenographer)
Ms Nani Hungahunga

Introduction

1. Ms Hungahunga was first registered as a social worker with the Social Workers Registration Board (“the Board”) on 3 March 2006. She holds a Bachelor’s Degree in Applied Social Sciences, with a Social Work major.
2. Over the relevant time period Ms Hungahunga worked in the shared position of House Parent (Whare Matua) and Teen Services Co-ordinator in the Teen Unit (Te Whare Karamu) operated by Te Taiwhenua o Heretaunga Trust in Hastings. Her contractor status and a schedule of the services she was contracted to provide to Te Taiwhenua o Heretaunga (the Principal) are set out in a Contract for Service which commenced on 29 June 2015. Ms Hungahunga continues to work in this role.
3. A Complaints Assessment Committee (“CAC”) appointed under the Social Workers Registration Act 2003 (“the Act”) laid a charge under section 82(1)(b) in relation to Ms Hungahunga practising without a current practising certificate between 16 June 2015 and 1 May 2016.
4. The charge read as follows:

“Pursuant to section 72(3) of the Act the Complaints Assessment Committee charges that Nani Hungahunga, registered social worker, of Napier:

(a) Between 15 June 2015 and 1 May 2016 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.”

5. At the hearing the CAC was represented by Counsel and Ms Hungahunga represented herself. An agreed statement of facts signed by Ms Hungahunga was produced to the Tribunal. A bundle of documents was produced by consent which contained a copy of the charge, documents concerning Ms Hungahunga’s registration and her annual practising certificate (“APC”) history, Ms

Hungahunga's Contract for Service, correspondence between the Board and Ms Hungahunga and certain other relevant information including the Code of Conduct for Social Workers (V3 January 2014). The CAC also called Ms Judith Douglas who is a registered social worker, to give an independent opinion on whether Ms Hungahunga has been engaged or employed as a social worker as alleged in the charge. The Tribunal considered a statement of evidence and oral evidence from Ms Douglas. The Tribunal also heard and considered oral evidence given by Ms Hungahunga under oath. Ms Hungahunga did not call any witnesses.

Legal principles

6. The burden of proving the charge is on the CAC. The standard of proof is the balance of probabilities.
7. The purpose of the Act is set out in section 3(a) and includes the protection of the safety of the public by prescribing or providing for mechanisms that ensure that social workers are both competent to practise, and accountable for the way in which they practise. Section 3(d) provides that the Act is to "*enhance the professionalism of social workers.*"
8. Holding a current practising certificate is a mandatory requirement for any registered social worker who is employed or engaged in social work (s. 25). The requirement to hold an APC is a fundamental mechanism by which the purposes of the Act are achieved. This requirement persists unless the social worker is recorded by the Board as non-practising or is otherwise removed from the register.
9. Pursuant to s. 44 of the Act all registered social workers who wish to retain their practising certificate are required to complete a competence assessment every five years. A competence assessment is required to enable the Board to determine whether the person's competence to practise social work is satisfactory for the purposes of the Act. If a practitioner fails to complete a competence assessment within the required timeframe then the practitioner is

no longer eligible to retain his or her practising certificate. The practitioner's APC, if one is held, immediately becomes invalid.

10. The Tribunal must be satisfied that the following elements of the charge laid under s82(1)(b), are established:

- That at all material times Ms Hungahunga was a registered social worker; and
- That at all material times she was employed or engaged as a social worker; and
- That at all material times Ms Hungahunga did not hold a current practising certificate;
- That Ms Hungahunga's conduct in continuing to be employed or engaged as a social worker without a current practising certificate, amounts to conduct unbecoming a registered social worker; and
- That this conduct reflects adversely on Ms Hungahunga's fitness to practise social work.

11. In correspondence with the Board prior to the CAC laying the charge, and to an extent when defending the charge, Ms Hungahunga maintained that she was not employed or engaged as a social worker at the material times. The Tribunal was therefore required to consider whether Ms Hungahunga was employed or engaged as a social worker during the period covered by the charge.

