

Social Workers Complaints and Disciplinary Tribunal

Social Workers Registration Act 2003

BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

REF **RSW8/D2/SWDT/2020**

UNDER the Social Workers Registration Act (“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 by the SOCIAL WORKERS REGISTRATION

BOARD

AND **MR POMARE LUMSDEN** of Otakiri, registered

social worker

Practitioner

HEARING held by audio visual link on Wednesday, 14 October 2020

MEMBERS

Ms J Hughson (Chairperson)

Ms L Cooper, Mr P McGurk and Ms S Jarvis (registered social workers)

Mr B Marra (layperson)

Ms G Fraser (Hearing Officer)

APPEARANCES

Ms E FitzHerbert for the Professional Conduct Committee

Mr P Lumsden in person

Introduction

1. Mr Lumsden is a registered social worker who was registered with the Social Workers Registration Board on 16 October 2016.¹ From 2014 to 2018 Mr Lumsden was employed by Presbyterian Support Northern/Family Works Northern as a social worker based at Whakatāne. At the time of the hearing he did not hold a current practising certificate.
2. On 20 December 2018 Mr Lumsden was convicted of two criminal charges in the District Court at Whakatāne.
3. These were charges of offences against sections 61(1)(c) and (2) of the Misuse of Drugs Act 1975. On the charges Mr Lumsden was sentenced to eight months' home detention.
4. The background to the convictions concerned the supply by Mr Lumsden of a Class A Controlled Drug, namely methamphetamine. The drug was supplied to another person and Mr Lumsden and that person used the methamphetamine together, at two separate times.
5. The victim was in her teenage years and had a history of methamphetamine abuse. Mr Lumsden had been her Oranga Tamariki-approved caregiver from February [] until November [], and he was [] to her. Mr Lumsden had a history of substance abuse, including a methamphetamine addiction.
6. Mr Lumsden notified the Social Workers Registration Board (the Board) of his convictions, in January 2019. The matter of the convictions was then referred to a Professional Conduct Committee (PCC) appointed by the Board. The PCC investigated the matter and laid the Charge before the Tribunal under section 82(1)(c) of the Social Workers Registration Act 2003 (the SWR Act).

Charge

7. The particulars of the Charge read:

1 That on 20 December 2018 Mr Lumsden was convicted by the Whakatane District Court of two offences against section 6(1)(c) of the Misuse of Drugs Act 1975 (supplying a Class A controlled Drug, namely methamphetamine), each

¹ Register entry, Social Workers Registration Board.

offence being punishable by a term of imprisonment for 3 months or longer, in that:

- a. Between 26 and 28 January [] in [], Mr Lumsden supplied a Class A controlled Drug (methamphetamine) to another person, which Mr Lumsden and that person used together; and*
- b. On 29 January [] at his home in Eastern Bay of Plenty, Mr Lumsden supplied a Class A controlled Drug (methamphetamine) to another person, which Mr Lumsden [and] that person used together.*

2 And that the offences were committed in circumstances that, either separately or cumulatively, reflect adversely on Mr Lumsden's fitness to practise as a social worker.

Hearing

8. The Charge was heard by audio visual link (AVL). The PCC was represented by Counsel and Mr Lumsden appeared in person. Mr Lumsden was in hospital at the time, about to have surgery. He appeared from his hospital room.
9. There was produced to the Tribunal an Agreed Statement of Facts and an Agreed Bundle of Documents. The Tribunal had some concerns about the material in these documents. There was conflicting information about the factual circumstances of the offending and Mr Lumsden's explanations for his conduct. Counsel was invited to address the Tribunal on the inconsistencies in the Agreed Statement of Facts and documents included in the Agreed Bundle of Documents. Also, there was some potentially prejudicial information in those documents including for example, reference to an additional criminal charge that had been dropped and reference to other conduct on the part of Mr Lumsden that was not relevant to the Charge. The Tribunal did not place any weight on that information. The Tribunal is statutorily obliged to conduct a hearing that observes the rules of natural justice² and considering such information would have been contrary to that obligation, in the Tribunal's view.

² Clause 5(1), Schedule 2, SWR Act.

