

DECISION RSW9/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 **BEN IAKIMO** registered social worker of Auckland

Hearing Held in Auckland on 23 November 2016

Present: Jo Hughson (Chairperson)

Sue Jarvis, Peter McGurk, Bernard Marra, Philip Comber (Members)

Fleur Nicholas (Hearing Officer)

Harriet Goodhew (Counsel for the Complaints Assessment Committee)

Mr Ben Iakimo

Introduction

1. Mr lakimo first registered as a social worker with the Social Workers Registration Board (“the Board”), provisionally, in August 2012. He gained full registration on 9 May 2013. Mr lakimo holds a Bachelor of Applied Social Work. Mr lakimo’s evidence was that he also holds a Level 4 Mental Health Certificate.
2. Between 1 July 2015 and 1 May 2016 Mr lakimo was employed by the Mahitahi Trust as a Kaupapa Maori Packages of Care Support Worker in Auckland. He did not hold a current practising certificate in this period. He has been employed by the Trust since around May 2012.
3. The Mahitahi Trust is an NGO which was established as a charitable trust in May 1997. The Trust is a mid-sized Maori mental health organisation which provides mental health and addiction services to a range of tangata whai ite ora in the community and residential services, in Auckland and South Auckland.
4. A Complaints Assessment Committee (“CAC”) appointed under the Social Workers Registration Act 2003 (“the Act”) laid a disciplinary charge under section 82(1)(b) in relation to Mr lakimo practising without a current practising certificate (“APC”) between 1 July 2015 and 1 May 2016.
5. The charge read as follows:

“Pursuant to section 72(3) of the Act the Complaints Assessment Committee charges that Ben lakimo, registered social worker, of Auckland:

 - (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 his fitness to practise as a social worker pursuant to s82(1)(b) of the Act.”*
6. At the hearing the CAC was represented by Counsel and Mr lakimo represented himself. The CAC’s evidence was adduced in the form of an affidavit sworn by Amy Charlotte Darwin on 17 November 2016. Ms Darwin is an employee of the Board and has previously held the roles of Registration Administrator and Professional Standards Coordinator with the Board. Currently she is involved in managing and collating registration and competency paperwork for the Board. Annexed to Ms Darwin’s affidavit were documents concerning Mr lakimo’s registration history, his Position Description (prepared in December 2011) and relevant correspondence between the Board and Mr lakimo as well as certain other relevant documentation including the Code of Conduct for Social Workers (V3 January 2014).

7. Also annexed to Ms Darwin's affidavit was a copy of a competence assessment which Mr lakimo had completed on 4 February 2013 in support of his application for full registration.
8. No other evidence was filed by the CAC, agreed or otherwise. Ms Darwin's affidavit was admitted by consent and her attendance at the hearing was excused on this basis.
9. The Tribunal also heard and considered oral evidence given by Mr lakimo (including sworn evidence given in answers to questions from Tribunal members and under cross-examination by Counsel for the CAC) relating to the performance of his role as a Kaupapa Maori Packages of Care Support Worker in the period covered by the charge, and in the preceding period. Mr lakimo did not call any witnesses and nor did he file any evidence in written form.
10. Mr lakimo confirmed at the hearing that he now holds a current practising certificate. He obtained his current APC in August 2016, because he stated, he did not want to "end up" before the Tribunal. His competence certification is not due to expire until 3 April 2018.

Legal principles

11. The CAC, as the prosecuting body, has the burden of proving the charge. The relevant standard of proof is the civil standard, being the balance of probabilities.
12. The purpose of the Act is set out in section 3. This 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 (s. 3(a)(i) and (ii)). Section 3(d) provides that the Act is to "*enhance the professionalism of social workers.*"
13. Holding a current practising certificate is a mandatory requirement for any registered social worker who is employed or engaged in social work (s. 25). This requirement persists unless the social worker is no longer employed or engaged as a social worker or is otherwise removed from the register. The requirement to hold an APC is a fundamental mechanism by which the purposes of the Act are achieved. Non-compliance with this requirement is therefore a serious matter.
14. The Tribunal must be satisfied that the following elements of the charge laid against Mr lakimo under section 82(1)(b), are established:

- That at all material times Mr lakimo was a registered social worker; and
- That at all material times he was employed or engaged as a social worker; and
- That at all material times Mr lakimo did not hold a current practising certificate; and
- That Mr lakimo’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 Mr lakimo’s fitness to practise social work.