12. The terms "*social work*" and "*employed or engaged as a social worker*" used in s. 25 are not defined in the Act. It is clear on the face of the section that the requirement to hold a current practising certificate is not restricted to employment in a role titled "social worker." It envisages circumstances in which a registered social worker may not be formally employed as a social worker but nonetheless is engaged in tasks and undertaking responsibilities that can

properly be considered social work. This is consistent with the broad purpose of the Act.

13. In *CAC v Angelo* RSW9/D1/SWDT/2015 the Tribunal adopted the approach set out in a Crown Law opinion which was referred to by counsel for the CAC. This opinion was jointly obtained by the Board and the Ministry of Social Development (“MSD”) in November 2013 and commended a broad approach be taken to what constitutes social work. The opinion concluded that a registered social worker is “*employed or engaged as a social worker*” and required to hold a current practising certificate if he or she:

“3.1 is engaged with casework decisions at any level; and/or

3.2 in the context of performing his or her role, expressly or implicitly holds himself or herself out as a registered social worker, or is held out in that way by his or her employer or colleagues.”

14. In assessing whether or not a person is employed or engaged as a social worker this Tribunal has in previous cases also considered whether or not a person is using his or her “social work skills and training” (*CAC v Kuruvilla* RSW1/D1/SWDT/2016).
15. Where the Tribunal is required to determine whether the registered social worker is employed or engaged as a social worker, this will require an assessment, on a case by case basis, of the nature of the role which the person is performing by reference to factual evidence including the job/position description of the social worker as well as evidence of the day to day tasks they undertake in the performance of their work.
16. As for the test of conduct unbecoming and which reflects adversely on a practitioner’s fitness to practise as a social worker, there are a number of decisions of this Tribunal where s. 82(1)(b) has been considered. In those cases the Tribunal adopted the approach of the Health Practitioners Disciplinary

Tribunal (“the HPDT”) and High Court appeals from that Tribunal in which an identical provision was considered under the Medical Practitioners Acts 1968 and 1995. The Tribunal as presently constituted has no reason to depart from that approach.

17. In *B v Medical Council*,¹ Elias J discussed the test as follows:

“There is little authority on what comprises “conduct unbecoming.” The classification requires assessment of degree. But it needs to be recognised that conduct which attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public...

The structure of the disciplinary processes set up by the Act, which rely in part upon judgment by a practitioner’s peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that usual professional practice, while significant, may not always be determinative: the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards not be permitted to lag. The disciplinary process in part is one of setting standards.”

18. Counsel for the CAC submitted that there are two steps involved in assessing what constitutes “conduct unbecoming”. The first step, she submitted, involves an objective analysis of whether or not the registered social worker’s acts or omissions can reasonably be regarded by the Tribunal as constituting conduct unbecoming of a social worker. The second step (the “threshold step”), Counsel for the CAC submitted involves the Tribunal being satisfied that the registered social worker’s acts or omissions require a disciplinary sanction for the purpose of protecting the safety of the public and/or enhancing the professionalism of social workers. This is the well-established two-stage approach which the

¹ [2005] 3 NZLR 810

Health Practitioners Disciplinary Tribunal takes when assessing whether a charge of professional misconduct is established for the purposes of s 100(1)(a) and s 100(1)(b) of the Health Practitioners Competence Assurance Act 2003. Under that legislation there is not a tiered structure of offences as is the case under the Social Workers Registration Act 2003, and as was the case under the Medical Practitioners Act 1968 and 1995. It was in the 1995 Act that the rider “reflects adversely on a practitioner’s fitness to practise” was added to the offence of “conduct unbecoming” from the 1968 Medical Practitioners Act.

