



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 408/Nur11/185P

IN THE MATTER of the Health Practitioners Competence
Assurance Act 2003

AND

IN THE MATTER of a Charge laid by a Professional Conduct
Committee pursuant to section 80(3)(b) of
the Health Practitioners Competence
Assurance Act 2003 against **CHRISTINE
BUSHELL**, registered nurse of **Auckland**

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING held at Auckland on 13 September 2011.

TRIBUNAL: Mr David M Carden (Chair)
Dr Annette Harrington, Ms Orana Harris, Ms Chris Taua and Mr
Harry O'Rourke (Members)

Ms G Fraser (Executive Officer)
Ms K O'Brien (Stenographer)

APPEARANCES: Mr M McClelland and Ms C Prendergast for Professional Conduct
Committee the Professional Conduct Committee

The practitioner, Ms Christine Bushell, in person

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The Charge

1. Ms Christine Bushell is a registered nurse. On 30 May 2011 the Professional Conduct Committee (“**the PCC**”) appointed by the Nursing Council of New Zealand pursuant to section 71 of the Health Practitioners Competence Assurance Act 2003 (“**the HPCA Act**”) laid a Charge against Ms Bushell.
2. That Charge read as follows:

*“**TAKE NOTICE** that a Professional Conduct Committee appointed by the Nursing Council of New Zealand pursuant to section 71 of the Health Practitioners Competence Assurance Act 2003 (“the Act”) has determined in accordance with s80(3)(b) of the Act that the complaint about the conduct of Christine Bushell, referred to the Committee pursuant to section 68(1) of the Act should be considered by the Health Practitioners Disciplinary Tribunal. The Professional Conduct Committee has reason to believe that grounds exist entitling the Tribunal to exercise its powers under s100 of the Act.*

Particulars of Charge

1.0 That during the period 12 October 2009 to 27 March 2010, as a registered nurse employed at Selwyn Oaks in Papakura, Ms Bushell ordered 504 tablets of Codeine Phosphate and/or 60 tablets of Zopiclone for patients under her care when she knew or ought to have known that codeine or Zopiclone were not being or had not been administered to these patients, and/or failed to raise concerns about missing Codeine Phosphate and/or Zopiclone tablets and/or a significant increased use of Zopiclone or codeine by these patients. In particular:

Mr Y

- 1.1 On or about 15 December 2009, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 30 mg tablets for Mr Y, bringing the total to 56, when she knew or ought to have known that Mr Y had not been administered any tablets since it was prescribed and/or there should have been 28 tablets already in stock;*
- 1.2 On or about 7/8 January 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate for Mr Y, bringing the total to 82, when she knew or ought to have known that Mr Y had only been administered two tablets on 6 January 2010 and/or that there should have been 56 tablets remaining in stock;*
- 1.3 On or about 22 January 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 30 mg for Mr Y, bringing the total to 110, when she knew or ought to have known that Mr Y had only been*

administered two tablets on 6 January 2010 and/or that there should have been 82 tablets remaining in stock;

- 1.4 On or about 12 February 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 30 mg for Mr Y, bringing the total to 138, when she knew or ought to have known that Mr Y had only been administered two tablets on 6 January 2010 and/or that there should have been 110 tablets remaining in stock;*
- 1.5 On or about 21 February 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 30 mg for Mr Y, bringing the total to 162, when she knew or ought to have known that Mr Y had only been administered two tablets on 6 January 2010, one tablet on 17 February 2010, one tablet on 18 February 2010 and two tablets on 23 February 2010, and/or that there should have been 134 tablets remaining in stock;*
- 1.6 On or about 2 March 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 30 mg for Mr Y, bringing the total to 189, when she knew or ought to have known that Mr Y had only been administered a total of seven tablets previously the last on 21 February 2010 at 2100 hours, and/or that there should have been 161 tablets remaining in stock;*
- 1.7 On or about 12 March 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 30 mg for Mr Y, bringing the total to 217, when she knew or ought to have known that Mr Y had only been administered a total of seven tablets from the date they were prescribed, and/or that there should have been 189 tablets remaining in stock;*
- 1.8 On or about 27 March 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 30 mg for Mr Y, bringing the total to 245, when she knew or ought to have known that Mr Y had only been administered seven tablets in total, and/or that there should have been 217 tablets remaining in stock;*

Ms N

- 1.9 On or about 15 December 2009, Ms Bushell ordered 28 tablets of Codeine Phosphate 30 mg for Ms N, bringing the total to 54, when she knew or ought to have known that Ms N had only been administered two tablets on 20 October 2009 and/or that there should have been 26 tablets remaining in stock;*
- 1.10 On or about 2 January 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 30 mg for Ms N [sic], bringing the total to 82, when she knew or ought to have known that Ms N had only been administered two tablets in total and/or that there should have been 54 tablets remaining in stock;*

Ms W

- 1.11 *On or about 21 February 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 15 mg for Ms W, making a total of 54 tablets, when she knew or ought to have known that Ms W was never administered Codeine Phosphate and/or that there should have been 28 tablets remaining in stock;*
- 1.12 *On or about 2 March 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 15 mg for Ms W, bringing the total to 84, when she knew or ought to have known that Ms W had not been administered any Codeine Phosphate and/or that there should have been 56 tablets remaining in stock;*
- 1.13 *On or about 19 March 2010, Ms Bushell ordered a further 28 tablets of Codeine Phosphate 15 mg for Ms W, bringing the total to 112, when she knew or ought to have known that Ms W was never administered Codeine Phosphate and/or that there should have been 84 tablets remaining in stock;*

Ms S - Zopiclone

- 1.14 *On or about 12 January 2010, Ms Bushell ordered a further 28 tablets of Zopiclone 7.5 mg for Ms S, bringing the total to 47 tablets, when she knew or ought to have known that only nine tablets had been administered and/or that there should have been 19 tablets remaining in stock;*
- 1.15 *On or about 21 February 2010, Ms Bushell ordered a further 28 tablets of Zopiclone 7.5 mg for Ms S, bringing the total to 66 tablets, when she knew or ought to have known that only a total of 18 tablets had been administered and/or that there should have been 38 tablets remaining in stock.*
- 2.0 *That during the period 12 October 2009 to 27 March 2010, it is alleged that Ms Bushell misappropriated Codeine Phosphate 30 mg and/or Codeine Phosphate 15 mg and/or Zopiclone 7.5 mg for her own use and/or for some other purpose. In particular:*
- 2.1 *That during the period 13 October 2009 to 27 March 2010, Ms Bushell misappropriated up to 245 Tablets of Codeine Phosphate 30 mg, dispensed for Mr Y, for her own use and/or for some other purpose;*
- 2.2 *That during the period 13 October 2009 to 27 March 2010, Ms Bushell misappropriated up to 107 tablets of Codeine Phosphate 30 mg, dispensed for Ms N, for her own use and/or for some other purpose;*

