

DECISION RSW8/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 **Selena Going** registered social worker of Opotiki

Hearing Held in Wellington on 7 November 2016

Present: Jo Hughson (Chairperson)
Toni Hocquard, Kim Fry, Tim O'Donovan, Johanna Drayton (Members)
Fleur Nicholas (Hearing Officer)
Adele Garrick (Counsel for the Complaints Assessment Committee)
Helen Hoffman (Stenographer)
Ms Selena Going (by telephone)

Decision: 20 December 2016

Introduction

1. Ms Going was first registered as a social worker with the Social Workers Registration Board (“the Board”) on 4 May 2007. She holds a Diploma in Community and Social Work.
2. Over the relevant time period Ms Going worked as a Probation Officer employed by the Department of Corrections.
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 Going practising without a current practising certificate between 1 July 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 Selena Going, registered social worker, of Opotiki:

(a) Between 1 July 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 Going represented herself. An agreed statement of facts signed by Ms Going was produced to the Tribunal. A bundle of documents was produced by consent which contained a copy of the charge, documents concerning Ms Going’s registration and her annual practising certificate (“APC”) history, Ms Going’s position description and key accountabilities for the role of Probation Officer, relevant correspondence between the Board and Ms Going and certain other relevant information including the Code of Conduct for Social Workers (V3 January 2014).
6. The CAC also produced by consent an affidavit from Hana Upokoina O-Vou Meinders who is a registration assistant at the Board. Annexed to Ms Meinders’ affidavit was a copy of a Competence Application form (for a recertification competence assessment) and continuing professional development log which the Board received from Ms Going on 17 August 2016. Ms Going’s competence certificate had expired on 22 June 2016.
7. The CAC also called Mr Michael Dale as an expert witness to give an independent opinion on whether Ms Going was employed or engaged as a social worker as alleged in the charge. Mr Dale is a registered social worker who is Senior Lecturer in the School of Social Work at Massey University. The Tribunal considered a statement of evidence and oral

evidence from Mr Dale. Mr Dale helpfully summarised (including with reference to academic writing including his own writing on the topic of probation practice as social work¹) the position that probation officer practice has a lengthy association with the social work profession and continues to reflect core social work values, knowledge and skills with probation still being regarded as a social work field of practice.

8. The Tribunal also heard and considered oral evidence given by Ms Going. Ms Going did not call any witnesses.
9. Ms Going confirmed that she now holds a current practising certificate which the Board issued on 21 September 2016 after she had undergone the competence recertification process.

Application for s. 79 orders

10. Prior to the hearing Ms Going made an application for all or part of the hearing to be conducted in private, and for permanent name suppression. The application was not supported by affidavit evidence. The grounds on which these orders sought were identical and are as set out below in paragraph 87.
11. While the CAC consented to an interim non-publication order in respect of Ms Going's name, which the Tribunal made in advance of the hearing (until further order of the Tribunal), the CAC opposed the application for a private hearing.
12. At the commencement of the hearing the Tribunal considered and determined Ms Going's application for the hearing to be conducted in private. In this regard the Tribunal considered Ms Going's written application, the Memorandum of Counsel for the CAC dated 1 August 2016 and further submissions made orally by Counsel for the CAC. Ms Going was invited to make further submissions and to give evidence in support of the application but declined this invitation.
13. Section 79(1) of the Social Workers Registration Act 2003 has, as its starting point that every hearing of the Tribunal must be in public. However section 79(2) provides that if, after having regard to the interests of any person, including without limitation, the privacy of any complainant and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may make an order prohibiting the publication of any report or ordering that any part of the hearing be held in private.
14. The Tribunal considered that neither the private interests of Ms Going (as disclosed in her application) nor the interests of the public were such

¹ MP Dale and A Trlin *Probation Practice as Social Work – Viewpoints of Practitioners in New Zealand* (2007) Social Work Review XIX (2)

that it would be desirable to conduct its hearing in private. This decision was announced orally before the hearing proceeded (in public). The Tribunal was satisfied that the public interest in open and transparent proceedings weighed against having this particular matter being heard in private. The hearing was of a charge which did not involve sensitive personal information pertaining to Ms Going and the Tribunal considered there was insufficient evidence before it of Ms Going's interests on which the Tribunal could justify making an order that the hearing should proceed in private.

15. The Tribunal indicated that it proposed to continue the interim suppression order in respect of Ms Going's name and identifying details and that this would be reconsidered once the Tribunal had heard the charge and indicated the likely outcome. Accordingly, the Tribunal announced that the interim order would remain in place until further order of the Tribunal. The Tribunal's decision in relation to the application for permanent name suppression is set out below.