19. Counsel for the CAC referred to the Court of Appeal decision in *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 which endorsed earlier statements which had been made by Elias J in *B v Medical Council* (noted at [2005] 3 NZLR 810) where Her Honour made the important point that the threshold (in cases of professional misconduct and conduct unbecoming under the Medical Practitioners Act 1995) is “inevitably one of degree”. The Court of Appeal expressed the issue in this way [80]:

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

20. Importantly in *F v Medical Practitioners Disciplinary Tribunal* the Court of Appeal went on in [80] to hold that in order to determine that the conduct is significant enough to warrant disciplinary sanction the Tribunal must satisfy itself that the conduct reflects adversely on the practitioner’s fitness to practise.
21. The Tribunal adopts the approach of the Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal*. As such, in cases where a charge is laid under s 82(1)(b) alleging conduct unbecoming a social worker, the Tribunal must first decide whether there has been a departure from acceptable standards. If the Tribunal is satisfied that first step is met then the Tribunal will need to go on and decide the threshold step being whether the established departure “reflects adversely on a practitioner’s fitness to practise as a social worker” and

therefore is significant enough to warrant disciplinary sanction for the purposes of protecting the safety of the public and/or enhancing the professionalism of social workers.

22. In adopting this approach for the purposes of s 82(1)(b), the Tribunal is signaling that it may not be in every case where the Tribunal finds there has been a departure from acceptable standards, that it will also find that the conduct reflects adversely on fitness to practise and as such is a departure which is significant enough to warrant disciplinary sanction.

23. In relation to the “reflects adversely on fitness to practise” rider, in *Zauka*² the HPDT held:

“It is not necessary that the proven conduct should conclusively demonstrate that the practitioner is unfit to practise. The conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine. Not every divergence from recognised standards will reflect adversely on a practitioner’s fitness to practise. It is a matter of degree.”

24. The Tribunal accepts that it is not required to find that in fact Ms Hungahunga is not a fit and proper person to practice social work. Ms Hungahunga’s competence or current fitness to practise was not called into question.

Facts

25. The Tribunal finds the following facts established on the evidence before it, most of which was agreed but for the issue of whether or not Ms Hungahunga was employed or engaged as a social worker in the relevant period.

26. Ms Hungahunga completed a Bachelor’s Degree in Applied Social Sciences from EIT with a major in Social Work and first registered as a social worker on 3 March 2006. This means that she must have at that time completed a

²Re Zauka, 236/03/103C, Health Practitioners Disciplinary Tribunal

programme of study which met the registration requirements of the Act which are to:

- Be considered 'competent to practise social work in Aotearoa New Zealand'
- Be a 'fit and proper person'; and
- Have met the practical experience requirements.

27. Ms Hungahunga has remained registered as a social worker since that date.

28. Board registration documentation shows that Ms Hungahunga has held an annual practising certificate ("APC") in each practising year since she first registered in March 2006. Ms Hungahunga has been through the competence assessment process previously through the Aotearoa New Zealand Association of Social Workers (ANZASW). Her last current APC was due to expire on 1 July 2015 however Ms Hungahunga failed to complete a competence assessment by 16 June 2015, which meant that her APC was immediately invalidated from that date. As at the date of hearing she had taken no steps to undertake a competence assessment which is a requirement for eligibility to renew her practising certificate.

29. Notwithstanding the invalidation of her APC and subsequent non-renewal, Ms Hungahunga has continued to work in her shared House Parent and Teen Services Coordinator roles for Te Taiwhenua o Heretaunga Trust. As at the date of the hearing Ms Hungahunga continued to work in these roles.

30. Te Taiwhenua o Heretaunga Trust offers a number of residential and non-residential community services to the Hawke's Bay area. Ms Hungahunga told the Tribunal she was employed by Te Taiwhenua o Heretaunga Trust from 2003 until 28 June 2015 in various roles "within health, youth, child and babies" including from 2011 as a teen parent intensive case worker and also as a reliever house parent at Te Whare Karamu which is a teen parenting service operated by the Trust.

