New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 406/Nur11/186P

IN THE MATTER of the Health Practitioners Competence Assurance Act 2003

AND

IN THE MATTER of disciplinary proceedings against **JAMES BRENT HENDERSON**, registered nurse of Dunedin

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING in Wellington on 27 September 2011

TRIBUNAL: Mr Bruce A Corkill QC (Chairperson)

Dr Marian Bland, Ms Hazel Irvine, Dr Annette Huntington and Mr Quentin Hix (Members)

Ms G Fraser (Executive Officer)

Ms T Murray (Stenographer)

APPEARANCES: Mr M McClelland and Ms H de Montalk, for the Professional Conduct Committee

Ms A O'Brien, for the practitioner

Introduction:

1. On 3 June 2011, a Professional Conduct Committee (PCC) appointed by the Nursing Council of New Zealand (NCNZ) charged that Mr Henderson had been convicted in the Auckland District Court on three counts of indecent assault of females over the age of 16 years, and that these convictions reflect adversely on Mr Henderson's fitness to practise.

The Charge:

2. The charge stated:

> ***"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 court convictions of James Brent Henderson referred to the Professional Conduct Committee pursuant to section 68(2) 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(1)(c) of the Act.*
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> ***Particulars of Charge***
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> *The Professional Conduct Committee pursuant to s81(2) of the Act charges that, on 3 December 2009 James Brent Henderson was convicted in the Auckland District Court of three counts of indecent assault of a female over the age of 16 years and that these convictions reflect adversely on his fitness to practise.*
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> ***Particulars of Convictions***
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> ***Count One***
> *The victim was involved in an altercation and feigned injury to get out of that difficulty. An ambulance was called. Mr Henderson placed his hand on her genital area inside her underwear on the outside of her vagina and surrounding area. He did not remove his hand straight away after the victim looked at him. He asked her whether or not that touching hurt.*
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> ***Count Two***
> *The victim was out jogging when she fainted or lost consciousness. An ambulance was called and she was in a dazed state when it arrived. She was taken to hospital and during that trip Mr Henderson lifted her t-shirt and bra above her breasts and was touching her breasts. She complained to hospital staff immediately upon arrival.*
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> ***Count Three***
> *The victim was a 16 year old school girl who was involved in a car accident. She*

was wearing her school uniform at the time. She was distraught because she had written off her deceased grandfather's car. Under the guise of a medical examination, Mr Henderson pulled down the waistband of her skirt and touched her vagina under her underwear. She was crying and extremely distressed at the time.

Legal Principles:

3. The burden of proof was on the PCC.

4. As to standard of proof, the appropriate standard is the civil standard, that is proof to the satisfaction of the Tribunal on the balance of probabilities, rather than the criminal standard. The degree of satisfaction called for will vary according to the gravity of the allegations. The greater the gravity of the allegations the higher the standard of proof.

5. In the decision of *Z v Complaints Assessment Committee* [2009] 1 NZLR 1, a majority of the Supreme Court stated that in civil proceedings in New Zealand (including disciplinary proceedings) there is a civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them. The Court endorsed the classic passage of Dixon J in *Brigginshaw v Brigginshaw* (1938) 60 CLR 336, 361-362 to the effect that the affirmative of an allegation must be made out to the reasonable satisfaction of the fact finder. Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal.

6. Section 100(1)(c) of the Act provides that a registered health practitioner may be disciplined by the Tribunal where "*… the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise*".

7. In *Pittwood* (84/Ost06/42P), there is a careful review of the second limb of the phraseology, "*reflects adversely*", which this Tribunal adopts.

