

Social Workers Complaints and Disciplinary Tribunal

Social Workers Registration Act 2003

BEFORE THE SOCIAL WORKERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

REF RSW11/D3/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 JUBERT MOEKE** of Papamoa Beach, registered
social worker
Practitioner

HEARING held by audio visual link on Monday, 1 March 2021

MEMBERS Ms J C Hughson (Chairperson)
Ms S Hunt, Ms A McKenzie, Ms T Robinson (registered social
workers)
Mr W McCarthy (layperson)

Ms G Fraser (Hearing Officer)

APPEARANCES Mr M K Regan for the Professional Conduct Committee
No appearance by or for the practitioner

Introduction

1. Mr Moeke is a registered social worker who fully registered with the Social Workers Registration Board on 20 April 2018.¹ He had completed a Bachelor of Social Work (Biculturalism in Practice) at Te Wānanga o Aotearoa. Mr Moeke began working as a social worker at Te Rūnanga O Ngāi Te Rangi Iwi Trust (Trust) on 10 June 2019. Prior to that he worked at Te Puna Hauora.² Independent of his position with the Trust, Mr Moeke also held part-time employment as a Lay Advocate based in the Tauranga Youth Court.
2. The Professional Conduct Committee charged that between 5 July 2019 and 11 September 2019, Mr Moeke sent inappropriate messages – via Facebook Messenger – to a 14-year-old girl (YG) who was enrolled in a programme for [] run by the Trust³. It was alleged that at the time Mr Moeke was employed by the Trust as a social worker and that he worked on the programme the young girl was attending.
3. This conduct was alleged to amount to professional misconduct pursuant to section 82(1)(a) of the Social Workers Registration Act 2003 (the SWR Act/the Act) or alternatively, conduct that is unbecoming of a social worker and reflects adversely on Mr Moeke’s fitness to practise pursuant to section 82(1)(b)) of the Act.
4. Further particulars of the disciplinary charge (the Charge) alleged that the nature and extent of Mr Moeke’s conduct breached all or any of Principles 1, 5, 7, 9 and/or 10 of the Code of Conduct applying to social workers.⁴
5. The allegations were first notified to the Social Workers Registration Board (the Board) in a mandatory report from the Chief Executive of the Trust, Mr Paora Stanley, which was received by the Board on 28 November 2019.⁵ The matter was then referred to a Professional Conduct Committee (PCC) appointed by the Board. The Board notified Mr Moeke of its decision to suspend his practising certificate pending completion of the PCC’s investigation. The PCC investigated the matter and laid the Charge before the Tribunal. By Order dated 20 October 2020 the Tribunal (separately constituted)

¹ Agreed Summary of Facts (ASF) at [2] and public register entry, Social Workers Registration Board.

² ASF at [3].

³ Disciplinary Charge dated 23 September 2020.

⁴ Issued by the Social Workers Registration Board pursuant to section 105 of the Act. March 2016 version.

⁵ Mandatory report pursuant to section 47A of the Act.

suspended Mr Moeke's registration pending determination of the Charge.⁶ The Tribunal was satisfied that there were reasonable grounds to believe that it was necessary and desirable in the public interest to make the Order.

Hearing

6. The Charge was heard by audio visual link (AVL). The PCC was represented by Counsel. Mr Moeke did not attend the hearing although prior to the hearing he had signed an Agreed Summary of Facts and he had also filed written submissions and documentation relevant to his then current financial situation.
7. There was produced to the Tribunal the Agreed Statement of Facts as well as a Bundle of Documents. The Bundle contained email correspondence between New Zealand Police and the PCC, other relevant Police documents and information pertaining to the Trust's internal investigation into the allegations prior to the mandatory report to the Board. Also included in the Bundle were character references from K Bliss⁷ and Tere Strickland⁸, for Mr Moeke. Those referees confirmed they had known Mr Moeke through the Pāpāmoa Bulldogs Rugby League Club. The Tribunal noted that there was no indication given in the references that the referees were aware of the Charge and/or the allegations in the Charge.

Legal Principles

Onus and standard of proof

8. The onus of proof of the Charge rested on the PCC.
9. As to the standard of proof, the appropriate standard was proof to the reasonable satisfaction of the Tribunal on the balance of probabilities (rather than the criminal standards). This is a static standard. However, as the seriousness of an allegation rises, so does the cogency of the evidence required to satisfy the standard⁹.

⁶ Order for Interim Suspension of Registration dated 20 October 2020.

⁷ Letter to whom it may concern dated 13 November 2020.

⁸ Letter to whom it may concern dated 9 August 2020.

⁹ Letter to whom it may concern dated 13 November 2020.