31. Ms Hungahunga advised the Tribunal that she is currently on leave from her employment but that as from 29 June 2015 she has been engaged as a contractor to the Trust pursuant to a Contract for Service to provide House Parent and Teen Parent Co-ordinator services, at Te Whare Karamu. The Contract for Service which the Tribunal considered does not expressly require her to hold a professional qualification or to be registered in order to perform her roles. It is not known to the Tribunal if Ms Hungahunga was required under her employment contract to be registered and/or to hold a current practising certificate. In any event the evidence establishes that she held a current practising certificate up until 16 June 2015. In the period from 17 June 2015 through to 28 June 2015 when she was an employee of the Trust she did not hold an APC and she has not held one since.
32. Ms Hungahunga's Contract for Service with Te Tai Whenua o Heretaunga Trust (which commenced on 29 June 2015) is a shared contract in that Ms Hungahunga and one other person jointly contract with the Trust to provide House Parent and Teen Parent Co-ordinator services. In her evidence before the Tribunal Ms Hungahunga stated that as from 1 July 2016 she has been a party to a new Contract for Service on the same terms but with a different partner.
33. The Schedule to Ms Hungahunga's Contract for Service is clear that the services she was required to undertake were derived from a contractual relationship between Te Taiwhenua o Heretaunga Trust and MSD. Ms Hungahunga was required to ensure her service delivery was congruent with applicable legislation in particular, ss. 396 and 403 of the Children, Young Persons and their Families Act 1989, and the Vulnerable Children Act 2014.
34. Twenty two specific services are listed in the Contract for Service. The Tribunal agrees with Ms Douglas' opinion and accepts that more than half of those services fall into the realm of what the Tribunal considers is social work practice. These specific services include the requirements:
- *"To connect on a personal level with clients and establish and maintain a trusting, supportive relationship with each young parent and their*

tamariki”; the Tribunal considers that engagement and interaction with clients on a personal level is a core activity of social work practice and that the establishment of trust between the professional and the client is central to the work of assessment and intervention that follows engagement;

- *“To provide intensive case management to 12-15 vulnerable teen parents and their children in each business year”*; the Tribunal considers that a person who provides case management services to vulnerable children and young people will be engaged with casework decisions for their clients; and
- Liaison with the funder, MSD including the requirement to coordinate repairs and liaise or tahi (meet) with Child Youth and Family. This requirement involves the coordination of referrals with other social services and as such, involves core social work practice.

35. In addition to involvement with clients and other agencies, the Contract for Service specifies a series of reports and roles to meet service accountability requirements as well as involvement in processes which promote ongoing service improvement. The Tribunal considers these are typical of professional social work practice. They are as follows:

- *“provide input into service improvement for Te Whare Karamu and teen parent services”* and *“regularly review and report against key performance indicators outlined by the Ministry for Social Development”*;
- *“complete monthly service reports...”* and *“complete bi-monthly statistical and narrative reports for the Ministry of Social Development”*;
- *“support and facilitate periodic audits by MSD”* and *“ensure that the service being delivered results in positive audit outcomes achieved”*.

36. The Tribunal had the benefit of hearing evidence from Ms Hungahunga as to the performance of her Contract for Service and the day to day tasks she undertakes. Ms Hungahunga was questioned about these matters and the CAC was able to call reply evidence from Ms Douglas. To a large extent the services specified in the Schedule to Ms Hungahunga's Contract for Services were the tasks which she described performing in her role. It is acknowledged by the Tribunal that she did so on a shared basis. Further, Ms Hungahunga did not suggest in her evidence that she did not or does not perform the specific services set out in her Contract for Service. Rather her evidence was that what she does on a day to day basis goes beyond the services specified in her contract including assisting with parenting duties and maintaining the House.

37. In her evidence Ms Hungahunga described some of the day to day tasks she undertakes in her roles. They included:

- The keeping of file records for each client and their child including daily notes, records of matters requiring monitoring, incident reports, and whether services have been accessed for the client. Ms Hungahunga stated *"we're always assessing about things that we need to make changes to, or issues that we are coming across, and that. And just about progress, can we see [the client] moving forward"*;
- playing a part in collecting information and being involved in discussions with her manager and work partner (and in relevant cases with Child Youth and Family) about referrals, including an assessment role;
- providing a follow-on service for clients who leave Te Whare Karamu; *"that's just to ensure they are not being set up to fail when they go out of the house. Then, once they're settled we just lead them up to the services they do have there"*;
- goal planning which involves connecting clients to other services and implementing interventions;
- transition planning with clients including involvement in making recommendations to Child Youth and Family social workers, and in the case of self-referrals transition planning

based on the monitoring of a client's progress and goal plans to assess readiness for transition from Te Whare Karamu; and

- telephoning the MSD about repairs, although Ms Hungahunga stated that direct contact with MSD is usually through "our manager" but she acknowledged that her manager relies on information including monthly reports and progress reports provided by her (and her colleague).

