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DECISION NO: **14/Nur/05/06P**

IN THE MATTER of the Health Practitioners Competence Assurance Act 2003

-AND-

IN THE MATTER of a charge laid by pursuant to Section 91(1)(b) of the Act against **STEPHEN DERECOURT,** Nurse, of Tauranga

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Dr D B Collins QC (Chairperson)

Dr M Bland, Dr R De Luca, Ms J Kilpatrick and Ms T Campbell (Members)

Ms R Devore (Executive Officer)

Ms H Hoffman (Stenographer)

HEARING: Held at Wellington on 13 July 2005

APPEARANCES: Mr M McClelland and Ms C Prendergast for

Mr C Tuck for Mr Derecourt

Introduction

1 Mr Derecourt is a registered nurse. He lives in Tauranga.

2 On 12 April 2005, a Professional Conduct Committee ("PCC") laid a charge of professional misconduct against Mr Derecourt with the Tribunal. The details of the charge are explained in paragraphs 8 and 9 of this decision.

3 The Tribunal considered the charge on 13 July 2005 and determined Mr Derecourt was guilty of professional misconduct.

4 The Tribunal announced its decision on 13 July 2005. However, the Tribunal's orders do not take effect until four days after this decision is posted to Mr Derecourt[1].

5 The penalties imposed by the Tribunal are:

5.1 Mr Derecourt's registration as a nurse is cancelled. This order is made pursuant to s.101(1)(a) of the Health Practitioners Competence Assurance Act 2003 ("the Act");

5.2 The majority of the Tribunal recommends Mr Derecourt not re-apply for registration for a period of six months from the date of this decision;

5.3 Before Mr Derecourt applies for re-registration, he must undergo an examination, and if necessary, therapy from either a psychiatrist or psychologist approved by the Nursing Council of New Zealand ("Council"). The purpose of this condition is to enable the Council to be satisfied Mr

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[1] Refer s.103(3) Health Practitioners Competence Assurance Act 2003

Derecourt is a fit and proper person to be reregistered as a nurse. This condition is imposed pursuant to s.102(2) of the Act;

5.4 Mr Derecourt pay 25% of the costs of the Tribunal and PCC associated with the hearing. This order is made pursuant to s.100(1)(f) of the Act.

6 The Tribunal also recommends that if Mr Derecourt is re-registered the Council should carefully assess Mr Derecourt's area of practice to ensure potentially vulnerable patients are not unreasonably exposed to him, bearing in mind the nature of Mr Derecourt's offending.

7 The Tribunal's reasons for its findings and penalties are explained below.

The Charge

8 The charge alleges Mr Derecourt had in his possession objectionable material within the meaning of s.131(1) of the Films, Videos and Publications Classifications Act 1993. The particulars of the charge allege Mr Derecourt had:

> *"1. In his possession two objectionable video recordings containing footage of urination and excrement involved in sexual acts and/or sexual acts involving children;*
>
> *2. In his possession two printouts showing humans involved in sexual acts with animals."*

9 The charge alleges that when viewed separately or cumulatively the particulars, constitute professional misconduct within the meaning of s.100(1)(b) of the Act.

Professional Misconduct

10 Professional misconduct is defined in s.100(1)(b) of the Act to include:

> *"(a) …any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner is registered at the time that the conduct occurred; or*
>
> *(b) … any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practised at the time the conduct occurred: …"*

11 The definition of professional misconduct is modelled on the definition of professional misconduct found in the Nurses Act 1977.

12 Those who drafted s.100(1)(a) and (b) of the Act drew a distinction between:

12.1 Acts and omissions of a health practitioner when discharging their professional activities; and

12.2 Conduct of a health practitioner not related to the discharge of their professional responsibilities.

13 Acts and omissions of a health practitioner when discharging their professional activities can only be considered professional misconduct, if, in the judgment of the Tribunal, the matters complained of amounted to malpractice or negligence.

