

Social Workers Complaints and Disciplinary Tribunal

Social Workers Registration Act 2003

BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

REF RSW6/D4/SWDT/2020

UNDER the Social Workers Registration Act 2003 (“the Act”)

IN THE MATTER of a disciplinary charge laid against a social worker under Part 4 of the Act.

BETWEEN **A PROFESSIONAL CONDUCT COMMITTEE**
appointed under the Act
Applicant

AND **SIOELI VAIANGINA** of Auckland registered social worker
Practitioner

HEARING held on Monday 14 September 2020

MEMBERS Ms C Garvey (Chairperson)
Ms K Fry, Ms S Jarvis, Mr P McGurk (registered social workers)
Mr B Marra (layperson)
Ms G J Fraser, (Hearing Officer)

APPEARANCES Ms A Garrick – for Professional Conduct Committee (PCC)

No representation for or by the practitioner

1. Mr Vaiangina is a registered social worker. On 20 January 2020, Mr Vaiangina was charged by a Professional Conduct Committee (PCC) as follows:

1 *In [], Mr Vaiangina indecently assaulted [under 16 year old 'K'] as follows:*

1.1 *After a funeral at Mr Vaiangina's house in [], Mr Vaiangina came into the bedroom K was in and:*

- (a) *Touched her neck and legs;*
- (b) *Told her she was pretty and that she knew how to dress up;*
- (c) *Told her to kiss him, following which she kissed him on the cheek;*
- (d) *Said "on the mouth", and moved his mouth over, following which she kissed him on the mouth; and*
- (e) *Told her to open her mouth but she did not.*

1.2 *In [], Mr Vaiangina accompanied K and her siblings to a park where:*

- (a) *The other children kissed and hugged him to greet him but K did not;*
- (b) *He told the other children to go away, and then told K to kiss him;*
- (c) *He gave her \$20 for her birthday present, after which she said "ok" and kissed him;*
- (d) *He told her to kiss him again, while holding her hand; and*
- (e) *He forced her to French kiss him, but she would not open her mouth. This happened approximately four times before he left.*

1.3 *After an incident with her family in [], K went to stay with Mr Vaiangina and his family for approximately two weeks during which:*

- (a) *On multiple occasions while K was alone, Mr Vaiangina tried to kiss her and told her to open her mouth and French kiss him;*
- (b) *She would try to push him away and tell him that it was not right; and*
- (c) *Mr Vaiangina touched her face and played with her hair while she was in bed.*

1.4 *One night in [] while K was staying with Mr Vaiangina, [], he called K to the living room to get him a drink. When she did:*

- (a) *He told her to sit on his lap and told her to look at him;*

- (b) *He put K's hand around him and pulled her closer and said to kiss him and K said, "No";*
- (c) *He tried to French kiss her and when she pushed him away, he pulled her against him and put his hand over her "private part";*
- (d) *She pulled his hand away and he said "What's wrong". She said this was what she did with her boyfriend, not with him. He said he was protecting her and she could rely on him;*
- (e) *He then put his hands up and felt K's breasts;*
- (f) *She pushed his hand away and [] then walked into the room.*

1.5 *One day in [], K was outside with Mr Vaiangina's [] in the garage where:*

- (a) *Mr Vaiangina came up behind K and hugged her back;*
- (b) *He told [] to leave and he started kissing K on the back of her neck; and*
- (c) *She pushed him away and told him "this has gone overboard".*

2. *By letter dated 29 April 2016, Mr Vaiangina received a formal warning from the Police for an indecent act on a young person under 16.*
3. *In 2017, Mr Vaiangina did not disclose the police investigation or warning when renewing his practising certificate.*
4. *Mr Vaiangina has not co-operated with the PCC's investigation in any meaningful way.*
5. *Mr Vaiangina's conduct as particularised in paragraph 1 above breached principles 1.1, 1.2, 9.1, 9.6 and 9.8 of the Code of Conduct issued by the Social Workers Registration Board pursuant to s105 of the Act (the Code).*
6. *Mr Vaiangina's conduct as particularised in paragraph 2 above breached principles 1.1, 1.2 and 9.1 of the Code.*
7. *Mr Vaiangina's conduct as particularised in paragraph 3 above breached principles 1.1, 9.1 and 9.6 of the Code.*
8. *Mr Vaiangina's conduct as particularised in paragraph 4 above breached principle 9.7 of the Code.*