10. An agreed statement of facts should contain a clear description of the events relied on to support the charge and should not include material that is plainly irrelevant, or which simply annexes a NZ Police Summary of Facts when that document conflicts or does not incorporate other information contained in documents included in the agreed bundle. The parties must clarify what is agreed (the basic facts of the matter) particularly as to the circumstances of the offending. Further, an agreed statement of facts should be signed and dated by the practitioner and formally presented by the prosecuting body on the basis that it is an agreed document.
11. The Agreed Bundle contained transcripts of interviews conducted by the PCC during its investigation, including a transcript of Mr Lumsden's own interview with the PCC. There was no evidence that the transcripts had been confirmed as accurate records of the interviews and the interviewees were not called as witnesses. No sworn evidence was provided by any of them. The transcripts were inadmissible hearsay evidence and the Tribunal was mindful that the Evidence Act 2006 applies as if the Tribunal were a court within the meaning of that Act (subject to the Tribunal's discretion to receive in evidence any statement, document, information or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not it would be admissible in a court of law)³. However, Counsel for the PCC indicated that the PCC did not take issue with anything said by the interviewees as recorded in the transcripts and she submitted that in fairness to Mr Lumsden they had been put before the Tribunal so they could be considered. The Tribunal received the transcripts on that basis. The Tribunal noted that some of the explanations Mr Lumsden had given for his offending during his PCC interview (as recorded in the transcript of his interview) went beyond the explanations he had given to the Police as recorded in the Police Summary of Facts. It was not clear what the PCC had agreed were the circumstances of the offending given that the Agreed Statement of Facts did not refer specifically to these further explanations.
12. The Ministry of Justice Certified Copy of Entry of Criminal Record evidencing the convictions was not put before the Tribunal. This should always be produced in every case where the Tribunal is being called upon to review a practitioner's convictions. In

³ Clause 6, Schedule 2, SWR Act. See *PCC of the Nursing Council v HPDT and W* [2020] NZCA 435.

the circumstances of this case (in particular, Mr Lumsden's current ill-health) the Tribunal was content to proceed based on the District Court Judge's Sentencing Notes and Mr Lumsden's acceptance that the two convictions in issue had been entered against him.

13. Counsel for the PCC made submissions in relation to the Board's Code of Conduct and the Board's Fit and Proper Person Policy. These documents were not included in the Agreed Bundle of Documents. During the hearing, the Tribunal asked Counsel to provide copies of these documents to the Tribunal and these were then produced to the Tribunal. If a party seeks to rely on documents of this nature, it will assist the Tribunal if copies are produced for the hearing. In this case, Mr Lumsden was not represented by Counsel and in fairness to an unrepresented practitioner like him, it is important that the practitioner is provided with copies of any and all material to be relied on by the PCC. This will ensure the practitioner has a proper opportunity to respond at the hearing.

Background and Facts

14. As above, it was not clear to the Tribunal what was agreed in terms of the factual background. In the end the Tribunal relied on the factual background as contained in the NZ Police Summary of Facts. The District Court Judge's Sentencing Notes were included in the Agreed Bundle of Documents but were not specifically referred to in the 'Agreed Statement of Facts'. These Sentencing Notes referred to the facts as they were contained in the Police Summary of Facts and therefore the Tribunal also had regard to the Judge's summary of the relevant factual background.
15. The factual background considered by the Tribunal was:
16. As above, at the time of the offending Mr Lumsden was an approved caregiver for Oranga Tamariki and worked in the Eastern Bay of Plenty as a social worker. He was [] to the victim and was her approved caregiver from February [] until November [].
17. Mr Lumsden was aware of the victim's history and previous struggles with the use of methamphetamine.
18. Mr Lumsden communicated by text messages with the victim to organise a weekend in the [] area to spend time with the victim as he would not be able to attend her actual birthday.

