

Complaints and Disciplinary Tribunal

DECISION NUMBER: RSW8/D1/SWDT/2015

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

BETWEEN a Complaints Assessment Committee
Complainant

AND Tai Estall
Respondent

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

Present: Catherine Garvey (Chairperson)
Yvonne Crichton-Hill (Member)
Darryn Russell (Member)
Phil Comber (Member)
Kim Fry (Member)
Amanda Mounla (Hearing Officer)
Kate Feltham (Counsel for the CAC)
Ian Schneider (Counsel for Respondent)
Tai Estall (Respondent)

Hearing Held in Christchurch on 30 November 2015

Introduction

- 1 Mr Estall holds a Diploma of Social Work. He has been registered with the Social Workers Registration Board (“the Board”) since February 2013. Mr Estall is employed as a community mental health clinician.
- 2 On 1 July 2014 Mr Estall’s practising certificate expired. On 28 August 2014 Mr Estall’s certificate of competency expired. Mr Estall continued working without current certification until 24 August 2015 when he was issued with a certificate of competency and annual practising certificate.
- 3 A Complaints Assessment Committee (“CAC”) appointed under the Social Workers Registration Act 2003 (“the Act”) laid a charge pursuant to section 82(1)(b) of the Act in relation to Mr Estall practising without a current practising certificate between 1 July 2014 and 24 August 2015.
- 4 The charge reads as follows:

“Pursuant to section 72(3) of the Act the Complaints Assessment Committee charges that Tai Estall, registered social worker, of Christchurch:

Between 1 July 2014 and 24 August 2015 was employed or engaged as a social worker without a current practising certificate;

And that 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 s82(1)(b) of the Act.”

Legal principles

- 5 The burden of proving the charge rests with the CAC. The standard of proof is the balance of probabilities.
- 6 The purpose of the Act is set out in section 3. This includes to protect the safety of the public by prescribing or providing for mechanisms that ensure that social workers are competent to practise, and accountable for the way in which they practise: section 3(a)(i) and (ii).
- 7 Section 3(d) further provides that the Act is to “*enhance the professionalism of social workers.*”
- 8 Section 25 of the Act requires all registered social workers who are employed or engaged as a social worker to hold a current practising certificate.
- 9 Section 44 of the Act requires all registered social workers to complete a competency assessment every five years. If a practitioner’s 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 established:
- a. That at all material times Mr Estall was a registered social worker; and
 - b. That at all material times he was employed or engaged as a social worker; and
 - c. That Mr Estall's conduct in failing to renew his practising certificate amounts to conduct unbecoming a registered social worker; and
 - d. That his conduct reflects adversely on his fitness to practise.
- 11 Mr Estall did not contest that he was "*employed or engaged as a social worker*" though his job does not carry the title of 'social worker'. Mr Estall's Job Specification required him to hold registration.
- 12 The term "*social work*" and the phrase "*employed or engaged as a social worker*" are not defined in the Act. Whether a person is engaged, employed or practising as a social worker is a factual matter. The Tribunal was not required to consider this in detail given the position taken by Mr Estall. We were referred by the CAC to a Crown Law opinion jointly obtained by the Board and Ministry of Social Development, which commends a broad approach be taken to what constitutes social work. This opinion concludes that a registered social worker is "*employed or engaged as a social worker*" and required to hold a current practising certificate if he or she:
- 3.1 is engaged with casework decisions at any level; and/or
 - 3.2 in the context of performing his or her role, expressly or implicitly holds himself or herself out as a registered social worker, or is held out in that way by his or her employer or colleagues."
- 13 The CAC laid the charge in reliance on section 82(1)(b). This charge is not mirrored in the charges available under the Health Practitioners Competence Assurance Act 2003 ("the HPCA Act"). However there is ample authority for the meaning of the phrase "conduct unbecoming" and the threshold test ("that reflects adversely on fitness to practice") from cases determined under the Medical Practitioners Act 1968 and 1995.
- 14 The term "conduct unbecoming" was considered in *B v Medical Council*¹, in which Elias J discussed the test in the following frequently cited passage:

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

“There is little authority on what comprises “conduct unbecoming.” The classification requires assessment of degree. But it needs to be recognised that conduct which attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public. Such protection is the basis upon which registration under the [Medical Practitioners] Act, with its privileges, is available. ..I accept ...that a findings of conduct unbecoming is not required in every case where error is shown. To require the wisdom available with hindsight would impose a standard which is unfair to impose. The question is not whether error was made, but whether the practitioner’s conduct was an acceptable discharge of his or her professional obligations. The threshold is inevitably one of degree...

