



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 418/Nur11/188P

IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003

AND

IN THE MATTER of disciplinary proceedings against
TAGI FIU, of Porirua, registered
nurse

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING in Wellington on 18 October 2011

TRIBUNAL: Mr Bruce A Corkill QC (Chairperson)

Dr Marian Bland, Ms Orana Harris, Ms Susan Matthews and Ms
Angela Hauk-Willis (Members)

Ms K Crosby (Executive Officer)

Ms H Hoffman (Stenographer)

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

Ms M More, for Ms T Fiu

Introduction:

1. Ms Tagi Fiu is a registered nurse of Porirua.
2. On 2 August 2011, a Professional Conduct Committee (PCC) laid a disciplinary charge against Ms Fiu under the Health Practitioners Competence Assurance Act 2003 (the HPCA Act).
3. The charge contained 62 particulars, and related to significant over claiming of monies, as a result of Ms Fiu's employment with the Capital and Coast District Health Board (the DHB) in the period December 2008 to May 2009.
4. The charge is 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 Tagi Fiu 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 15 December 2008 to 17 May 2009, while employed as a registered nurse in the Rangitahi Unit of Capital and Coast District Health Board Ms Fiu claimed hours that she had not worked and/or allowances that she was not entitled to when she knew or ought to have known that she had not worked those hours and/or was not entitled to claim those allowances. In particular:*
 - 1.1 *On 17 December 2008 Ms Fiu claimed she worked 1430-2305hrs and/or claimed no meal break and higher duty allowances when she knew or ought to have known she was on leave and/or did not work those hours and/or was not entitled to claim these allowances;*
 - 1.2 *On 18 December 2008 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break allowance when she knew or ought to have known that she was on sick leave and did not work those hours and/or was not entitled to claim these allowances;*
 - 1.3 *On 18 December 2008 Ms Fiu claimed overtime from 1605-2130hrs when she knew or ought to have known that she was on sick leave and/or did not work those hours;*

- 1.4 *On 19 December 2008 Ms Fiu claimed she worked 0700-1605hrs when she knew or ought to have known that she was on leave and/or did not work those hours;*
- 1.5 *On 20 December 2008 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she was on leave and/or was not entitled to claim these allowances;*
- 1.6 *On 20 December 2008 Ms Fiu claimed overtime from 1605-2130hrs when she knew or ought to have known that she was on leave and/or did not work those hours;*
- 1.7 *On 21 December 2008 Ms Fiu claimed that she worked 1605-2305hrs overtime and/or claimed the no meal break allowance when she knew or ought to have known that she did not work those hours and/or was not entitled to claim this allowance;*
- 1.8 *On 26 December 2008 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break allowance when she knew or ought to have known that she was on sick leave did not work these hours and/or was not entitled to claim this allowance;*
- 1.9 *On 26 December 2008 Ms Fiu claimed she worked 1605-2305hrs overtime and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she was on sick leave and/or did not work these hours and/or was not entitled to claim these allowances;*
- 1.10 *On 27 December 2008 Ms Fiu claimed she worked 0700-160hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she was on sick leave and/or did not work these hours and/or was not entitled to claim these allowances;*
- 1.11 *On 27 December 2008 Ms Fiu claimed she worked 1605-2000hrs overtime when she knew or ought to have known that she was on sick leave and/or did not work these hours;*
- 1.12 *On 28 December 2008 Ms Fiu claimed she worked overtime from 0700-1605hrs and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours and/or was not entitled to claim this allowance;*
- 1.13 *On 17 January 2009 Ms Fiu claimed she worked from 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she was on bereavement leave and did not work these hours and/or was not entitled to claim these allowances;*
- 1.14 *On 18 January 2009 she claimed she worked 1605-2300hrs overtime and/or claimed the no meal break allowance when she knew or ought to have known that she had not worked those hours and/or that she was not entitled to claim this allowance;*