19. Mr Lumsden asked the victim to locate methamphetamine for him to purchase for them to smoke together and to find a motel with a spa for them to stay in for the weekend.
20. Between 26 January [] and 28 January [] Mr Lumsden travelled from the Eastern Bay of Plenty to the [] area to spend the weekend with the victim.
21. Mr Lumsden picked up the victim from the end of her mother's driveway in the early hours of Saturday, 26 January [].
22. Mr Lumsden brought methamphetamine with him for himself and the victim to smoke together.
23. Mr Lumsden told the victim he wanted to purchase some more methamphetamine and drove the victim to an ATM machine located in []. Mr Lumsden gave the victim his Westpac bank card for her to draw out the amount of \$250.00 cash to be able to purchase a bag of methamphetamine for the pair to smoke.
24. Mr Lumsden organised for him and the victim to stay at a Motor Inn at [] and he spent the weekend bingeing on methamphetamine with the victim.
25. On 29 January [] Mr Lumsden was back at home in the Eastern Bay of Plenty with the victim.
26. Mr Lumsden and the victim smoked methamphetamine together in the kitchen after everyone in the home had gone to bed.
27. Police were called to the address and found the victim in a paranoid and aggressive state with a stab wound she had inflicted upon herself. It was apparent to Police that the victim was under the influence of drugs.
28. Mr Lumsden admitted to Police that he had been smoking methamphetamine with the victim and paying for it. He told Police he knew the victim used methamphetamine and that he thought it was safer for her to smoke it with him.
29. Mr Lumsden was charged by Police. He pleaded guilty. He was convicted of the two charges on 20 December 2018 and sentenced in the District Court at Whakatāne by Judge LM Bidois to eight months' home detention with special conditions which included that Mr Lumsden attend an assessment for alcohol and drugs as directed by a probation officer, that he attend any counselling, treatment or programme as recommended by the assessment as directed by and to the satisfaction of a probation officer, and to attend and "appropriate programme" to the satisfaction of a probation

officer. There were the six months' standard conditions as well as special post-detention conditions.

30. The Tribunal noted that Mr Lumsden told the PCC during his interview, when explaining his conduct, that on the one hand he had wanted to help the victim but on the other hand he (as a methamphetamine addict himself) had just wanted to get better drugs for himself. Of concern to the Tribunal was that this was not an explanation Mr Lumsden gave to Police and as such it is likely it was not considered by the Judge when he sentenced Mr Lumsden.

The Charge -discussion

31. It was submitted for the PCC that:
 - a. The two convictions reflect adversely on Mr Lumsden's fitness to practise as a social worker and so constitute a disciplinary offence under section 82(1)(c) of the SWR Act, they being convictions to which that subsection refers (offences which are punishable by imprisonment for a term of three months or more). The offences in this case (supply of methamphetamine) were each punishable by a maximum penalty of life imprisonment.
 - b. "Fitness to practise" is not defined in the SWR Act however section 47 (2)(c) provides some guidance about circumstances where the Board might find someone is not fit to practise. Fitness is inherently linked to the functions of the Act being protection of the public and enhancement of the profession.
 - c. Guidance may be sought from cases which involved the Tribunal's consideration of convictions before the SWR Act was amended in February 2019. In that regard, convictions were previously considered in the context of charges brought under section 82(1)(b) (conduct unbecoming) which requires the Tribunal to find that the conduct reflects adversely on a social worker's fitness to practise as a social worker.
 - d. An inquiry into fitness to practise is not restricted to consideration of a practitioner's physical or mental fitness, but can relate to whether the conduct or conviction impacts on wider standards of professional conduct and public and professional confidence in the particular area of practice.

- e. With reference to the Tribunal's dicta in *CAC v RSW Going* 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 social work. Not every divergence from recognised standards will reflect adversely on a practitioner's fitness to practise. It is a matter of degree.
- f. The Board's Code of Conduct is a helpful indicator of proper practice and ethical standards required of a social worker. Principle 1 (acting with integrity and honesty) and Principle 5 (maintaining public trust and confidence in the social work profession) are two of the minimum professional standards of behaviour, integrity, and conduct.
- g. The Board's Fit and Proper Person Policy also provides guidance. This Policy also notes that fit and proper people are those in whom the public can have trust and confidence, and who can practise social work safely and effectively. With respect to convictions, the Policy provides that offences towards children or other dependents and serious drug offences are types of convictions which would likely lead a reasonable person to conclude that a person is not fit to practise social work.
- h. The offences were committed in circumstances that reflected adversely on Mr Lumsden's fitness to practise as a social worker. Mr Lumsden was aware of the victim's vulnerability and "fragile state". The victim looked up to Mr Lumsden and she was struggling with addiction at a very young age. While the PCC accepted that Mr Lumsden did not have any malicious intent with respect to his conduct, his actions fell far below the standard expected of a social worker. Rather than providing support and assistance to the victim Mr Lumsden actively encouraged the damaging and illicit use of a serious drug, supplying it to the victim on two occasions and partaking in its abuse alongside her. Having regard to the victim's vulnerability and the position of authority and trust she had in him given his history as her caregiver, Mr Lumsden's actions were the result of "poor judgement and self-gratification". They were harmful actions, which have "undoubtedly had a serious effect" on the victim.