Purposes of disciplinary proceedings

10. The primary purpose of the SWR Act is to provide mechanisms for the protection of the public and the maintenance of professional standards by ensuring that social workers are competent and accountable for the way in which they practise.¹⁰ A further purpose is to “enhance the professionalism of social workers”.¹¹ The disciplinary regime in Part 4 of the Act is one of the mechanisms designed to achieve these purposes.
11. It is well established that the purposes of professional disciplinary proceedings are to enforce a high standard of propriety and professional conduct, to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question, to protect both the public and the profession itself against persons unfit to practise, and to enable the profession, as a body, to ensure that the conduct of its members conforms to the standards generally expected of them.¹² In addition, there is a punitive element. This is reflected in the Tribunal’s power in section 83 to impose certain penalties when a practitioner has been found guilty of a disciplinary offence under section 82 of the Act.¹³

Grounds for discipline under the SWR Act

12. Section 82 of the SWR Act sets out the grounds on which the Tribunal may make an order under section 83. Two of those grounds are where the Tribunal is satisfied the social worker has been guilty of professional misconduct (section 82(1)(a)) or has been guilty of conduct that is unbecoming of a social worker and reflects adversely on the social worker’s fitness to practise as a social worker (section 82(1)(b)).

Professional misconduct

13. Section 82(2) of the Act provides that a social worker is guilty of professional misconduct if he or she, relevantly, breaches the Code of Conduct (section 82(2)(a)) or commits an act or omission that, in the opinion of the Tribunal, has brought or is likely to bring discredit to the social work profession (section 82(2)(d)).

¹⁰ SWR Act, section 3(a).

¹¹ SWR Act, section 3(d).

¹² *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 at 724.

¹³ For example, the power to fine (section 83(1)(c)), and order a censure (section 83(1)(b)). These penalties are also aimed at protecting the public and enhancing professionalism by acting as deterrents and holding social workers to account for their actions.

14. In previous decisions the Tribunal has adopted a two-step approach to assessing professional misconduct:
 - a. The first step requires an objective analysis of whether the social worker's acts or omissions can reasonably be regarded by the Tribunal as constituting a breach of the Code.
 - b. The second step requires the Tribunal to be satisfied that the social worker's acts or omissions require disciplinary sanction for the purposes of protecting the public and/or enhancing the professionalism of social workers. This step is commonly referred to as the "threshold".
15. As to the threshold step the Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal*¹⁴ expressed the issue being that 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."¹⁵ The Court endorsed the earlier statement of Elias J (as she was then) in *B v Medical Council*¹⁶ that "the threshold is inevitably one of degree". In that decision Elias J held that the relevant conduct must be measured against the standards of "competent, ethical and responsible practitioners".
16. It was submitted for the PCC that the threshold step "should not be overstated in the context of section 82(2)(a) of the Act, which firmly places the focus of the enquiry on the first stage: whether there has been a breach of the Code of Conduct". Counsel rightly pointed out that this is a difference between professional misconduct under the Health Practitioners Competence Assurance Act 2003 (where there is a two-stage assessment required when assessing this) and under the SWR Act. While not having to concern itself significantly with the issue of threshold in this case (for the reasons outlined below), the Tribunal wishes to signal that it does not consider that in every instance where there has been a breach of the Code of Conduct the conduct will be sufficiently serious to warrant a finding of professional misconduct for the purposes of section 82(1)(a).

¹⁴ [2005] 3 NZLR 774 (CA)

¹⁵ Above fn. 14 at [80].

¹⁶ [2005] 2 NZLR 810.

17. The two-stage test for professional misconduct is an objective one and does not allow the Tribunal to consider matters personal to the practitioner in any significant way.¹⁷ Personal factors may be given full consideration at the penalty stage.

'Conduct unbecoming'

18. The Tribunal has in previous decisions adopted a similar two-step approach to the assessment it is required to make of whether established conduct amounts to 'conduct unbecoming' for the purposes of section 82(1)(b):
- a. The first step involves an objective analysis of whether the social worker's acts or omissions can reasonably be regarded by the Tribunal as constituting conduct unbecoming of a social worker.
 - b. The second step requires the Tribunal to be satisfied that the social worker's acts or omissions reflect adversely on the social worker's fitness to practise as a social worker, and therefore require sanction for the purposes of protecting the safety of the public and/or enhancing the professionalism of social workers.
19. As to the 'reflects adversely on fitness to practise' rider, it is not necessary that the proven conduct conclusively demonstrates that the social worker is unfit to practise; that is, the Tribunal is not required to find that in fact the social worker is not a fit and proper person to practise social work. The conduct will need to be of a kind that is inconsistent with what might be expected from a social worker 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 social worker's fitness to practise. It is a matter of degree.¹⁸
20. These approaches to the Tribunal's assessment of professional misconduct and 'conduct unbecoming' recognise that it cannot be that every departure from accepted professional standards or every unwise or immoral act by a social worker in his or her professional or personal life should amount to professional misconduct for the purposes of section 82(1)(a), or 'conduct unbecoming' for the purposes of section 82(1)(b).