The conduct particularised in paragraphs 1-8 above considered individually and/or cumulatively constitutes:

- (a) *Professional misconduct pursuant to s 82(2)(a) or 82(2)(d) of the Act; or, in the alternative,*
- (b) *Conduct that is unbecoming of a social worker and reflects adversely on his fitness to practise as a social worker pursuant to s 82(1)(b) of the Act.*
2. On application by the PCC the Tribunal made interim orders suppressing the name and details that might lead to the identification of the complainant on 6 May 2020¹. These orders were made permanent at the close of the hearing on 15 September 2020.
3. The PCC made a recommendation for interim suspension pursuant to s 74 of the Act. The Tribunal convened by teleconference on 18 May 2020 to consider the recommendation and the PCC submissions and submissions from counsel on behalf of Mr Vaiangina, Mr Foliaki. On 28 May 2020 the Tribunal made an order for interim suspension of Mr Vaiangina’s practising certificate pending the hearing of this charge².

The Evidence

4. On 31 July 2020 the PCC notified the Tribunal that the complainant would not be called as a witness and applied to produce the complainant’s evidential video interview with the Police, recorded on 1 April 2016. By decision dated 31 August 2020 the Tribunal declined the application^{3,4}. The Tribunal also declined to accept the transcript of the complainant’s evidence, notes made by the complainant and portions of the Police evidence, which were redacted for the hearing. The PCC’s application to adduce the Police statement by [HY], the complainant’s school guidance counsellor, was successful. Ms HY passed away in [] 2019 and was therefore unavailable as a witness.

¹ RSW6/D1/RSWDT/2020 PCC v Vaiangina – Minute 6 May 2020

² RSW6/D2/SWDT/2020 PCC v Vaiangina - Decision on interim suspension 28 May 2020

³ RSW6/ - PCC v Vaiangina – Decision on admissibility of evidence 31 August 2020 and Minute 3 September 2020

⁴ The Tribunal’s decision on admissibility relied on the decision of the High Court in *W v Health Practitioners Disciplinary Tribunal* [2019] NZHC 420, [2019] 3 NZLR 779. The Court of Appeal upheld this in a judgment issued on 18 September 2020: *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal and W* CA 152/2019; [2020] NZCA 435.

5. Evidence of a general nature regarding the complainant's allegations was received in the statements of [HY], Detective Sergeant Andrew Bell, Detective Constable Jacinda Clarke and Detective Constable Paul Mo. This was introduced as evidence that the allegations were made, the Police contact with Mr Vaiangina and context for the formal warning for indecent assault given to Mr Vaiangina. The Convenor of the PCC Lorraine Sayers gave evidence about the PCC's investigation. No evidence was called on behalf of Mr Vaiangina.
6. The PCC also produced a bundle of documents. While called an Agreed Bundle counsel acknowledged there was an absence of objection (silence) from Mr Vaiangina rather than explicit agreement as to the material contained in the bundle. The bundle contained correspondence between the Board and Mr Vaiangina, correspondence between the PCC and Mr Vaiangina, Police job sheets, the formal warning issued to Mr Vaiangina and an index of the list of documents disclosed to Mr Vaiangina in the course of the PCC investigation.

The Hearing

7. The charge was heard in Auckland on 14 and 15 September 2020. The Tribunal granted the PCC's request made on 8 September 2020 for its Wellington-based counsel Ms Garrick to appear by audio visual link (AVL). Mr Vaiangina did not appear in person or by counsel. The Tribunal was satisfied that proper notice was given of the hearing to Mr Vaiangina and counsel, including an offer to attend by AVL.
8. The evidence from Lorraine Sayers was given by AVL, and the police witnesses Mo, Bell, and Clarke appeared in person.
9. The Tribunal deliberated at the conclusion of the evidence on liability and announced its decision that particulars 2, 3, 6 and 7 were found proved. The Tribunal found particulars 1 and 5, 4 and 8 were not made out to the requisite standard.
10. Following oral submissions from the PCC the Tribunal reached a decision on penalty. The PCC agreed that the Tribunal should reserve its decision on costs to allow Mr Vaiangina the opportunity to provide sworn evidence and submissions as to costs, including his financial position. Submissions from Mr Foliaki were received on 17 October 2020 and Mr Vaiangina's

supporting affidavit was received on 29 October 2020. Submissions in reply from the PCC were received on 3 November 2020.