38. Ms Hungahunga accepted under cross examination that she feels more guided when doing her job a consequence of being a social worker and that is because she is able to use in her job things that she had learnt as part of her social work training, as well as her life experience.

39. Significantly Ms Hungahunga agreed in answer to a question from a Tribunal member that she performs both a parenting role and a social work role when working with clients at Te Whare Karamu.

40. The Tribunal accepts Ms Douglas' evidence that while Ms Hungahunga's role is a very complex one which has a practical component that might not be considered social work on its own, a number of the tasks she undertakes (albeit jointly) do constitute social work tasks.

41. Those tasks which Ms Hungahunga described in her evidence and which the Tribunal considers involve social work practice are:

- her role in assessment processes including input (albeit as part of a team) into reports;
- making recommendations after her continual assessment of the young women in her care;
- the monitoring of the clients' capacity to parent;
- involvement in the assessment of possible interventions for the women, these being the particular elements of social work practice;
- Ms Hungahunga's involvement in what is an intensely therapeutic programme some of which inevitably will be informed by Ms

Hungahunga's knowledge base as a social worker (as well as by her own experience as a mother and grandmother);

- Ms Hungahunga's involvement in assessing and monitoring risk and then making interventions based on her risk assessments; and
- Ms Hungahunga's involvement in outreach services post transition from Te Whare Karamu, and her involvement in assessing the well-being of recently transitioned young parents and their children, all of which would involve Ms Hungahunga using her background social work knowledge to inform her decision-making about these matters.

42. The Tribunal is satisfied that Ms Hungahunga's role as a House Parent and Teen Parent Co-ordinator also involves her engaging with casework decisions, including assessment and working with high needs clients to change their lives. The Tribunal agrees with Ms Douglas that the involvement Ms Hungahunga described she has when clients come into Te Whare Karamu including discussions around whether the women being referred meet the relevant criteria, involves assessment and case work decisions. Further, Ms Hungahunga's involvement with monitoring the well-being of young women and their babies which may lead to the changing of goal plans, also involve case work decisions.

43. Ms Hungahunga's own evidence establishes that her qualification and training provided skills which she inevitably brought and continues to bring to her roles working directly with high needs teen parent clients of Te Taiwhenua o Heretaunga Trust/Te Whare Karamu.

44. Ms Hungahunga did not provide any direct evidence from Te Tai Whenua o Heretaunga as to the nature of her role or in relation to support in attaining her competence recertification and an APC. Indeed she confirmed that Te Taiwhenua o Heretaunga Trust is unaware of these proceedings.

45. In any event, the Tribunal was satisfied it had sufficient evidence before it as to the nature of her work (including the Contract for Service provided by Ms Hungahunga, as well the oral evidence which she gave at the hearing about

these matters) to enable it to make a finding that Ms Hungahunga was engaged as a social worker in the relevant time period.

46. Satisfied that Ms Hungahunga was engaged as a social worker at the relevant times (and continues to be), Ms Hungahunga was therefore required to hold a current practising certificate pursuant to s. 25 of the Act. This required her to have undertaken a competence assessment to satisfy the Board that her competence to practise as a social worker is satisfactory, and in order to ensure eligibility for an APC.
47. There was evidence before the Tribunal in the agreed statement of facts and in the bundle of documents that Ms Hungahunga had been sent reminders by the Board (including on 15 May 2015, 5 June 2015 and 22 June 2015 prior to her APC expiring) about the need for her to renew her APC. In any event Ms Hungahunga confirmed in her evidence that she was aware that she was required to undertake a competence assessment by 16 June 2015 and that she knew her APC was also about to expire (on 30 June 2015). Ms Hungahunga acknowledged that the Board correspondence advised her about how an APC could be renewed and that she has taken no steps to do so.
48. On 10 September 2015 the Board wrote to Ms Hungahunga and gave her final notice to renew her APC or respond to the Board by 21 September 2015, otherwise the matter would be referred to the Chair of the Tribunal and possibly, a CAC. There is no record of Ms Hungahunga having responded to this request.
49. The matter was referred to the CAC on 16 October 2015 and Ms Hungahunga was advised by letter accordingly. This letter was returned undelivered.
50. Following receipt of an email from the Board on 3 November 2015 to which were attached copies of the Board's letters of 10 September 2015 and 16 October 2015, Ms Hungahunga telephoned the Board and during the conversation with the Board staff member, she acknowledged that her 'competence had expired'. Ms Hungahunga indicated at that time that she did