- i. Mr Lumsden’s judgement and decision-making amounted to a significant divergence from the expected standard. Rather than protecting or supporting the victim he encouraged her to engage in harmful and illegal behaviour.
 - j. The facts establish that the convictions and the circumstances of the offending do reflect adversely on the practitioner’s fitness to practise as a social worker and a disciplinary response is warranted.
32. The Tribunal accepted those submissions from the PCC. The Tribunal considered that another circumstance of the offending not emphasised by the PCC was that the offending was premeditated, given that Mr Lumsden had contacted the victim to make the arrangements for the [] weekend.
33. Section 82(1)(c) of the SWR Act refers generically to convictions for an offence punishable by imprisonment for a term of 3 months or longer. No specific offences against specified statutes are referred to in this section of the Act (unlike in the equivalent section in the Health Practitioners Competence Assurance Act 2003). The onus is on the PCC to establish that the convictions reflect adversely on fitness to practise, on the balance of probabilities.
34. The Tribunal was satisfied there could be no doubt that this was serious offending by Mr Lumsden. Extracts from the District Court Judge’s Sentencing Notes demonstrate the seriousness of the conduct and the convictions and include:

“[1] Mr Lumsden, you are 50 years of age so can only be described as a mature person. You have previously been approved by Oranga Tamariki or CYFS as a caregiver so people must have considered you a responsible person. I know that you lost your mother last year and that has taken a toll on the family but what you did on these occasions is hard to understand.

[2] [] what caregiver, albeit not the caregiver of the young person at this time, thinks it is all right to share methamphetamine with someone [], who has suffered the upbringing she had experienced, her vulnerability, fragileness, as I have said it is hard to believe. You should have been helping her rather than feeding her addiction. It is self-gratification to say, “It was better to smoke methamphetamine with me rather than out on the streets”.

[3] You were someone that she looked up to because she spent a considerable time living at your address. You should have been holding out a helping hand rather than a hand loaded with methamphetamine which is only going to cause more destruction and more damage to her.

....

[5] ...The police have identified the following aggravated features. The victim was [], you were 49. That is a significant age difference. []. You were an approved caregiver for her previously. You were aware of her histories and struggle with meth use. You went to [] and spent the weekend binging on methamphetamine and because of her age and health and other issues the police say she was particularly vulnerable and of course this was premeditated because you had contacted her to make the arrangements.

[6] It is acknowledged you pleaded guilty. It is acknowledged that there is no commerciality and that this was shared supply. The police accept that this is a rather unusual case given the breach of trust, the actual supply of methamphetamine which has a maximum penalty of life imprisonment, the harm that that drug does, even to existing users, a sentence of imprisonment should be imposed albeit acknowledging that the least restrictive is likely to be home detention and community work....

....

[11] I have to assess the overall seriousness of your offending. We have to understand the harm that methamphetamine does to users. You should know the addictive qualities. You were supposed to go to [] to your conference and you are running around getting involved in the use of meth and arranging a weekend so you can binge. That tells you how addictive it is and for a young person it will be doing some serious harm to her body.

[12] A sentence of imprisonment is inevitable....

.....

35. A social worker works with people, many of whom are vulnerable and carry significant health and social issues. They often work in unsupervised settings. There is a significant trust placed by clients in the social worker that they will be properly cared for and their interests promoted to the extent necessary for their current needs. They trust the social worker to do what is right for them and they follow the advice given to them or recommendations made in respect of them. That means that the social worker must show self-restraint in his or her own life, and in how they deal with other people. That also means that they must show self-restraint in how they deal with drugs like methamphetamine. That is especially so because people with whom they may be working (clients) may themselves be struggling with addictions and/or issues relating to their exposure to drugs like methamphetamine in their personal and/or family lives.
36. The Tribunal is of the view that when it is considered objectively, Mr Lumsden's conduct reflects adversely on his ability to discharge the ethical and professional obligations towards clients in his professional capacity as a social worker.
37. The Tribunal considers that Mr Lumsden's conduct which resulted in the convictions that have been entered against him is at the most serious end of the spectrum in terms of misconduct which reflects adversely on his fitness to practise as a social worker.
38. For those reasons, the Tribunal had no difficulty in finding the Charge established.

