

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL  
TARAIPUINARA WHAKATIKA KAIMAHI HAUORA**

**HPDT No:** 1039/Phys 18/433P

**UNDER** the Health Practitioners Competence Assurance Act 2003 (“the HPCA Act”)

**IN THE MATTER** of a disciplinary charge laid against a health practitioner under Part 4 of the HPCA Act

**BETWEEN** **A PROFESSIONAL CONDUCT COMMITTEE** appointed by the Physiotherapy Board of New Zealand  
**Applicant**

**AND** **MR MICHAEL JOHN EVANS** of Gisborne, Registered Physiotherapist  
**Practitioner**

**Hearing:** Held at Auckland on 4 and 5 June 2019

**Tribunal:** Ms M Dew QC (Chair)  
Ms K Davie, Mr J Salesa, Ms S Stewart, Ms D Fenton (Members)  
Ms D Gainey (Executive Officer)

**Appearances:** Ms B Johns for the Professional Conduct Committee  
Ms J Stafford for the Practitioner

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**DECISION OF THE TRIBUNAL**

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[1] Mr Evans is a registered physiotherapist. He holds a Diploma in Physiotherapy and has been registered with the Physiotherapy Board of New Zealand since 1992.

[2] Mr Evans presently practices at Physio4Life in Gisborne. At all material times, Mr Evans was the director, shareholder and manager of Third Wave Physiotherapy Limited (trading as Physio4Life).

[3] On 17 December 2018, a Professional Conduct Committee of the Physiotherapy Board laid a disciplinary charge of professional misconduct against Mr Evans under the Health Practitioners Competence Assurance Act 2003 (**HPCA Act**). That charge has now been amended by consent (the **Charge**).<sup>1</sup> By way of summary, the particulars of the Charge allege that:

- (a) On approximately 251 occasions between 2013 and 2016, Mr Evans invoiced ACC for more than 12 hours of service in one day, including 10 occasions when he invoiced ACC for over 24 hours in one day.
- (b) On or about 19 occasions between 2013 and 2016, Mr Evans made claims to ACC for two treatments provided on the same day to the same patient under two different ACC45 claim forms.
- (c) On approximately 54 occasions between 2013 and 2016, Mr Evans provided ACC funded treatment to his family members contrary to the ACC Treatment Provider Handbook 2011 (**TPH**).

[4] Mr Evans admits particulars 1(a), 1(b) and 2 of the Charge in its entirety, and accepts that his conduct amounts to professional misconduct deserving of a disciplinary sanction. However, it remains for the Tribunal to determine whether the Charge is established, and if so what, if any, penalty should apply.

[5] The hearing proceeded on the basis of an Agreed Summary of Facts dated 8 May 2019 and an Agreed Bundle of Documents.

## **The Charge**

[6] The particulars of the Charge are set out below:

1. Mr Evans invoiced ACC for more treatment than provided, in that:
  - (a) On approximately 251 occasions between 2013 and 2016 Mr Evans invoiced ACC for more than 12 hours of services in one day, including 10 occasions when he invoiced ACC for over 24 hours in one day, by invoicing ACC for more treatment time than provided, contrary to the Accident Compensation (Liability to Pay or Contribute to the Cost of Treatment) Regulations 2003, and contrary to the legal and ethical obligation to act with honesty and integrity in all professional activities (including when

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<sup>1</sup> Amended Notice of Charge dated 8 May 2019.

interacting with funders and insurers) and to ensure that financial remuneration is commensurate with the work performed (Principle 6.3 and 6.6 of the Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct, October 2011).

- (b) On or about 19 occasions between 2013 and 2016, Mr Evans made claims to ACC for two treatments provided on the same date to the same patient under two different ACC45 claim forms.
2. On approximately 54 occasions between 2013 and 2016, Mr Evans provided ACC funded treatment to family members, namely his wife and two sons, contrary to ACC's TPH which sets out ACC's policy in relation to treatment of family and contrary to the Physiotherapy Board's *Position Statement on the Treatment of Whanau and Family Members and Self Treatment*.