15. Mr lakimo’s position at the hearing and the tenor of his evidence was that in the period covered by the charge he was not employed or engaged as a social worker for the purposes of section 25 of the Act.

16. 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 has made it clear in its previous decisions that it considers 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.

17. In *CAC v Angelo*¹ 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.”

¹ RSW9/D1/SWDT/2015

18. 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*², *CAC v Hungahunga*³).
19. The CAC submitted that so long as there are aspects of Mr lakimo’s role that constitute social work, he should be considered to be employed or engaged as a social worker for the purposes of the Act.
20. The Tribunal as presently constituted considers that if social work skills and training are being used by the practitioner and the practitioner is engaged in casework in a role which is not titled “social worker” then it is the extent to which those skills and training are being used and the level of responsibility and professional judgement for casework decisions which the practitioner is required to exercise in the performance of their role, which are key considerations.
21. Thus, where, in any given case the Tribunal is required to determine whether the registered social worker was employed or engaged as a social worker in the relevant time period, 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 registered 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 case the Tribunal was able to be assisted by evidence given by the practitioner.
22. 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 under the Medical Practitioners Act 1995. The Tribunal as presently constituted has no reason to depart from that approach.
23. In *B v Medical Council*⁴, 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.

² RSW1/D1/SWDT/2016;

³ RSW6/D1/SWDT/2016

⁴ [2005] 3 NZLR 810

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."

24. The Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal*⁵ 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."

25. 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.
26. 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 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.

⁵ [2005] 3 NZLR 774

27. In relation to the “reflects adversely on fitness to practise” rider, in *Zauka*⁶ 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.”

28. 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 Mr lakimo was not (and is not) a fit and proper person to practise social work.

Analysis of factual elements of the charge

29. Mr lakimo completed a Diploma in Applied Social Work (a recognised social work qualification) and was provisionally registered as a social worker in August 2012. He gained full registration with the Board on 9 May 2013. He commenced his current position in May 2012.

30. As above, the evidence establishes that Mr lakimo has remained registered as a social worker since that date. Therefore the Tribunal is satisfied that the first element of the charge is established.

31. It was not in dispute that Mr lakimo did not hold a current practising certificate in the period from 1 July 2015 to 1 May 2016.

32. Board registration documentation shows that for the 2012/2013 registration year, Mr lakimo held an APC until 31 June 2013. For the 2013/2014 year, Mr lakimo did not hold an APC however he held one for the 2014/2015 year. He did not renew his APC for the 2015/2016 year. It was not disputed that Mr lakimo did not hold an APC in the relevant period and on the evidence before it, the Tribunal is satisfied the third element of the charge is established.

33. Notwithstanding the non-renewal of his APC for the practising year which commenced on 1 July 2015, Mr lakimo continued to work in his Support Worker role for the Mahitahi Trust and at the hearing he confirmed he still works in this role.

34. The Tribunal considered Mr lakimo’s position description. This document states that it was prepared in December 2011 for the Position Title “Kaupapa Maori Packages of Care Support Worker” which position was

⁶Re Zauka, 236/03/103C, Health Practitioners Disciplinary Tribunal

being created “in a brand new service”. It is stated in the Position Description that the position “may change over time to reflect the needs of the position as they are identified”. Mr Lakimo did not suggest that the Position Description had changed and indeed he supplied this document to the investigator appointed by the CAC on the basis that this was current.