- 1.15 *On 19 January 2009 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she was on bereavement leave and/or did not work these hours and/or was not entitled to claim this allowance;*
- 1.16 *On 19 January 2009 Ms Fiu claimed she worked 1605-1930hrs overtime and/or claimed the no meal break allowance when she knew or ought to have known that she was on bereavement leave and/or did not work these hours and/or was not entitled to claim this allowance;*
- 1.17 *On 20 January 2009 Ms Fiu claimed she worked 0700-1605 and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she was on leave and/or did not work these hours and/or was not entitled to claim these allowances;*
- 1.18 *On 21 January 2009 Ms Fiu claimed she worked 0700-1605 overtime and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances ;*
- 1.19 *On 23 January 2009 Ms Fiu claimed she worked 1605-2300 overtime and/or claimed the no meal break allowance when she knew or ought to have known that she had not worked these hours and/or was not entitled to claim this allowance;*
- 1.20 *On 25 January 2009 Ms Fiu claimed that she worked 1605-2300hrs overtime and/or claimed the no meal break when she knew or ought to have known that she did not work these hours and/or was not entitled to claim this allowance;*
- 1.21 *On 15 February 2009 Ms Fiu claimed that she worked 0700-1605hrs overtime and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work those hours and/or was not entitled to claim these allowances;*
- 1.22 *On 16 February 2009 Ms Fiu claimed that she worked 0700-1605hrs and/or claimed the no meal break allowance when she knew or ought to have known that she did not work those hours and/or was not entitled to claim this allowance;*
- 1.23 *On 17 February 2009 Ms Fiu claimed that she worked 1430-2305hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work those hours and/or was not entitled to claim this allowance;*
- 1.24 *On 17 February 2009 Ms Fiu claimed that she worked overtime from 2305-0130hrs on 18 February when she knew or ought to have known that she did not work those hours;*
- 1.25 *On 18 February 2009 Ms Fiu claimed that she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*

- 1.26 *On 18 February 2009 Ms Fiu claimed overtime from 1605-2305hrs when she knew or ought to have known that these hours was not overtime but her ordinary rostered hours of work;*
- 1.27 *On 19 February 2009 Ms Fiu claimed that she worked 0700-1605hrs and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours because she was on sick leave and/or was not entitled to claim this allowance;*
- 1.28 *On 21 February 2009 Ms Fiu claimed that she worked overtime from 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work those hours and/or was not entitled to claim these allowances;*
- 1.29 *On 22 February 2009 Ms Fiu worked 0700-1605hrs and/or claimed the higher duty allowance when she knew or ought to have known that Chris Frith was the shift coordinator and/or that she was not entitled to claim this allowance;*
- 1.30 *On 27 March 2009 Ms Fiu claimed that she worked overtime from 1605-2300hrs and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours and/or that she was not entitled to claim this allowance;*
- 1.31 *On 1 April 2009 Ms Fiu claimed she worked overtime from 2300-2400hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work this hour and/or was not entitled to claim these allowances;*
- 1.32 *On 8 April 2009 she claimed that she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*
- 1.33 *On 8 April 2009 Ms Fiu claimed that she worked overtime from 1605-2300hrs and claimed the no meal break allowance when she knew or ought to have known that these were her ordinary rostered hours and/or that she had a meal break and/or was not entitled to claim this allowance;*
- 1.34 *On 9 April 2009 Ms Fiu claimed overtime from 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*
- 1.35 *On 11 April 2009 Ms Fiu claimed that she worked 0700-1605 when she knew or ought to have known that she did not work these hours because she worked from 1605-2300hrs;*
- 1.36 *On 11 April 2009 Ms Fiu claimed that she worked 0700-1605hrs and/or claimed the higher duty allowance when she knew or ought to have known that Zoe Halstead was the shift coordinator and/or that she was not entitled to claim this allowance;*