Discussion - liability

11. The onus of proving the charge rests with the PCC. The burden of proof in disciplinary proceedings is the civil standard, the balance of probabilities. The more serious the allegation, the stronger the evidence that may be required to prove it: *Z v Dental Complaints Assessment Committee*.⁵
12. The PCC focussed its submissions on s 82(2)(a) of the Act which provides that a social worker is guilty of professional misconduct if he or she breaches the code of conduct issued by the Board.
13. The Tribunal adopts a two-step process to assessing professional misconduct:
 - a. the first step is to make an objective analysis of whether or not Mr Vaiangina's acts or omissions can be reasonably regarded by the Tribunal as constituting a breach of the Code of Conduct;
 - b. the Tribunal is then required to be satisfied that those acts or omissions require a disciplinary sanction for the purposes of protecting the safety of the public and/or enhancing the professionalism of social workers.
14. We accept the submissions of the PCC in reliance on well-established principles that the Tribunal is required to assess whether there has been a departure that is significant enough to warrant sanction, with the conduct measured against the standards of "competent, ethical and responsible practitioners."⁶

⁵ SC 22/2007; [2008] NZSC 55.

⁶ See *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774, and *B v Medical Council* [2005] 3 NZLR 810.

15. The PCC submitted that in terms of s 82(2)(a) the threshold is determined by a breach of the Code, and that on the words of this section any breach of the Code of Conduct constitutes professional misconduct.
16. In the alternative the PCC pleaded that Mr Vaiangina is guilty of conduct unbecoming a social worker, and which conduct reflects adversely on his fitness to practise as a social worker: s82(1)(b). Again, this involves a two-step approach:
 - a. An objective analysis of whether or not the social worker's acts or omissions can be reasonably regarded by the Tribunal as constituting conduct unbecoming of a social worker;
 - b. The Tribunal must be satisfied that the acts or omissions reflect adversely on the social worker's fitness to practise and require sanction for the purposes of protecting the public and/or enhancing the professionalism of social workers.

Particulars 1 and 5

17. Particular 1 relied wholly on the complainant's evidence contained in her evidential video interview, which the Tribunal found to be inadmissible in the absence of the complainant attending the hearing as a witness or the Tribunal being satisfied as to her unavailability. Full reasons for this finding are set out in the Tribunal's separate admissibility decision.
18. Particular 1 sets out serious allegations that amount to criminal offending, namely indecent assault on a person aged under 16 which carries a penalty of up to 7 years imprisonment⁷. The PCC emphasised that the fact the Police warned Mr Vaiangina rather than lay a criminal charge was a decision made out of concern for the complainant rather than doubt about the veracity of the allegations. We accept that was the case but nonetheless the very specific particulars that we were asked to find proved were unsupported by direct evidence before us.
19. In the absence of evidence from the complainant or other direct evidence of the multiple allegations of indecent assault, particular 1 was not made out. As a consequence of this

⁷ Section 135 Crimes Act

particular 5, which pleaded a breach of the Code in reliance on the conduct described in particular 1, was not proved.