8. In *Re Zauka* (Decision 236/03/103C, 17 July 2003) the Medical Practitioners Disciplinary Tribunal was required to consider a similar provision – section 109(1)(e) of the Medical Practitioners Act 1995. That Tribunal, guided by observations of the District Court in *CAC v CM* [1999] DCR 492, stated:

> "*It was not necessary that the proven conduct should conclusively demonstrate that the practitioner is unfit to practise. The conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine. Not every divergence from recognised standards will reflect adversely on a practitioner's fitness to practise. It is a matter of degree.* "

9. In *Murdoch* (Phys06/45P), the Tribunal stated:

> "*Fitness to practise cannot, in the context of a conviction, relate only to the practitioner's clinical ability. It must also involve the moral consideration and conduct which offends the law or is immoral or unethical, must reflect adversely on the practitioner's fitness to practise. Registration carries with it obligations to behave in a way which is ethical, honest and in accordance with the law. Failure to uphold the law or dishonesty must adversely affect a practitioner's fitness to practise.*"

10. In *Professional Conduct Committee v Martin* (Gendall J, 27 February 2007, CIV-2006-485-1461) the Court stated:

> "*Fitness often may be something different to competence. … aspects of general deterrence as well specific deterrence remain relevant. So, too, is the broader consideration of the public or community's confidence in the upholding of the standards of the nursing profession.*" (paragraph [46])

11. The Tribunal accepts and applies the above principles, in this case.

The Hearing:

12. The Tribunal received a certified copy of the convictions, the sentencing notes of Cunningham DCJ, and counselling and probation reports.

13. Counsel for Mr Henderson accepted that both limbs of Section 100(1)(c) were

established; however the Tribunal was nonetheless required to satisfy itself that the elements of the charge were made out.

14. The convictions were clearly established by the certified copy of the entries in the criminal record, in respect of the charges brought against Mr Henderson. The charges were all brought under Section 135 of the Crimes Act. Mr Henderson was sentenced by the Court on 3 December 2009 to 9 months intensive supervision with the special condition that he must attend and participate in a psychological assessment and complete any treatment counselling recommended by that assessment.

15. These were qualifying convictions for the purposes of Section 100(2)(b) of the Act being offences punishable by imprisonment for a term of three months or longer.

16. It is next necessary to consider the issue of whether the convictions reflect adversely on fitness to practice.

17. It is plain from the nature of the convictions, and the comments of the sentencing Judge, that the conduct in question constituted very serious criminal offences; furthermore, they occurred in a professional context when Mr Henderson as a trained nurse was employed as an ambulance officer. The misconduct occurred on three occasions in 1999, with significant impact on the victims.

18. In the course of her remarks, the Judge stated:

> "*Clearly, all the victims here were vulnerable. They had all suffered some kind of medical incident and Mr Henderson, as an ambulance officer and trained nurse, was in a position of trust in that these women were in his care. There was, in my view, premeditation, and there seemed to be a pattern of offending that occurred throughout 1999.*"

19. Her Honour went on to outline the significant harm that had occurred to the victims, which was considered a yet further aggravating feature.

20. The Tribunal is satisfied that Mr Henderson's conduct fell well below that expected of a nurse, and that the failures were significant enough to warrant disciplinary sanction. The conduct was totally unacceptable for any registered nurse.

21. There was a significant departure from legal, professional and ethical standards and accordingly discipline was warranted.

22. The professional charge is accordingly established.

Penalty:

23. Mr Henderson gave evidence for penalty purposes. In summary:

    23.1. He outlined his work experience, following initial registration in November 1997. His areas of practice had been mental health, cardio-thoracic specialties, working as an ambulance officer, and he then worked in a cardiology, coronary care and emergency nursing unit.

    23.2. He was initially interviewed by the Police in March 2006, and was charged in October 2006. He was at that point moved to non-clinical duties with his employer. He resigned in 2008.

    23.3. Initially he was tried and sentenced to imprisonment; however the Court of Appeal ordered a retrial. During his period of imprisonment, he suffered assaults and abuse: mental, physical and sexual.

    23.4. When the matter was reheard, he pleaded guilty to the charges described in the Notice of Charge above, with the result which has been described. There was reasonably significant publicity as a result of these convictions.

    23.5. He has undertaken psychological assessments as requested by the Court, and thereafter by the Department of Corrections.