- 1.37 *On 12 April 2009 Ms Fiu claimed that she worked overtime from 1605-2130hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*
- 1.38 *On 13 April 2009 Ms Fiu claimed that she worked 0700-1605hrs and claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*
- 1.39 *On 16 April 2009 Ms Fiu claimed that she worked 1430 2300hrs overtime and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*
- 1.40 *On 18 April 2009 Ms Fiu claimed that she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours because she was on sick leave and/or was not entitled to claim these allowances;*
- 1.41 *On 18 April 2009 Ms Fiu claimed that she worked 1605-1830hrs overtime when she knew or ought to have known that she did not work these hours because she was on sick leave;*
- 1.42 *On 19 April 2009 Ms Fiu claimed that she worked 1605-2130hrs overtime and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours and/or was not entitled to claim this allowance;*
- 1.43 *On 20 April 2009 Ms Fiu claimed that she worked 0700-1605hrs and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours because she was on sick leave and/or she was not entitled to claim this allowance;*
- 1.44 *On 22 April 2009 Ms Fiu claimed that she worked 1430-2300hrs overtime and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*
- 1.45 *On 24 April 2009 Ms Fiu claimed that she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours because she was on annual leave and/or was not entitled to claim these allowances;*
- 1.46 *On 25 April 2009 Ms Fiu claimed that she worked 1605-2300hrs overtime and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours and/or was not entitled to claim this allowance;*
- 1.47 *On 28 April 2009 Ms Fiu claimed that she worked 0700-1605hrs overtime and/or claimed the no meal break and higher duty allowances*

when she knew or ought to have known that she did not work these hours and/or was not entitled to claim this allowance;

- 1.48 On 1 May 2009 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours because she was on sick leave and/or was not entitled to claim these allowances;*
- 1.49 On 2 May 2009 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours because she was on annual leave and/or was not entitled to claim these allowances;*
- 1.50 On 3 May 2009 Ms Fiu claimed she worked 1430-2300hrs overtime and claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*
- 1.51 On 4 May 2009 Ms Fiu claimed she worked 0700-1605hrs overtime and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours and/or was not entitled to claim this allowance;*
- 1.52 On 5 May 2009 Ms Fiu claimed she worked 1605-2300hrs overtime and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and was not entitled to claim these allowances;*
- 1.53 On 9 May 2009 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known that she did not work these hours and/or was not entitled to claim these allowances;*
- 1.54 On 9 May 2009 Ms Fiu claimed she worked 1605-2130hrs overtime when she knew or ought to have known that she did not work these hours;*
- 1.55 On 11 May 2009 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours and/or was not entitled to claim this allowance;*
- 1.56 On 11 May 2009 Ms Fiu claimed she worked 1605-2130hrs overtime and/or claimed the higher duty allowance when she knew or ought to have known that these were her ordinary rostered hours of work and/or that Helen O'Sullivan was the shift coordinator and/or that she was not entitled to claim this allowance;*
- 1.57 On 13 May 2009 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break and higher duty allowances when she knew or ought to have known she did not work these hours and/or was not entitled to claim these allowances;*

- 1.58 *On 13 May 2009 Ms Fiu claimed she worked 1605-2130hrs overtime and/or claimed the no meal break allowance when she knew or ought to have known that these were her ordinary rostered hours and/or that she had a meal break and/or was not entitled to claim this allowance;*
- 1.59 *On 14 May 2009 Ms Fiu claimed she worked 0700-1605hrs and/or claimed the no meal break allowance when she knew or ought to have known she did not work these hours because she was on sick leave and/or was not entitled to claim this allowance;*
- 1.60 *On 16 May 2009 Ms Fiu claimed she worked 0700-1605hrs overtime and/or claimed the no meal break and higher duty allowances when she knew or ought to have known she did not work these hours and/or was not entitled to claim these allowances;*
- 1.61 *On 17 May 2009 Ms Fiu claimed she worked 0700-1605hrs and claimed the higher duty allowance when she knew or ought to Helen O'Sullivan was the shift coordinator and/or was not entitled to claim this allowance;*
- 1.62 *On 17 May 2009 Ms Fiu claimed she worked 1605-2300hrs overtime and/or claimed the no meal break allowance when she knew or ought to have known that she did not work these hours and/or was not entitled to claim this allowance.*

The conduct alleged in Charges 1.0 amounts to professional misconduct pursuant to section 100(1)(a) or (b) of the Act and particulars 1.0 to 62 either separately or cumulatively, are particulars of that professional misconduct.”