Particulars 2, 3, 6 and 7

20. In November [], the complainant made a disclosure to her school counsellor that she had been indecently assaulted by Mr Vaiangina. The Police were notified of the allegations by the school counsellor that same day. The complainant gave an evidential video interview on [].
21. On 24 April 2016 Mr Vaiangina voluntarily attended the police station and was interviewed by Detective Constable Mo and Detective Constable Clarke. According to the Police evidence, a small number of the complainant's specific allegations were put to Mr Vaiangina, which he denied. Before further allegations could be put to him Mr Vaiangina sought legal advice and ended the interview. Mr Vaiangina was then given a verbal warning for indecent assault by Detective Constable Mo, followed by a formal written warning dated 29 April 2016. Detective Constable Mo said that he told Mr Vaiangina the warning would be discoverable to anyone requesting a police vet on him.
22. Detective Constable Mo said he discussed the possibility of issuing a warning with his superiors prior to interviewing Mr Vaiangina, and that following the interview he consulted further before preparing the written warning. He considered there were grounds to lay a charge in reliance on the Solicitor-General's guidelines for prosecution, namely that the evidence was "likely to lead to a conviction." Detective Constable Mo's decision not to prosecute was based on his view that the offending was "minor" by reference to the alleged indecent touching being over not under clothing; the absence of prior charges, and his predominant concern for the welfare of the complainant whom he considered lacked family support in relation to her complaint and would be unsupported if the matter was prosecuted.
23. The formal warning reads:

"This letter is to formally advise you that you have been warned for the offence of "indecent act on a young person under 16" in relation to indecently touching and kissing [the complainant].

“Indecent act on a young person under 16” is an offence under section 134(3) of the Crimes Act 1961.

Police have concluded their investigation and no further action will be taken in relation to this matter.

Should any further allegations of [a] sexual nature be made in relation to you, you may be arrested and charged.

...”

24. Mr Vaiangina did not notify the Board of this warning. When he applied to renew his annual practising certificate for the 2017-2018 year, the Board conducted the police vetting process prescribed by s 50 of the Act. Section 50(1) reads:

“In order to help determine whether a person is a fit and proper person to practise social work for the purposes of this Act, the Board-

(a) must obtain a Police vet from the Police Vetting Service;

(aa) ...

(b) must consider any criminal convictions (whether in New Zealand or overseas) and other information disclosed to the Board by the Police or otherwise known to the Board.”

25. On 14 August 2017 in response to the Board’s request, the Police provided the following New Zealand Police Vetting report:

“Police hold the following relevant information:

[]: The applicant received a written warning from the Police for Indecent Assaults Female 12-16. The alleged victim was a [] who was staying at his address at the time and the allegation involved kissing and touching the girl’s breasts and vagina over her clothing. The applicant denied the offending.”

26. On 24 August 2017 the Board wrote to Mr Vaiangina and requested an explanation for his non-disclosure, his reflections on the impact of the warning on his social work practice, his explanation of the circumstances that led to him receiving a Police warning, any actions he had taken since to mitigate against ongoing risks and asked whether he had informed his employer. Mr Vaiangina responded on 12 September 2017 requesting further time. He wrote again on 2 October 2017 denying the allegations as follows:

“To make my answer short and clear I did not do it and I know it is hard to prove my innocent (sic) until I prove it in the court of law.”

27. Mr Vaiangina went on to state that his role as a community social worker was “hugely affected” and “my public reputation is damaged but the supports of my family, my friends and colleagues give me hope in myself.” With regard to his non-disclosure Mr Vaiangina said:

“I did not disclose this because I thought there was nothing to disclose despite the police report.”

28. We are mindful that Mr Vaiangina was not charged with any offence under the Crimes Act and as he observed to the Board he could not prove his innocence of the allegations in particular 1 through the criminal justice system. He has maintained his denial of the allegations to the Police, Board and PCC and did not give evidence to the Tribunal.

29. The Tribunal considers that the fact and the circumstances of the warning are sufficient to undermine the trust and confidence that the community must be able to hold in a registered social worker. As this Tribunal observed in *Lumsden*⁸, social workers often work with clients in unsupervised settings, and in situations which require clients to place significant trust in them. Their role requires the provision of recommendations and advice. As such it is important that a social worker demonstrates good decision making and ethical conduct in their own life.

30. At the relevant time it was the 2016 Code of Conduct that provided ethical guidance to the profession. Principle 1 addresses the expectation that social workers will act with integrity and honesty in all personal and professional behaviour (1.1), comply with all legal professional and

⁸ RSW8/SWCDT/2020 – discussion at [35]

ethical obligations and any other relevant standards including those in the Social Workers Registration Act 2003 (1.2).