35. The Position Description does not require Mr Lakimo to be registered as a social worker in order to perform this role. Rather, the specified qualification is a National Certificate in Mental Health (Support Work), minimum Level 4 mental health or similar. Other qualifications and knowledge are specified to include “knowledge of, and experience in community work, recovery perspectives, relevant mental health legislation, experience in the mental health sector, knowledge of relevant agencies and services (mental health, social and other community based resources) and knowledge and experience of those who experience “unwellness”.

36. The Position Description states that the purpose of the role is to:⁷

“.....using the principles of strength-based recovery and community resources, actively work with tangata whai ite ora and their whanau to achieve identified goals and support needs.”

37. The key accountabilities associated with the job purpose are stated to include:⁸

- Develop effective and approachable relationships with tangata whai ite ora and their whanau, to achieve identified goals and support needs;
- Keep documentation accurate and up to date; the key performance indicators for this accountability refer to the need to ensure “daily progress notes” adhere to relevant policies including health information, privacy and informed consent policies; ensure that “Recovery and Care plans are completed and reviewed as required”, as well as the completion of incident reports and the accurate and timely preparation of “other reports”;
- Ensure each tangata whai ite ora support hours and recovery plan is appropriately managed by working closely with clinical teams, Support Workers, Key workers and other relevant service providers;
- Ensure case management processes including the appropriate use of the “flexi-fund”, participation in multi-

⁷ Affidavit, Darwin, exhibit “AD23”, page 3

⁸ Affidavit, Darwin, exhibit “AD23”, page 3

disciplinary hui and “tangata whai ite ora work meets National Health Standards”;

- Establish positive working relations and work collaboratively with Auckland District Health Board clinical representatives and other key workers and team members and attend relevant meetings, including monthly inter-departmental meetings; and “actively networks with community-based resource providers”;
- Act as the face of service delivery to tangata whai ite ora and their whanau, staff, external agencies and other groups;
- Various other accountabilities as specified on pages 4 and 5.

38. The Person Specifications (Skills and Abilities) include:⁹

- The ability to build rapport with tangata whai ite ora and their whanau and provide encouragement;
- The ability to display patience and understanding;
- The ability to work cohesively and effectively with team members;
- Flexibility – the ability to work with a varying tangata whai ite ora base recognizing the unique circumstances of each individual;
- Administrative and time management skills;
- The ability to identify family needs and provide appropriate support;
- Service delivery and people-centred focus;
- Problem solving skills;
- Have a “partnership approach”;
- A demonstrated ability to establish and maintain effective relationships with a wide range of stakeholders.

39. The Tribunal considered that the Position Description outlined some elements of the role which would properly be considered social work practice and other elements which would not.

40. In March 2013 Mr Iakimo had made a competence application in which he actively referred to social work teachings which he stated informed his practice as a support worker. A copy of his competence assessment documentation was before the Tribunal in Ms Darwin’s affidavit¹⁰ and this was also considered by the Tribunal. 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

⁹ Affidavit, Darwin, exhibit “AD23”, page 6

¹⁰ Affidavit, Darwin, exhibit “AD1”

Act. It was on the basis of Mr lakimo's competence assessment that he was granted full registration.