14 Acts or omissions not associated with a practitioner's discharge of their professional responsibilities can only be considered to be professional misconduct if, in the judgment of the Tribunal, the matters complained of have:

> "*…brought or [were] likely to bring discredit to the profession that the health practitioner practised at the time the conduct occurred*".

15 The term to "*bring discredit to the profession*" was considered by Gendall J in *Collie v Nursing Council of New Zealand*[2] when considering an appeal brought under the Nurses Act 1977. His Honour noted:

> *"To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard for the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned"*.

16 The test as to what constitutes professional misconduct under the Act requires a two step evaluation. In the circumstances of this case, where the charge is brought under s.100(1)(b) of the Act the two steps are:

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[2] Unreported HC Wellington AP300/99, 5 September 2000

16.1 First, an objective analysis of whether or not the health practitioner's conduct can be reasonably regarded by the Tribunal as having brought, or was likely to bring, discredit to the nursing profession.

16.2 Secondly, the Tribunal must be satisfied that the health practitioner's acts or omissions require a disciplinary sanction for the purposes of protecting the public, and/or maintaining professional standards, and/or punishing the health practitioner.[3]

Onus and Standard of Proof

17 The PCC carries the burden of proving the charge.

18 The standard of proof required in professional disciplinary hearings has recently been the subject of discussion at the highest judicial levels.

19 By way of background, Jeffries J in *Ongley v Medical Council of New Zealand*[4] adopted the following passage from *Re Evitt; ex parte New South Wales Bar Association*[5]:

> *"The onus of proof is upon the Association but is according to the civil onus. Hence proof in these proceedings of misconduct has only to be made upon a balance of probability: Rejfek v McElroy[6]. Reference in the authorities to the clarity of proof required where so serious a matter as the misconduct (as here alleged) of a member of the Bar is to be found, is an acknowledgement that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved".*

20 The same observations were made by a full bench of the High Court in *Gurusinghe v Medical Council of New Zealand*[7] where it was emphasised that the civil standard of proof must be tempered "having regard to the gravity of the allegations". A similar observation was reiterated by another full bench of the High Court in *Brake v Preliminary Proceedings Committee*[8]. The Court said:

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[3] Refer *Nuttall 8/Med04/03P paragraphs 57 – 71 and the cases cited therein.*
[4] (1984) 4 NZAR 369
[5] (1967) 1NSWLR 609
[6] [1966] ALR 270
[7] [1989] 1 NZLR 139 at 163
[8] [1997] 1 NZLR 71

> *"The standard of proof is not the criminal standard. The Preliminary Proceedings Committee is required to prove the charge to the civil onus, that is, proof on the balance of probabilities. But the authorities have recognised that the degree of satisfaction for which the civil standard of proof calls, will vary according to the gravity of the facts to be proved: Ongley v Medical Council of New Zealand[9]. The charges against the appellant were grave. The elements of the charge must therefore be proved to a standard commensurate with that gravity."*

21 Numerous other cases have reiterated the test articulated by Jeffries J in *Ongley*. It suffices for present purposes to refer briefly to:

21.1 *M v Medical Council of New Zealand*[10]*:*

> *"The onus and standard of proof is upon the [respondent] but on the basis of a balance of probabilities, not the criminal standard, but measured by and reflecting the seriousness of the charge."*

21.2 *Cullen v Medical Council of New Zealand*[11]*:*

> *The MPDC's legal assessor, Mr Gendall, correctly described the [standard of proof required in medical disciplinary proceedings]*
>
> > *'[The] standard of proof is the balance of probabilities. As I have told you on many occasions, where there is a serious charge of professional misconduct you have got to be sure. The degree of certainty or sureness in your mind is higher according to the seriousness of the charge, and I would venture to suggest it is not simply a case of finding a fact to be more probable than not, you have got to be sure in your own mind, satisfied that the evidence establishes the facts."*

22 In *F v MPDT*[12] William Young J suggested that in medical disciplinary proceedings the standard of proof should be proof beyond reasonable doubt. Three Judges decided that case. William Young J was the only Judge who suggested that disciplinary proceedings should be governed by the standard of proof applicable in criminal proceedings. His Honour approved a recent decision of the Privy Council in

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9 [1984] 4 NZAR 364, 375-376

10 (No 2) unreported HC Wellington, M239/87, 11 October 1990 Greig J.