not consider her current role as a House Parent was social work. Following a discussion with a Board employee she agreed that she was using her social work skills in her role.

51. It is an agreed fact that at some point following initial warnings about getting her 'recertification', Ms Hungahunga requested an extension to complete this but was advised this was not possible. Following this conversation, Ms Hungahunga contacted the Board and noted that she hoped to have her "competence recertification" documents to the Board by 13 November 2015.
52. Ms Hungahunga provided the CAC investigator with a copy of her Contract for Service, on 29 December 2015.
53. Ms Hungahunga telephoned the Board about the CAC process on 17 March 2016 and during the discussion stated that in her role as Teen Parent Coordinator she used her experience and knowledge from being a mother and grandmother in the role as opposed to her experience and knowledge as a social worker. Ms Hungahunga also stated she wished explain her family circumstances to the CAC which were that she had a daughter who had been diagnosed with a major health issue and needed regular treatment out of town. Ms Hungahunga was advised that as the CAC had already convened about her case it was too late for her to discuss her case with the CAC and it was explained to her she had already had the chance to respond to the CAC when a disclosure package had been sent to her. In a telephone conversation with a Board employee on 29 March 2016, after she had received the CAC decision to lay a Charge, she advised she had not had time to respond to the disclosure package because of the way the courier had left the package. Later on the same day it was explained to Ms Hungahunga that she could apply online for her competence 'recertification' and she said she would do this. As at the date of the hearing she had still not done so.

The Charge – discussion

54. As above, the purpose of the Act includes the protection of the public, ensuring that social workers are accountable, and enhancing the professionalism of social workers. Registered social workers have a responsibility to meet the statutory requirements of registration both in terms of practising certificates and competence assessment, in order to practise legally. Non-compliance with these requirements is therefore a serious matter.
55. The Tribunal is satisfied that at the material times (16 June 2015 to 1 May 2016) Ms Hungahunga was a registered social worker. The first element is met on the evidence.
56. The Tribunal is also satisfied the evidence establishes that although some aspects of Ms Hungahunga's role may not strictly have been social work practice, she was engaged in social work in her roles as House Parent and Teen Parent Co-ordinator in the relevant period, for the reasons given. The second element is also met.
57. As Ms Hungahunga was engaged in social work in the relevant period, she was required to hold a current practising certificate. The Tribunal is satisfied that the evidence establishes Ms Hungahunga failed to undertake the required competence assessment to enable her to renew her practising certificate and that in the period from 16 June 2015 to 1 May 2016 (and ongoing) Ms Hungahunga practised social work without a current practising certificate. The Tribunal finds the third element of the charge is established.
58. It is noted that after registering with the Board in March 2006, Ms Hungahunga renewed her practising certificate annually and she acknowledged to the Tribunal that she had previously undertaken competence recertification through the ANZASW. Therefore she ought to have been familiar with what was required of her by 16 June 2015. She was also advised by the Board, both before and after the expiry of her APC on 30 June 2015, of the need to renew her APC.