Legal principles

16. The burden of proving the charge rests with the CAC. The standard of proof is the civil standard being the balance of probabilities.
17. 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.*"
18. 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.
19. The Tribunal must be satisfied that the following elements of the charge laid against Ms Going under section 82(1)(b), are established:
 - That at all material times Ms Going 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 Going did not hold a current practising certificate;
- That Ms Going's conduct in continuing to be employed or engaged as a social worker without a current practising certificate, amounts to conduct unbecoming of a registered social worker; and
- That this conduct reflects adversely on Ms Going's fitness to practise social work.

20. In correspondence with the Board and with the CAC prior to the CAC laying the charge, Ms Going maintained that she was not employed or engaged as a social worker at the material times. She maintained that she was employed as a "Probation Officer", not as a "Social Worker". At the hearing Ms Going stated that she had not received a response from the Board as to the question she had as to whether or not she was required to have a current practising certificate when working as a Probation Officer. However she also stated that she had never said she was not engaged in social work practice when she worked as a probation officer and that she had never denied that in the period covered by the charge she was engaged in social work when she was performing this role.

21. Although by the time of the hearing Ms Going did not appear to be suggesting she was not engaged in social work in the relevant time period the Tribunal considered and made a finding on this issue to remove any doubt about whether this element of the charge had been established.

22. Other than a reference to Ms Going's job title, position description and key accountabilities, the agreed summary of facts is silent as to the factual basis on which it is alleged that she was employed or engaged in social work in the period alleged in the charge. However the agreed bundle of documents contained a copy of Ms Going's position description and key accountabilities for her role as a Probation Officer. An initial question for the Tribunal (before it knew whether or not Ms Going intended to give evidence), was whether it could be satisfied from reading the position description and in particular the key accountabilities of the role that Ms Going was employed or engaged in social work in that role, and whether any additional evidence was needed in order to be satisfied of this factual issue.

23. The terms "*social work*" and "*employed or engaged as a social worker*" used in s. 25 are not defined in the Act. However the Tribunal considers that 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.

24. In *CAC v Angelo*² 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.”*

25. 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*³, *CAC v Hungahunga*⁴).

26. Where, as in the case, the Tribunal considers it is required to determine whether the registered social worker was 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 (or confirmation that the tasks set out in the job description were in fact performed by the practitioner). In this regard in this case the Tribunal was able to be assisted by evidence given by the practitioner.

27. As for the test of conduct unbecoming of a social worker 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 Medical Practitioners Disciplinary Tribunal and High Court appeals from that Tribunal in which a charge of conduct unbecoming which reflects adversely on a practitioner’s fitness to practice was considered

² RSW9/D1/SWDT/2015

³ RSW1/D1/SWDT/2016

⁴ RSW6/D1/SWDT/2016

under the Medical Practitioners Acts 1995. The Tribunal as presently constituted has no reason to depart from that approach.

28. In *B v Medical Council*,⁵ 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.”

29. The Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal*⁶ endorsed the earlier statements which had been made by Elias J in *B v Medical Council* 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 at paragraph [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.”

30. Importantly in *F v Medical Practitioners Disciplinary Tribunal* the Court of Appeal went on at paragraph [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.

31. In *CAC v Hungahunga* the Tribunal adopted the approach of the Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal* as does this Tribunal as presently constituted. As such, in cases where a charge is laid under s 82(1)(b) alleging conduct unbecoming of a social worker, the Tribunal must first decide whether there has been a departure from acceptable standards and was conduct unbecoming of a social worker. If

⁵ [2005] 3 NZLR 810

⁶ [2005] 3 NZLR 774

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.

32. This approach recognises that for purposes of a charge laid under s 82(1)(b), 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.

33. In relation to the “reflects adversely on fitness to practise” rider, in *Zauka*⁷ the New Zealand Health Practitioners Disciplinary Tribunal 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.”

34. When satisfying itself that the conduct reflects adversely on fitness to practise, the Tribunal accepts that it is not required to find that in fact the practitioner is not a fit and proper person to practise social work. There was no suggestion in this case that Ms Going was not (and is not) a fit and proper person to practise social work.

Factual findings

35. The Tribunal finds the following facts established on the evidence before it.

36. Ms Going completed a Diploma in Community and Social Work and first registered as a social worker on 4 May 2007. The Tribunal considers this means that she must have at that time completed a 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.