Legal Principles:

5. The burden of proof was on the PCC.
6. 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.
7. Section 100 of the HPCA Act defines the grounds on which a health practitioner may be disciplined. The Tribunal has now had ample opportunity to consider the test for professional misconduct under the section, and the approach to it is well settled – examples of the correct approach are found in *Nuttall* (8/Med04/03P); *Aladdin* (12/Den05/04D and 13/Den04/02D) and *Dale* (20/Nur05/09D).

8. The section provides that malpractice and/or negligence and/or conduct likely to bring discredit to the profession can constitute professional misconduct.
9. “Malpractice” is defined in the Collins English Dictionary (2nd ed) as:
 1. *“The immoral, illegal or unethical conduct or neglect of professional duties. Any instance of improper professional conduct.”*
10. In the new shorter Oxford English Dictionary (1993 edition) the word is defined as:

“Law. Improper treatment or culpable neglect of a patient by a physician or of a client by a lawyer ... 2 gen criminal or illegal action: wrongdoing, misconduct.”
11. Malpractice, although often equated with negligence, is perhaps better considered 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 other forms of conduct reaching the necessary level of gravity, such as assaulting a patient, swearing at or threatening a patient, a deliberate failure to obey an instruction or sexual misconduct. (see para 23.65, “Medical Law in New Zealand”, 2006).
12. Negligence and malpractice were discussed by Gendall J in *Collie v Nursing Council of New Zealand* [2000] NZAR 74. His Honour said:

“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, or oversight or for that matter carelessness.”
13. Similarly, it is for the Tribunal to decide whether the conduct, if established, would be likely to bring discredit on the medical profession. In the same case Gendall J stated:

“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 whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standard of the nursing profession was lowered by the behaviour of the nurse concerned.”
14. In *IRG v Professional Conduct Committee of the Psychologists Board* [2009] NZAR

563, the Court of Appeal emphasised that the intention in enacting section 100 in its current form was to move away from an approach that differentiated between levels of seriousness in the charge. The differentiation was now likely to be reflected in the penalty, not the charge (at [49]).

15. There are two steps involved in assessing what constitutes professional misconduct:
 - 15.1. The first step involves an objective analysis of whether or not the health practitioner's acts or omissions 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;
 - 15.2. The second step 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 warrant maintaining professional standards and/or punishing the health practitioner.
16. This approach to the assessment of professional misconduct under the statute is well established under previous decisions of the Tribunal, and in authorities such as *McKenzie v MPDT & Anor* [2004] NZAR 47.
17. The correct approach to threshold is that described in the Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774, which endorsed the earlier statement of Elias J in *B v Medical Council* (noted at [2005] 3 NZLR 810). She made the important point that the threshold is "*inevitably one of degree*". The Court of Appeal expressed the issue in this way:

"In cases of both professional misconduct and conduct unbecoming it will be necessary to decide if there has been a departure from acceptable standards and then to decide whether the departure is significant enough to warrant

sanction.”

18. In determining whether the departure is significant enough there must be positive reasons to justify such a conclusion.
19. The Tribunal accepts and applies the above principles, in this case.

Evidence:

20. The hearing was able to proceed on the basis of an agreed summary of facts, which set out the background circumstances and contained Ms Fiu's acknowledgement that the facts in the disciplinary charge were admitted; she further stated that she agreed the conduct amounted to professional misconduct and was of a nature that warranted the imposition of a disciplinary sanction.
21. The agreed summary of facts is as follows:
 1. *Ms Tagi Fiu (Ms Fiu) is a registered nurse who was employed in the Rangitahi adolescent mental health unit at Capital & Coast District Health Board until her dismissal on 23 September 2009.*
 2. *Ms Fiu registered as a nurse in December 2007 and began working in the Rangitahi Unit in 2008 on the completion of the new graduate nurse programme.*
 3. *Ms Lucy Laphen (Ms Laphen) is the Team Leader of the Rangitahi Unit and has been in this position since 2002.*
 4. *In her role as Team Leader of the Rangitahi Unit, Ms Laphen meets monthly with the Finance Department of Capital & Coast Health. In these meetings, issues such as budget “blow-outs” are discussed.*
 5. *Around June 2009, Ms Laphen was advised that there had been a lot of overtime worked in Rangitahi Unit in the previous month. Ms Laphen was surprised to hear this because all overtime had to be approved by her and as far as she was aware, she had not approved any overtime for that month.*
 6. *Ms Laphen then went through the financial records of each nurse employed at Rangitahi Unit and discovered that Ms Fiu had earned \$4,582.65 in overtime payments for the month of May. None of these claims had been approved by Ms Laphen.*