59. The Tribunal is concerned that despite stating her intention to submit the required documentation in late 2015 and again in March 2016, and despite knowing from past experience what was required in terms of the renewal process, as at the date of the hearing Ms Hungahunga had failed to attend to these matters.
60. Ms Hungahunga was asked by the Tribunal why she had not yet submitted the competence assessment/recertification documentation to the Board and obtained an APC. Ms Hungahunga indicated she intends to submit the required documentation once the outcome of this proceeding is known to her. She was clear that her failure to attend to these matters was not related in any way to “money”. She described various family circumstances and personal health issues which she said had previously got in the way of her submitting this documentation.
61. Of course, these matters do not provide Ms Hungahunga with a defence to the charge. It was her primary responsibility as a registered social worker to ensure that a current practising certificate has been issued if she was employed or engaged as a social worker, as the Tribunal has found she was. If a competence assessment is required to ensure the timely issue of a current practising certificate then the onus is on the practitioner to ensure that this is attended to within the required timeframe. A practitioner who does not comply with these obligations will be practising illegally.
62. The Tribunal considers that when viewed objectively, Ms Hungahunga’s conduct in continuing to be engaged as a social worker over the period of almost one year having failed to undertake a competence assessment and hold a current practising certificate is inconsistent with what might be expected for a practitioner who acts in compliance with the standards normally observed by those who are fit to practise as a registered social worker. The Tribunal is satisfied therefore that the conduct was “conduct unbecoming”.

63. The Tribunal is also satisfied that Ms Hungahunga's conduct in practising social work in breach of these mandatory legal requirements reflects adversely on her fitness to practise as a social worker. An annual practising certificate is an important part of meeting the principle purpose of the Act to protect the safety of the public. As has been recognised in cases involving other professionals, a practising certificate is in effect a notice to the world that a practitioner is fit and competent to practise. The Tribunal considers that a failure to comply with the requirement to hold a current practising certificate while practising undermines a fundamental premise on which the regulatory regime for registered social workers operates. For this reason the Tribunal determines that Ms Hungahunga's conduct is sufficiently serious to warrant discipline for the purposes of enhancing the professionalism of registered social workers and protecting the safety of the public.

64. Accordingly, satisfied that all the elements of the charge are established, the Tribunal finds that the Charge is made out.

65. That finding having been announced orally at the hearing, the Tribunal heard evidence from Ms Hungahunga on matters relevant to penalty and costs and heard submissions from the parties.

Penalty

66. The principles relevant to penalty in the disciplinary context are comprehensively set out by Collins J in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*.³ In summary the Tribunal's role in determining the appropriate penalty in any case involves consideration of the following eight factors:

- The protection of the public, which includes deterring other social workers from offending in a similar way;
- To set professional standards;

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

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

67. Williams J in *Katamat v Professional Conduct Committee* [2012] NZHC 1633, 21 December 2012 stated that of all these factors the primary factor is what penalty is required to protect the public and deter similar conduct. However the need to punish the practitioner can be considered, but this is of secondary importance. The objective seriousness of the misconduct, the need for consistency with past cases, the likelihood of rehabilitation and the need to impose the least restrictive penalty that is appropriate will all be relevant to the inquiry. Williams J went on to state that *“it bears repeating, however, that the overall decision is ultimately one involving an exercise of discretion.”*

68. This Tribunal has recently considered a number of charges laid pursuant to s. 82(1)(b) in circumstances where a registered social worker has not renewed their annual practising certificate. While each case turns on its own facts, there are also a number of similarities that arise, including notification to the social worker by the Board of the requirement to renew the practising certificate; relatively lengthy periods of time during which the practising certificate is not

held, and prior awareness of the renewal processes for practising certificates including competence assessments.

69. Counsel for the CAC submitted that a censure, fine and contribution towards costs is appropriate, which the Tribunal accepts. Ms Hungahunga did not take exception to that submission but submitted that she wished any financial penalty which the Tribunal may impose to be at the low end.

70. By way of aggravating features, the Tribunal accepts the CAC's submission that a period of almost one year is aggravating. The Tribunal also accepts that the lack of action including in the face of reminders sent to Ms Hungahunga by the Board about the need to renew her APC (both before and after its expiry date) and undertake a competence assessment is of some concern.

71. The Tribunal accepts the CAC's submission that a mitigating factor in this case is Ms Hungahunga's cooperation with the CAC in preparation for the hearing including agreeing a statement of facts and consenting to the admission of the bundle of documents. The Tribunal considers that Ms Hungahunga deserves some credit for this, as well as for the effort she made to attend the hearing and her willingness to give evidence before the Tribunal which assisted the Tribunal with its inquiry.