37. Ms Going has remained registered as a social worker since that date.

38. Board registration documentation shows that until her last current practising certificate expired on 30 June 2015, Ms Going had held an

⁷Re Zauka, 236/03/103C, Health Practitioners Disciplinary Tribunal

annual practising certificate (“APC”) in each practising year since she first registered in May 2007.

39. Notwithstanding the non-renewal of her APC for the practising year which commenced on 1 July 2015, Ms Going continued to work in her Probation Officer role for the Department of Corrections and at the hearing she confirmed she remained working in probation in the Community Corrections Service in Opotiki until early August 2016 (but she stated has since changed jobs).

40. The Position Description for the role of Probation Officer which the Tribunal considered does not expressly require Ms Going to hold a professional qualification or to be registered as a social worker in order to perform her role. The Position Description states that the purpose of the Probation Officer role is to⁸:

“.....protect the public by bringing about positive change in offenders’ lives. A Probation officer provides Courts with recommendation to inform sentencing decisions and manage offenders’ lives on community-based sentences and orders.”

41. The key accountabilities associated with the job purpose are stated to include⁹:

- Screening assessment and structured assessment interviewing;
- Complete assessments as appropriate and prepare sentencing recommendations for court;
- Development of sentence plans that address the offenders’ rehabilitation and safety needs;
- Complete post-sentencing assessment interviews; and
- Develop sentence plans that address the offenders’ identified rehabilitation and safety needs.

42. The Probation Officer Person Specification includes¹⁰:

- The ability to “build and maintain effective working relationships”;
- The ability “to be flexible and adapt behaviour”
- The ability to exhibit “well-developed communication skills that enable clear, relevant and appropriate presentation of ideas, opinions, views and recommendations”;

⁸ ABOD, Tab 18, p 49

⁹ ABOD Tab 17 and Tab 18, p 50

¹⁰ ABOD, Tab 18, p 52

- The ability “to analyse, evaluate and solve detailed problems and make well-reasoned decisions, based on reliable data and information”;
- Understanding the importance of working cross-culturally; and
- Understanding and using assessment, sentence planning, and sentence management.

43. The Tribunal had the benefit of hearing evidence from Ms Going. Ms Going confirmed, with reference to her position description and the key accountabilities, that she performed those tasks when she was working in as probation officer in the relevant period. She stated that she had commenced work as a Probation Officer in January 2015 at which time she held a current practising certificate which she was required to hold in her previous role with the Department of Child, Youth and Family. Under cross examination Ms Going accepted that she was using her social work skills and knowledge as a probation officer and she acknowledged that what she was doing as a probation officer involved casework of a kind including needs assessments and planning.

44. Ms Going did not take issue with the evidence of Mr Dale (which the Tribunal accepts) which was that in his opinion, she was using her foundational social work training (including core interpersonal skills associated with establishing client rapport, interviewing and assessment skills associated with obtaining and evaluating information provided by the client and drawn from other sources including client records and court documents, and the application of core social work practice theory such as motivational interviewing, working with client resistance, cross-cultural practice and the location of the client within an ecological framework), as well as her social work skills and knowledge and was performing tasks which fall into the realm of social work when working as a Probation Officer. Nor did Ms Going take issue with Mr Dale’s opinion that in discharging her role as a Probation Officer she was a registered social worker who was involved in working directly with clients via case management of individual clients through the assessment, sentence planning and sentence management processes.

45. As at the date of hearing Ms Going’s competence certificate had expired (on 22 June 2016) but on 17 August 2016 Ms Going had made an application to undertake a recertification competence assessment, which is a requirement for eligibility to renew her practising certificate. 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.

46. It was clear from her application form (annexed to Ms Meinder's affidavit) that Ms Going relied on her probation officer work in support of her application for competence recertification. For example, Ms Going stated in her Continuing Professional Development Log which was attached to her application:

"Overall the Probation Officer role utilizes Social work skills being, analysis, report writing, counselling, advocacy and many more factors."

Further:

"as a Probation Officer I must utilize these skills learnt and those adapted from previous roles and knowledge to ensure safety of the public, reduce re-offending and work towards reform."

And:

"Putting into practice has included writing Court and Parole Board reports, one to one focused sessions utilizing Motivational Interviewing techniques and using the Whanau and Community, Hapu Iwi to support social change".