Penalty

39. Satisfied that Mr Lumsden has been convicted by a court in New Zealand of offences that are punishable by imprisonment for a term of 3 months or longer and that the offences were committed in circumstances that reflect adversely on his fitness to practise as a social worker, the Tribunal was able to make penalty orders specified in section 83(1) of the SWR Act. The orders the Tribunal was able to make in this case were:
 - a. An order that:
 - i. Mr Lumsden's registration be cancelled, or his registration or practising certificate be suspended for a period of not more than 3 years; and
 - ii. For a period of not more than 3 years, he may practise as a social worker only in accordance with stated conditions (as to employment, supervision, or otherwise);

- b. An order that Mr Lumsden be censured;
 - c. An order that Mr Lumsden undergo stated additional training, professional development or both;
 - d. An order that Mr Lumsden pay part or all of the costs and expenses of and incidental to:
 - i. Any inquiry made by the PCC in relation to the subject matter of the charge;
 - ii. The prosecution of the charge by the PCC; and
 - iii. The hearing (by the Tribunal).
40. In dealing with a matter that constitutes an offence for which the social worker has been convicted by a court, as Mr Lumsden has, the Tribunal must not impose a fine (section 83(3)).
41. Section 83(1)(ca) provides that the Tribunal may order that the social worker “apologise to the complainant”. There was no “complainant” in this case as the matter was the result of convictions notified to the Board, rather than arising from a complaint.
42. Section 83(2) provides that the Tribunal must not make an order cancelling a social worker’s registration unless it has first considered suspension or the imposition of conditions on the person’s registration or practising certificate.
43. In its submissions the PCC referred to the need for any penalty to be imposed to fulfil the functions of protecting the public and enhancing the professionalism of social workers (section 3(a) and (d) of the SWR Act). Counsel for the PCC agreed with the Tribunal that the imposition of disciplinary penalties have a purpose in the maintenance (and/or setting) of professional standards and there is also a punitive element (although that is much less of a feature in cases where the Tribunal has considered conduct that has already been considered in a criminal court).
44. In addition the PCC referred to the relevant penalty principles identified by His Honour Collins J in *Roberts v Professional Conduct Committee* [2012] NZHC 3354, at [44]-[55], which this Tribunal has adopted as relevant to the sentencing exercise here:
- a. What penalty most appropriately protects the public.
 - b. The important role the Tribunal plays in setting professional standards.
 - c. The penalties imposed may have a punitive function but protection of the public and setting professional standards are the most important factors.

- d. Where appropriate, the rehabilitation of the social worker involved.
 - e. That any penalty imposed is comparable to other penalties imposed on social workers in similar circumstances.
 - f. Assessing the social worker's behaviour against the spectrum of sentencing options available and trying to ensure that the maximum penalties are reserved for the worst offenders.
 - g. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.
 - h. Whether the penalty proposed is fair, reasonable, and proportionate in the circumstances presented.
45. This being the first case the Tribunal has considered involving a charge laid under section 82(1)(c) the PCC's submissions referred to previous decisions where convictions were considered under section 82(1)(b). There are no social worker cases which are directly comparable.
46. Reference was made to a decision of the Health Practitioners Disciplinary Tribunal⁴ where a medical laboratory scientist had been convicted under the Misuse of Drugs Act (supplying (including selling) Class B drugs (oxycodone hydrochloride) to six 17 year old males) resulting in cancellation of her registration. In that case the Tribunal accepted Counsel for the PCC's submission that supplying drugs to young people "reflected adversely on the practitioner's ability to discharge the ethical and professional obligations towards patients in her professional capacity". The Tribunal noted that "the practitioner was at all times in control of the situation and she was the adult who was responsible".⁵ In that case the Tribunal noted previous decisions referred to by the PCC that had involved health practitioners who had received convictions under the Misuse of Drugs Act resulting in censure and cancellation.⁶
47. The PCC submitted that the aggravating features were:
- a. The age and vulnerability of the victim; [teenage], fragile, addicted to methamphetamine, and was vulnerable with a troubled upbringing. Mr

⁴ *PCC v Ms A* (HPDT, 878/MLT16/370P, 9 December 2016) at [21.6].