31. Principle 9 set out an expectation on social workers to maintain trust and confidence in the profession including that a registered social worker will:

9.1 Maintain a high standard of professional and personal behaviour – avoid activities, work, or non-work that may in any way bring the social work profession into disrepute; the same standards of conduct are expected when using social media and electronic forms of communication.

and

9.6 Work constructively with, and be honest, open, and constructive in your dealings with managers, employers, the SWRB and other authorities.

32. To highlight the seriousness of Mr Vaiangina’s non-disclosure, the PCC referred us to the Teachers Disciplinary Tribunal decision of *CAC v Teacher*⁹ in which the teacher omitted relevant teaching experience from her curriculum vitae in order to avoid discovery of a mandatory report made about her to the Teaching Council. For this failure and other misconduct, the teacher was censured and de-registered. Counsel also referred us to two decisions of the Health Practitioners Disciplinary Tribunal involving midwives failing to engage with the Midwifery Council on competence and recertification matters; there were a number of different aspects to those cases but we accept that a lack of constructive engagement with one’s registration authority is an important matter that may justifiably lead to disciplinary sanction.¹⁰

33. A registered social worker must disclose pertinent matters to the Board in a timely way. The process of renewing an annual practising certificate is an obvious trigger for disclosure of any matter that might objectively raise questions about competence or fitness to practise. A formal Police warning is clearly within the category of matters that warrant disclosure. The PCC did not give evidence of the specific questions asked by the Board of applicants renewing

⁹ (2015) NZTDT 2013/4

¹⁰ *Professional Conduct Committee v Tolland* HPDT 325/Mid10/146P; *Professional Conduct Committee v Mason* (2012) 465/Mid12/204P

their APC but Mr Vaiangina ought to have recognised the Police warning was relevant information he should provide to the Board. He demonstrated a lack of insight in not disclosing the warning, and further, in not taking the opportunity given by the Board to reflect and engage with them once the warning was discovered in August 2017. We note that the Act provides the Board with non-disciplinary mechanisms by which it can deal with matters that may reflect on fitness to practise.

34. The Tribunal is satisfied that a formal Police warning for indecent assault was issued to Mr Vaiangina verbally and in writing and particular 2 is proved. As to particular 3, Mr Vaiangina failed to disclose the warning to the Board when applying to renew his practising certificate (or at any other time). These failures constitute a breach of the 2016 Code of Conduct as pleaded in particulars 6 and 7.

Particulars 4 and 8

35. The PCC alleged that Mr Vaiangina failed to co-operate with the PCC investigation “in any meaningful way.” Reading the correspondence between the PCC and Mr Vaiangina it is clear from this that Mr Vaiangina did not provide the detailed written answers that the PCC wanted. He did respond to the PCC and was polite in his brief correspondence. He made it clear that he did not want to view the complainant’s evidential video interview or transcript. This case is distinguishable from the lawyers’ disciplinary cases that the PCC referred us to, as those involved elements including deliberate delay, obstruction of process and failures to comply with requests for the production of documents¹¹.
36. Understandably the PCC encourages the full co-operation of social workers who are under investigation. A social worker who does not, for example, supply detailed responses potentially misses the opportunity to influence the deliberations of, and recommendations made by a PCC. That is a matter for each social worker under investigation to weigh, ideally with the help of appropriate support and advice. What Part 4 of the Act requires during the investigation process is that the PCC provides the detail of, and gives a social worker a reasonable opportunity to respond in writing to a complaint¹² and allows the social worker a

¹¹ *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83; *Orlov v National Standards Committee 1* [2013] NZHC 1955

¹² Section 71(3)(a)(i) and 71(3)(b)(i)

reasonable opportunity to appear in person should they wish to do so¹³. The Act does not impose an obligation on the social worker to take these opportunities.

37. The 2016 Code of Conduct issued by the Board included an expectation of constructive engagement with the Board and authorities¹⁴ but we are not prepared to find that Mr Vaiangina's conduct in this respect reaches the disciplinary threshold¹⁵.
38. The Tribunal finds that particulars 2, 3, 6 and 7 individually and cumulatively amount to professional misconduct pursuant to s 82(2)(a) and s 82(2)(d) of the Act.