### **Agreed Summary of Facts**

[7] The factual background set out below is based on the Agreed Summary of Facts filed with the Tribunal.

[8] At all material times, Mr Evans provided physiotherapy services as an ACC registered treatment provider under the Accident Compensation (Liability to Pay or Contribute to the Cost of Treatment) Regulations 2003. In doing so, Mr Evans is subject to the expectations, responsibilities and expectations as set out in the Treatment Provider Handbook (TPH) (2011), the Physiotherapy Board's Standards of Ethical Conduct (March 2006), the Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct (2011) and the Joint Physiotherapy New Zealand / Physiotherapy Board Position Statement regarding Treatment of Whanau and Family Members and Self Treatment (December 2012).

*Particular 1(a): 2013-2016, claiming over 12 hours service in one day on 251 occasions (including over 24 hours in one day, on 10 occasions)*

[9] In relation to particular 1(a), Mr Evans admits that on approximately 251 occasions between 2013 and 2016 he invoiced ACC for more than 12 hours of services in one day, including 10 occasions when he invoiced ACC for over 24 hours in one day, by invoicing for more treatment time than provided.

- [10] Mr Evans admits that the conduct was contrary to his professional obligations:
- (a) To ensure that invoices rendered to ACC comply with the ACC Regulations and the TPH;
  - (b) To act with honesty and integrity in all professional activities (including when interacting with funders and insurers);

- (c) To ensure that financial remuneration is commensurate with the work performed (Principle 6.3 and 6.6 of the Code of Ethics); and
- (d) As set out in the TPH.

[11] Mr Evans agreed to repay all invoiced treatments for all days that exceeded a 14 hour day within that 3 year period, totalling \$75,056.81. Payment of the total amount was made on 16 May 2017.

[12] In a letter to Mr Evans dated 6 June 2017, ACC stated that it considered that there may be sufficient evidence to bring a criminal prosecution against Mr Evans, but that it had decided not to do so due to Mr Evans taking full responsibility for his conduct, agreeing to rectify the loss to ACC by repaying \$75,056.81, and undergoing a Performance Improvement Plan. Instead, it issued Mr Evans with a formal warning.

[13] The ACC Integrity Services Investigation Findings Report dated 27 June 2017 stated that the evidential test for potential charges under the Accident Compensation Act 2001 and the Crimes Act 1961 had not been met, that there was no evidence of fraud and that the evidence pointed to negligent record keeping rather than criminal intent.

*Particular 1(b): 2013-2016, claiming twice for the same patient on 19 occasions*

[14] In relation to particular 1(b), on or about 19 occasions between 2013 and 2016, Mr Evans provided treatment to the respective patient for two separate injuries under different claim numbers during one 40-minute appointment, but invoiced ACC for two separate 40 minute appointments under separate claim numbers. Mr Evans accepts such conduct was contrary to his professional obligations.

*Particular 2: 2013-2016, Family members' treatment charged on 54 occasions*

[15] In relation to Particular 2, between 2013 and 2016, Mr Evans provided treatment to his wife and two sons. Mr Evans invoiced ACC for 54 treatments which he provided to those family members, totalling at least \$1,601.88.

[16] Mr Evans admits that he provided those treatments to family members in non-emergency situations and that there were no exceptional circumstances; and therefore such treatment did not constitute good clinical practice and should not have been invoiced to ACC in accordance with its policy regarding treatment of family members.

[17] Mr Evans admits that in providing those treatments, his conduct was contrary to his professional obligations, and in particular, that he did not comply with the TPH, the Position Statement and the Code of Ethics.