⁵ Above, fn. 2 at [31.5].

⁶ *Dabous* 695/Phar14/303P (possession of Classes B and C drugs for supply), *Pulman* 375/Phar11/171P (manufacturing methamphetamine); and *Foley* 764/Nur15/311P (unauthorised possession of a drug) where a censure and suspension was ordered.

Lumsden was aware of these matters, having been the victim's former Oranga Tamariki- approved caregiver.

- b. The abuse of trust: as her former caregiver Mr Lumsden was in a position of trust. The victim looked up to him and respected him.
 - c. The potential for harm; noting the well-established harmful effects of methamphetamine (its highly addictive nature with the potential for abuse and for the development of dependence and which can have a range of adverse effects).
48. The Tribunal accepts those are aggravating features. It considers that additional aggravating features are the premeditated nature of the offending and the fact that the victim in fact suffered adverse health consequences from her consumption of methamphetamine on the occasion when she smoked the drug with Mr Lumsden at his home. Further, Mr Lumsden was the adult responsible and whose own addiction experience meant that he knew the dangers inherent in the drug.
49. There is also the feature that Mr Lumsden's offending only came to the light when Police were called to his home on 29 January [] when the victim was suffering from the effects of consuming methamphetamine (as above, she was in a paranoid and aggressive state with a stab wound she had inflicted on herself).
50. The Tribunal is also troubled by Mr Lumsden explanation to the PCC that he was at least partly motivated by a desire to get better drugs for himself. This further indicates that he had little regard to the harm that he was doing to his young victim to whom he supplied the methamphetamine at the times reviewed.
51. The PCC advanced several mitigating factors. In this regard, the Tribunal was referred to the mitigating factors identified by the District Court Judge in his Sentencing Notes and to the transcripts of three interviews conducted by the PCC that were included in the Agreed Bundle. The interviewees were described as "character witnesses" but the transcripts indicate they were interviewed about matters that went beyond Mr Lumsden's character. The interviewees were Mr Mark Noble (a colleague who reported he has known Mr Lumsden for around nine years), Ms Nicola Ssekajja (Mr Lumsden's former manager who has known him since 2016) and Ms Sharon Lumsden-Brown (Mr Lumsden's partner of 16 years). To the extent that character 'evidence' is recorded in the transcripts, the Tribunal has had regard to those transcripts, but not otherwise given

their hearsay nature. The Tribunal wishes to signal that if character information is to be produced it should be other than in the transcript of an interview conducted by the PCC that is not the subject of any sworn evidence. A formal letter of reference would be more appropriate.

52. The 'character evidence' can be summarised by stating that those interviewed by the PCC were positive about Mr Lumsden's competence to practise social work and saw him as a mentor with great potential provided he continued to work towards sobriety.
53. The mitigating factors referred to by the PCC were:
 - a. Mr Lumsden's own history of substance abuse, including methamphetamine abuse.
 - b. Mr Lumsden was struggling with the death of his mother.
 - c. The offending was not malicious, and it was not commercial, and was committed when Mr Lumsden was himself addicted to methamphetamine.
 - d. Mr Lumsden took steps after being charged to address his drug abuse issues. He pleaded guilty and accepted the facts in the criminal jurisdiction. He kept the Board updated of the charges and the Court process. He cooperated fully with the PCC investigation (including being interviewed).
 - e. Mr Lumsden no longer abuses drugs or alcohol. He has completed his sentence. He continues to attend Narcotics Anonymous meetings.
 - f. He has the support of pro-social family and colleagues, including his former manager who considers that the conduct would not prevent him from working again.
 - g. Mr Lumsden has demonstrated "remorse and humility" for his actions.
 - h. Mr Lumsden is currently suffering ill-health. In this regard Mr Lumsden told the Tribunal he has an aggressive cancerous tumour.
54. It was submitted for the PCC that as Mr Lumsden's offending was driven by a methamphetamine addiction, rather than financial or malicious reasons, the PCC did not consider that cancellation of Mr Lumsden's registration was appropriate or justified. It was submitted that this was a case where an appropriate outcome would be a censure and conditions (which would combine "rehabilitative and punitive factors aimed at both assisting him to address and resolve his addiction issues, as well as marking the conduct as serious and providing a deterrent effect"). The conditions suggested were