2.3 *That during the period 13 October 2009 to 27 March 2010, Ms Bushell misappropriated up to 25 tablets of Codeine Phosphate 15 mg, dispensed for Ms K, for her own use and/or for some other purpose;*

2.4 *That during the period 13 October 2009 to 27 March 2010, Ms Bushell misappropriated up to 66 tablets of Zopiclone 2.5 mg, dispensed for Ms S, for her own use and/or for some other purpose;*

The conduct alleged in Charges 1.0 and 2.0 amounts to professional misconduct pursuant to section 100 (1)(a) or (b) of the Act and particulars 1.1 – 1.15 and 2.1 – 2.4 either separately or cumulatively, are particulars of that professional misconduct.

3. On 19 July 2011 the Tribunal made an order for permanent suppression of the names of the four patients referred to in that Charge namely Mr Y, Ms N, Ms W, and Ms S. Although no other application for suppression of name was made, the Tribunal also of its own initiative suppresses the name of Ms K contained in the Charge.
4. The Tribunal heard the charge on Tuesday, 13 September 2011. Counsel for the PCC attended. Ms Bushell also attended and was unrepresented by counsel. Evidence was tendered by the PCC and submissions made on its behalf. Ms Bushell made some submissions but did not tender any evidence. She had the opportunity to cross-examine all witnesses for the PCC. In respect of certain of the proposed witnesses namely Lorraine Vivienne Sobotka, Isabella Joanne Wright, Thembisile Beverley Glenrose Ngema and Angela Margaret McCallion, she said that she did not wish to cross examine them at all and consented to the statements that had been prepared for them with exhibits attached being read as evidence in the case. She had said the same concerning Minnie Walker but the PCC did call Minnie Walker to give evidence in any event.
5. Ms Bushell, frankly from the outset, admitted certain portions of the charge and did so freely. She emphasised that it was her concern to have matters dealt with promptly and that she did not wish to inconvenience either the Tribunal or witnesses or other persons involved more than was necessary. It was emphasised to her that she could take what time she wished, deal with such matters as she wished and call such evidence as she wished.

6. The particulars of the charge that she admitted to were all as set out in paragraph 1 except for the following:
 - 6.1. She denied the allegation in particular 1.0 : that “ ... she knew or ought to have known that codeine or Zopiclone were not being or had not been administered to these patients”.
 - 6.2. In particular 2.0 and particulars 2.1 – 2.4 she denied that she had misappropriated Zopiclone for her own use and/or for some other purpose but admitted that she had misappropriated some but not all of the Codeine Phosphate for her own use.
 - 6.3. At the conclusion of the charge, that the conduct to the extent that she had admitted to it, amounted to professional misconduct pursuant to section 100(1)(b) of the HPCA Act.
7. Specifically, she admitted that the conduct, to the extent admitted amounted to professional misconduct pursuant to section 100(1)(a) of the HPCA Act and she admitted that the particulars to the extent she had admitted them, amounted to professional misconduct.
8. Given the denial of the allegation of the misappropriation of Zopiclone by Ms Bushell for her own use and/or some other purpose and the admissions that had been made, the PCC withdrew those aspects of the particulars of the charge that related to that allegation.
9. Ms Bushell had written to the Tribunal a letter dated 19 June 2011 which included:

” ... I do not wish to trouble you to be heard in a tribuneral [sic]... After the meeting with the Professional Conduct committee on 28.4.2011 which I attended with my daughter as support I knew I had hit rock bottom and I needed to do something to help sort out the mess I had created. I know I was procrastenating [sic] and trying to stick my head in the sand so if I couldn't see it I did not have to deal with it. I contacted CADS (community drug & alcohol services) to ask if they could help me. I have tried to register with CADS Manukau City in an attempt to get some help in sorting

my life out. I hope they will accept me in their programe [sic]. I am a manic depressive and have been treated for this with a variety of different medications with varying success over the years since I was 15 yrs old. I have recently been diagnosed with severe osteo-arthritis which affects my elbows knees & joints. This lead [sic] to a L knee replacement with limited result as the surgeon cut my ligament at the same time. I am presently on pain medications & antidepressants and I'm having problems dealing with reality at times. I'm not working at present and I know that if I don't begin to deal with my issues I have no future. I would like to help seek an end to this investigation & the concerns arising from it. I will abide by your decision.

I know I may have a problem with drugs – admitting to myself has been a huge differculity [sic] to say the least, I want and need help to sort out the tangle of self deception & lies. To admit this has been mortifying part of me still does not want to admitt [sic] it but another part realises there is a problem. I can not go on like this, I hate what I have become. I get no peace it's like I'm having an argument with myself inside my head. Reality verses justifications & excuses.

As I have said I will abide by the coucil's [sic] decisions, please let me know when you have decided & if I can be of further help. I only hope the CADS programme will accept me and I can become a better person”.

10. The Tribunal took time to consider the evidence in the light of the submissions that had been made by the PCC and by Ms Bushell and came to the conclusion that the charge was made out and that Ms Bushell was guilty of misconduct as had been alleged.
11. The Tribunal announced this decision to the hearing at the time, with reasons to be given in writing later, as is now done.
12. After announcing its decision on the charge as brought, the Tribunal invited submissions on penalty. Submissions were duly made and considered and the Tribunal announced the penalty it proposed to impose, with reasons given later, as is also now done.

Case for the PCC

13. On the basis of the evidence tendered, the admissions that were made and the letter written, the PCC submitted that the charge was established. It submitted that the relevant criteria had been established by those admissions, namely, that Ms Bushell had been guilty of professional conduct because of those acts which amounted to malpractice or negligence in the scope of her practice as a nurse and/or that she had been guilty of

professional misconduct because those acts had brought or were likely to bring discredit to the nursing profession.

14. It further submitted that that misconduct was of sufficient gravity to warrant a disciplinary sanction for the purposes of protecting the public and/or maintaining professional standards and/or punishing Ms Bushell.