### **Relevant law under the HPCA Act – Professional Misconduct**

[18] The charge before this Tribunal is that the conduct separately or cumulatively amounts to professional misconduct pursuant to section 100(1)(a) and/or section 100(1)(b) of the Act, which provide as follows:

#### **“100 Grounds on which health practitioner may be disciplined**

- (1) The Tribunal may make any 1 or more of the orders authorised by section 101 if, after conducting a hearing on a charge laid under section 91 against a health practitioner, it makes 1 or more findings that –
  - (a) 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 occurred; or
  - (b) 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 occurred;”

[19] There is a well-established two stage test for determining professional misconduct.<sup>2</sup> The two steps are:

- (a) First, did the proven conduct fall short of the conduct expected of a reasonably competent health practitioner operating in that vocational area? This requires an objective analysis of whether the practitioner’s acts or omissions can reasonably be regarded by the Tribunal as constituting malpractice, negligence or otherwise bringing, or likely to bring, discredit on the profession; and
- (b) Secondly, if so, whether the departure from acceptable standards has been significant enough to warrant a disciplinary sanction for the purposes of protection of the public and/or maintaining professional standards?

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<sup>2</sup> *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA), as applied in *Johns v Director of Proceedings* [2017] NZHC 2843.

[20] The burden of proof is on the PCC. The PCC must produce evidence that establishes the facts on which the Charge is based to the appropriate civil standard of proof.

[21] The standard of proof is the civil standard of proof; that is proof which satisfies the Tribunal that on the balance of probabilities the particulars of the charge are more likely than not. The Tribunal must apply a degree of flexibility to the balance of probabilities taking into account the seriousness of the allegation, and the gravity of the consequences flowing from a particular finding.<sup>3</sup>

### **Relevant policies and standards**

[22] The relevant applicable standards and policies that Mr Evans was subject to are summarised briefly below.

#### *ACC Treatment Provider Handbook*

[23] In relation to treatment of family members, the TPH states that: “the view of ACC... is that it is not good clinical practice for [ACC treatment providers] to treat themselves or their close family members. This applies to all types of treatment provider. We generally consider it unacceptable and unethical for providers to claim payment from an external funder for treating close family”.<sup>4</sup>

[24] The TPH states that ACC will only consider paying for treatment provided to family members in “exceptional circumstances”. The examples given relate to emergencies.

#### *The Aotearoa NZ Physiotherapy Code of Ethics and Professional Conduct*

[25] The Code of Ethics, Principles 6.3 and 6.6 have particular application in this case.

- (a) Principle 6.3 requires the practitioner must act with honesty and integrity in all professional activities (including when interacting with funders, employers, employees, and insurers).
- (b) Principle 6.6 requires that the physiotherapist must ensure that financial remuneration is commensurate with the work performed.

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [112].

<sup>4</sup> 2011.

[26] As to the treatment of family members, the Code of Ethics states that physiotherapists; (a) should avoid treating family members (principle 10.6), and (b) must keep contemporaneous, accurate and legible records of patient/client treatment and progress (principle 5.7).<sup>5</sup>

*Joint Physiotherapy NZ and Physiotherapy Board's Position Statement*

[27] The Position Statement relevantly states that treating family members does not constitute good clinical practice. It notes that the potential problems associated with caring for close family members include the possibility that the physiotherapist lacks objectivity, and the presence of family dynamics may make it difficult for the client to change providers.

[28] Further, if funding is sought from a third party in these situations, then care must be taken to meet particular criteria regarding verification, documentation and care plans.<sup>6</sup>

**Relevant cases**

[29] The PCC referred the Tribunal to a range of cases it says are applicable to the present case which deal with professional misconduct in circumstances where there had been an abuse of trust of a third-party funder, by a health professional for personal gain.<sup>7</sup>

[30] In particular, the PCC referred the Tribunal to *Nonoa*<sup>8</sup>. In that case, the Tribunal found that Mr Nonoa, also a physiotherapist, was in breach of ethical and professional standards which related to his honesty and integrity in his dealings with ACC. Mr Nonoa's conduct included invoicing services to ACC under another provider's name when the services were not provided by either practitioner, and invoicing ACC for treatment provided to family members when there were no exceptional circumstances and without independent verification.

[31] In *Tovaranonte*, the practitioner claimed payment from ACC for sums totalling \$3,553.44 for treatment of patients that he had not undertaken and/or for which he was not entitled over a five-month period. Following inquiry into the matter by ACC, Dr Tovaranonte was cautioned, but two months later again claimed payment from ACC for treatments that he had not undertaken/for which he was not entitled. Two years later,

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<sup>5</sup> Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct, October 2011.