7. *Ms Laphen then asked the Payroll Department to look over the previous four months earnings by Ms Fiu and a trend of increasing overtime, no meal break and higher duty allowance claims by Ms Fiu was noted.*
8. *On 3 July 2009 Ms Fiu attended a meeting with Shyam Murti and Gary Waghorn, HR advisors at Capital & Coast District Health Board, and Ms Laphen.*
9. *Ms Fiu was advised that the meeting had been called because of concerns that had arisen around overtime and other allowances that had been claimed by Ms Fiu.*
10. *Various timesheets and shift planners were shown to Ms Fiu to illustrate the discrepancies between what she claimed she had worked on her timesheets and what she had actually worked on the shift planner.*
11. *Ms Fiu explained the discrepancies in her timesheets in a variety of ways such as that she had come in to work when she was on sick leave or on a rostered day off, that she had made honest mistakes on her timesheets or that she had undertaken the role of shift coordinator even though someone else was allocated that role on the shift planner.*
12. *As a result of this meeting, Capital & Coast Health decided to undertake a formal investigation and to interview other staff to confirm or deny Ms Fiu's explanations.*
13. *Interviews with staff from the Rangitahi Unit confirmed that on the occasions that Ms Fiu had claimed to be shift coordinator when another staff member was allocated that role, Ms Fiu had not been the coordinator and that there was never more than one shift coordinator on any shift.*
14. *Following analysis of the interviews with staff from the Rangitahi Unit and Ms Fiu's timesheets, Capital & Coast District Health Board reached the conclusion that Ms Fiu had falsified her timesheets and made claims for payments she was not entitled to.*
15. *These actions were determined to amount to breaches of Capital & Coast District Health Board's code of conduct and were considered to be serious misconduct. Ms Fiu's employment was subsequently terminated.*
16. *Throughout the Capital & Coast District Health Board's investigation and disciplinary process, Ms Fiu continually denied any wrongdoing on her part.*
17. *Capital & Coast District Health Board then notified the Nursing Council of New Zealand of Ms Fiu's dismissal and the matter was*

referred to a Professional Conduct Committee (“PCC”) for investigation.

18. *At the completion of the PCC’s investigation, Ms Fiu was invited to meet with the PCC, which she did on 9 June 2011.*
19. *At this meeting, Ms Fiu admitted that she had claimed for overtime and/or higher duties allowances that she was not entitled to (as particularised in the notice of complaint and now the notice of charge) and that for the six-month period that was the subject of the complaint (December 2008-May 2009,) she had over-claimed approximately \$16,590.*
20. At the hearing, Counsel for the practitioner confirmed that Ms Fiu's admission in respect of the facts extended to each limb of each particular.
21. Counsel for the PCC addressed the Tribunal on the legal principles involved; it was submitted that each particular was clearly established and was sufficiently serious as to warrant the imposition of a disciplinary penalty.
22. Notwithstanding Ms Fiu's acceptance that there was professional misconduct, the Tribunal nonetheless had the responsibility of reaching its own conclusion on this issue.
23. It was accepted that although the charge pleaded that the particulars, whether considered separately or cumulatively, were particulars of professional misconduct, given the consensus position that there was no issue as to the factual basis for the charge, Counsel agreed it was appropriate for the Tribunal to consider the particulars cumulatively.
24. Considered cumulatively, the Tribunal had no hesitation in concluding that the established deceitful and dishonest conduct over a period of six months undoubtedly constitutes malpractice and the bringing of discredit to the nursing profession. It is a matter of significant concern that the conduct was able to proceed for as long as it did; the totality of the misconduct is very serious indeed, involving prolonged and multiple breaches of trust.