Case for Ms Bushell

15. Essentially Ms Bushell's position was that she was admitting those particulars of the charge as are recorded above and that these did amount to professional misconduct and that she was prepared to accept the outcome of the disciplinary process. When asked, she conceded that the misconduct was of sufficient gravity to warrant disciplinary sanction, although that is ultimately a question for the Tribunal.

Background

16. Ms Bushell was employed as a registered nurse at Selwyn Oaks, an aged care facility in Papakura, on 12 October 2009. During the course of inquiry into Ms Bushell's employment there concerning matters to which the charge relates Ms Bushell resigned from her position on 10 May 2010.
17. The four persons named in the charge, Mr Y, Ms N, Ms W and Ms S were residents at the facility at the relevant times.
18. Ms Sandra Sheene was employed as clinical coordinator at Selwyn Oaks from November 2009 to March 2011. In that role she was responsible for day to day clinical services and clinical issues in nursing.
19. In March 2010 Ms Sheene asked Ms Imelda Keogan, a registered nurse employed at the time at Selwyn Oaks, to carry out a medication audit on the stock PRN medication.

20. Ms Keogan said that she had not been involved with a stock medication audit before then. She said she went through the locked cupboard in the nurses' station to check what was there and the expiry dates of medication. The first medication check was carried out by her on 10 March 2010 and she checked what was in stock. At that audit she discovered there was no Codeine Phosphate for any resident in stock.
21. The evidence was that there should have been stock for each of four named patients, namely 189 tablets for Mr Y (30 mg), 107 tablets for Ms N (30 mg), 25 tablets for Ms K (15 mg) and 84 tablets for Ms W (30 mg).
22. There was further evidence given to the Tribunal, from the statements of the witnesses whose evidence was accepted by Ms Bushell or who in fact gave oral evidence of further orders for Codeine Phosphate and Zopiclone that were made by Ms Bushell, of absence of enquiries that were made about the stocks of these drugs held at the facility from time to time, and of the limited amount of these drugs that were required by the respective patients.
23. The audit revealed the detail which comprises the particulars of the charges to the extent that these are accepted by Ms Bushell.
24. The evidence of Ms Sobotka (who was the Human Resources Manager for the Selwyn Foundation at the time) included:
 - 24.1. On 2 March 2010 Ms Bushell ordered the standard 28 tablets (four weeks' supply) of Codeine Phosphate for Mr Y and Ms W and requested same day delivery.
 - 24.2. On 19 March 2010 Ms Keogan received an order for Codeine Phosphate for Ms W of 28 tablets that had been placed by Ms Bushell and on 20 March 2010 she discovered that 28 tablets of Codeine Phosphate for Ms W were missing.
 - 24.3. On 27 March 2010 Ms Keogan received an order for Codeine Phosphate for Mr Y (28 tablets) which had been ordered by Ms Bushell on 27 March 2010. Ms Bicknell found this medication missing when she checked on 28 March 2010.

- 24.4. Mr Y was prescribed Codeine Phosphate 30 mg on 13 October 2009 and 28 tablets were ordered by Ms Bushell. He was administered two tablets on 6 January 2010, one tablet each on 17 and 18 February 2010, two tablets on 20 February 2010, and one tablet on 21 February 2010 which would have left a balance of 21 tablets.
- 24.5. Further tablets for Mr Y were ordered by Ms Bushell comprising 28 tablets each on 15 December 2009, 7/8 January 2010, 22 January 2010, 12 February 2010, 21 February 2010, 2 March 2010, 12 March 2010, and 27 March 2010 bringing a total of 245 tablets surplus for Mr Y's needs, but there were none in stock.
- 24.6. On 11 August 2009 Ms N was prescribed Codeine Phosphate 30 mg 1 – 2 tablets four-hourly.
- 24.7. She was administered two tablets on 20 October 2009 and one tablet each on 4, 5 and 8 January 2010; which would have left a balance of 23 tablets.
- 24.8. Ms Bushell ordered further tablets for Ms N comprising 28 each on 15 December 2009 and 2 January 2010 leaving a balance of 79 tablets.
- 24.9. Ms W was prescribed Codeine Phosphate 30 mg one tablet four-hourly and this was ordered by a bureau nurse on 4 January 2010. Despite Ms W's never having received any Codeine Phosphate Ms Bushell ordered a further 28 tablets each on 21 February 2 and 19 March 2010. This would have left 112 tablets which were missing as at 19 March 2010.
- 24.10. Ms S was prescribed Zopiclone 7.5 mg one tablet at night as required on 23 November 2009 and a faxed order for 28 tablets was sent and these were received.
- 24.11. There is a schedule of dates on which Ms S was administered one tablet of Zopiclone between 6 January and 2 February 2010; and, despite there being a balance at that later date, Ms Bushell ordered a further 28 tablets each on 12

January 2010 and 20 and 21 February 2010 which would have meant 66 tablets in stock but there were none.

25. The statement from Ms Angela Margaret McCallion, a registered pharmacist in Royal Oak, Auckland, referred to other ordering of Codeine Phosphate by Ms Bushell, to which the particulars, the charge and as accepted by Ms Bushell, refer.
26. It is not otherwise necessary for the purpose of this decision to go into other detail of when the orders were placed by Ms Bushell, what medication was needed for the individual patients from time to time, what drugs remained for them which had not been used, or where those drugs may have individually gone.
27. The Tribunal has reviewed the evidence submitted by the PCC and is satisfied that the charge and its particulars, to the extent admitted by Ms Bushell, are proven by the evidence tendered. In particular, it is satisfied that Ms Bushell ordered the further tablets of Codeine Phosphate for Mr Y, Ms N and Ms W from time to time as is alleged in the particulars.
28. The Tribunal is satisfied likewise that Ms Bushell ordered the further tablets of Zopiclone for Ms S from time to time as is alleged in the particulars. It has not considered the purpose for those orders as this was withdrawn by the PCC.
29. After certain investigations had been carried out at Selwyn Oaks there were meetings with Ms Bushell and she was confronted with information that had been obtained. Various explanations were given by her and there were some criticisms apparently made by her in relation to management issues, some of which may have been the substance of what she referred to at the Tribunal hearing.
30. In particular apparently she said that she had ordered medication to make sure there were enough drugs to get through the weekend and that she was not thinking about the amounts at the time and not checking the charts. When asked by Ms Subotka at what time an alarm bell would ring when orders kept going in for the same resident and at what stage she would inform the doctor, that is, what checks were in place, Ms Bushell apparently confirmed that there were no checks in place.