Penalty

39. The PCC submitted that the penalties available to the Tribunal are those that applied at the time of the offending rather than the provisions of s 83(1) as they were amended in February 2019. The relevant penalties available at the time of the offending were:
 - a. cancellation of registration;
 - b. suspension for a period not exceeding 12 months;
 - c. conditions on practice, for a period not exceeding three years;
 - d. censure;
 - e. fine; and
 - f. costs.

¹³ Section 71(3)(a)(ii) and 71(3)(b)(ii)

¹⁴ Principle 9.6

¹⁵ The current Code of Conduct also includes in Principle 9 the expectation that social workers will work co-operatively with the Board.

40. The February 2019 amendment retains these penalties, with some additions. As will be apparent the focus of the Tribunal was on the most serious penalties available both before and after the amendment, namely suspension or cancellation.
41. The Tribunal must impose a penalty that reflects the seriousness of the proven particulars of the charge. The Tribunal considered the well-established penalty principles set out in *Roberts v Professional Conduct Committee*¹⁶. These are, in summary:
- a. the Tribunal should impose the penalty most appropriate to protect the public. In part this may be achieved by deterring other practitioners from behaving in a similar way;
 - b. the Tribunal has an important role in the setting of professional standards;
 - c. the penalties imposed may have a punitive function, notably censure and fine, but the setting of standards and protection of the public are the most important factors;
 - d. the Tribunal's penalty should, where appropriate, take into account the rehabilitation of the practitioner;
 - e. the penalty should be comparable to those given in similar circumstances. Each case does require careful assessment of its own facts and circumstances;
 - f. the Tribunal should reserve maximum penalties for the worst offenders;
 - g. the penalty imposed should be the least restrictive that can reasonably be imposed in the circumstances;
 - h. the penalty should be fair, reasonable and proportionate.
42. Registration and holding a practising certificate convey a responsibility to act professionally and to avoid behaviour in one's professional and personal life that is inconsistent with the ethical and professional standards of the social work profession. The Tribunal considers that

¹⁶ CIV 2012-404-003916; [2012] NZHC 3354 at [44] – [55]

the proven particulars of the charge give rise to a need to protect the public. Further, the allegations of multiple incidents of indecent assault on a person aged under 16 years are very concerning and the formal Police warning is a serious matter. Mr Vaiangina's lack of disclosure of the formal warning and his breaches of the Code of Conduct are also serious.

43. It is usual for the Tribunal to consider any aggravating and mitigating factors going to penalty. The PCC submitted that the following were aggravating features of Mr Vaiangina's conduct:

- a. That the decision to issue a formal warning was not due to lack of evidence;
- b. The alleged offending to which the warning related is serious and raises significant concerns as to Mr Vaiangina's suitability to practise as a social worker and work with young and vulnerable clients;
- c. The absence of acknowledgment of wrongdoing or acceptance of responsibility;
- d. The apparent lack of insight that the warning and surrounding circumstances were matters that ought to be raised with his employer and the Board.

44. Mr Vaiangina's denial of the allegations is not an aggravating factor but there is no correlating mitigation, in the absence of him being willing to discuss the circumstances of the allegations with the Board, PCC or Tribunal. He appears to not have shown any insight into the relevance of the allegations to his professional practice and relationship with his professional body. Mr Vaiangina did not participate in the disciplinary proceedings. This did not negate the need for the Tribunal to properly consider the charge. There was no agreed summary of facts. The Tribunal took care to ensure that Mr Vaiangina was in receipt of all relevant information about the proceedings and was often faced with no response from him or his counsel, which was not helpful.

45. We take into account as a mitigating factor that the PCC was not successful in proving all particulars of the charge and was largely unsuccessful in its application to admit hearsay evidence.