25. Although it is surprising that the misconduct was not detected sooner (since some of the time claimed was for periods when Ms Fiu was either taking annual leave or was on sick leave) any failure to detect on the part of others does not exonerate Ms Fiu who must bear full responsibility in the professional sphere for the dishonest conduct involved.
26. The Tribunal concludes that a disciplinary sanction is indeed necessary to protect the public, maintain professional standards and punish the health practitioner, having regard to the serious conduct involved.
27. Accordingly the charge of professional misconduct was established; this conclusion was announced at the hearing.

Penalty

28. Ms Fiu provided an affidavit, and was questioned on that affidavit. Her evidence in summary was:
 - 28.1. She accepted she had falsified timesheets to gain a pecuniary advantage, and that she had in effect stolen over \$16,000.00 from her employer.
 - 28.2. She deeply regretted her actions, and acknowledged that it was money the DHB could not afford.
 - 28.3. She also regretted that she had been unable to work in her chosen field because of her actions and that she had let down her colleagues and clients.
 - 28.4. She stated she was very sorry that she had falsified her timesheets, and offered no excuses, although she explained her personal circumstances at the time of the offending.
 - 28.5. She confirmed that she wished to continue in the nursing profession, believing that she had skills in that respect, and no complaints had been made. She regarded the offending as not relating to her ability to practise as a nurse.

- 28.6. She accepted that conditions might be imposed upon her, and would accept those conditions.
- 28.7. She wished to pay back the misappropriated money, and wished to come to an arrangement in that respect. She had been wanting to do this since the time prior to the misappropriation being discovered, but had been unable to do so because she had not been working.
- 28.8. She elaborated on the reasons as to why she had not been working. An interim practising certificate had been issued on 9 June 2009, with a condition that she must have a competence assessment within three months; it appears that because of a medical issue she had not been able to work and had been unable to meet the condition; thus she had not been able to return to practice. She also elaborated on the fact that she had had family commitments which had precluded her from obtaining employment and repaying the sum involved.
29. A supporting affidavit was filed by a work colleague, who told the Tribunal that she considered Ms Fiu possesses excellent nursing skills and experience; she elaborated on her reasons for holding this opinion. The PCC confirmed that the employer had raised no issues of competence at work.
30. Submissions were then received from Counsel.
31. Counsel for the PCC:
- 31.1. Referred to the well known legal principles involved, which are summarised below.
- 31.2. Submitted that the conduct involved a very serious and intentional breach of trust over an extended period.
- 31.3. Referred to cases of dishonesty where the Tribunal had previously considered it appropriate to impose orders of cancellation. It was submitted this was the appropriate outcome in the present case, along with an order of censure.

31.4. It was accepted that any question of a fine would depend on financial circumstances. It was then clarified that Ms Fiu was in receipt of legal aid, and consequently no order for costs could be sought.

32. Counsel for Ms Fiu submitted:

32.1. There had been an early guilty plea.

32.2. There was no previous history of convictions.

32.3. Ms Fiu showed remorse and insight.

32.4. She was (realistically) not seeking name suppression.

32.5. She regretted her actions.

32.6. She wanted to repay the misappropriated money by way of reparation.

32.7. The behaviour was not patient centered, nor did it involve drugs or patient care.

32.8. She had already suffered by reason of the fact that she had not been able to practise since November 2010, and had, in a de facto sense, been suspended.

32.9. Her skills were attested to by a senior colleague.

32.10. Reference to case law was made; the relevant cases are discussed below.

32.11. Counsel submitted that the matter could perhaps be dealt with by suspension, but in any event conditions on practice involving the repayment of the money misappropriated, a requirement that she not hold any post involving responsibility in any unit or ward, so that she would be working equivalent to the status of a new graduate, a requirement that her shift supervisor check and sign her time records, and that she report to a senior practitioner regularly.

32.12. It was confirmed Ms Fiu was in receipt of legal aid, and that the effect of section 40(2) of the Legal Services Act 2000 is that no order could be made against an aided person in a civil proceeding unless there were exceptional circumstances.

33. For the PCC it was confirmed that there was no assertion of exceptional circumstances; and the fact that the practitioner was in receipt of legal aid indicated impecunious circumstances which would be relevant to the issue of whether a financial penalty should be imposed.