¹⁷ *Cole v Professional Conduct Committee of the Nursing Council* [2017] NZHC 1178, at [126]-[130].

¹⁸ This was the approach adopted by the Tribunal in *CAC v Going* RSW8/D1/SWDT/2016, 20 December 2016, at [31] and in terms of the rider, adopting the Medical Practitioners Disciplinary Tribunal's approach in *Dr Zauka* MPDT, 236/03/103C, 17 July 2003.

Relevant standards and the Code of Conduct

21. Guidance as to the relevant standards that apply to the conduct of social workers can be found in the Code of Conduct issued by the Board pursuant to section 105 of the Act. The March 2016 version of the Code of Conduct applied in relation to the conduct the Tribunal reviewed in this case.¹⁹ The Code is a guide to the minimum standards expected of social workers and extends beyond professional practice to personal conduct and integrity.²⁰ The Code also serves as a means by which clients and the public can know the standards of conduct that they can reasonably expect from social workers. In short, the Code is a helpful indicator of proper practice and ethical standards expected of social workers.
22. Relevantly:
- a. **Principle 1 (Act with integrity and honesty)** requires social workers to act ethically in all personal and professional behaviour and to communicate in an appropriate way.²¹
 - b. **Principle 5 (Protect the rights and promote the interests of clients)** requires social workers to maintain personal and professional boundaries and not form inappropriate relationships with clients.²²
 - c. **Principle 7 (Respect the client’s privacy and confidentiality)** requires social workers to protect the privacy of clients’ personal information and to treat information gained in the course the social worker/client relationship as confidential information and use it for professional purposes only.²³
 - d. **Principle 9 (Maintain public trust and confidence in the social work profession)** requires social workers to maintain a high standard of professional and personal behaviour and to avoid activities that may in any way bring the social work profession into disrepute.²⁴ Principle 9.1

¹⁹ Bundle of Documents, pages 42-75.

²⁰ The Preamble to the Code notes that “[b]ecause they are in positions of trust and confidence [registered social workers] must also have high standards in their personal lives”.

²¹ Code of Conduct at [1.1] and [1.5], Bundle at p 46.

²² Code of Conduct at [5.8], Bundle at p 56.

²³ Code of Conduct at [7.1] and [7.2], Bundle at p 62.

²⁴ Code of Conduct [1.1], Bundle at p 67.

specifies that the same standards of conduct are expected when using social media and electronic forms of communication.

- e. **Principle 10 (Keep accurate records and use technology effectively and safely)** requires social workers to keep clear and accurate records, and for those records to be made contemporaneously.²⁵ Further, the expectation is that social workers are aware of the dynamics, advantages, and limitations of technology-based interactions and in particular, to set and maintain clear and appropriate personal and professional boundaries in all forms of communication, including online communications.²⁶

Facts

- 23. The Tribunal was satisfied the following facts were established on the evidence before it and therefore, that the conduct alleged in the Charge was proved.²⁷
- 24. In November 2019 a 14-year-old-girl (YG) – who was enrolled in a programme [] run by the Trust²⁸ – disclosed to a social worker at the Trust that Mr Moeke had been sending her inappropriate messages via Facebook Messenger (messages).
- 25. The messages YG complained of were sent by Mr Moeke between 5 July and 11 September 2019. A complete copy of the messages was produced to the Tribunal.²⁹
- 26. YG would often not respond to Mr Moeke’s messages, but he persisted with his messaging regardless.
- 27. Among other things, the messages show Mr Moeke:
 - a. Asking YG about the programme she was attending.
 - b. Providing YG with information about other young people on the programme (including revealing the fact of another young person having a court appearance)
 - c. Ending many of his messages to YG with “xxx”.
 - d. Referring to YG as “bub”, “babe”, “cheeky bum” and “hun”.

²⁵ Code of Conduct [10.1] and [10.2], Bundle p 69.

²⁶ Code of Conduct [10.6], Bundle p 69.

²⁷ ASF signed on 23 November 2020 by Mr Moeke and Counsel on behalf of the PCC.

²⁸ This was a [] programme.

²⁹ Bundle of Documents, Tab 1.

- e. Responding to YG when she told him she was “stoned” or “smoking cones” by saying “that’s cool” or “nice”.
 - f. Asking YG questions about where she would be staying the night and whether she was alone.
 - g. Inviting YG to go to the movies with him and “catch up” in the evening.
 - h. Saying to YG “[I] miss seeing you” and “you can hug me now”.
 - i. Asking YG who else could see her screen (as they were messaging one another).
 - j. Telling YG that he wouldn’t mind seeing her a lot more and had noticed her looking at him.
 - k. Saying to YG that he wished she was older so that he could date her, and that he would ask her out if she wasn’t attending the course.
28. At the time he sent the messages, Mr Moeke was employed by the Trust as a social worker and worked on the programme YG was attending.
29. In his role with the Trust, Mr Moeke did not make any record of the messages between him and YG.