<sup>6</sup> Physiotherapy Board's Position Statement on the Treatment of Whanau and Family Members and Self Treatment, December 2012.

<sup>7</sup> *Nonoa* 1013/Phys18/427P; *Tovaranonte* 870/Med16/344P; *Fairgray* 138/Phar07/75P; *Howells* 980/Med18/416P; *Henderson* 451/Med11/200P; *Marchand* 280/Med09/133P; *Palmer* 96/Phys06/43P; and *Satya* 365/Phar10/169P.

<sup>8</sup> 1013/Phys18/427P.

Dr Tovarantonite conducted private medical examinations in a publicly funded clinic, including seeking payment from patients and using public facilities and resources that he was not entitled to. Mr Tovarantonite was found guilty of professional misconduct that amounted to negligence, malpractice, and brought discredit to the profession.

### **Finding on the Charge**

[32] The Tribunal is satisfied that each of the Charges has been established. The evidence submitted in the Agreed Summary of Facts and the Agreed Bundle of Documents establish the Charge as laid.

[33] In respect of Particular 1(a), the Tribunal is satisfied that Mr Evans' conduct in invoicing ACC for more treatment time than provided on 251 occasions between 2013 and 2016 amounts to professional misconduct. It fell well short of the conduct expected of a reasonably competent health practitioner practising as a physiotherapist as a registered ACC provider.

[34] In relation to Particular 1(b), the Tribunal is also satisfied that Mr Evans' conduct in claiming for two treatments provided on the same day to the same patient under two different ACC45 claim forms amounts to professional misconduct.

[35] In respect of Particular 2, the Tribunal is satisfied that the conduct meets the required threshold. Providing ACC funded treatment to family members on 54 occasions in non-emergency situations and with no exceptional circumstances also amounts to professional misconduct. It was contrary to Mr Evans' professional obligations and in particular, he did not comply with the TPH, the Position Statement, and the Code of Ethics.

[36] Overall, the Tribunal is satisfied that the Particulars of the Charge are established, in relation to Particulars 1(a), 1(b) and 2, and that all of the Particulars are established both separately and cumulatively under section 100(1)(a) and section 100(1)(b) of the HPCA as malpractice, negligence, and conduct likely to bring discredit to the profession.



## Penalty

[37] Given that the Tribunal is satisfied the charge is established, it must go on to consider the appropriate penalty under section 101 of the HPCA Act. The penalties may include:

- (a) Cancellation of registration;
- (b) Suspension of registration for a period not exceeding 3 years;
- (c) Censure;
- (d) An order that the practitioner may only practise with conditions imposed on employment or supervision or otherwise;
- (e) A fine of up to \$30,000; and
- (f) An order as to costs of the Tribunal and/or the PCC to be met in part or in whole by the practitioner.

[38] The Tribunal accepts as the appropriate sentencing principles those contained in *Roberts v Professional Conduct Committee*<sup>9</sup> where Collins J identified the following eight factors as relevant whenever the Tribunal is determining an appropriate penalty. In particular, the Tribunal is bound to consider what penalty:

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the health practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty "fair, reasonable and proportionate in the circumstances."

[39] Counsel for the PCC submits that the appropriate penalty in this case is a censure, a suspension of 3 – 4 months, conditions on Mr Evans' practice for 2 years, a fine of \$10,000 and a contribution of 50% to the costs of the PCC and the Tribunal.

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<sup>9</sup> [2012] NZHC 3354 at [44]-[51].

[40] For Mr Evans, it was submitted that suspension for any period of time would be disproportionate to the offending, overly punitive and inconsistent with previous Tribunal decisions. It was also submitted that the nature of the offending and his rehabilitation meant that conditions on Mr Evans' practice were unnecessary.

[41] Mr Evans submitted that a penalty of a censure together with a modest fine was an appropriate penalty. This would take into account the significant impact that this matter has had on Mr Evans and his family over a 3 year period and the reputational damage that he will suffer as a result of the publication of the outcome of this hearing.