46. The Tribunal was required to consider the lesser penalties available to it before cancelling Mr Vaiangina's registration. The Tribunal did so. We consider that cancellation is the appropriate outcome. Mr Vaiangina's lack of engagement with the Tribunal meant that we had no direct evidence as to his response to the serious allegations and the circumstances that led to the Police warning; no evidence from him as to his insight, his intentions for his social work practice or any matters that might be relevant to rehabilitation. Looking at the penalties applicable at the time of the offending, suspension is for a defined period of no more than 12 months, and in our view, would have necessitated the imposition of conditions on Mr Vaiangina's return to practice. Any conditions would have been guesswork in the face of Mr Vaiangina's lack of engagement.

47. We consider it appropriate that Mr Vaiangina be censured.

48. Accordingly, the Tribunal imposes the following penalties:

- a. Cancellation of Mr Vaiangina's registration.
- b. Censure

Costs

49. The PCC's reply submissions stated that its costs were in the sum of \$37,935.69. At the hearing the Tribunal's estimated costs were \$29,046. In *Vatsyayann v Professional Conduct Committee of the New Zealand Medical Council*¹⁷, Priestley J identified principles for costs in disciplinary proceedings (in the HPDT) which have been followed by this Tribunal previously. These are:

- a. the cost of disciplinary proceedings should not fall entirely on the profession as a whole;
- b. a social worker who is disciplined should make a proper contribution towards the costs of the Tribunal and PCC;
- c. costs are not intended to be punitive;

¹⁷ [2012] NZHC 1138 at [34]

- d. the Tribunal should consider the financial means of the practitioner if they are known;
- e. a practitioner's defence should not be deterred by the risk of a costs order;
- f. a general starting point is a contribution of 50%.

50. The estimated costs of the Tribunal and PCC were notified to Mr Vaiangina following the hearing to give him an opportunity to provide evidence of his financial means for the Tribunal to consider when determining costs. Mr Foliaki's submissions were directed more generally to penalty. He referred to the following factors, which are summarised from the submissions:

- a. that Mr Vaiangina is now 64 years of age and retired due to significant health conditions and "the circumstances surrounding his work situation";
- b. Mr Vaiangina is not yet entitled to an age-related pension;
- c. Mr Vaiangina and his wife each receive a weekly benefit. Details of some outgoings were set out in Mr Foliaki's submissions (and some of which Mr Vaiangina corrected in his affidavit). It was submitted that he and his wife were living "hand to mouth" and struggling with their regular expenses;
- d. he and his wife have one dependent residing within the family home;
- e. he does not intend to return to the workforce;
- f. Mr Vaiangina is not able to pay any costs, and any order would be primarily a punitive one rather than serving the protective and standard-setting purposes of discipline. Mr Foliaki submitted that any demand for enforcement of a costs order could result in bankruptcy and the potential sale of the family home.

51. Mr Foliaki referred us to HPDT decisions where costs orders were minimal or not imposed, reflecting the dire financial circumstances of the practitioner. He cited *Spence v Professional*

*Conduct Committee of the Physiotherapists Board*¹⁸ in which the High Court ordered a very small contribution by Mr Spence to the costs of the PCC for its investigation, the Tribunal hearing and the scale costs sought on appeal¹⁹, on the basis that to impose more than a token amount would “place an intolerable burden upon Mr Spence” in light of his financial and reduced employment circumstances. Rehabilitation was a significant consideration for the Judge, in that he did not want a crippling award to impede the practitioner’s full return to productive professional service.

52. We note that in a similar way this Tribunal has reluctantly avoided a costs order or made minimal awards in previous cases where the information provided to us has made clear that a practitioner would suffer real hardship as a consequence.
53. We have considered the matters set out in Mr Vaiangina’s affidavit of 29 October 2020. Mr Vaiangina outlined the following information relevant to his financial means:
 - a. he resigned from his role as a social worker in or about February 2020, a decision which was related to these disciplinary proceedings. It appears that his employer raised the matter of the proceedings with him rather than Mr Vaiangina disclosing this, and he refers to having a choice between resignation or suspension pending the outcome of the disciplinary proceedings.
 - b. Mr Vaiangina does not disclose holding any other employment since that time;
 - c. Mr Vaiangina’s wife was the main source of income for the household between his resignation and August 2020 when she suffered a COVID-19 pandemic-related job loss. This necessitated both receiving a WINZ benefit and neither have yet obtained further work, though Mr Vaiangina’s wife is younger than he and may do so in future;
 - d. Mr Vaiangina and his wife have weekly mortgage payments for the foreseeable future;

¹⁸ [2019] NZHC 1516

¹⁹ The PCC’s actual costs prior to the appeal, and High Court scale costs for the appeal totalled nearly \$70,000 and the court ordered Mr Spence to pay a total of \$2,500.

e. Any costs order would cause “extreme hardship in the most financially difficult time” of Mr Vaiangina and his wife’s life together.