The Charge - discussion

30. At the conclusion of the hearing the Tribunal gave an oral indication of its finding that the established conduct amounted to professional misconduct. The reasons for this finding follow.
31. It was submitted for the PCC that:
- a. Mr Moeke’s conduct was in breach of his obligations under the Code of Conduct and requires disciplinary sanction for the purposes of protecting the safety of the public and/or enhancing the professionalism of social workers.
 - b. Mr Moeke’s conduct breached the Code of Conduct in the following respects:
 - i. Principle 1: by virtue of his communications with YG, Mr Moeke has failed to act ethically.
 - ii. Principle 5: With reference (as an example) to the messages Mr Moeke sent to YG saying he wished she was older so that he

could date her and that he would ask her out if she was not attending the course, Mr Moeke formed an inappropriate relationship with YG.

- iii. Principle 7: in the course of his messages to YG, Mr Moeke failed to protect the privacy of another client's personal information. Specifically, in one message, Mr Moeke told YG about another young person's court appearance.
 - iv. Principle 9: the conduct was in breach of the expectation that social workers avoid activities that may in any way bring the social work profession into disrepute, noting the same standards of conduct are expected when using social media and electronic forms of communication. Mr Moeke's conduct in respect of YG risks bringing the social work profession into disrepute.
 - v. Principle 10: Mr Moeke failed to keep accurate records of his communication with YG. Further, he failed to set and maintain clear and appropriate personal and professional boundaries in his online communications with YG.
- c. There have been clear breaches of the Code and Mr Moeke's behaviour represents a significant departure from the standards reasonably expected of a social worker. With reference to the Tribunal's decisions in *CAC v Harrison*³⁰ and *CAC v Austin*³¹, Mr Moeke's conduct is also sufficiently serious to warrant disciplinary sanction. As such, the conduct was professional misconduct.

32. The Tribunal accepted those submissions from the PCC.

33. Mr Moeke's conduct was a breach of multiple principles of the Code of Conduct. Those breaches were a departure from the conduct that the public and the social work profession would expect of a reasonable social worker, when viewed objectively. The Tribunal was satisfied the breaches were serious and sufficiently so to warrant discipline. There was an emotional blurring of the professional boundary and the words

³⁰ *CAC v Harrison* RSW3/D1/SWDT/2019, 20 February 2020.

³¹ *CAC v Austin* RSW2/D2/SWDT, 9 September 2016.

Mr Moeke used in his text messages to YG were inappropriate emotionally. The references to “xxx”, “cheeky bum”, “bub”, “babe” and “hun” were not appropriate words to use with a vulnerable young (14-year-old) girl. There were direct invitations to meet outside of the professional social worker context including at the movies and indications from Mr Moeke that he wanted to see YG more and would miss her. The Tribunal considered that those messages were indicative of an inappropriate relationship having formed between Mr Moeke and YG.

34. The previous cases referred to by Counsel involved a breach of professional boundaries in the social work profession. They provided some guidance to the Tribunal in terms of assessing the seriousness of Mr Moeke’s conduct, although the Tribunal considered this case on its own facts. The Tribunal considered as relevant factors YG’s age and vulnerability, demonstrated by the fact that she was participating in a [] course run by the Trust. Mr Moeke was or ought to have been aware of YG’s inherent (and actual) vulnerability which called for a need for extreme caution and a strict adherence to professional boundaries. It was Mr Moeke’s responsibility to maintain clear and appropriate personal and professional boundaries in his online communications with YG and by his conduct, he failed to discharge that responsibility over a two-month period. The Tribunal was concerned about what Mr Moeke considers is acceptable and safe practice and had little difficulty concluding the conduct was a serious departure from what is acceptable conduct in the social work profession.
35. The Tribunal considers that given the implicit power imbalance in a social worker-client relationship, and the breach of trust that is involved where there is a breach of professional boundaries, this will likely adversely impact the client involved. Maintaining appropriate professional boundaries is a fundamental skill, obligation, and professional discipline for all social workers. The Tribunal considered that social workers who lack the ability to maintain appropriate professional boundaries step onto a slippery slope of complicated relationships with clients which are likely to be damaging to the client, will be confusing, and may result in even more serious misconduct. There is the potential for mutual emotional dependency to arise. In the worst cases sexual relationships can develop. Social workers like Mr Moeke who are involved in delivering courses or providing professional services to vulnerable clients, particularly youth, cannot be ‘friends’ with those clients.