Legal Principles

34. In determining the appropriate penalties, the Tribunal recognised the following functions of disciplinary proceedings:
- 34.1. To protect the public – this object is reinforced by section 3 of the HPCA Act;
- 34.2. 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;
- 34.3. 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);
- 34.4. 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).
35. 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.¹ 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*

¹ Paras 77-82.

between the two terms 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.

[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 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”.*”

36. 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.² 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:*

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.

[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.”³*

² *Patel, supra, para 30 per Lang J; L v The Director of Proceedings, Woodhouse J, 25 March 2009, CIV-2008-404-2268 [47-48].*

³ *Patel v The Dentists Disciplinary Tribunal HC AK AP77/02, 8 October 2002.*

Discussion:

37. The Tribunal considered there were the following aggravating factors:
- 37.1. The charge related to 62 particulars involving repeated dishonesty over six months.
 - 37.2. Ms Fiu took a long time to acknowledge the dishonesty involved, which included not being truthful to her employer.
38. The Tribunal considered there were the following mitigating factors:
- 38.1. There had been a plea of guilty and co-operation in the bringing of the professional charge.
 - 38.2. There was a commitment to repaying the sum involved.
 - 38.3. Ms Fiu showed sincere remorse.
 - 38.4. There was no evidence of negligence in patient care, or other issues which sometimes occur in cases of this kind such as the misappropriation of drugs.
 - 38.5. The situation had arisen in difficult personal circumstances, which Ms Fiu had outlined to the Tribunal in evidence.
 - 38.6. There was now insight, although it took some time for this point to be reached.
39. As the case law above makes clear, the Tribunal must impose the least restrictive outcome.
40. The PCC relied on the following cases:
- 40.1. In *Hawes*⁴ a nurse had been convicted of submitting false timesheets and claiming a salary for hours she had not worked over a 12 month period. As a result of the convictions entered against her, the Tribunal found that they reflected adversely on fitness to practise. The Tribunal concluded that the conduct involved a gross breach of trust; Ms Hawes had deceived her

⁴ 185/Nur08/94P.

employer regularly over an extended period of time and the deception involved a significant amount of money. The Tribunal concluded that in order to ensure proper professional standards and maintain public safety, it was necessary to cancel the practitioner's registration.

40.2. In *Bain*⁵ the nurse had been convicted of stealing some \$1,500.00 of cash from her employer, and further cash amounts from elderly residents' personal accounts. An order of cancellation was imposed.

41. Counsel for the practitioner relied on previous decisions where suspension orders had been made, such as:

41.1. *Stewart*,⁶ where a practitioner had been charged with falsely claiming over a period of the year that she had been sick or unable to work, and there had been inappropriate claims for remuneration. The Tribunal undertook a careful review of previous decisions.⁷ It concluded that whilst the offence was serious it was not in the same category as cases such as *Winefield*, *Pearson*, *Murdoch*, *Pellowe* or *Fairgray*, some of which cases involved cancellation, and others involved suspension for a period of at least six months. The order which was appropriate to address the public safety and protection of professional standards factors was a period of suspension for two months.

41.2. *Fairgray*,⁸ where there was fraud by a pharmacist amounting to \$104,633.00. The starting point for the Tribunal in that instance was 12 months suspension. Factors which the Tribunal then took into account included an early guilty plea, credit for having been candid as to what had

⁵ 387/Nur11/176P.

⁶ 140/Nur078/64P.

⁷ Including *Winefield* 60/Phar06/30P, *Pearson* 39/Nur05/23P, *Healy* 123/Nur07/70P, *Keshvara* 53/Med06/29P, *Pitwood* 84/Ost06/42P, *Palmer* 96/Phys06/43P, *Murdoch* 76/Phys06/45P, *Pellowe* 137/Phar07/74P and *Fairgray* 138/Phar07/75P.

⁸ 138/Phar07/75P.

occurred, the absence of any financial gain, and the fact he was not seeking name suppression which would also be an aspect of penalty. Consequently the Tribunal was persuaded that appropriate orders would be suspension for a period of three months and a fine of \$10,000.00.