54. In reply, the PCC submitted that Mr Vaiangina’s financial position justifies a reduction from the 50% starting point but does not give any further indication of what it considers appropriate. We agree with the PCC’s submission that Mr Vaiangina’s decision not to defend the charge is not a mitigating factor from the perspective that he did not participate in most aspects of the proceeding rather than take a constructive approach to reducing the hearing time. We agree entirely with the PCC that Mr Vaiangina’s assertion that a guilty finding was inevitable is wrong, and we also agree with the PCC’s response that this assertion is:

“plainly incorrect and ignores fundamental principles of law, such as the burden of proof. It also overlooks that the Tribunal only found the charge partly proved.”

55. We also agree with the PCC’s response to Mr Vaiangina’s assertion that the PCC ought not to have prosecuted once he advised he was withdrawing from social work practice. Ms Garrick submitted:

“The purpose of the Social Workers Registration Act 2003 (the Act) includes protecting the safety of members of the public and enhancing the professionalism of social workers. Section 127 of the Act states that on the written application of a social worker, the Board may cancel the social worker’s registration but it prevents the Board doing so if disciplinary action against the social worker has begun or is pending. This demonstrates that once a disciplinary process has begun, the social worker cannot circumvent it by being asked to be removed from the Register...There remained a public interest in the proceedings for the purpose of setting professional standards and, thereby, protecting the public (as well as protection of the public in relation to Mr Vaiangina specifically).”

56. The Tribunal has determined that but for Mr Vaiangina’s limited financial means a significant contribution towards costs would have been justified with a reduction from the 50% starting point to account for those aspects of the charge that were not proved. However on the evidence we have, while some questions are raised as to the totality of this, does establish that Mr Vaiangina is in a difficult financial situation. He was employed apparently until the

disciplinary proceedings came to light but has not obtained further employment and does not intend to do so before qualifying for the pension when he turns 65. He still has a fairly substantial sum outstanding on his mortgage, in the context of his stage of life. It appears that any burden imposed by a costs order would be borne heavily by his wife.

57. With that said, we consider an order of costs is appropriate in all the circumstances including the need to ensure that orders are made fairly against those who appear before the Tribunal and are found guilty, and the fact that the profession will otherwise bear the entire cost of the proceedings. We have determined that an order will be made that Mr Vaiangina pay costs in the sum of \$1000. This is a very small proportion of the actual costs incurred but will be significant to Mr Vaiangina.

Suppression

58. Either on an application or by its own motion the Tribunal is empowered by s 79 of the Act to make orders suppressing the names or identifying particulars of the social worker involved in a proceeding, the complainant or any other person if it is satisfied it is desirable to do so having regard to the interests of any person, including the complainant, and the public interest.
59. Permanent orders suppressing the name and identifying particulars of the complainant are made and the names and identifying particulars of others interviewed by the Police whose names and details were provided in the evidence to the Tribunal. This order includes the name of the complainant's school and particulars that would identify her school.

Orders of the Tribunal

60. The Orders of the Tribunal are as follows:
- a. Cancellation of Mr Vaiangina's registration with the Social Worker's Registration Board from the date of this decision;
 - b. Censure
 - c. Mr Vaiangina is to pay costs in the sum of \$1000.

- d. The Tribunal directs the Hearing Officer to request the Social Workers Registration Board Registrar, subject to the suppression orders above, to publish this decision on the Board's website and to publish a summary of the Tribunal's decision in its professional publication to members of the social work profession.

Dated at Auckland this 15th day of December 2020



Catherine Garvey
Chairperson | Social Workers Complaints and Disciplinary Tribunal