47. Ms Going did not provide any direct evidence from the Department of Corrections Probation Service as to the nature and performance of her role as Probation Officer however Ms Going stated that Corrections is aware of this matter. The Tribunal noted however that as part of her recertification competence application, on 12 August 2016 Ms Going's Supervisor/Manager (who is also a Probation Officer) signed a declaration that Ms Going is competent against the Social Workers Registration Board's ten core competence standards. Further a Safe and Nurturing Families Coordinator declared that he had observed the social work practice of Ms Going and that he endorsed the recommendation of the Supervisor as to Ms Going's competence against the social work competence standards. As above, Ms Going placed reliance on her probation work in support of her recertification competence assessment. It was clear on the basis of this documentation that Ms Going acknowledged that her social work qualification, skills and training informed her practice as a Probation Officer.

48. Significantly, in answer to a question from the Chair as to the performance of her role as a Probation Officer, Ms Going stated that from 12 October 2015 at least, she was aware that she was required to hold a current practising certificate but she wanted advice from the Board as to whether there could be a payment system set up for her to make instalment payments of the application fee because of her precarious financial circumstances at that time.

49. The Tribunal was satisfied it had sufficient evidence before it as to the nature of Ms Going's probation work to enable it to make a finding that Ms Going was engaged in social work in the relevant time period, notwithstanding that her job title was "Probation Officer" not "Social Worker". Ms Going's role as a Probation Officer in the relevant period clearly involved her working directly with clients via case management and required her to be involved in making case management decisions regarding individual clients through the assessment, planning and sentence management process. For these reasons, the Tribunal considered that the discharge of the functions and accountabilities of the Probation Officer role in the relevant period, involved Ms Going engaging in social work.
50. As Ms Going was found to have engaged as a social worker at the relevant times, the Tribunal is satisfied that Ms Going was required to hold a current practising certificate pursuant to s. 25 of the Act. It was not in dispute that Ms Going did not hold a current practising certificate in the period from 1 July 2015 to 1 May 2016.
51. There was evidence before the Tribunal in the agreed statement of facts and in the bundle of documents that Ms Going had been sent three reminders by the Board (in May and June 2015 prior to her APC expiring) about the need for her to renew her APC¹¹. The renewal process was set out in those reminders. Delivery records for this correspondence show that these reminders were received and opened.
52. On 10 September 2015 Ms Going was contacted by the Board after her APC had expired. She was warned that if her APC had not been renewed by 21 September 2015 the matter would be referred to the Chair of the Tribunal for a decision as to whether to establish a CAC to investigate¹². Ms Going was sent the "Registrar's message" in September 2015, after her annual practising certificate had expired which warned practitioners of the potential consequences of continuing to practise without a current practising certificate¹³. Not having received a response from Ms Going, the matter was referred to a CAC in October 2015. In an email to the Board dated 10 October 2015 Ms Going advised that she was unable to afford the cost of renewing her APC and her employer would not cover the cost as she was not in a social work position. Ms Going asked whether it is possible not to have a current practising certificate while not practising "or is there a payment option?"¹⁴

¹¹ ABOD Tabs 5,6 and 7

¹² ABOD, Tab 9

¹³ ABOD 8

¹⁴ ABOD, Tab 11

53. In response, on 12 October 2015, the Board sent an email to Ms Going and asked her to provide further information about her current position so it could assess whether or not she was practising social work¹⁵. Ms Going accepted that she received this email. There is no evidence that she responded to this email.
54. When contacted by the CAC's investigator in December 2015¹⁶ Ms Going restated her belief that she was not working as a social worker stating that her role was not classed or recognised as a social work position, and she was not in a financial position to pay for her APC renewal except by instalments.

The Charge – discussion

55. 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 in terms of practising certificates in order to practise legally. Non-compliance with this requirement is therefore a serious matter.
56. The Tribunal is satisfied that at the material times (1 July 2015 to 1 May 2016) Ms Going was a registered social worker. The first element is met on the evidence.
57. The Tribunal is also satisfied the evidence establishes that Ms Going's role as Probation Officer involved her engaging in social work in the relevant period, for the reasons given. The second element is also met.
58. As Ms Going 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 Going failed to renew her practising certificate and that in the period covered by the charge Ms Going practised social work without a current practising certificate. On this basis the Tribunal finds the third element of the charge is established.
59. It is noted again that after registering with the Board in May 2007, Ms Going has renewed her practising certificate annually until 30 June 2015. As above, 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 if she intended to continue to practise social work. Having heard from Ms Going it was clear that she was aware of her statutory and professional obligations to hold a current practising certificate if she was practising social work. She ought also to have been aware that until such time as payment has been received, the Board would not issue an APC and if she

¹⁵ ABOD, Tab 11

¹⁶ ABOD, Tab 14

continued to practise, she would be doing so illegally. It was Ms Going's primary responsibility as a registered social worker to ensure that a current practising certificate had been issued before she was in a position to continue to be engaged in social work practice, as the Tribunal has found she was.