31. In relation to Ms W for whom no Codeine Phosphate had ever been administered, Ms Bushell apparently responded to Ms Subotka that that surprised her as Ms W was in constant pain.
32. The enquiries at Selwyn Oaks continued; Ms Bushell was asked to provide written responses to questions raised which she did; there were further meetings and ultimately that led to Ms Bushell's resigning her position as a registered nurse at Selwyn Oaks by letter dated 7 May 2010.

Knowledge of the administration of drugs

33. One part of the charge denied by Ms Bushell is that she knew or ought to have known that Codeine Phosphate or Zopiclone were not being used or had not been administered to the patients in question.
34. This was denied by her from the outset. Essentially, Ms Bushell's position on this issue was that she checked the drugs resources from time to time and, if she found that there was further stock needed, she ordered this.
35. She acknowledged that she did not check this out from the individual charts for the patients as to their requirements. This would have involved looking at the chart, seeing what drugs had been ordered for a patient, assessing what drugs had been used by or for that patient, and then assessing whether there was need for further supply.
36. Although the evidence before the Tribunal suggests that this was common practice at the time, the fact remains that this checking did not occur. Ms Bushell says that she went to the supply cupboard, found that there were no drugs there, and ordered them.
37. The Tribunal does not accept that as an excuse. First, it has the frank admission from Ms Bushell that she ordered these tablets in these significant quantities. That alone should have alerted her to the care needed for proper assessment of the need for this drug for that particular patient. The drugs were ordered in the name of the particular patient and any competent nurse ordering drugs in these quantities should have been alerted to the concerns that this raised. Where any patient required drugs to the extent ordered in

this case, medical advice should have been obtained. Ms Bushell clearly did not follow that course and clearly did not have that concern.

38. Secondly, there is the fact that when enquiries were made there were no drugs available for those patients, despite their having been ordered by Ms Bushell at earlier times. She should have known or had some recollection of the orders that she had placed and, when she found there were no drugs, (if indeed it were the case that someone else had taken or used those drugs), then she should have made further inquiry.
39. Thirdly, her own admission is that she misappropriated those drugs for her own use. Although there is some question about whether they were all misappropriated for that purpose, the fact that some of those drugs were misappropriated for Ms Bushell's own use, and indeed, as the Tribunal understands the admission and so finds, a significant proportion, is clear evidence that she must have known that these were not being used or administered for the individual patients.
40. The Tribunal accordingly finds that part of the charge made out, that in respect of Codeine Phosphate and Zopiclone, Ms Bushell knew or ought to have known that these were not being or had not been administered to those patients.

Misappropriation of drugs for Ms Bushell's own use

41. Another significant aspect of the charge, contained in particulars 2.0 and 2.1 - 2.4 relates to the allegation that Ms Bushell misappropriated the Codeine Phosphate in the respective strengths of 30 mg and 15 mg for her own use and/or for some other purpose.
42. While Ms Bushell, as has been recorded, admitted that she misappropriated these drugs for her own use, she did not admit that the whole of them as alleged, was misappropriated for that purpose. She frankly conceded that she simply did not know the quantities. Her case was that there may have been some of the drugs that she ordered for those patients which were legitimately used for them but she has no detail and she frankly concedes that she used the remainder for her own use.

43. Reference in her letter and at the hearing to attendance at the CADS programme for help with drug dependency only serves to affirm that she does need that assistance and does have that drug dependency.
44. The PCC did not tender any direct evidence to confirm the misappropriation of the drugs for Ms Bushell's own use and invited the Tribunal to draw the inference from the facts as alleged, as proven and as conceded, that Ms Bushell must have done so, given her drug dependency as acknowledged.
45. It also pointed to some evidence of drug dependency although there was some challenge to this evidence by Ms Bushell.
46. Although it may be said from the evidence that there are some uncertainties about the exact quantities of Codeine Phosphate misappropriated by Ms Bushell for her own use, it is unlikely that any of the Codeine Phosphate that she ordered was used for patients, given the evidence that there was always excess on hand for the individual patients.
47. The Tribunal has given credit to Ms Bushell to the extent that it can, in relation to these discrepancies and uncertainties about quantum of drugs, but is satisfied that the charge is made out that Ms Bushell did misappropriate drugs largely of the quantities alleged for her own use; and this is affirmed by Ms Bushell's own admission.
48. There was some evidence given and time spent exploring the question of management issues at Selwyn Oaks and whether it might have been easier for Ms Bushell to carry out this process of ordering drugs not needed for patients and for her own use because of practices and processes at Selwyn Oaks.
49. The Tribunal is of the view, however, that this issue may go to the penalty and mitigation, but does not go to the question of whether the charge is made out.

Charge: General Principles

50. The burden of proving the Charge is on the Professional Conduct Committee.

51. The standard of proof is the balance of probabilities, the standard that applies in civil litigation. The gravity of the allegation is an important factor. The more serious the allegation, the greater part must be the degree of satisfaction on the balance of probabilities.
52. The Supreme Court has affirmed this in *Z v Complaints Assessment Committee*¹ that the balance of probabilities standard is to be applied flexibly dependent on the seriousness of the matters to be proved and the consequences of proof. It affirmed that the standard in disciplinary proceedings is that civil standard of balance of probabilities. It endorsed the judgment in *Brigginshaw v Brigginshaw*².
53. The Tribunal has followed the principles enunciated in *Z* in its decisions including in *Decisions Professional Conduct Committee v Dawson*³ and *Professional Conduct Committee v Karagiannis*⁴.
54. The PCC also referred to the Tribunal's decision in *PCC v Chand*⁵. In that case the Tribunal applied the principles as stated in *B v Medical Council of New Zealand*⁶.

Elias J (as she then was) said⁷:

“The structure of the disciplinary processes as set up by the Act, which rely in large part upon judgment by a practitioner’s peers, emphasises that the best guide to what is acceptable professional conduct is the standard applied by competent, ethical and responsible practitioners. But the inclusion of lay representatives in a disciplinary process and the right of appeal to this Court indicates that usual professional practice, while significant, may not always be determinative; the reasonableness of the standards applied must ultimately be for the Court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards are not permitted to lag. The disciplinary process in part is one of setting standards.”

55. Orders can be made under section 101 of the Health Practitioners Competence Assurance Act 2003 if the Tribunal, after conducting a hearing on a Charge laid, makes one or more of several available findings.