36. Further, a social worker's professional obligations do not end outside the professional social work context. Sending text messages of the nature sent here, via social media to a vulnerable young client, outside of the professional setting, the Tribunal considered to be a serious falling short of accepted standards that apply to members of the social work profession. Considered objectively, they reflect poorly on Mr Moeke and on the profession, and in the Tribunal's opinion, they bring the social work profession into disrepute.
37. The Tribunal noted that in one text exchange, Mr Moeke told YG that he wished she were older so he could date her. YG responded "*ayeeee im juss one of the students that attend the course???*" to which Mr Moeke responded, "*yes but if you weren't attending the course I would ask you*". YG then responded "*ewwww? What the fuck? ayeee...*" Mr Moeke then texted "*don't panic that's why I said if you were older*". YG replied "*...exactly now I won't be able to be comfortable in the same place as you anymore !!!*". The Tribunal was of the view that this exchange indicated that the young girl was trying to put a boundary in place and was very uncomfortable about Mr Moeke's messaging. The young girl should not have been placed in that situation by a social worker.
38. Disclosing in a text message to a vulnerable young person, the details of another young person's participation in criminal proceedings before the Court was a failure to protect the privacy and confidentiality of a client's personal information and a clear breach of privacy. This conduct involved a significant lapse of judgement by Mr Moeke and was a serious departure from acceptable professional standards.
39. The fact that Mr Moeke made no records of his electronic communications with YG in any records held about her by the Trust was concerning. The Tribunal considered it indicated an intention by Mr Moeke to conceal what he knew was conduct that was inappropriate for a social worker. This conduct was unacceptable and was another serious breach of acceptable standards, viewed objectively.
40. Mr Moeke continued to message YG despite his evident knowledge that sending personal text messages of the nature he was sending her was not appropriate. In this regard the Tribunal was concerned about Mr Moeke's text questioning YG who could see her screen as they were messaging each other, and his message that if she were not attending the course, he would ask her out. These messages indicate that Mr Moeke

understood the professional boundary issues at the time of his conduct. The Tribunal considered that in those circumstances Mr Moeke's conduct was deliberate, pre-meditated conduct and as such, viewed objectively, was a grave departure from what is acceptable conduct for a member of the social work profession.

41. In conclusion the Tribunal was satisfied that Mr Moeke breached Principles 1, 5, 7, 9 and 10 of the Code and the breaches were sufficiently serious to warrant discipline.
42. It was for those reasons the Tribunal was satisfied the Charge was established. Mr Moeke's actions amounted to professional misconduct. Having made that finding the Tribunal was not required to go on and consider the Charge as it was laid in the alternative, and it did not do so.

Penalty

43. Having made an adverse finding of professional misconduct, the Tribunal was able to go on and make penalty orders specified in section 83(1) of the SWR Act.

Submissions for the PCC

44. Counsel for the PCC referred to the need for any penalty to be imposed to be consistent with the purposes of the Act. That is, the imposition of disciplinary penalties has a purpose in the maintenance (and/or setting) of professional standards, protecting the public, and there is also a punitive element. Counsel recognised that the most serious penalties of cancellation and suspension of registration are reserved for the most serious cases.
45. In addition, Counsel 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.
46. Counsel referred to Mr Moeke’s response to the allegation in the Charge. In this regard the evidence was:
- a. As a result of YG’s complaint, the Trust’s CEO (Mr Stanley) met with Mr Moeke on 28 November 2019 to discuss YG’s disclosure³².
 - b. At that meeting, Mr Moeke told Mr Stanley that he was part of a “Swingers Chat Group” and that he has inadvertently sent messages intended for that group to YG.³³
 - c. At a further meeting on 4 December 2019, Mr Stanley provided Mr Moeke with a copy of the messages between him and YG.³⁴
 - d. In response, Mr Moeke acknowledged that his behaviour was unacceptable and “careless”. He resigned from his position with the Trust that same day.³⁵
 - e. In addition to carrying out its own investigation into the messages, the Trust referred the message to Police.³⁶
 - f. On 29 November 2019, Detective Constable Karen Millar spoke to YG about the messages.³⁷
 - g. YG confirmed with Detective Constable Millar that Mr Moeke had initiated contact with her via Facebook Messenger and that he had tried to meet her outside of the course on a number of occasions.³⁸

³² ASF at [11]

³³ ASF at [12]

³⁴ ASF at [13]

³⁵ ASF at [14]

³⁶ ASF at [15]

³⁷ ASF at [16]

³⁸ ASF at [17] While considering Mr Moeke’s messages to YG inappropriate, Police concluded they fell short of justifying a criminal prosecution.

h. During the PCC investigation Mr Moeke initially indicated a willingness to engage with the PCC. However, after 31 July 2019 Mr Moeke did not provide any response to the PCC and ceased all communication with it. ³⁹ Mr Moeke re-engaged with the PCC after the Charge was laid on 23 September 2020, and he actively participated in the proceedings including not opposing the PCC's recommendation for interim suspension. ⁴⁰