72. When deciding whether to exercise the discretion which s. 83 affords to the Tribunal and when imposing penalties in this case the Tribunal had regard to the need for general deterrence to the social work profession as well as specific deterrence to Ms Hungahunga.

73. The Tribunal is satisfied this is a case where it is of sufficient significance to impose penalties. The Tribunal considers that penalty orders should be imposed in this case to protect the public, which includes deterring other practitioners from offending in a similar way. The penalty orders the Tribunal imposes are as follows:

- Ms Hungahunga is censured (s 83 (1)(b)); and

- A fine of \$300 (s. 83(1)(c); and
- A contribution towards the costs of the Tribunal and CAC in the sum of \$1,000 to be divided evenly between the Tribunal and the CAC (s. 83(1)(e)(ii),(iii) and (iv)).

74. The Tribunal considers these orders are fair, reasonable and proportionate in all the circumstances.

75. A censure is an appropriate penalty to reflect the failure to comply with the mandatory requirements which flow from registration as a social worker, and that this failure reflects on Ms Hungahunga's professionalism.

76. With regard to the fine, the maximum available under the Act is \$10,000. In her written submissions Counsel for the CAC accepted the position taken previously by this Tribunal that this maximum means some adjustment is required when looking for guidance at decisions of the Health Practitioners Disciplinary Tribunal (where the maximum fine available is \$30,000).

77. The Tribunal considers that a fine of \$300 reflects the length of time over which Ms Hungahunga continued to be engaged in social work without a current practising certificate (almost one year) and without taking any steps to undertake a competence assessment so that she could then renew her practising certificate. The Tribunal strongly advises Ms Hungahunga to take steps to attend to these matters at the earliest opportunity to avoid the issue of her continuing to practise without an APC being taken further by the Board. Any reoffending is likely to be viewed less favourably by the Tribunal were it to be called upon to consider ongoing non-compliance in the future. A fine at this level also ensures consistency with other cases of this nature which the Tribunal has considered most recently.

78. The Tribunal also has the power to make an order of costs. The costs incurred by the CAC when conducting its investigation, and when prosecuting the charge need to be considered as well as the Tribunal's own costs (all excluding GST).
79. The costs and expenses incurred by the CAC and the Tribunal in this case were in the region of \$11,000 excluding GST.
80. A useful statement as to the applicable principles when considering the issue of costs, which the Tribunal adopts, is contained in the decision of *Vatsyayann v PCC* [2012] NZHC 1138 when Priestley J said:

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

81. Having heard evidence from Ms Hungahunga as to her ability to contribute to costs were the Tribunal minded to impose a costs order, the Tribunal is satisfied that Ms Hungahunga does have financial means to meet a costs order. Ms Hungahunga did not suggest otherwise but again, she asked the Tribunal to impose an award at the lower end of the range of costs orders which the Tribunal has imposed in previous decisions (being \$500 to \$1700).
82. The Tribunal had regard to Ms Hungahunga's indication that she intends to take steps to comply with her mandatory obligations in terms of competence assessment and an annual practising certificate once the outcome of this

proceeding is known to her. Having heard from Ms Hungahunga the Tribunal had no reason to doubt that she is genuine about her desire to comply with the legislative requirements in order to resume lawful practice. The Tribunal also took into account Ms Hungahunga's concerns about the burden for her of having to meet a costs order at the same time as having to meet the costs of compliance, close to Christmas and in circumstances where she has young persons who are financially dependent on her or who otherwise rely on her for financial support.

83. While this matter and its outcome ought to be a salutary lesson for Ms Hungahunga as to the need to comply with legislative requirements in a timely manner, in this case the Tribunal is prepared make a reduced costs order. Had the factors outlined above not been in the mix, the Tribunal would have been minded to have made a costs order in the region of 25% of the total reasonable costs in this case.

84. The Tribunal directs the Executive Hearing Officer to publish a copy of this decision on the Board's website.

DATED

This 8th day of November 2016



Jo Hughson

Chairperson

Social Workers Complaints and Disciplinary Tribunal