1 [2009] 1 NZLR 1

2 (1938) 60 CLR 336 per Dixon J.

3 300Nur09/139P; 28/4/10

4 181/Phar08/91P; 3/10/08

5 106/Nur06/49P

6 Auckland High Court; HC 11/96; Elias J

56. These findings include:

56.1. *“That the practitioner has been guilty of professional misconduct because of 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 was registered at the time that the conduct occurred⁸”; or*

56.2. *“The practitioner has been guilty of professional misconduct because of 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 that the conduct occurred⁹”.*

57. The Committee urged that the Tribunal follow the principles enunciated in its decision *PCC v Nutall*¹⁰ which included:

“71. The Tribunal is of the view that much of the jurisprudence concerning the meaning of professional misconduct under earlier legislative regimes continues to be relevant under the HPCA Act. In particular, the Tribunal believes the test as to what constitutes professional misconduct continues to involve a two step process:

71.1 The first step involves an objective analysis of whether or not the health practitioner’s acts or omissions in relation to their practise can be reasonably regarded by the Tribunal as constituting:

Malpractice; or

Negligence; or

Otherwise meets the standard of having brought, or was likely to bring discredit to the practitioner’s profession.

71.2 The second step of the process requires the Tribunal to 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”.

58. Those are principles which the Tribunal has followed in other cases and are appropriate in this case.

59. The Tribunal has in other decisions, as it does in this decision, relied on the Collins English Dictionary (2nd ed.) definition of “Malpractice”:

“The immoral, illegal or unethical conduct or neglect of professional duties. Any instance of improper professional conduct”.

60. Reliance has been placed by the Tribunal, as it does now, on the principles enunciated in Medical Law in New Zealand, 2006 at para 23.65 that, although malpractice is often equated with negligence it is perhaps better considered as a broader concept, capable of encompassing neglect, but also of extending to trespassory conduct in the process of caring for patients in relation to consent, breaches of patient confidence and fiduciary obligations, and certain other forms of conduct.

61. In the context of professional misconduct as provided in section 2 of the Nurses Act Gendall J¹¹ noted:

“Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness. That sort of test must still apply to the malpractice/negligence definition in s. 2(a) of the Act”.

62. He then said at paragraph 23:

“Clearly it envisages conduct in the performance of the nurse’s usual professional duties if it amounts to “malpractice or negligence”. That requires, in line with authorities and the accepted view, that the negligence or malpractice be of a serious degree and such as to be substantially below the standards expected of a nurse”.

63. The Committee also urged that the Tribunal take into account these extracts from *Collie v Nursing Council of New Zealand*¹² where the Court described the term “to bring discredit to the nursing profession” in the following way:

“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

¹¹ In *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at paragraph 21

¹² High Court, Wellington, AP300/99; 5 September, 2000: Gendall J

that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned.”

Charge: discussion

64. The Tribunal has considered the evidence that was submitted and has considered the admissions that were frankly and clearly given by Ms Bushell at the hearing as to allegations made.
65. It is satisfied that the charge as brought has been largely made out. There is clear evidence and acknowledgement of the ordering of tablets of Codeine Phosphate and tablets of Zopiclone for patients under Ms Bushell’s care.
66. The Tribunal has found that Ms Bushell knew or ought to have known that those drugs were not being or had not been administered to those patients. There was evidence and an acknowledgement from Ms Bushell that she failed to raise concerns about the missing Codeine Phosphate and the missing Zopiclone tablets and concerns about a significant increased use of Codeine Phosphate or Zopiclone by those patients.

Particulars 1.1 to 1.15

67. The Tribunal is satisfied on the evidence and in the light of the admissions made by Ms Bushell that each and every one of these particulars is made out.

Particular 2.0

68. The Tribunal is further satisfied on the evidence and in light of the admissions made that Bushell misappropriated Codeine Phosphate 30 mg and Codeine Phosphate 15 mg for her own use.
69. The remaining part of charge 2.0 has been withdrawn by the PCC.

Particulars 2.1 to 2.3

70. The Tribunal is satisfied and the acknowledgement is given, that Ms Bushell misappropriated the tablets dispensed for Mr Y, Ms N and Ms K for Ms Bushell's own use.

Particular 2.4

71. This is withdrawn by the PCC.

Malpractice or negligence

72. Having regard to the definitions referred to above, and taking into account the facts as found, the Tribunal has concluded that there was malpractice on the part of Ms Bushell in ordering these drugs for these patients in the circumstances mentioned and, to the extent that this is established, for her own use.
73. One matter of concern is that there were not drugs on hand when they should have been. That appears to relate not only to the four named patients of Selwyn Oaks, but to any other patient that may have needed pain relief of this kind at the time; because it appears that Ms Bushell had taken all of the remaining stocks of Codeine Phosphate from the store.
74. This is malpractice on her part and the Tribunal so finds.
75. The Tribunal also finds that Ms Bushell's acts have brought or were likely to bring discredit to the nursing profession at the time. Nurses should be able to be relied on to handle all medications responsibly. They should know the importance of keeping these drugs secure. They should know the importance of keeping clear and accurate records of how drugs are used, ordered and disposed of. They should take care in dealing with each individual patient to check records concerning drug requirements and drug use so that there are appropriate drugs on hand. This then means that, as drugs are used up, they are replaced in a timely and responsible way; but without excess.

76. Likewise, it clearly brings the nursing profession into disrepute for a nurse to be ordering and using drugs in the name of patients or the institution for which she works when this is for her own purposes.
77. Accordingly the Tribunal has found that the both grounds under section 100(1)(a) and (b) of the HPCA Act have been made out.
78. It notes that Ms Bushell has already accepted that her conduct amounted to professional misconduct pursuant to section 100(1)(a) of that Act and that the particulars in question, at least to the extent she has admitted these, amounted to professional misconduct. Despite her denial that this practice may bring the nursing profession into disrepute under section 100(1)(b) of the HPCA Act, the Tribunal finds that also made out.
79. As to the second step of the process the Tribunal is satisfied that Ms Bushell's acts or omissions require a disciplinary sanction for the purposes of protecting the public and maintaining professional standards and punishing her.
80. As noted above the Tribunal reached this conclusion for reasons which are now given, at the conclusion of the hearing and announced this and invited submissions on penalty.