41. Mr lakimo stated in his application that he utilised social work practice approaches and worked alongside others to refine these. He described his role at the Mahitahi Trust as involving working alongside his clients to identify goals and concerns, and then formulate a plan. He wrote about evaluating one particular client's priorities after consultation with his client and his client's clinical team. One statement he made indicated that he took personal responsibility for goal setting and longer term decisions relating to that client, which the Tribunal accepts is indicative of casework decision-making.
42. An initial question for the Tribunal, before it knew whether Mr lakimo would give (or call any witnesses to give) evidence, was whether it could be satisfied from reading the job description, key accountabilities and performance indicators as well as Mr lakimo's March 2013 competence assessment documentation that Mr lakimo was employed or engaged in social work in that role in the period specified in the charge (from 1 July 2015 to 1 May 2016). In this particular case, because Mr lakimo did not accept that he was employed or engaged as a social worker in this period, the Tribunal considered that additional evidence as to Mr lakimo's actual performance of his role between 1 July 2015 and 1 May 2016 was required to satisfy the Tribunal that the second element of the charge (as set out above) was established.
43. Counsel for the CAC accepted there was no evidence before the Tribunal that Mr lakimo was actually performing the key accountabilities in his job description, in the period covered by the charge. Counsel acknowledged that the Tribunal would have to draw an inference, unless told otherwise, that Mr lakimo continued to perform the roles and functions in the manner in which he had referred to them in his competence assessment documentation submitted to the Board in May 2013 and as set out in his Job Description, in the subsequent two and a half to three year period.¹¹ Counsel acknowledged there was nothing from the Mahitahi Trust as to what Mr lakimo was doing in his role from 1 July 2015. However, Counsel submitted there had been no indication from Mr lakimo to the CAC that his role had changed, and that his job title remained the same. In this regard Mr lakimo had provided his Job Description to the CAC's investigator in early 2016 which Counsel submitted "lines up with the competence application" and at that time he did not suggest that "he was doing something different". On that basis, Counsel submitted that an inference could be drawn that Mr lakimo had in fact been employed or engaged as a social worker in the period from 1 July 2015 to 1 May 2016.

¹¹ Transcript of hearing, pages 29 and 30

44. Counsel for the CAC referred to the Tribunal's decision in *Kuruvilla* and submitted that this case¹² is directly comparable. Ms Kuruvilla was a community support worker in an outpatient mental health service of a district health board. She was responsible for working directly with clients to develop a support plan, liaising with clients and third parties such as WINZ, doctors, accommodation services and rehabilitation providers, and assisting clients to be organized and to develop routines. The Tribunal found that "the particular level of responsibility for casework decisions, coupled with using social work skills in practice" rendered Ms Kuruvilla's "support worker" role to be a social work role for the purposes of the Act.
45. On the evidence which was before the Tribunal in Mr lakimo's case however, the Tribunal does not agree that his case is directly comparable to Ms Kuruvilla's case. The Tribunal is not satisfied the evidence establishes that Mr lakimo had a similar level of responsibility for casework decisions, or that he used social work skills in practice to the same extent as Ms Kuruvilla.
46. The tenor of Mr lakimo's evidence was that in the relevant period the reality of his support worker role on a day to day basis differed from what he initially signed up for under his employment contract, at least in the period covered by the charge. His evidence was that initially he tried to work with a social worker hat on but after he had studied for and obtained his mental health certificate he realised what the job actually involved and as such he changed his approach to ensure it aligned with his mental health, rather than his social work, training and mentality.¹³
47. In his evidence Mr lakimo explained that his role involved him working with clients to "support the goals that they [the client] set, the goals the key workers set, the social workers set, and the nurses set, we support them with that". His evidence was that he does not do "caseloads", that all clients have key workers who could be social workers, nurses, doctors or psychologists and that he was just a "support worker". The key workers are not employees of the Trust, he stated. It was his evidence that it is the key workers who send the client referrals to the Trust; the Trust nurse then triages the client on to the support workers.
48. Mr lakimo's evidence was that the recovery and care plans for each client are developed and driven by the key workers; that he does not have any role in the development of the care plans or for developing client goals; and that it is his responsibility as a support worker simply to

¹² RSW1/D1/SWDT/2016

¹³ Transcript of hearing, page 52

ensure those plans are followed and that the client is supported to achieve the set goals.¹⁴