11 unreported HC Auckland, 68/95, 20 March 1996, Blanchard J

12 CA 213/04, 4 May 2005

Campbell v Hamlett[13] in which their Lordships held that disciplinary proceedings should be decided on the basis of proof beyond reasonable doubt.

23 The Tribunal records its deep respect for William Young J. The Tribunal also observes his comments were not endorsed by the other members of the Court of Appeal. The Tribunal believes that New Zealand courts have universally applied the standard of proof test articulated by Jeffries J in *Ongley* for the past two decades. In these circumstances the Tribunal believes that the New Zealand authorities currently require the Tribunal to assess culpability on the basis of the civil standard of proof, bearing in mind that serious allegations require a high standard of proof.

24 In this case, where the Tribunal has made findings adverse to Mr Derecourt, it has done so because the evidence satisfies the test as to the standard of proof set out in paragraphs 19 to 21 of this decision. The allegations against Mr Derecourt are of a serious nature. Accordingly, the Tribunal has applied a high standard of proof. The Tribunal's adverse findings have only been made where the Tribunal believes the evidence against Mr Derecourt is compelling and in circumstances where the Tribunal is fully satisfied adverse findings must be made.

Preliminary Applications

25 Prior to the hearing, Mr Derecourt applied for orders suppressing publication of his name and any identifying features pending the determination of the charge against him by the Tribunal. In a written decision delivered on 12 July 2005, the Tribunal declined Mr Derecourt's application for interim name suppression.

26 At the commencement of the hearing Mr Tuck, counsel for Mr Derecourt, made an application to have the charge stayed/struck out on the basis that the delays between Mr Derecourt's offending, and the hearing of the disciplinary charge constituted an abuse of process.

27 Mr Derecourt's application to stay/strike out the charge was based upon the following chronology:

27.1 18 July 2001 Mr Derecourt found in possession of the objectionable material;

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[13] [2005] UKPC 19

27.2	17 December 2001	Mr Derecourt charged with four offences under s.131(19) of the Films, Videos and Publications Classifications Act 1993;
27.3	25 February 2002	Mr Derecourt convicted in the Rotorua District Court following guilty pleas. He was fined $750 in relation to each offence. An order for destruction of the documents was also made.
27.4	November 2004	An officer of the Department of Internal Affairs alerted the Council Mr Derecourt had been convicted. This occurred when the Department of Internal Affairs was assisting the Council with inquiries in relation to another nurse who had recently been sentenced to prison for possession of objectionable material.
27.5	14 April 2005	The Tribunal receives the charge from the PCC.
27.6	13 July 2005	Charge to be heard and determined.

28 In his submissions, Mr Tuck accepted Mr Derecourt was not prejudiced by the passage of time from the date of the offending to the date of this charge being heard. Mr Derecourt was not prejudiced because he has always accepted the facts relied upon by the PCC. Mr Derecourt proposed to defend the disciplinary charge solely on the basis that his offending did not merit the imposition of a disciplinary finding. Mr Tuck's fundamental submission was that the delay was unfair because there was a risk the Tribunal might judge Mr Derecourt by present day standards, and not by having regard to the standards applicable in July 2001.

29 After hearing submissions from both counsel, the Tribunal carefully considered the application to stay/strike out the charge but resolved that this application had to be dismissed. The Tribunal will now briefly explain its reasons for reaching that conclusion.