Penalty - PCC submissions

81. The PCC submitted that this was serious misconduct on Ms Bushell's behalf that demanded serious response. It referred to the need for protection of the public, maintenance of standards in the nursing profession, and punishment of Ms Bushell.
82. It referred first to the option of cancellation of registration of Ms Bushell as a nurse pursuant to section 102(1)(a) of the HPCA Act with the added requirement that, if Ms Bushell were ever to apply for reinstatement to the register, she must complete the CADS programme on which she has embarked and as would then be required by the Nursing Council and must be referred to the Nursing Council's Health Committee.
83. It referred to the option of suspension pursuant to section 101(1)(b) of the HPCA Act and again submitted that there should be conditions for attendance and continuation of

the CADS programme and that, when the period of suspension was completed, she be referred to the Health Committee of the Nursing Council for such period of time as was deemed appropriate.

84. It sought censure. It acknowledged that any fine imposed must be subject to the financial circumstances. It sought a contribution to costs and indicated that the expected costs for the PCC would not be above \$20,000.00. It acknowledged that Ms Bushell did not seek name suppression.

Penalty - Ms Bushell's submissions

85. On penalty, Ms Bushell acknowledged frankly from the outset that she never wanted to practise as a nurse again. She said she likes dealing with and helping people but the stress of the profession was over and above what she had expected. She said that in her experience the Nursing Council did not extend the help that it offered. She said that the nursing profession was all about paperwork rather than nurses' needs.
86. She said she wanted to care for people but did not see the true position in the profession until she had been there for a couple of years. She said she had not hurt anyone nor caused harm but acknowledged that she had compromised her career. She said she did not want to hurt anyone else. She has tried, she said, to work through the issues but this has not proved possible and now that she has stopped working. She has had operations on her knee which have been compromising and complicated and she is on a sickness benefit.
87. She said there is financially not much for her; there is nothing in the bank, no home and no car and she is not sure where she would find a job when she is physically able after her post-operative recovery.
88. She is on drugs advice. She is aged 53 years with no partner and lives with her daughter and grandson. She helps with her grandson so that her daughter can work and pursue studies. She does attend the CADS programme as noted in her letter and she said that

this is helping. She is able to manage her stress and the programme is teaching her things about herself. She is making good progress.

89. She said that, particularly when her mother died of cancer, she always wanted to go nursing but that her personal circumstances were such as to deny this until later in her life. She said she has shown she can do it but she has to face up to the trouble she is now in.
90. In reply counsel for the PCC said that the Nursing Council had not had any interaction with Ms Bushell for many years and had not been asked to assist her; and made reference to other Tribunal cases.

Penalty: Discussion

91. The authority to impose penalties on the practitioner under section 101 of the Health Practitioners Competence Assurance Act 2003 are:
 - 91.1. That registration be cancelled.
 - 91.2. That registration be suspended for a period not exceeding 3 years.
 - 91.3. That the health practitioner be required, after commencing practice following the date of the order, for a period not exceeding 3 years, to practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise specified.
 - 91.4. Censure.
 - 91.5. A fine of up to \$30,000.00 (but not if he or she has been convicted of a relevant offence or damages have been awarded against him (which do not apply here)).
 - 91.6. Costs.
92. The functions of disciplinary proceedings are:

92.1. Protecting the public especially having regard to the provisions of s. 3(1) of the Act which reads:

“The principal purpose of this Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.”

92.2. Maintaining professional standards¹³. The Tribunal takes into account the following extract from the judgment in *Young v PCC*¹⁴:

“The protection and maintenance of professional standards is an important part of the protection of the public. It is through the maintenance of high professional standards that the public is protected. Deterrence is in the same category. This is intended to discourage others from acting in the same way reflected in the severity of the punishment imposed.”

92.3. Punishing the practitioner in question¹⁵

92.4. In appropriate circumstances, rehabilitation of the practitioner¹⁶

93. In *A v Professional Conduct Committee*¹⁷ the High Court, having considered the range of sanctions available to the Tribunal, cited with approval the decision in *Taylor v The General Medical Council*¹⁸ and said that four points could be expressly and a fifth impliedly derived from the authorities namely:

“First, the primary purpose of cancelling or suspending registration is to protect the public, but that “inevitably imports some punitive element”. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is “some condition affecting the practitioner’s fitness to practise which may or may not be amenable to cure”. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.”

94. The Court went on¹⁹:

“Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v

13 Refer *Dentice v Valuers Registration Board* [1992] 1 NZLR 720; *Ziderman v General Dental Council* [1976] 2 All ER 344

14 Wellington HC: CIV 2006-485-1002: 1/6/07: Young J

15 Refer *Dentice*; also *Patel v Complaints Assessment Committee* (Auckland High Court (CIV 2007- 404 – 1818; 13/8/07; Lang J; and *Winefield* 83/PHAR06/30P).

16 *Patel*; also *J v Director of Proceedings* (Auckland High Court CIV 2006 – 404 – 2188; 17/10/06; Baragwanath J.

17 Auckland HC: CIV 2008 - 404 –2927; 5/9/08; Keane J

18 [1990] 2 All ER 263

19 Para 82

B (HC Auckland, HC 4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele v The General Medical Council [2005] EWHC 2143, though “... the maintenance of public confidence ... must outweigh the interest of the individual doctor”, that is not absolute – “the existence of the public interest in not ending the career of a competent doctor will play a part.”

95. The Tribunal is also mindful of the remarks of Randerson J in *Patel v Dentists Disciplinary Tribunal*²⁰. That case involved an appeal by a dentist whose name had been removed from the register by the Dentists Disciplinary Tribunal in relation to charges arising from his treatment of an elderly couple for whom he carried out crown and bridge work, accepted by the Court as being “grossly incompetent and completely unacceptable”²¹.

96. In discussing the purpose of disciplinary proceedings the Court said:

“[28] *The Dentist Act does not provide any guidance on this subject but I am satisfied that the following statement of principle by Eichelbaum CJ in Dentice v Valuers Registration Board [1992] 1 NZLR 720, 724-725 is apposite in this case:*

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist 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 professional calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them; see, generally, Re A Medical Practitioner [1959] NZLR 784 at pp 800, 802, 805 and 814. In New Zealand, such provisions exist in respect of medical practitioners, barristers and solicitors, dentists, architects, pharmacists, real estate agents and a number of other professionals and callings, as well as valuers; ...