47. It was submitted for the PCC that given the seriousness of the conduct, the starting point in this case should be one of cancellation. It was submitted, with reference to the penalty orders made in *CAC v Harrison* and *CAC v Austin* that if the Tribunal were satisfied that the matter could be dealt with by way of a penalty short of cancellation, orders of censure and the imposition of conditions⁴¹ together with costs may be appropriate.
48. In *CAC v Harrison* the social worker ran a Waka Ama programme between November 2015 and February 2016 in which a teenage girl (A) participated. Mr Harrison and A had a whakapapa connection and were from the same hapu. During the programme A contacted Mr Harrison about bullying and Mr Harrison assessed her suicide risk as moderate. He continued to contact A over the next few weeks and provided social work services to her during that time. Soon after, Mr Harrison gave A the opportunity to do work experience and gave her a bottle of perfume as a gift and a mobile phone. Over the next two months, Mr Harrison sent A messages that said, "I love you oi" and "I miss you". At no time throughout the period did Mr Harrison seek guidance about the appropriateness of providing social services to A and nor did he request supervision. The Tribunal found that cumulatively the conduct amounted to professional misconduct. In relation to the text messages the Tribunal held that these were unprofessional and had the potential for misinterpretation and for compromising both

³⁹ ASF at [24]

⁴⁰ ASF at [21]-[26]/

⁴¹ The PCC submitted that appropriate conditions pursuant to section 83(1)(b) would be a condition requiring Mr Moeke to be under the supervision of a senior (Board approved) social worker for a period of 2 years, a condition requiring him to undertake a programme in professional boundaries and ethical issues (to be approved by the Board) and a condition that he be required to advise any employer or prospective employer of the proceeding and the Tribunal's decision for a period of 2 years.

the sender and the recipient. The Tribunal found there was no acceptable explanation for Mr Harrison to be texting a teenager to say he loved and missed her. The conduct overall was assessed as a moderate departure from acceptable standards. The Tribunal found a penalty short of cancellation or suspension was appropriate and made an order of censure, an order imposing conditions, and a costs order of \$500.

49. In *CAC v Austin* the social worker had entered an “intense personal relationship” with a client whom she knew was vulnerable and failed to disclose this to a supervisor. This included allowing the client to live at her address after being discharged from her care as a case manager. While there was no alleged sexual conduct, the Tribunal found that the level of contact was significant and showed a close and dependent relationship. The Tribunal found the charge of professional misconduct established and imposed penalties short of cancellation including a censure, the imposition of conditions and a costs order of \$2500.
50. Counsel also referred to a New Zealand Teachers Disciplinary Tribunal case involving a teacher who had formed an inappropriate relationship with a 10-year-old student.⁴² The teacher encouraged the student to form an emotional dependence on her by engaging in Instagram messaging of a personal nature, taking the student home on two occasions, and providing the student with treats including a “onesie”, a soft toy, food, and money. That Tribunal found the conduct was serious misconduct as that term was defined under the Education Act 1989, and ordered a censure, suspension of her practising certificate until conditions were met, and an order that the teacher advise prospective employers of the Tribunal’s decision (and provide a copy of it to them) for a period of 12 months.

Penalty - Discussion

51. Taking all relevant factors into account the Tribunal considered that the conduct it has reviewed in this case and the circumstances of the offending are at the serious end of the spectrum in terms of conduct on the part of a registered social worker that requires disciplinary sanction.
52. The Tribunal considered the aggravating features were:

⁴² *CAC v Teacher* NZTDT 2016/55, 2 November 2016.

- a. The age and vulnerability of the young person involved.
 - b. The potential and likelihood of the young person suffering emotional harm.
 - c. That the conduct was a deliberate breach of professional boundaries and there can be no acceptable explanation for it. Mr Moeke was entirely responsible for the conduct occurring as it did.
 - d. The two-month period in which the conduct occurred.
 - e. The serious nature of the breach of another young person's privacy.
 - f. The concealment of the conduct by virtue of Mr Moeke's failure to make a record of his communications with YG in any records held about her by the Trust.
53. There is also the feature that Mr Moeke's offending only came to the light when YG made a disclosure to another social worker who worked at the Trust.
54. In terms of mitigating factors, the Tribunal had regard to Mr Moeke's written submission to the Tribunal⁴³. In that document Mr Moeke:
- a. Indicated he wished to "sincerely apologise" to YG and he wished to write a formal letter of apology to her and "share that the behaviour was unacceptable and careless".
 - b. He apologised to the Board. He stated that at first (when the mandatory report was made), he had been confident he had support when he felt overwhelmed but when that support ceased, he had had anxiety. He went into a shell and closed everyone out hence he did not accept support that was available to him from others.
 - c. Indicated he has received support (including food and financial support in the form of money for sober driving) from members of his local rugby league club of which he is Chairperson, and from his children.
 - d. He would like to return to working as a social worker but "I know I need to prove too [sic] many that I am capable and strong in fulfilling any requirements".

⁴³ Dated 19 January 2021.