30 The leading cases on the principles applicable to stay/strike out on the grounds of delay involve criminal prosecutions. Disciplinary proceedings are not criminal

prosecutions.[14] The High Court has however recognised a disciplinary body such as the Tribunal has jurisdiction to stay/strike out proceedings because of delay.[15] Both counsel correctly submitted the Tribunal has the jurisdiction to regulate its own process[16] and to stay/strike out a charge if it is satisfied the practitioner suffered either specific or general (presumptive) prejudice.[17]

31 The Tribunal considered whether there was any evidence of specific prejudice to Mr Derecourt occasioned by the delays that have occurred in this case. The Tribunal could find no evidence of specific prejudice particularly because Mr Derecourt has accepted the facts alleged by the PCC. The absence of any factual dispute negates any concern Mr Derecourt may have suffered specific prejudice.

32 In examining the question of presumptive prejudice the Tribunal considered two matters:

32.1 The fact Mr Derecourt accepts the facts alleged by the PCC;

32.2 The time lapse between the date of the offending and the hearing of the charge.

33 In the Tribunal's view, the matters raised by Mr Tuck do not give rise to a serious suggestion of presumptive prejudice. Mr Tuck was most concerned the Tribunal not unfairly judge Mr Derecourt by applying standards applicable to today, as opposed to the time of the offending. The Tribunal assures Mr Derecourt that he has been judged on the basis his offending occurred in July 2001. Indeed, as will become apparent later in this decision, Mr Derecourt has benefited from the delay because the Tribunal has recommended Mr Derecourt not apply for re-registration for a period of six months. This is a far lesser period than might otherwise have been recommended. This recommendation reflects in part the delays that have occurred in this case.

Background Facts

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[14] *Re A Medical Practitioner* [1959] NZLR 782*; Gurusinghe v Medical Council of New Zealand* (supra); *Guy v Medical Council of New Zealand* [1995] NZAR 67.

[15] *E v MPDT* (unreported) HC Wellington, 190/99, 24.4.01 Goddard J; *Ford v MPDT* (unreported) HC Wellington, CP268/01, 18.2.02 Gendall J

[16] Clause 5, Schedule 1 of the Act

[17] Refer *W v R* (1998) 16 CRNZ 33

34 Mr Derecourt accepted the evidence of Mr Chovhan, an Inspector employed by the Department of Internal Affairs. Mr Chovhan explained in an affidavit that in August 2000, the Department seized objectionable material from an address in New Plymouth. The documents seized included correspondence from Mr Derecourt explaining he had in his possession “animal, bondage and [urination] material”. A search warrant was executed at Mr Derecourt’s address in Rotorua. Twenty video recordings and two printouts were seized. Of the twenty video recordings seized, two were classified as objectionable as they contained footage of urination and excrement involved in sexual acts and sexual acts involving children as young as 6 years of age. The two printouts showed humans involved in sexual acts with animals.

35 When Mr Derecourt was interviewed, he admitted possession of the objectionable material. Mr Chovhan’s evidence was Mr Derecourt stated:

> *“…he had in his possession two or three video recordings containing golden showers, bondage and discipline, [excrement] and twenty minutes of kiddie porn. He knew child sex was illegal but held on to the video recording as he liked the bondage and discipline in the beginning of the video”.*

Finding of Professional Misconduct

36 The material found in Mr Derecourt’s possession was highly offensive, degrading and injurious to children. It is totally unacceptable for any health professional to possess material of the kind found in Mr Derecourt’s home in July 2001. The Tribunal finds it utterly repugnant for a nurse to have in their possession material depicting sex with children.

37 Members of the nursing profession are dedicated to the care and well being of patients and others in our community. Mr Derecourt’s conduct completely offends these fundamental objectives of nursing.

38 By any analysis Mr Derecourt’s actions brought or were likely to bring discredit to the nursing profession.

39 The Tribunal accepts Mr Derecourt has already been punished in the District Court. However, his conduct was very serious, and so far removed from the standards

expected of a nurse that a disciplinary sanction must be imposed for the purposes of maintaining professional standards and protecting the community.