[29] In the light of those general purposes, it is also relevant to consider the purpose of the removal of a practitioner’s name from a professional register. There is authority for the proposition that removal from a professional register is a protective purpose and is not designed to punish the professional concerned; Re A Medical Practitioner [1995] 2 QBR 154, 164. Plainly, removal from the register does serve to protect the public but it also serves the function identified in Dentice of maintaining professional

20 Auckland HC; AP77/02; 8/10/02;

21 Paragraph 32

standards and maintaining public confidence in the standing of the profession. It also acts as a deterrent to the individual concerned and others in the profession.

[30] The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist's fitness to practise against the need for removal and its consequences to the individual: Dad v General Dental Council at 1543. As the Privy Council further observed:

Such consequences 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 be 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.

[31] I respectfully adopt the observations of the Privy Council and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case. As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large”.

97. Some help is obtained from other decisions of the Tribunal and in the courts. Each case must be decided on its own facts and circumstances; but there is also a need for consistency in Tribunal's decisions.
98. The Tribunal has taken into account the cases of:
- 98.1. *Stephen James Farquhar*²². In that case the nurse was charged with first administering Pethidine intravenously to patients which had not been properly prescribed and which compromised their safety and well-being; and secondly removal of and failure to account for certain quantities of Pethidine. The Tribunal took the view that these were serious offences and removed his name from the register with conditions to be imposed should he ever apply again for registration.

- 98.2. *Louise Fiona Kilbride*²³. Ms Kilbride was charged with certain offences of taking quantities of diazepam for her own use. She was suspended for 12 months and censured.
- 98.3. *Dan Eric Hansson*²⁴ Mr Hansson had been convicted in a District Court of stealing 120 ampules of Fentanyl for his own use. Before the Tribunal his registration as a nurse was cancelled on the grounds that he had brought the profession into disrepute.
- 98.4. *Bruce William Hewson*²⁵. Mr Hewson was also convicted in a District Court, this time on charges of theft of Fentanyl, morphine and pethidine for his own use. His registration was also cancelled.
- 98.5. *Gayle Ann Plasmeyer*²⁶. Ms Plasmeyer had been convicted in a District Court on charges of theft of controlled drugs and of use of morphine. Before the Tribunal she was also charged with practising without a practising certificate. Her registration was cancelled.
99. The Tribunal has borne all those authorities in mind in considering the penalty to be imposed. Each case must be considered on its own merits.
100. The PCC argued that there was room for cancellation of Ms Bushell's registration as a nurse. It also acknowledged the primary alternative available, that of suspension on conditions.
101. Before the Tribunal cancels registration it must be satisfied that an alternative penalty would not be sufficient to achieve the purposes of the disciplinary processes. In considering the alternatives to cancellation of registration, the Tribunal must consider whether that is sufficient to achieve those purposes. It must consider the factors which mitigate against cancellation of registration.

23 161/Nur08/83P and 183/Nur08/83P

24 124Nur07/68P

25 125 Nur07/67P

26 101 Nur07/52P

102. The factors which have influenced the Tribunal in this matter are these. First, in relation to factors mitigating against Ms Bushell's position and in favour of penalisation are:
- 102.1. The drugs in question, particularly Codeine Phosphate, are serious drugs which can be open to serious abuse and misuse.
 - 102.2. Ms Bushell has acknowledged that she took these drugs for her own use. There is no evidence that she has caused harm to others with this, but likewise there is the potential for drugs which are wrongly in the hands of any person, including a nurse, to cause for harm to others.
 - 102.3. The misappropriation of the drugs has occurred over a period of some weeks and is not an isolated incident. Consequently, the quantities have increased from few to many.
 - 102.4. Ms Bushell carried out this process by manipulating records and the use of various residents at the facility in an apparent attempt to avoid detection.
 - 102.5. Because Ms Bushell had taken all of the drugs from storage that were available, there were not any available for residents who may have genuinely needed them especially those with some urgency.
103. Against this are weighed the following factors mitigating in Ms Bushell's favour:
- 103.1. There is no evidence of any matters of concern about her clinical practice as a nurse or her abilities; and, apart from the events in question, she has apparently discharged her role to the nursing profession and the patients under her care in a competent manner.
 - 103.2. The competence that is mentioned was also apparent at the hearing, not only in relation to nursing professional matters, but in relation to the way Ms Bushell conducted the hearing on her own behalf, she being quite ready and able to understand processes and make a meaningful contribution to the hearing process.

- 103.3. She has totally accepted the wrongdoing in question and has taken full responsibility for that on herself and, apart from the matters mentioned below relating to management, without blaming other individuals.
 - 103.4. She has accepted the severity and importance of what she has done and the level of wrongdoing involved.
 - 103.5. She has been proactive in taking steps to face up to her drug dependency and has embarked on the CADS programme already and is pursuing this, apparently with positive results.
 - 103.6. She has apologised to the Tribunal several times during the course of the hearing and the prosecution of this matter for her wrongdoing and for taking time and resources in the pursuit of the charges laid against her. Although the Tribunal notes that there were denials in her responses initially to the inquiries that were made, it also notes that this was in the context of employment issues. The Tribunal is of the view that Ms Bushell has now faced up to the realities and is appropriately apologetic and accepts responsibility for this behaviour.
 - 103.7. Ms Bushell is prepared to accept publication of her name and has not sought suppression of it. This will impact on her family members and her own reputation, but she is prepared to accept the consequences.
 - 103.8. Certain aspects of management at the facility which are now referred to.
104. Some issues relating to practices at the facility were raised during the hearing by Ms Bushell. These did not go to the essential questions of whether she had been guilty of the charges as brought by the PCC and the Tribunal indicated that some of these matters would be considered in the context of whether they went as mitigating factors to penalty.

105. These factors included:

105.1. Whether there was an effective care plan in place which complied with legal requirements; or whether there was some time taken by nurses to complete a care plan which distracted them from their time for patient care. Ms Bushell's questions related to whether there had been a care plan and the evidence was that, although there was a care plan, this did not comply with the law because it had not been formulated by registered nurses; and that it required to be rewritten in a proper manner. Ms Bicknell said²⁷ that this was occurring about the time of the offending and time was being taken for that purpose such that there were fewer nurses on the wards at the time. This is not a factor which the Tribunal considers affects either the charge or the penalty.