49. Mr lakimo stated that he attends clinical meetings as a support person for the client however he does not make any decisions as those are the responsibility of the clinicians involved and the client's key worker. If there is an issue with the client, then in his role as support worker, Mr lakimo would contact the key worker and it is the key worker who then makes decisions about whether the client is readmitted to hospital or respite.
50. In terms of the flexi-fund referred to in the Job Description Mr lakimo stated that his line manager is responsible for allocating funds if a support worker requests an allocation on behalf of a client.¹⁵
51. In respect of case notes, Mr lakimo's evidence was that these are a record of what he and the client have done on any given day but they do not involve him recording any reflections, which he acknowledged would be a feature of social worker practice.
52. On balance, on the evidence before it, the Tribunal considered that the discharge of the functions and accountabilities of Mr lakimo's support worker role in the relevant period, while it did involve him undertaking some social work tasks, overall it was not one which involved him being "employed or engaged as a social worker". The Tribunal considered that Mr lakimo's involvement in case management decisions and the extent to which he used his social work skills and training in practice in the relevant period was not at a level or to a degree that involved him exercising the level of professional judgement and responsibility one would reasonably expect a person who was employed or engaged as a social worker to be exercising. In the absence of evidence to the contrary, the Tribunal did not consider it was in a position to draw the inference which Counsel for the CAC invited the Tribunal to draw. As a consequence the Tribunal could not be satisfied that the CAC had proven the second element of the charge factually, on the balance of probabilities.
53. It follows that the Tribunal could not be satisfied that Mr lakimo was required to hold a current practising certificate pursuant to s. 25 of the Act, in the relevant period.
54. Not being satisfied that the second element of the charge had been established factually on the balance of probabilities, the Tribunal found

¹⁴ Transcript of hearing, page 40

¹⁵ Transcript of hearing, page 43

that the charge against Mr lakimo was not proved. This finding was announced orally at the hearing and the hearing concluded.

Additional comment

55. There was evidence before the Tribunal in Ms Darwin's affidavit that Mr lakimo had been sent three reminders by the Board (one in May and two in June 2015 prior to his APC expiring) about the need for him to renew his APC.¹⁶ The renewal process was set out in those reminders. Delivery records for this correspondence show that none of these reminders were opened by Mr lakimo. Mr lakimo accepted that he "probably got" these reminders by email forwarded from his wife but did not open them because of a change in personal circumstances.
56. On 10 September 2015 Mr lakimo was contacted by the Board by letter after his APC had expired. He was warned that if his APC had not been renewed by 21 September 2015 the matter would be referred to the Chairperson of the Tribunal for a decision as to whether to establish a CAC to investigate.¹⁷ Mr lakimo did not respond. Mr lakimo was sent the "Registrar's message" in September 2015, after his APC had expired which warned practitioners of the potential consequences of continuing to practise without a current practising certificate.¹⁸ Mr lakimo did not respond to this letter either. Not having received a response from Mr lakimo, the matter was referred to a CAC in October 2015. An investigator was appointed in mid-October 2015 and it was not until 24 December 2015 that Mr lakimo made contact with the investigator. This was the first occasion when Mr lakimo advised that he (and his employer) did not consider that he was employed or engaged as a social worker as he was employed as a community support worker.
57. At the hearing Mr lakimo acknowledged that if Board documentation is sent to him he will now be ensuring that he reads it.
58. The Tribunal wishes to record that it is concerned that a registered social worker in Mr lakimo's position did not communicate directly and in a timely manner with his registration body about his practising status, when he must have been aware his APC was due for renewal, at least by June 2015. The evidence established that Mr lakimo had in a previous practising year obtained an APC and the Tribunal considers therefore that he must have been aware of the annual timeframes for this process. The Tribunal is of the view that the onus is on practitioners to be proactive about communicating with the Board about any actual or perceived changes to their practising status. Had Mr lakimo

¹⁶ Affidavit, Darwin, exhibits "AD6", "AD8" and "AD10"

¹⁷ Affidavit, Darwin, exhibit "AD14"

¹⁸ Affidavit, Darwin, exhibit "AD12"

communicated his position to the Board before his APC for the practising year ending 30 June 2015 expired, then he may well not have found himself the subject of disciplinary processes under the Act.

59. The Tribunal does not consider that it is an appropriate discharge of a registered social worker's professional responsibilities to ignore correspondence received from the Board or to fail to engage about matters relevant to such important matters as practising status and APC renewal, either when called upon by the Board to do so or otherwise.

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

DATED 21 February 2017



Jo Hughson

Chairperson

Social Workers Complaints and Disciplinary Tribunal