55. Because Mr Moeke did not attend the hearing the Tribunal was unable to hear from him directly. For that reason, the Tribunal placed less weight on the matters raised in his written submission than would have been placed had the Tribunal had the benefit of seeing and hearing from Mr Moeke.
56. The Tribunal also considered the character references in the Bundle. However, because there was no indication the referees were aware of the Charge and/or the allegations in the Charge, only a minimal amount of weight was given to them. K Bliss stated that Mr Moeke is a very caring and passionate person who is always there to help when it is needed, whether emotionally or doing physical work. Further, that he is a “great communicator in everything he does, whether in person, phone or email”. Tere Strickland had known Mr Moeke for 12 months when she gave a reference. Mr Moeke was stated to have demonstrated “great leadership, management, direction and initiative to grow membership of the rugby league club, and wellness programmes and pathways”, “demonstrates an impressive professionalism” and can “handle any situation with professional thoughtfulness and excellence”.
57. Counsel did not submit there were any mitigating factors, and the Tribunal did not consider there to be any factors other than those referred to above.
58. The Tribunal considered that Mr Moeke’s conduct was more serious than the conduct (the text messaging) reviewed in *Harrison*, which was considered to be the most comparable previous Tribunal decision.

Penalty - findings

59. The Tribunal was statutorily required first to consider suspension or the imposition of conditions on the person’s registration or practising certificate before it decided whether to make an order cancelling the practitioner’s registration⁴⁴. It did so.
60. 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

⁴⁴ Section 83(2), SWR Act

its disapproval about the convictions in question and deter the social worker and other social workers from engaging in similar conduct.

61. As was said by the Privy Council in *Dad v General Dental Council* ⁴⁵at [1543]:

Such consequences [cancellation] can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.

62. The Tribunal 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.

63. The Tribunal concluded that there were no alternatives to cancellation of registration.

64. The Tribunal noted Mr Moeke's comment that he knows he needs to prove to many, including himself, that he is "capable and strong" in fulfilling the requirements for being able to work as a social worker.⁴⁶ That statement did not indicate to the Tribunal that Mr Moeke has sufficient insight into the severity and unacceptability of his conduct. Mr Moeke made no reflective statement which may have satisfied the Tribunal of his ability to reflect on his behaviour and the harm he likely caused to a vulnerable young person. In any event, in terms of rehabilitation the Tribunal was concerned that no evidence, independent or otherwise, was put before the Tribunal about any steps Mr Moeke has taken to address his behaviour, and the outcome of those steps, if any. In short, the Tribunal was unable to be satisfied as to the likelihood that Mr Moeke may be rehabilitated. The Tribunal did not consider it was sufficiently able to assess what may have been appropriate conditions to impose on practice, in those circumstances.

65. The Tribunal considered that the public requires protection from Mr Moeke. There is also a need to maintain public confidence in the profession. A strong message needs to be sent to Mr Moeke and other social workers that engaging in behaviour of the nature the Tribunal has reviewed is unacceptable in the profession and indicates that a social worker is unfit to practise. The conduct was a significant departure from acceptable professional standards and eroded the mana of the social work profession. The Tribunal

⁴⁵ Referred to in *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, AP77/02, 8 October 2002, Randerson J) at [31]

⁴⁶ Mr Moeke's written submission, p 2

considered that combination of circumstances was such that greater weight needed to be given to those matters than to the consequences of the imposition of a cancellation order to Mr Moeke.

66. The Tribunal therefore orders cancellation of Mr Moeke's registration.
67. The Tribunal noted that when making an order that the registration of a social worker be cancelled, the Tribunal may fix a date before he or she may not apply for registration again and/or impose conditions⁴⁷ that he or she must satisfy before he or she may apply for restoration to the register.
68. Should Mr Moeke ever wish to return to the social work profession 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 making in these proceedings, the finding of professional misconduct and the factual circumstances of the offending. Further, there would also be a need for the Board, as the registration authority, to take account of matters that Mr Moeke may advance, that there is no possibility he will reoffend, that the public is adequately protected, and that Mr Moeke will maintain social work standards. The Tribunal expects that Mr Moeke would want to at least demonstrate he has undertaken appropriate courses of education or training in the areas of professional boundaries and communication.
69. The Tribunal considered that the Board, as the registration authority, will be best placed to assess whether the time is right to restore Mr Moeke to the register and whether any conditions should be imposed should he successfully re-register and be issued with a practising certificate.
70. For those reasons, the Tribunal did not make any orders as to restoration of registration under section 84 of the Act.
71. In addition to an order cancelling Mr Moeke's registration the Tribunal also makes an order censuring him as a permanent record of the Tribunal's significant disquiet about the conduct which has been reviewed.

Costs

72. The PCC sought an order of costs, having referred to relevant principles⁴⁸ including that:

⁴⁷ Section 84 (2) specifies the conditions that may be imposed.

⁴⁸ *Vatsyayann v PCC* [2012] NZHC 1138.