    23.6. He described the nature of the supervision which was undertaken following the District Court sentence, and made reference to a psychological assessment that was directed by the Court, which was before the Tribunal. It indicated:

    - when interviewed on 15 July 2010, he said he had pleaded guilty to avoid being incarcerated again; and he stated that his actions had been

grossly misinterpreted and exaggerated by the victims. As a result the Department of Corrections psychologist concluded Mr Henderson was unsuitable for psychological treatment for his offending issues due to his denial of offending.

- There was a "*seemingly low level of re-offending risk*".

23.7. Reference was also made to a very recent report prepared for the purposes of the Tribunal hearing by a counsellor who had earlier prepared a report for the criminal proceedings. The recent report indicated the matters that had been discussed at counselling. It stated Mr Henderson had decided to plead guilty to the charges to avoid returning to prison. However, in his oral evidence, Mr Henderson told the Tribunal that via counselling it had "*been pointed out that what I did was wrong in terms of my actions …*"

23.8. He explained his family circumstances, and his passion for health caring and people. He apologised to the Nursing Council and to his colleagues for the damage done to the reputation of the nursing profession.

23.9. Finally, he explained his financial circumstances.

24. As to penalty, the PCC submitted:

24.1. The Tribunal should have regard to the relevant legal principles, as outlined below.

24.2. It stated that the finding against Mr Henderson was extremely serious. The victims were vulnerable, and Mr Henderson was in a position of trust in that the victims were in his care. The Judge had also found that there was premeditation and a pattern of offending that occurred throughout 1999.

24.3. The only penalty open to the Tribunal, given the seriousness of the misconduct, was cancellation of registration. Additionally an order of censure

was sought so that a clear message could be sent to Mr Henderson and all other health professionals that conduct of this kind would not be tolerated.

25. For Mr Henderson, the following submissions were made:

25.1. Reference was made to the relevant legal principles, including the Tribunal's decision of *E*, [1] referred to below.

25.2. It was submitted that from the authorities referred to below, the Tribunal is required to consider alternatives short of cancellation, if such would be appropriate in all the circumstances. It was submitted that in this instance a penalty short of cancellation was appropriate.

25.3. In summary, the following mitigating factors were emphasised:

- the offending occurred some twelve years ago;
- there have been no other complaints since then, notwithstanding considerable publicity in 2008;
- Mr Henderson had been assessed as being at low risk of reoffending, through the use of two different risk assessment tools;
- Mr Henderson had voluntarily engaged in counselling from time to time since 2007, and continues to do so;
- he had kept his employers, both nursing and non-nursing, informed of his circumstances over the course of the Police investigation, his convictions and sentencing, and the current proceedings;
- he had voluntarily ceased clinical nursing practice, moving to a non-clinical role during the Police investigation, and until his initial trial and conviction in 2008, at which time he had ceased nursing practice;
- his nursing colleagues were aware of his convictions and nonetheless

had provided positive references as to his valuable contribution as a nurse, and as to his skills;

- he had ceased to hold an APC on 30 June 2009.

25.4. Having regard to the mitigating factors just mentioned, cancellation would be unduly punitive and the Tribunal should therefore consider suspension, which would meet the requirements of protecting the public; the Tribunal could consider supervision or other conditions relating to counselling to assist in meeting these objectives.

25.5. As far as the maintenance of professional standards was concerned, an order of censure would be the appropriate sanction.

25.6. As regards punishment, the Tribunal was not permitted to impose a fine on Mr Henderson by the provisions of the Act; nor should it impose an outcome that had the effect of being punitive particularly since the offences had occurred some twelve years ago.

25.7. The Tribunal needed to consider rehabilitation, given Mr Henderson's established skills and his desire to remain within the profession. It was explained, for example, that he would like to become an industrial nurse following the conclusion of his apprenticeship as an electrician which would be in a little over twelve months.