### Comparable cases on penalty

[42] The PCC referred the Tribunal to a range of cases it says are applicable which deal with professional misconduct in circumstances where there had been an abuse of trust of a third-party funder, and exploitation of the health professional's position for personal gain.<sup>10</sup>

[43] The PCC referred the Tribunal to *Nonoa*<sup>11</sup>, as referred to above. In that case, the Tribunal declined to impose a period of suspension, stating that such a penalty is “generally reserved for those cases in which there has been a deliberate intention to defraud and to gain financial advantage”. The PCC submitted that this statement is not correct as a matter of law, and referred the Tribunal to several instances in which suspension had been imposed where the practitioner had not been found to have acted deliberately or dishonestly.<sup>12</sup>

[44] The PCC urged the Tribunal to what it says are more comparable cases, including *Tovaranonte*<sup>13</sup> and *Fairgray*,<sup>14</sup>

- (a) In *Tovaranonte*, the Tribunal did not accept that Dr Tovaranonte was sufficiently naïve as to not know what he was doing was wrong. He was suspended for 3 months, censured, had conditions imposed for 3 years, fined \$5,000 and ordered to pay costs of \$50,000.
- (b) In *Fairgray*, Mr Fairgray was suspended for 3 months, fined \$10,000 and censured. In this case the pharmacist Mr Fairgray had submitted false claims

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<sup>10</sup> *Nonoa* 1013/Phys18/427P; *Tovaranonte* 870/Med16/344P; *Fairgray* 138/Phar07/75P; *Howells* 980/Med18/416P; *Henderson* 451/Med11/200P; *Marchand* 280/Med09/133P; *Palmer* 96/Phys06/43P; and *Satya* 365/Phar10/169P.

<sup>11</sup> 1013/Phys18/427P.

<sup>12</sup> See, for example, *Macdonald v PCC* HC Auckland, CIV 2009-404-1516, 10 July 2009; *PCC v A* (Nur15/333P), *PCC v White* (525/Opt12/220P).

<sup>13</sup> 870/Med16/344P.

<sup>14</sup> 138/Phar07/75P.

for expired prescriptions over an 18 month period, with a value of some \$104,000, when he knew or ought to have known the claiming wrong.

[45] Mr Evans referred the Tribunal to *Nonoa* and also *PCC v Moore*<sup>15</sup> as the most comparable cases on the basis that they were related to administrative rather than professional clinical competence deficiencies. There were other cases also raised by the practitioner including *Howells* and *Henderson* as cases in which the penalty of suspension was not warranted. The practitioner urged the Tribunal to follow the line of cases that ordered censure, fines and conditions rather than suspension. The distinction urged on us is that suspension is only warranted if there is some issue of professional competence or serious dishonesty. Mr Evans submits that neither apply in his case.

[46] In *Moore*, the physiotherapist's charge related to a large number of incomplete or missing patient notes, removal of patient notes from the practice, failing to engage appropriately with the Physiotherapy Board, and practicing without an annual practising certificate for a short period of time. In that case, the Tribunal decided that it would not suspend the practitioner as there was no evidence of incompetent physiotherapy practice and due to cooperation shown by the Ms Moore. She was censured and had conditions placed on her practice for 2 years.

[47] Ultimately, each case will turn on its own facts and the Tribunal's view of the least restrictive penalty that is the most fair and proportionate overall.

### **Aggravating and mitigating factors**

[48] In considering the appropriate penalty, the Tribunal is required to consider the aggravating and mitigating factors in this case. The Tribunal notes the following aggravating factors:

- (a) Mr Evans was an experienced practitioner, with 27 years' experience, who worked extensively with ACC patients. We do not consider it is plausible that he did not understand that there was a significant risk that he was over charging ACC, given the extensive nature of the overclaiming that has been established. Equally, we do not consider this is simply a case of administrative oversight during busy periods of practice, given the period over which the misconduct occurred;
- (b) We accept the PCC submission that Mr Evan's appears to lack some insight into the serious nature of his misconduct. His unsworn statement produced to the Tribunal while clearly accepting responsibility for his actions, does seek to minimise the nature of the overclaiming as involving a serious breach of trust owed to ACC as a professional.