60. The Tribunal considers that when viewed objectively, Ms Going's conduct in continuing to be engaged in social work over the period of ten months despite not holding 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' of a registered social worker.
61. The Tribunal is also satisfied that Ms Going's conduct in practising social work in breach of this mandatory legal requirement reflects adversely on her fitness to practise as a social worker. The conduct was wholly unacceptable. The requirements for practitioners who have chosen to register to apply in time for the renewal of their APC is fundamental to the professionalism of a registered social worker. This is a requirement that is one of the cornerstones of the regulatory regime which registered social workers choose to participate in to assure employers, clients and the public that they are professional and fit and competent to practise. The fact that the regime is voluntary does not remove the personal responsibility for registered social workers to comply with the legal requirement to hold a current practising certificate if they are continuing to practise social work. Lack of employer support does not obviate the practitioner's personal responsibility. For these reasons, the Tribunal determines that Ms Going'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.
62. The Tribunal acknowledges that in her correspondence with the Board in late 2015, and in her evidence before the Tribunal, Ms Going raised several factors which she stated were relevant to her failure to apply for an annual practising certificate. These included her lack of clarity around whether she was required to hold a current practising certificate when working as a Probation Officer, lack of support from her employer in relation to payment of the fee for an annual practising certificate, and financial constraints which she stated affected her ability to pay the application fee. These are subjective considerations which the Tribunal considers are relevant to questions of penalty and not to the objective assessment the Tribunal has been required to make of whether the conduct was a falling short of accepted standards and was "conduct unbecoming" which reflects adversely on Ms Going's fitness to practise. The Tribunal does not consider it is appropriate for it to take into account subjective considerations relating to the knowledge or personal

circumstances of the practitioner when it is considering whether a charge framed in the nature of the charge in this case, is proved. The purpose of the disciplinary procedure under the Social Workers Registration Act 2003 could not be met if in every case the Tribunal was required to take into account subjective considerations relating to the practitioner.

63. Satisfied that all the elements of the charge are proved, the Tribunal finds that the Charge is established.

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

Penalty

65. 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*.¹⁷ 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;
- 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.

66. 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

¹⁷ High Court Wellington CIV 2012-404-003916 [12 December 2012]

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.”*

67. 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 certificates¹⁸.
68. Counsel for the CAC submitted that a censure, fine and contribution towards costs is appropriate, which the Tribunal accepts.
69. By way of aggravating features, the Tribunal accepts the CAC’s submission that a period of ten months is aggravating. The Tribunal also accepts that the lack of action including in the face of reminders sent to Ms Going by the Board about the need to renew her APC (both before and after its expiry date) is of some concern. This correspondence provided Ms Going with the opportunity to clarify what was required of her well before she eventually responded to the Board several months after her APC had expired.
70. However the Tribunal does not accept Counsel for the CAC’s submission that it can also take into account when imposing penalties that there was a period of a further four months from 1 May 2016 before Ms Going obtained an annual practising certificate such that the actual period of time when she practised without a practising certificate was 14 months rather than the 10 months as charged. The Tribunal has imposed a penalty in respect of the conduct charged and which the Tribunal is satisfied has been established. As such when considering comparable cases the Tribunal has considered cases where the length of time involved has been at the lower end of range of time periods the Tribunal has considered.
71. In her evidence before the Tribunal Ms Going’s explanation for not attending to the renewal of her annual practising certificate for the

¹⁸ CAC v Nelson RSW4/D1/SWDT/2015, 18 December 2015; CAC v Russell RSW6/D1/SWDT/2015, 18 December 2015; CAC v Estall RSW8/D1/SWDT/2015, 18 December 2015; CAC v Angelo RSW9/D1/SWDT/2015, 19 April 2016; CAC v Haswell RSW5/D1/SWDT/2015, 19 April 2016; CAC v Kuruvilla RSW1/D1/SWDT.2016, 19 April 2016.