25.8. Counsel also submitted that as well as Mr Henderson having to comply with any conditions which the Tribunal might impose, Mr Henderson would also have to comply with any return to practice requirements which NCNZ might impose when application was made for the reissuing of an APC.

25.9. Finally, submissions were made as to costs, and relevant financial details for that purpose were explained.

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[1] 245/nur09/1168.

Legal Principles:

26. In determining the appropriate penalties, the Tribunal recognised the following functions of disciplinary proceedings:

 26.1. To protect the public – this object is reinforced by section 3 of the HPCA Act;

 26.2. to maintain professional standards – this object is emphasised in *Taylor v General Medical Council* [1990] 2 All ER 263; *Ziderman v General Dental Council* [1976] 2 All ER 344 and *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720;

 26.3. to punish the practitioner in question, as referred to in *Dentice v The Valuers Registration Board* and *Patel v Complaints Assessment Committee* (CIV-2007-404-1818, 13 August 2007 Lang J);

 26.4. where appropriate, to rehabilitate the practitioner, as referred to in *J v Director of Proceedings* (CIV-2006-404-2188, 17 October 2006, Baragwanath J), and *Patel* (supra).

27. In *A v PCC* (5 September 2008, Keane J, CIV-2008-404-2927), the Court discussed carefully the range of sanctions available to the Tribunal, particularly cancellation and suspension.[2] The Court stated that four points could expressly be derived from the authorities, and implicitly a fifth:

> "*[81] 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.*
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> *[82] Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v B (HC Auckland, HC4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele the General Medical Council [2005] EWHC 2143, though "… the maintenance of public confidence … must*

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[2] Paras 77-82.

> *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"*."

28. In numerous cases, the need to consider and explain why lesser options have not been adopted is emphasised. But the Tribunal has to proceed on the basis of what is appropriate having regard to the public interest, and the need to maintain public confidence in the profession.[3] Randerson J put the matter in this way:

> "*[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 [2002] 1 WLR 1538. As the Privy Council further observed at 1543:*
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> > *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 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.*
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> *[31] I respectfully adopt the observations of the Privy Counsel 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.*" [4]

Penalty - Discussion:

29. As mentioned, Counsel for the practitioner referred to the decision of *E.* [5] That case involved a conviction for indecent assault, in respect of a practitioner and a victim who had previously lived together in a domestic relationship. The Tribunal was satisfied that the conviction reflected adversely on Mr E's fitness to practise, and that

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[3] *Patel*, supra, para 30 per Lang J; *L v The Director of Proceedings*, Woodhouse J, 25 March 2009, CIV-2008-404-2268 [47-48].

[4] *Patel v The Dentists Disciplinary Tribunal* HC AK AP77/02, 8 October 2002.

[5] 245 Nur /9/116P.

the appropriate outcome was suspension for two years with conditions to apply thereafter; there was also an order of censure and costs. Because there had been name suppression in the District Court, an order of non-publication of name was made in the professional disciplinary case.

30. The Tribunal considers the *E* case to be quite different from the present case. Although the practitioner had already been away from practice for some 2 years at the time of hearing (and in this case there was such a period of approximately 3 years), there were distinguishable factors relating to the personal circumstances of the practitioner; also the offending in that case did not occur in the work environment. This case is not sufficiently comparable with the present case as to lead to a conclusion that the same penalties should be imposed.

31. In the present case, the Tribunal considers there are the following aggravating factors:

    31.1. There were three discrete occasions of serious sexual offending;

    31.2. Normally, given such serious circumstances of offending, cancellation would follow; however, it is recognised that particular circumstances may require a different outcome.

    31.3. There had been reluctance on the part of Mr Henderson to accept that he had indeed offended, even at the date of preparation of a probation report for the Department of Corrections in July 2010; and the insight which he said had developed at counselling was not referred to in the counsellor's report, giving rise to doubt as to the extent of the insight.

32. There are the following mitigating factors:

    32.1. Mr Henderson accepted at an early point that a disciplinary offence had occurred, and cooperated fully in the hearing of the matter.