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

- 15 The Tribunal adopts this approach to assessing whether Mr Estall’s failure to renew his practising certificate, and delay in renewing his certificate of competency so that he could do so, amounts to conduct unbecoming.
- 16 The Tribunal must also be satisfied that Mr Estall’s conduct reflects adversely on his fitness to practise. This does not require the Tribunal to find that in fact Mr Russell is not a fit or proper person to practise social work².
- 17 Under the HPCA Act, it is an offence in and of itself for a registered practitioner to practise without a current practising certificate: s100(1)(d). This Act contains a similar provision in s82(2)(b). This emphasises the significance that attaches to registration. The obligations on registered practitioners to maintain fitness and competence, and the obligations on the Board to be satisfied that registered practitioners are fit and competent, are obligations intended to protect the public and to enhance professional standards.

² CA213/04 [4 May 2005] at [81].

Facts

- 18 The Tribunal considered the Agreed Summary of Facts, the agreed bundle of documents, evidence heard directly from Mr Estall and submissions made by his advocate, and the letters in support of Mr Estall from Messrs Lawrence Seinfano and Jeff Millar.
- 19 Mr Estall first registered with the Board in February 2013. He renewed his practising certificate in June 2013 for the 2013/2014 practising cycle.
- 20 On 24 May 2014 the Board emailed Mr Estall a notice reminding him to renew his practising certificate for the coming year. 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 Estall received a second emailed notice dated 2 July 2014 which noted he had attempted to renew his APC online 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 Estall did not respond to this notice.
- 22 By a final notice to Mr Estall 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 Estall made no contact with the Board following receipt of this notice. He acknowledged that he was under stress at work due to restructuring and some changes in his role, and that he *“kept letting things slip.”*
- 24 On 28 August 2014 Mr Estall’s competency certification expired. Mr Estall stated that at the time he was unsure as to how the administrative tasks he had taken on within his organisation during a restructuring process might be applied. However he acknowledged that when he did complete his competency assessment, he had no difficulty in applying his work to his reflections on the core competencies. Mr Estall also confirmed that the changes in his role over the relevant period did not alter the fundamental nature of his work, which he accepted was social work.
- 25 Mr Estall received correspondence from the Board dated 27 November 2014 advising him 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. He then received communication

querying his contact details in February 2015, at which time Mr Estall confirmed receipt of the earlier correspondence.

- 26 A CAC was convened in March 2015. Mr Estall provided the CAC with a letter apologising for his failure to renew his practising certificate. Mr Estall was unable to renew his practising certificate at this stage as he had not completed a competence assessment. He did not complete this until 24 August 2015. He continued to practise throughout.
- 27 Mr Estall's evidence was that he had failed to prioritise the renewal of his APC and his competence certification. He was remorseful, and did not seek to make any excuse for his conduct.
- 28 The CAC confirmed and the Tribunal accepts that there is no concern in relation to Mr Estall's competence. Mr Estall also provided the Tribunal with two references attesting to the quality of his social work practice.

Findings - liability

- 29 After hearing submissions from counsel on behalf of the CAC, evidence from Mr Estall and submissions from his advocate Mr Schneider, the Tribunal retired to consider whether the charge was proved. An oral decision was delivered upholding the charge. The reasons for that decision are now set out.
- 30 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. Section 25 is mandatory, and a fundamental mechanism to achieve these purposes.
- 31 Mr Estall was aware of the requirement to renew his practising certificate. He received reminders from the Board. The reasons he gave for not doing so were that he was under stress in his workplace, and had some uncertainty about how to complete his competence assessment in the context of his role being restructured. He did not seek advice about this.
- 32 The Tribunal found that Mr Estall's failure to renew his practising certificate, when reminders were sent including with an explanation of the consequences of a failure to renew, amounts to conduct unbecoming.
- 33 The Tribunal also considered Mr Estall's failure to take steps to ensure he completed his competence assessment in a timely manner, as this caused a significant delay in his ability to renew his practising certificate. Mr Estall acknowledged that he should have sought clarification regarding his competence assessment.
- 34 When the period of time over which Mr Estall continued to practise without a current practising certificate is considered, with the delay of almost 12 months in completing his competency certification, the Tribunal found that this conduct does reflect adversely on Mr Estall's fitness to practise.