“maintaining continued attendance at Narcotics Anonymous or similar, and submit to hair follicle testing at the Board’s request”, “making a full disclosure on any application for employment as to the conviction and addiction” and “undergo two years’ supervised practice”. When questioned by the Tribunal about the conditions suggested, Counsel indicated that as part of the two years’ supervised practice there should be six monthly reporting to the Board (by the supervisor), and any drug testing should be at the Board’s request, with the condition to remain in effect for a period of three years. When asked who should be expected to fund the cost of a supervisor, Counsel submitted that this should be for Mr Lumsden or his employer.

55. No submissions were made by Mr Lumsden as to penalty however he did address the Tribunal. He told the Tribunal that he accepts that what he did was wrong and said that he “fully apologises to everyone”. He said he accepts that “things need to be put in place for me”, in terms of his rehabilitation. The Tribunal wishes to record its gratitude to Mr Lumsden for the genuine apology he expressed for his conduct, and for his appearance before the Tribunal at the hearing in what were clearly difficult circumstances for him in terms of his health and hospital admission.

Discussion

56. Taking all factors into account the Tribunal considered that the convictions it has reviewed in this case and the circumstances of the offending are at the most severe end of the spectrum in terms of conduct on the part of a registered social worker that requires disciplinary sanction.
57. The Tribunal has carefully considered whether there are any alternatives to cancellation of registration which would achieve the objectives of protecting the public and maintaining the standards of the social work profession. The Tribunal has concluded that there are no alternatives to cancellation of registration. Under no circumstances can conduct of the nature Mr Lumsden has engaged in and been convicted for, be tolerated in the social work profession. The public requires protection from Mr Lumsden and a strong message must be sent to other social workers that supplying a seriously harmful drug like methamphetamine to a young person will not be countenanced.
58. The Tribunal therefore orders cancellation of Mr Lumsden’s registration.

59. The Tribunal was statutorily required to first consider suspension or the imposition of conditions on the person's registration or practising certificate before it decided to make an order cancelling Mr Lumsden's registration. It did so. The Tribunal accepts that cancellation of registration should not be ordered if an alternative penalty can achieve the objectives sought. Rehabilitation of the social worker is a factor requiring careful consideration. The Tribunal must balance protection of the public and the maintenance of professional standards with the need to express its disapproval about the convictions in question and deter the social worker and other social workers from engaging in similar conduct.
60. In terms of rehabilitation the Tribunal was concerned that no independent evidence was put before the Tribunal about the steps Mr Lumsden is said to have taken to address his addiction issues, and the outcome of those steps. For example, there was no material from Narcotics Anonymous to verify that Mr Lumsden had engaged and was continuing to engage with that entity, or what attendance involved. Mr Lumsden told the Tribunal that his engagement with Narcotics Anonymous broke down due to Covid-19 and he mentioned 'online support' since then. Mr Lumsden told the Tribunal that he has had formal drug and alcohol counselling as part of the service of his sentence for his convictions, but not otherwise.
61. While the parties had agreed Mr Lumsden has been drug-free since his offending the Tribunal did not consider it was able to be satisfied sufficiently as to the steps Mr Lumsden has taken, and his drug-free status. This was in circumstances where there was information in Mr Lumsden's PCC interview transcript that indicated he had managed to hide his addictions from his employer. Mr Lumsden told the Tribunal that he accepted his drug-free lifestyle was relatively recent and short term when considered against his lengthy period of addiction from a young age.
62. In any event, the Tribunal did not consider it was in a position to be able to assess what may have been appropriate conditions to impose on practice were the Tribunal to reach a view that a suspension and conditions on practice would be an appropriate penalty response.
63. In addition to an order cancelling Mr Lumsden's registration the Tribunal also makes an order censuring him as a permanent record of the Tribunal's disapproval of the conduct

which led to the convictions that were entered against him, and the seriousness of those convictions.