    32.2. He had undertaken at his own instigation counselling over and above that directed by the Probation Service.

32.3. He had been completely candid when the Police first interviewed him with his charge nurse, and then with his employer generally at the time the criminal charges were laid against him, along with the NCNZ.

32.4. The offences occurred 12 years ago; there has been extensive publicity since but no person has come forward to indicate other offending.

32.5. Good references from persons who are aware of all the circumstances were placed before the Tribunal, including from his current employer.

32.6. It is clear Mr Henderson has a strong commitment to his profession; in that regard the Tribunal is alert to the public interest factor in not ending the career of the a health professional who has undergone extensive training, which needed to be considered.

33. Balancing the aggravating factors against the mitigating factors in order to reach a proportionate outcome, the Tribunal considers the only responsible step it can take is to cancel Mr Henderson's registration. But, it also considers it appropriate to make recommendations with regard to the possibility of an application for re-registration. Such an approach will balance the very serious offending involved, against Mr Henderson's stated commitment to the nursing profession and the possibility of rehabilitation. The Tribunal has determined that any future practice which Mr Henderson chooses to undertake must be the subject of full scrutiny by NCNZ, so that all the options which it would have available to it in that situation can be considered.

34. Alongside the order of cancellation, then, the Tribunal recommends to NCNZ that:

34.1. It may well wish to consider receiving an application for re-registration after 12 months from the date of the hearing, this to coincide with the conclusion of Mr Henderson's apprenticeship.

34.2. It may also wish to consider Mr Henderson's referral to its Health Committee for appropriate assessment.

35. The Tribunal recognises that NCNZ is not bound by these recommendations, but it is confident careful consideration will be given to all relevant matters in light of Mr Henderson's circumstances at the time of any application for re-registration Mr Henderson may choose to make.

36. An order of censure will also be made, given the serious offending involved. A strong message needs to be sent to all health practitioners that conduct of this kind is inappropriate.

37. Finally, the Tribunal was required to consider costs. The Tribunal was informed that costs were:

    37.1. For the PCC, $3,500.00, not including GST.

    37.2. For the Tribunal, $10,600.00, not including GST.

38. The authorities require the Tribunal to take 50 percent of reasonable costs as a starting point, and then either increase or decrease the practitioner's contribution, taking into account all relevant factors.

39. Here, it is common ground that there has been significant cooperation from Mr Henderson, including the fact that he consented to the matter being heard in Wellington rather than Dunedin (which would have been more costly) and he himself travelled to Wellington for the purposes of the hearing.

40. The Tribunal has also carefully considered his financial circumstances, which were modest, but not to the point of him being impecunious.

41. It has concluded that an appropriate contribution to costs will be at the level of 30%. Arrangements for repayment can be discussed with NCNZ.

Conclusion:

42. The charge is established.

43. Mr Henderson's registration is cancelled.

44. The Tribunal recommends to NCNZ that:

    44.1. It may well wish to consider receiving an application for re-registration after 12 months from the date of hearing, that is, 27 September 2011.

    44.2. It may well wish to consider a referral of Mr Henderson to its Health Committee for appropriate assessment.

45. There shall be an order of censure: Mr Henderson and all other health practitioners must recognise that conduct of the kind which the Tribunal has been required to consider is completely unacceptable.

46. There is an order for costs:

    46.1. In respect of the PCC's costs, Mr Henderson is to pay the sum of $1,050.00, with GST not being payable.

    46.2. In respect of the Tribunal's costs, Mr Henderson is to pay the sum of $3,180.00, with GST not being payable.

47. The Tribunal directs that a copy of this decision and a summary be placed on the Tribunal's website. It further directs that a notice stating the effect of its decision be placed in the *New Zealand Gazette*, *Kai Tiaki*, and the Nursing Council's newsletter.

DATED at Wellington this 4th day of October 2011

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B A Corkill QC
Chairperson
Health Practitioners Disciplinary Tribunal