40 The Tribunal accordingly, has no hesitation in concluding the accepted facts constitute professional misconduct within the meaning of s.100(1)(b) of the Act.

41 The Tribunal records that each particular of the charge constitutes professional misconduct. In these circumstances, it is not necessary to make any cumulative finding in relation to the two particulars of the charge. The penalties imposed are cumulative penalties and relate to both findings of professional misconduct.

Penalty

42 Mr Tuck urged the Tribunal to be lenient. He emphasised that:

42.1 The offending occurred four years ago;

42.2 Mr Derecourt admitted the charges laid in the District Court;

42.3 Mr Derecourt admitted the factual basis of the charge laid by the PCC;

42.4 Mr Derecourt has been a registered nurse for 25 years and has led an otherwise blameless life;

42.5 Mr Derecourt has continued to work as a nurse until very recently. No issues or concerns have arisen since the events complained of.

43 Mr Tuck explained that at the time of his offending Mr Derecourt worked as a nurse at Lakelands Hospital. He subsequently moved to Tauranga and worked in a private facility until recently. Since this charge has been laid against him, Mr Derecourt has taken a break from nursing and is now working in a restaurant. It is, however, Mr Derecourt's desire to resume practising as a nurse.

44 The Tribunal received evidence which suggests Mr Derecourt has been deeply affected by the laying of this charge against him. He has recently commenced counselling for "grief and depression".

45 Mr Derecourt wrote a letter of explanation to the PCC. That letter was presented to the Tribunal. In that letter Mr Derecourt expressed his deep remorse for his conduct

and stated he was deeply disappointed and embarrassed by his actions. Mr Derecourt explained that since his offending he has worked hard "to clean up [his] act". He also said:

> *"… should the Committee feel that the past mistakes and convictions makes me unfit to practise or of unworthy character I will accept this without question. I live with the consequences of my actions every day of my life and have always believed that when one door closes another one opens".*

46 The range of penalty options available to the Tribunal are set out in s.101 of the Act. The penalties available to the Tribunal are:

46.1 Cancelling Mr Derecourt's registration;

46.2 Suspending Mr Derecourt from practising for a period of up to three years;

46.3 Imposing conditions on Mr Derecourt's ability to practise for a period of up to three years;

46.4 Censuring Mr Derecourt;

46.5 Imposing a fine of up to $30,000;

46.6 An order for costs.

47 The Tribunal notes that s.101(2) of the Act prohibits the Tribunal imposing a fine when dealing with a matter that constitutes an offence for which the practitioner has been convicted by a Court. The Tribunal is of the view that provision prohibits the imposition of a fine in this case.

48 The Tribunal was advised that last year the Council cancelled the registration of a nurse who had been sentenced to nine months imprisonment for five convictions under the Films, Videos and Publications Classifications Act 1993. Those charges related to the downloading, storage and dissemination of pornographic images involving a young boy. When that case was dealt with by the Council, the nurse's registration was cancelled without any recommendation being made as to when the nurse should apply for re-registration. It is reasonably clear that the case dealt with by the Council last year involved more serious offending than occurred in Mr Derecourt's

case. The sentences imposed by the District Court in both cases were vastly different. Those different sentences are most likely explained by different levels of offending.

49 Mr Tuck submitted Mr Derecourt's offending was at the lower end of the scale. He suggested that the sentence imposed by the District Court categorised Mr Derecourt's offending as similar to a speeding offence.

50 The Tribunal finds itself in total disagreement with Mr Tuck's submissions concerning the seriousness of Mr Derecourt's offending. The Tribunal believes Mr Derecourt's conduct was extremely serious, grossly reprehensible and totally unacceptable for a member of the nursing profession.