- g. The full cost of investigating and prosecuting a social worker should not fall on the social work profession (as a whole).
 - h. Members of the profession who appear on disciplinary charges should make a proper contribution towards the costs of the investigation, prosecution, and the hearing.
 - i. Costs are not punitive.
 - j. A social worker's means, if known, are to be considered.
 - k. A social worker has a right to defend himself or herself and should not be deterred by the risk of a costs order; and
 - l. In a general way 50% of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards⁴⁹.
73. The PCC indicated that the reasonable costs incurred for its investigation and prosecution of the Charge totalled \$6,043.20 (excluding GST). The costs for the Tribunal were estimated to be \$8,891.00 (excluding GST).
74. The PCC submitted that the costs in this case were relatively modest partly due to Mr Moeke's cooperation re-engagement with the process once the Charge was laid. It was noted that Mr Moeke is no longer employed in a social work capacity. It was submitted that those are factors that should be taken account of by the Tribunal when considering the issue of costs.
75. In his written submissions Mr Moeke stated that since his practising certificate and registration were suspended (by the Board and the Tribunal in 2020) his finances have been "tight". However, he stated he can make do with what he has "left", and his three children help-out as best they can. Mr Moeke provided some printouts of his bank statements for various accounts. He advised that he has set up various accounts for different payments and for his children when they can deposit money to assist him. The statements provided indicate that Mr Moeke has limited financial means and he is on a Work and Income benefit. As this is a means-tested benefit this likely suggests that Mr Moeke does not have large financial resources. Unfortunately, the Tribunal was not assisted by a declaration of financial means which would have given a more comprehensive picture of Mr Moeke's financial means.

⁴⁹ *Cooray v Preliminary Proceedings Committee* HC Wellington AP/23/94, 14 September 1995, Doogue J.

76. All matters considered, the Tribunal is of the view that Mr Moeke should be ordered to pay a contribution toward the costs that have been incurred by the PCC and the Tribunal. The social work profession should not be expected to meet all the costs of the disciplinary process which has been initiated because of Mr Moeke's own actions. The contribution is to be a reduced contribution having regard to Mr Moeke's financial circumstances, as best they could be ascertained, and to account for the extent to which he has cooperated in these proceedings (although noting that because of his cooperation the total costs incurred will likely have been less). Accordingly, the Tribunal makes an order that Mr Moeke is to pay a contribution of 30% of the PCC's total reasonable costs and expenses of and incidental to its investigation and prosecution, being payment of the sum of \$1,813.00. Further, there will be an order that Mr Moeke is to pay a 30% contribution towards the costs and expenses of and incidental to the Tribunal hearing, being payment of the sum of \$2,667.00.

Non-publication order

77. The Tribunal is satisfied that it is desirable to make permanent the interim order that has been in place in respect of the name of the young person involved in Mr Moeke's offending. Having regard to her privacy interests there is no public interest in her name and any identifying features 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.
78. This order will not extend to the fact that YG was participating in the course Mr Moeke was involved in as a social worker at the Trust and nor will it extend to YG's age. However, the name of the course is to be suppressed as publication may lead to the identification of YG.
79. The interim order suppressing from publication the name and identifying features of three other students who were on the course YG attended will be made permanent pursuant to section 79(2)(d). The names of those students may be recorded in documents that form part of the Tribunals' Record: (Ms N), (Ms H) and (Ms M). It is desirable that the names of these young people are permanently suppressed from publication, to protect their privacy interests.

80. Mr Moeke did not seek an order prohibiting publication of his name. It is in the public interest and therefore desirable that his name can be published in connection with these disciplinary proceedings.

Result and Orders

81. The Charge against Mr Moeke is made out under section 82(1)(a) of the SWR Act. Mr Moeke's conduct was professional misconduct.
82. Mr Moeke's registration as a social worker is cancelled (section 83(1)(a)(i)).
83. Mr Moeke is censured (section 83(1)(b)).
84. Mr Moeke is to pay \$1,813.00 by way of a contribution towards the total costs and expenses of and incidental to the PCC inquiry and the prosecution of the Charge (section 83(1)(e) (ii) and (iii))
85. Mr Moeke is to pay \$2,667.00 by way of a contribution towards the total costs and expenses of and incidental to the Tribunal's hearing (section 83(1)(e)(iv)).
86. There is to be a permanent order for non-publication of the name and identifying features of the young person involved (YG) pursuant to section 79((2) (d)). This order does not extend to the fact that YG was participating in the course Mr Moeke was involved in as a social worker at the Trust. Further, the order will not extend to YG's age. However, the name of the course is to be the subject of the order as publication may lead to the identification of YG.
87. There is to be a permanent order for non-publication of the names and identifying features of three students who were on the course YG attended: (Ms N), (Ms H) and (Ms M).
88. 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 the Board's professional publication to members of the social work profession.

DATED at Wellington this day of April 2021

Jo Hughson

Chairperson

Social Workers Complaints and Disciplinary Tribunal