105.2. Security for drugs. There are requirements for drugs to be kept under lock and key. The evidence suggested in this case that drugs were received and were generally kept in a secure location. There was apparently a nurses' station or office which was locked and kept locked with a keypad for authorised entry only. Inside that office there was a secure facility for drugs but inadequate room for two trolleys to be in it at the same time. The trolleys themselves were locked such that, if there were not an appropriate person in control of the trolley at the time, the trolley would be locked and the drugs secured in it. There was evidence that as drugs arrived during the day shift these were left in the nurse's office to be processed later according to the legal requirements by night staff. It was said that those drugs were left in the nurse's office which was secured by the keypad lock. Again, the Tribunal does not consider that this impacts on either the charge against Ms Bushell or the penalty; although it notes that there is the requirement to keep drugs secure.

105.3. Staff ratio levels. There was evidence from Ms Sheene which criticised staff ratio levels both in relation to this specific facility and generally in relation to aged care. She said this resulted in an increased amount of pressure and stress for the nursing staff. She said stress levels were very high and this was a

contributing factor. Neither the facility nor other parties were called to give evidence in reply or given any opportunity to respond to those criticisms. The Tribunal does not take them into account as being established except to the extent that there appeared to be sufficient evidence for the Tribunal to conclude that Ms Bushell may have been facing further stress as the result of her workload and these factors. That may indeed have contributed to her offending, particularly if there was not the same level of surveillance and control and care over nursing practices during that time.

- 105.4. The proper process that should have been followed was for the drugs to be ordered in accordance with the doctor's prescription for the individual patient. There were two methods of drug distribution followed at the facility. The first was called robotic distribution which is the supply of all drugs for a particular patient on a robotic basis. That means that for that particular patient on any particular day all the drugs were available in a roll. The alternative system is blister packing of one particular drug and quantities of this are used for the individual patient on a regular basis and as supplied. PRN medication in blister packs is ordered as required and it was that process that was in question in this case. The stocks of drugs not in a robotic roll were kept in the nurses' station as described; and if any stock was low or depleted, a nurse could order this direct from the pharmacy; but should have had reference to an individual patient's charts and needs before making the order in the patient's name. The suggestion was that had there been better surveillance of the ordering of PRN medication in blister packs and the need for this for individual patient from time to time, Ms Bushell would not have reached the stage where she could have ordered so many without this having been detected. It was when the audit was undertaken by Ms Sheene that matters came to a head.

106. The Tribunal has taken those factors into account in its decision.

Penalty - result

107. Having taken all the legal principles into account in determining penalty for Ms Bushell and the aggravating and mitigating factors mentioned, the Tribunal has formed the view that Ms Bushell should be suspended from practice as a nurse for a period of two years from the date of this order pursuant to section 101(1)(b) of the HPCA Act.
108. The Tribunal is also of the view that it should order that Ms Bushell may, after commencing practice following the date of the suspension period, practise her profession as a nurse only in accordance with these conditions, namely:
- 108.1 That she satisfy the Nursing Council of New Zealand that she has continued from the date of this Order, her attendance at, and participation in, the CADS programme she has presently embarked upon, and
- 108.2 That prior to her recommencing practice as a nurse she satisfy the Nursing Council of New Zealand of her ability to perform the required functions of nursing and practise under any conditions placed on her by the Nursing Council of New Zealand.
- These conditions can only be imposed by the Tribunal for a period of three years from the date of this Order. Any further supervision or surveillance during or beyond that period will be under the control of the Nursing Council of New Zealand.
109. It has formed the view that she should also be censured. This is not a formality but is a significant and meaningful expression by the Tribunal of its concern about the offending and level and that this is not practice which should go without censure.
110. The Tribunal has formed the view that there should be no fine imposed. Ms Bushell was frank about her financial position and produced a statement which she had completed for other purposes which showed her assets and liabilities and income and outgoings. The PCC acknowledges that this indicates that there is a difficult financial position and Ms Bushell is frank about the fact that she cannot afford a fine. Accordingly the Tribunal does not impose any fine.

Costs

111. The principles applicable to costs are these. In *Cooray v Preliminary Proceedings Committee*²⁸ there is reference to a 50% contribution. That is in the context, however, of a starting point and other factors may be taken into account to reduce or mitigate that proportion.
112. In *Winefield*²⁹ the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:
- 112.1. The hearing being able to proceed on an agreed statement of facts.
 - 112.2. Co-operation of Mr Winefield.
 - 112.3. The attendance of Mr Winefield at the hearing.
 - 112.4. Consistency with the level of costs in previous decisions.
113. Applying these principles the Tribunal has formed the view that the most realistic it can be by way of order for costs is an order for contribution towards the costs of this prosecution totalling \$5,000.00 to be divided equally between the PCC and the Tribunal.

Orders

114. The Tribunal Orders:
- 114.1. That Ms Bushell is suspended from practice as a nurse for two years from the date of this Order pursuant to section 101(1)(b) of the HPCA Act.
 - 114.2. That pursuant to section 101(1)(c) of the HPCA Act Ms Bushell may, after commencing any practice as a nurse following the date of this Order practise her profession as a nurse only in accordance with the following conditions as to

²⁸ Wellington HC: AP 23/94; 14/9/95; Doogue J
²⁹ 60/Phar06/30P

her employment for a maximum period of three years from the date of this Order, namely:

- 114.2.1. That she satisfy the Nursing Council of New Zealand that she has continued from the date of this Order her attendance at, and participation in, the CADS programme she has presently embarked upon; and
- 114.2.2. That prior to her recommencing practice as a nurse she satisfy the Nursing Council of New Zealand of her ability to perform the required functions of nursing and practise under any conditions placed on her by the Nursing Council of New Zealand.
- 114.3. That Ms Bushell be censured pursuant to section 101(1)(d) of the HPCA Act.
- 114.4. That Ms Bushell pay, pursuant to section 101(1)(f) of the HPCA Act, the sum of \$5,000.00 towards the costs and expenses of and incidental to the inquiry by the PCC, the prosecution of charges and the hearing by this Tribunal, to be divided as to \$2,500.00 to the PCC and \$2,500.00 to the Tribunal.
- 114.5. No Order for further suppression of name other than those ordered already in respect of the four individual residents of the facility was sought and no Order for suppression of name is made.
- 114.6. Subject to the suppression orders above, orders that the Executive Officer publish a copy of this decision and a summary on the Tribunal's website. The Tribunal further orders the Executive Officer to publish a notice stating the effect of the Tribunal's decision in *Kai Tiaki: Nursing New Zealand*, and the Nursing Council's newsletter *News Update*.

DATED at Auckland this 19th day of October 2011

.....
 David M Carden
 Chairperson
 Health Practitioners Disciplinary Tribunal