42. In this case, it is to be noted that no application for non publication of name was made, and the Tribunal accepts that the possibility of publicity is an aspect of the outcome of the proceeding which can be taken into account.
43. Because of the impecunious financial circumstances, the Tribunal does not consider a fine should be imposed as an aspect of penalty.
44. In light of all these background factors, and having had careful regard to all the previous decisions of the Tribunal, the Tribunal was satisfied that it could impose outcomes short of cancellation; and that the correct outcome was suspension and conditions on practice, together with an order of censure. The Tribunal also accepts that this is a case where there is a public interest in not ending Ms Fiu's career by way of an order of cancellation of registration at the present time.⁹
45. As regards the period of suspension, the Tribunal considers the misconduct which occurred here was very serious. As already made clear the dishonest behaviour occurred over an extended period. The starting point for an order of suspension is accordingly a period of 18 months. However, the Tribunal accepts that Ms Fiu had not been able to practise for nearly a year (this factor is indirectly related to the circumstances the Tribunal was required to consider, in that Ms Fiu's employment was terminated as a result of her offending; and this led to her inability to meet the condition on practice imposed by the Nursing Council when she was granted an interim practising certificate); and the plea of guilty and other mitigating factors

⁹ See the principle referred to in *A v PCC* at [82], para 35 above.

referred to persuade the Tribunal that the appropriate period of suspension is a period of nine months. The Tribunal considers this period is consistent with the indication given by Lang J in *McDonald v PCC*,¹⁰ to the effect that orders of suspension for nine months or longer have generally been imposed where the misconduct involves intentional or deliberate misconduct, often amounting to criminal conduct.

46. As regards the recommendations and conditions on practice which the Tribunal is satisfied should be ordered, these are necessary to ensure public safety and the maintenance of standards.
47. The Tribunal has noted Ms Fiu's intentions to repay the monies that have been wrongfully taken. It is accepted those intentions are sincere. It is not practical to impose a condition with regard to this possibility, but it strongly recommends to Ms Fiu that she deal with this issue as she had said on oath to the Tribunal that she will. That is a matter she should discuss with the DHB.
48. The Tribunal's conclusions were announced at the hearing on 18 October 2011, so that the orders could take effect immediately.¹¹ In the course of its remarks, the Tribunal told Ms Fiu that it considered the outcomes it was ordering would give her a second chance. It also noted, however, that were there to be any further difficulties of the kind the Tribunal was required to consider, she could not expect an outcome as supportive as that which was being ordered.

Conclusion

49. The charge of professional misconduct is established.
50. Ms Fiu is suspended from practice for a period of nine months from 18 October 2011.

¹⁰ CIV-2009-404-1516, 10 July 2009 at [95].

¹¹ A written and signed ruling containing the Tribunal's orders was, after those orders had been announced, given to Ms Fiu immediately following the hearing on 18 October 2011.

51. The Tribunal recommends to the Nursing Council that before Ms Fiu recommences practice, she should undertake a competency assessment programme.
52. The following conditions on practice will apply for a period of 12 months following the resumption of practice:
 - 52.1. The Nursing Council shall approve Ms Fiu's place of employment as a registered nurse.
 - 52.2. Ms Fiu may not for the period of the conditions work in sole charge.
 - 52.3. Ms Fiu is to have professional supervision by a supervisor approved by the Nursing Council, the cost of which shall be met by Ms Fiu. The Tribunal recommends to the Nursing Council that the supervisor have an in depth understanding of the cultural context of her nursing practice.
 - 52.4. Ms Fiu is to undertake such papers in relation to professional ethics as the Nursing Council shall determine, having regard to the nature of the offending.
53. An order of censure was made: the Tribunal must express for the benefit of Ms Fiu and for the benefit of the profession its strong disapproval of the misconduct which occurred over many months.
54. The Tribunal directs that the Executive Officer publish a copy of this decision and a summary on the Tribunal's website. It further directs the Executive Officer to publish a notice stating the effect of its decision in the New Zealand Gazette, Kai Tiaki Nursing New Zealand and the Nursing Council's Newsletter (Section 157 HPCA Act).

DATED at Wellington this 27th day of October 2011

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B A Corkill QC
Chairperson
Health Practitioners Disciplinary Tribunal