practising year which commenced on 1 July 2015 was that she was involved in a Family Court case at the time which was her focus and for which she had to borrow a significant sum of money and was having financial difficulty making ends meet such that she could not afford to pay the practising certificate fee. She stated in answer to a question from a Tribunal member about why she did not contact the Board on 1 July 2015 to explain her situation, that because of the Court proceedings her “mind wasn’t on the APC. It was on the placement of a 1 year old, that was bigger in the scheme of things, my focus was on a 1 year old child, not on an APC”. In answer to a question from Counsel for the CAC Ms Going confirmed “I’m not denying that social worker skills that were used or tasks or whatever it is....The only reason for me was that I couldn’t afford the APC because I put a child first”. This explanation does not excuse Ms Going’s conduct however the Tribunal understands the circumstances which Ms Going has stated she was in at the time she was required to renew her practising certificate. The reality was that Ms Going had chosen to register as a social worker and by virtue of that she was required to ensure she complied with her legal and professional obligations including to obtain a current practising certificate in a timely manner if she wanted to continue to practise social work.

72. The Tribunal accepts the CAC’s submission that a mitigating factor in this case is Ms Going’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 and the admission of Ms Meinders’ affidavit evidence. This is relevant because it indicates that Ms Going has insight into her offending and that she has accepted the reality of the matter. The Tribunal considers that Ms Going deserves some credit for this, as well as for the effort she made to participate in the hearing and her willingness to give evidence before the Tribunal which assisted the Tribunal with its inquiry.
73. The Tribunal also accepts that if there was indeed lack of employer support for compliance with the annual practising certificate requirement, then this was also a mitigating factor. However not having heard from the employer about its position on the issue, the Tribunal has not been able to place much weight on this factor (raised by Ms Going in her correspondence with the Board prior to being referred to the CAC but less so before the Tribunal).
74. Ms Going has since attended to her competence recertification and she has obtained and currently holds a practising certificate. Ms Going acknowledged in evidence that while her new job is not titled “social worker” she is required to use her social work skills in the role and that she understands that she is required to hold a current practising certificate. This indicates to the Tribunal that Ms Going is aware of her legal and professional obligations to hold a current practising certificate

if she is employed or engaged in social work and that Ms Going has insight into the nature of her offending and is unlikely to reoffend in a similar way. This is a further mitigating factor which the Tribunal has taken into account in this case.

75. 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 Going.

76. 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 Going is censured (s 83 (1)(b)); and
- A fine of \$200 (s. 83(1)(c)); and
- A contribution towards the costs of the Tribunal and CAC in the sum of \$600.00 to be divided evenly between the Tribunal and the CAC (s. 83(1)(e)(ii),(iii) and (iv)).

77. The Tribunal considers these orders are fair, reasonable and proportionate in all the circumstances and they are the least restrictive penalty orders that can reasonably be imposed in this case.

78. 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 Going's professionalism.

79. 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).

80. The Tribunal considers that a fine of \$200 reflects the length of time over which Ms Going continued to be engaged in social work without a current practising certificate (ten months). A fine at this level also ensures consistency with other cases of this nature which the Tribunal has considered most recently.

81. 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).

82. The costs and expenses incurred by the CAC and the Tribunal in this case were in the region of \$19,000 excluding GST.
83. A useful statement as to the applicable principles when considering the issue of costs, which the Tribunal adopted in *CAC v Hungahunga*, is contained in the decision of *Vatsyayann v PCC*¹⁹ 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".

84. Subsequent to the hearing, Ms Going was requested to supply to the Tribunal a statement of her financial means which set out her outgoings, income, any assets and liabilities, supported by statutory declaration. Having considered this information and taking into account the evidence from Ms Going as to her ability to contribute to costs were the Tribunal minded to impose a costs order, the Tribunal is satisfied that Ms Going does have financial means, albeit very limited, to meet a costs order.
85. In this case, taking into account Ms Going's financial circumstances as disclosed to the Tribunal, and her cooperation with the Tribunal process the Tribunal orders that Ms Going pay a token contribution towards costs in the sum of \$600.00 to be divided evenly between the CAC and the Tribunal.
86. The Tribunal directs the Executive Hearing Officer to publish a copy of this decision on the Board's website in the usual manner, at the expiration of the statutory appeal period.

Application for permanent suppression of name and identifying details

87. The grounds on which Ms Going sought orders under s.79 can be summarised as follows:

¹⁹[2012] NZHC 1138

- Ms Going would like to maintain her respected position in the community, including the good name she has established over 13 years of social work practise;
- Publication of her name may cause difficulties in continuing to practise as a social worker, resulting in financial difficulty for her and her two children;
- Her conduct has not resulted in harm to anyone;
- Ms Going has already suffered humiliation as a result of Family Court proceedings involving Child, Youth and Family in which she was successful. As a result, she is already in the position of trying to rebuild her relationships and respect. Publication of her name will only further hinder this process.
- Publication of her name will hinder her goals to pursue further education (a Masters in Social Work) and to become a tutor of social work.