Findings - Penalty

- 35 The Tribunal heard submissions on penalty from the CAC. Mr Estall gave evidence as to his financial situation. Mr Estall and Mr Schneider also made submissions.
- 36 The Tribunal considers that the relevant principles are those set out by Collins J in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*.³ That case deals with the disciplinary regime under the HPCA Act. There is sufficient conformity between the purposes of the HPCA Act and the Social Workers Registration Act, and between the disciplinary sanctions available under these Acts to confidently accept that the principles outlined in *Roberts* are applicable to cases heard by this Tribunal.
- 37 The principles relating to penalty are, in summary:
- a. To protect the public, which includes deterring others from offending in a similar way;
 - b. To set professional standards;
 - c. Penalties have a punitive function, both directly (such as a fine) and as a by-product of sanctions imposed;
 - d. Rehabilitation of practitioners, where appropriate;
 - e. To impose penalties that are comparable to those imposed in similar circumstances;
 - f. To reserve the maximum penalties for the worst offending;
 - 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.
- 38 Counsel for the CAC referred to two cases involving social workers practising without a current practising certificate considered by this Tribunal (differently constituted), both on 22 March 2013. In *Sanders*⁴ the social worker did not hold a practising certificate from 1 July 2012. Other than to assert an inability to pay the fee and to seek removal from the register, the social worker did not engage with the process and did not appear at the hearing. The Tribunal imposed a censure and suspended the social worker's registration.

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

⁴ Decn 11NAPC 05/13/SWDT

- 39 In *WT*⁵, the social worker was found guilty of a charge in reliance on s82(1)(b), having practised without a practising certificate between 1 July 2012 and 26 November 2012. The Tribunal imposed a censure.
- 40 It does not appear that the Tribunal was provided with full submissions as to the principles relevant to penalty, or relevant case law.
- 41 Counsel for the CAC also relied upon several cases involving charges laid in reliance on s100(1)(d) of the HPCA Act. The Tribunal accepts that the principles in these cases are relevant. However we are mindful that section 100(1)(d) creates an absolute offence, and in considering cases under that section the Health Practitioners Disciplinary Tribunal is not required to consider whether the health practitioner's conduct amounts to conduct unbecoming that reflects adversely on fitness to practise.
- 42 Further the maximum fine available under the Act is \$10,000. This is in contrast to the maximum fine of \$30,000 available to the Health Practitioners Disciplinary Tribunal. Counsel for the CAC accepted that when these maximum fines are considered, as a matter of principle and by reference to sentencing principles, this must influence the level of fine reasonably able to be imposed in a case such as this.
- 43 The Tribunal considers that the level of fine available for a failure to hold a current practising certificate ought not be in the same quantum as in cases determined under the HPCA Act for this reason (unless the circumstances elevate the fine in a particular case).
- 44 The CAC submitted that the Tribunal should impose a censure, fine and costs on Mr Estall. No specific submission was made as to the appropriate level of fine, or costs.
- 45 Through his advocate, Mr Estall acknowledged that a censure is appropriate. A fine and order for costs was said to be "*onerous.*" The Tribunal received evidence from Mr Estall as to his financial position.
- 46 The Tribunal makes the following findings on penalty:
- a. Mr Estall is censured;
 - b. A fine of \$200 is imposed;
 - c. Costs in the sum of \$1200 are payable by Mr Estall.
- 47 We agree, as the Tribunal said in both *Sanders* and *WT*, that the requirement to hold a practising certificate and to maintain a current competency certificate are "*fundamental to the professionalism of a registered social worker.*" The imposition of a censure and a fine reflects this.
- 48 With regard to costs, the Tribunal accepts that a reasonable starting point is a contribution of 50% of the costs of the CAC and the Tribunal. This figure can be reduced when the Tribunal takes into account Mr Estall's co-operation with the CAC including the production of an Agreed

⁵ Decn 25W APC 05/13/SWDT

Summary of Facts and agreed bundle of documents; Mr Estall's acceptance of Dr Duke's evidence by affidavit, and Mr Estall's attendance and conduct during the course of the hearing. Mr Estall's financial circumstances are also taken into account.

- 49 We are mindful that in the two cases dealt with by this Tribunal that were referred to us there were no orders as to either a fine or costs. However there is no detail in those decisions to assist us as to why this was so, but an indication that additional orders would be considered in the future. The Tribunal considers that a fine ought to be imposed primarily as a deterrent to others who might chose not to prioritise the renewal of their practising certificate, or maintenance of certificate of competence.
- 50 It is appropriate for social workers who are the subject of a disciplinary charge to contribute to the costs incurred where that charge is proved; the costs are otherwise borne by the profession as a whole.

Conclusion

- 51 The Tribunal finds the charge of conduct unbecoming that reflects adversely on Mr Estall's fitness to practise is proved.
- 52 The Tribunal orders that Mr Estall be censured.
- 53 The Tribunal orders that Mr Estall pay a fine in the sum of \$200.
- 54 The Tribunal orders that Mr Estall pay a contribution towards the cost of the CAC and the Tribunal, to be shared equally, in the sum of \$1,200.
- 55 The Tribunal directs that the Executive Officer ensure that this decision is published on the Board's website.

DATED this 18th day of December 2015



Catherine Garvey.
Chairperson
Social Workers Complaints and Disciplinary Tribunal