64. Should Mr Lumsden ever intend to seek a return to the social work profession then he will be able to make an application for registration to the Board. Any such application would have to take account of the censure and cancellation orders which the Tribunal is ordering in these proceedings, the two convictions that were entered against Mr Lumsden and the factual circumstances of the offending. Further, there would also be a need to take account of matters that Mr Lumsden may advance to the Board, as the registration authority, that there is no possibility he will reoffend, that the public is adequately protected and that social work standards will be maintained.

Costs

65. The PCC sought an order of costs, having referred to relevant principles⁷ including that
- a. The full cost of investigating and prosecuting a social worker should not fall on the social work profession (as a whole).
 - b. Members of the profession who appear on disciplinary charges should make a proper contribution towards the costs of the investigation, prosecution, and the hearing.
 - c. Costs are not punitive.
 - d. A social worker's means, if known, are to be considered.
 - e. A social worker has a right to defend himself or herself and should not be deterred by the risk of a costs order; and
 - f. 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.
66. The PCC indicated that the reasonable costs incurred for its investigation and prosecution of the Charge totalled \$9,702.53. It was indicated that a contribution was not sought to the additional legal fees that the PCC incurred because of seeking external legal advice during the investigation. The costs for the Tribunal were estimated to be \$7,444.00.

⁷ *Cooray v Preliminary Proceedings Committee* AP23/94, 14 September 1995, Doogue J; *Vatsyayann v PCC* [2012] NZHC 1138.

67. The PCC submitted that the costs in this case are “relatively modest” partly due to Mr Lumsden’s cooperation with the investigation. It was also submitted that having served a sentence of home detention and being on a sickness benefit, Mr Lumsden has been unable to work. It was submitted that those matters should be taken into account by the Tribunal when considering the issue of costs.
68. Mr Lumsden told the Tribunal that after he lost his job with Family Works Northern in 2018, his wife was involved in an accident and she lost her job. Both he and his wife are sickness beneficiaries. Mr Lumsden said he and his wife look after two of their grandchildren and he told the Tribunal that they struggle financially. Mr Lumsden disclosed that he has money in his Kiwisaver however because of his current health status (his aggressive cancer) he is hoping to ensure that these funds will be available for his wife and whānau for the future.
69. It was clear to the Tribunal that a costs order would have a significant impact on Mr Lumsden and his whānau having regard to their current circumstances. In addition to the matters identified by Mr Lumsden the Tribunal envisages that there will likely be day to day to costs incurred that are associated with his current ill-health and treatment.
70. All matters considered, the Tribunal is of the view that in the unique circumstances of this case, Mr Lumsden should not be ordered to pay a contribution toward the costs that have been incurred by the PCC and the Tribunal.
71. Had the combination of circumstances relating to Mr Lumsden’s current financial means and health situation not been present then the Tribunal would have made an order requiring him to contribute towards the costs of both the PCC and the Tribunal, in the usual way.

Non-publication order

72. The Tribunal is satisfied that is desirable to make permanent the interim order that has been in place in respect of the name of Mr Lumsden’s victim, her address and occupation and age. Having regard to her privacy interests there is no public interest in her name being published in connection with these proceedings. Accordingly, there will be a permanent order to that effect pursuant to section 79(2)(d) of the SWR Act.

73. Mr Lumsden did not seek an order prohibiting publication of his name. He does not have name suppression in relation to the criminal proceedings he has faced, and it is in the public interest that his name is able to be published in connection with these disciplinary proceedings.

Result and Orders

74. The Charge against Mr Lumsden is made out under section 82(1)(c) of the SWR Act.
75. Mr Lumsden's registration as a social worker is cancelled (section 83(1)(a)(i)).
76. Mr Lumsden is censured (section 83(1)(b)).
77. There is to be an order for non-publication of the name, address, occupation, and age of Mr Lumsden's victim (section 79((2) (d))).
78. The Tribunal directs the Hearing Officer to request the Board Registrar 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 Wellington this 30th day of October 2020



Jo Hughson

Chairperson

Social Workers Complaints and Disciplinary Tribunal