88. As above, the application was not supported by affidavit evidence. Ms Going was invited to give evidence on matters which she relied on in support of her application, at the hearing, including her reliance on humiliation associated with the Family Court proceedings referred to in her notice of application. In answers to questions from Tribunal members, Ms Going explained that the circumstances surrounding her resignation from Child, Youth and Family where she had worked for 14 years were related to the Family Court matter and the fallout from those proceedings. She described her loss of faith in the “system” and the embarrassment and humiliation she suffered as a consequence of the Family Court proceedings. She expressed concern that the social workers involved in the Family Court proceedings may “get reason to keep targeting” her when she is “just trying to move on with [her] life”. She stated that she wishes to undertake further study and that she is concerned that publication of her name will hinder this goal. Ms Going stated that her current employer, who paid the fee for her current practising certificate, is not aware of these proceedings.

89. Counsel for the CAC made the following submissions in opposition to an order for permanent name suppression:

90. The starting point, by reference to section 79 of the Act is that disciplinary proceedings should be conducted in public.

91. In reliance on established principles the following should be taken into account²⁰:

- The openness and transparency of disciplinary proceedings;
- Accountability of the disciplinary process;

²⁰ These were discussed in *Director of Proceedings v Y 591/Med13/258P*, 23 December 2013

- The public interest in knowing when a practitioner has been charged with a disciplinary offence;
- The principle of freedom of speech enshrined in section 14 of the New Zealand Bill of Rights Act 1990; and
- The need to avoid unfairly impugning others.

92. The CAC accepts that Ms Going has faced other difficulties in her personal and professional life and relies on her employment to support her family. Counsel for the CAC submitted however that these matters do not provide relevant grounds for non-publication of Ms Going's name.

93. The CAC submitted and the Tribunal accepts that the effect of publication of Ms Going's name on her professional reputation must be assessed in the light of the particular nature of the charge being one of conduct unbecoming relating to practising without an APC. There is no suggestion that Ms Going has conducted herself unethically or has harmed clients in any way. Nor does the charge relate to Ms Going's competence. Implicit in this submission is the contention that the adverse disciplinary finding in this case is unlikely to have any significant impact on Ms Going's ongoing practise of social work.

94. It was further submitted that while this case might be embarrassing for Ms Going, embarrassment alone does not amount to a sufficient ground for name suppression.

95. Accordingly, it was submitted that Ms Going had not identified sufficient grounds for suppression to outweigh the public interest in openness and transparency and in accountability; and therefore suppression was not desirable in this case.

Discussion

96. There is a presumption that disciplinary hearings will be held in public and the names of those charged and found guilty of a disciplinary offence will be published.²¹ Section 79(1) makes this clear. However the Tribunal may prohibit the publication of some or all parts of a proceeding including the social worker's name, or any particulars of the affairs of any person. Section 79 provides:

- (1) Except as provided in this section and in section 80, every hearing of the Tribunal must be held in public.
- (2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by the person or body prosecuting the charge, the social worker concerned, a complainant, or a witness, or of its own motion) make any 1 or more of the following orders:

²¹ *B v B* High Court 4/92, 6 April 1993 per Blanchard J at [98]

- a. An order that the whole or any part of a hearing must be held in private:
- b. An order prohibiting the publication of any report or account of any part of a hearing, whether held in public or in private:
- c. An order prohibiting publication of the whole or any part of any books, papers, or documents produced at a hearing:
- d. An order prohibiting the publication of the name, or any particulars of the affairs, of any person.

97. The test, whether “the Tribunal is satisfied that it is desirable” to make an order prohibiting publication of the name or particulars of any person, is analogous to the statutory test in section 95(2)(d) of the Health Practitioners Competence Assurance Act 2003. This Tribunal has rarely considered s 79(2)(d)²² however decisions of the Health Practitioners Disciplinary Tribunal and appeals from that tribunal as to the application of this test provide guidance.

98. The Tribunal is required to consider any balance the interests of any person with the public interest.

99. The relevant public interest factors are those identified by Counsel for the CAC, as set out in *M v Police* (1991) 8 CRNZ; *R v Liddell* [1995] 1 NZLR 538; and *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546.