51 In considering the penalty options available to it, the Tribunal has paid special regard to:

51.1 The fact Mr Derecourt has not previously offended and has had 25 years experience as a nurse without being the subject of any disciplinary action prior to this case;

51.2 Mr Derecourt fully co-operated with the PCC and the Tribunal;

51.3 The offending occurred four years ago;

51.4 Mr Derecourt has suffered grief and depression as a result of being charged by the PCC;

51.5 Mr Derecourt is remorseful and genuinely sorry for his actions;

51.6 The references provided by Mr Derecourt attesting to his generally good character.

52 In normal circumstances, a nurse found in possession of the materials located in Mr Derecourt's house in July 2001 could expect to have their registration cancelled for a very lengthy period.

53 The Tribunal has given careful consideration to imposing a penalty less severe than cancellation of registration. In particular, the Tribunal has reflected on the possibility of suspension, or even conditions being imposed on Mr Derecourt's registration.

However, the Tribunal has concluded Mr Derecourt's offending was so serious that the Tribunal is bound to impose the maximum penalty available under the Act.

54 The Tribunal unanimously concludes Mr Derecourt's registration as a nurse must be cancelled. The Tribunal is however, not unanimous about the minimum time which should pass before Mr Derecourt applies for re-registration. The Tribunal does not have the power to determine how long a practitioner's cancelled registration lasts. Only the Council can determine if Mr Derecourt can be reregistered, and if so, when. The Tribunal can however recommend that the practitioner not re-apply for registration for a defined time. In this case, the majority of the Tribunal believes it appropriate to recommend Mr Derecourt not apply for re-registration until six months after the date of this decision. This recommendation should not be construed as a finite period of cancellation of Mr Derecourt's registration. In reaching this conclusion, the majority of the Tribunal have borne in mind the mitigating factors identified in paragraphs 51.1 to 51.6 of this decision.

55 One member of the Tribunal, Ms T Campbell, believes that Mr Derecourt should not apply for re-registration for at least twelve months from the date of this decision. She records Mr Derecourt's offending as so serious that he should not be permitted to practise as a nurse for at least a year.

56 All members of the Tribunal believe special conditions should be met before the Council consider any application by Mr Derecourt for re-registration. The Tribunal believes it is necessary for Mr Derecourt to be assessed by either a psychologist or psychiatrist approved by the Council and undertake any therapy recommended by that psychologist or psychiatrist before he is re-registered. The purpose of this condition is to ensure that the Council is satisfied Mr Derecourt is a fit and proper person to be re-registered as a nurse. This condition is imposed pursuant to s.100(2)(ii) of the Act.

57 In making an order for costs pursuant to s.100(1)(f)(iii) and (iv) of the Act the Tribunal has borne in mind:

57.1 Mr Tuck's submission his client could meet an award of costs;

57.2 Mr Derecourt has co-operated fully with the PCC and Tribunal thereby reducing the costs of the hearing.

Awards for costs in disciplinary proceedings usually involve the practitioner found guilty paying approximately 50% of the costs of the Tribunal and PCC. In this case, the factors referred to in paragraphs 57.1and 57.2 justify an order Mr Derecourt pay just 25% of the costs of the Tribunal and PCC[18], being $2,390.00.

58 The Tribunal records that if Mr Derecourt is re-registered, the Council should pay special regard to the environments in which he practises so as to ensure potentially vulnerable patients are not put at risk, bearing in mind the nature of Mr Derecourt's offending.

59 Pursuant to s.157(2) of the Act, the Tribunal directs its Executive Officer publish in Kai Tiaki Nursing New Zealand[19] and the Nursing Council Newsletter,[20] a summary of the Tribunal's findings and orders. That summary should include Mr Derecourt's name.

DATED at Wellington this 28th day of July 2005

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D B Collins QC

Chairperson

Health Practitioners Disciplinary Tribunal

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[18] Refer for example to Neuberger v Veterinary Surgeons Board, unreported, HC Wellington AP No. 103/94, 7 April 1996, Doogue J

[19] Journal of the New Zealand Nurses Organisation

[20] Nursing Council Newsletter