100. Different considerations apply in relation to the making of permanent non-publication orders following a guilty finding, to those which apply in respect of interim orders. This was discussed by Panckhurst J in *Tonga v Director of Proceedings*²³ in the following way:

“[35] To my mind there is a presumption in favour of openness, and therefore name publication in s.95. Obviously the section is to be read as a whole...The requirement of public hearing necessarily impacts in relation to ss(2) of the section. It empowers and enables the Tribunal to ameliorate the impact of a public hearing by making orders in terms of the sub-section where it is desirable to do so, including, of course, an order granting name suppression. The scheme of the section means, in my view, that the publication of names of persons involved in the hearing is the norm, unless the Tribunal decides it is desirable to order otherwise. Put another way, the starting point is one of openness and transparency, which might equally be termed a presumption in favour of publication.

[42] ...following an adverse disciplinary finding more weighty factors are necessary before permanent suppression will be desirable. This, I think, follows from the protective nature of the jurisdiction. Once an adverse finding has been made, the probability must be that the public interest considerations will require that the name of the practitioner be published in the preponderance of cases. Thus the statutory test of what is “desirable” is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may include in favour of the private interests of the practitioner. After the hearing, by which time evidence is out and findings have been made,

²² *CAC v Batin* RSW4/D1/SWDT/2016

²³ HC, Christchurch, CIV 2005-409-2244 21 February 2006 at [42]

what is desirable may well be different, the more so where professional misconduct has been established.”

101. Gendall J in *Anderson v PCC*²⁴ agreed with the remarks of Panckhurst J in *Tonga v Director of Proceedings* (above). His Honour referred to what might constitute the relevant private interests of a person seeking name suppression as follows:

“Private interests will include the health interests of a practitioner, matters that may affect a family and their wellbeing, and rehabilitation. Correspondingly, interests such as protection of the public, maintenance of professional standards, both openness and “transparency” and accountability of the disciplinary process, the basic value of freedom to receive and impart information, the public interest in knowing the identity of a practitioner found guilty of professional misconduct, the risk of other doctors’ reputations being affected by suspicion, are all factors to be weighed on the scales.

..Of course publication of a practitioner’s name is often seen by the practitioner to be punitive but its purpose is to protect and advance the public interest by ensuring that it is informed of the disciplinary process and of practitioners who may be guilty of malpractice or professional misconduct. It also reflects the principles of openness of such proceedings and freedom to receive and impart information.”

102. The Tribunal considers these same principles and observations apply in the context of applications for non-publication orders under section 79 of the Act.

103. The Tribunal has considered Ms Going’s private interests. However it is not satisfied that any of these, either when they are considered individually or cumulatively, outweigh the public interest factors at play which favour her name being published. In terms of Ms Going’s personal interests, there is no suggestion that Ms Going is currently suffering from any health circumstances that would cause undue harm if her name is published in connection with these proceedings. The Tribunal accepts that name publication may cause some embarrassment and humiliation to Ms Going however these are factors which are likely to feature in the majority of disciplinary cases which come before this Tribunal. The difficulties in Ms Going’s personal and professional life are not in themselves sufficient grounds to displace the presumption in favour of publication, in the Tribunal’s view.

104. The Tribunal accepts Counsel for the CAC’s submission that the effect of publication of Ms Going’s name on her professional reputation must be assessed in the light of the particular nature of the charge being one of conduct unbecoming relating to practising without an APC. The requirement to hold a current practising certificate is an important one and is one of the mechanisms by which the public is protected, that there

²⁴ HC, Wellington CIV-2008-485-1646 14 November 2008 at [36] and [37]

is accountability and by which professional standards are enhanced. It is not a minor matter that Ms Going continued to practise social work for a period of 10 months without an APC and that she did not obtain a current practising certificate until September 2016.

105. Having regard to the purposes of disciplinary proceedings and the other public interest factors, the Tribunal considers that there are insufficient grounds for the making of a permanent name suppression order. The Tribunal is also concerned that there is a risk that the presumption of openness and transparency will be too easily displaced in future cases which come before the Tribunal, were it to make a permanent order in this case on the basis of the grounds disclosed by Ms Going.

106. In applying the principles discussed above and balancing the public interest against the private interests of Ms Going, the Tribunal is not satisfied that it is desirable to make the order sought.

107. Accordingly the application for permanent non-publication of Ms Going's name is declined.

DATED 20 December 2016



Jo Hughson

Chairperson

Social Workers Complaints and Disciplinary Tribunal