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<sup>15</sup> 998/Phys18423P.

- (c) We also note that Mr Evans seeks to minimise his treatment of family members by reference to his belief that others in the profession also treat family. This explanation avoids recognition of the dangers of regularly treating family members as he did and the compounding impact of his charging ACC for these treatments.
- (d) The financial gain to Mr Evans had been substantial. He repaid \$75,000 to ACC after its audit had established this amount as due.

[49] However, there are also material mitigating factors in this case, which we take into account, including that:

- (a) Mr Evans has cooperated with ACC, the PCC and now this Tribunal throughout the investigations and prosecution;
- (b) He has reimbursed ACC for the \$75,000 which was overclaimed;
- (c) Mr Evans has otherwise been a long serving and competent practitioner;
- (d) He has subsequently made changes to his practice to ensure ongoing compliance with the ACC regulations and the TPH; and
- (e) This has been his first appearance before this Tribunal.

### **Finding on Penalty**

[50] The Tribunal has taken into account the relevant sentencing principles, aggravating and mitigating factors and the comparative cases.

[51] We are satisfied that the appropriate penalty in this case is a censure, suspension of Mr Evans from practise for a period of 2 months, conditions to be imposed on his return to practise, a fine of \$5,000 and a contribution of 30% to the costs of the PCC and the Tribunal.

[52] The Tribunal has considered Mr Evans' position that:<sup>16</sup>

- (a) During 2015, staff shortages and an excessive workload meant that he was treating up to 3 patients at a time;
- (b) All claims were for treatments that took place and were documented in the patient records;
- (c) He was not aware at the time that his billing practices did not comply with ACC regulations; and

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<sup>16</sup> Practitioner submissions on penalty dated 4 June 2019 at [8].

- (d) His actions were at all times driven by a desire to do the best by his patients and family and that he was not motivated by a desire to obtain a financial advantage.

[53] However, the Tribunal was unable to accept Mr Evans' unsworn statement in relation to his intentions. In the present case, the Tribunal has found that Mr Evans' misconduct was deliberate and intentional. He is an experienced practitioner and we consider the evidence establishes that Mr Evans' conduct went beyond mere administrative efficiencies and overwork.

[54] There was, in our view, an element of deliberate conduct over a lengthy period of time that was seriously reckless as to his obligations to ACC and the profession.

[55] Further, in making this finding on penalty, the Tribunal notes that, as submitted by the PCC, the viability of ACC as an honesty-based system depends on the trustworthiness of practitioners and the accuracy of the claims submitted. Accordingly, deterrence is a key factor in this case. It is important for the Tribunal to set professional standards for the profession and in doing so it must send a strong message to health practitioners generally that the system cannot be manipulated.

[56] The Tribunal has had regard to the appropriateness of suspension as a penalty in this case. We have considered whether a censure would have been sufficient in this case together with the other conditions. In doing so, the Tribunal has applied the considerations relating to suspension as set out by the High Court in *A v PCC*:<sup>17</sup>

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.

[57] The Tribunal has also considered, in light of the statement in *Nonoa*, whether or not deliberate intention to defraud is required in order to impose a suspension. In the Tribunal's view, this element is not a requirement in every case before imposing a suspension. Rather, whether or not suspension is appropriate in each case and should it be considered in light of broader principles set out in *Roberts*, as well as taking into account the approach in *A v PCC* as set out above.

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<sup>17</sup> HC Auckland [2008] NZHC 1387 at [81].

[58] The conduct established is, in our view, sufficiently serious to warrant a short period of suspension in line with the comparable decision in *Tovaranonte*<sup>18</sup>. The Tribunal is also concerned that Mr Evans did not, as yet, fully appreciate the serious nature of his conduct and the breach of trust he has committed in relation to his ACC obligations.

[59] The fine of \$5,000 is ordered to denote the serious nature of the offending and is in line with other comparable fines from the cases cited to us by both the practitioner and the PCC.

[60] The conditions imposed are designed to address Mr Evan's rehabilitation, on his return to practice to both ensure that he clearly understands his ethical obligations and has a period of professional supervision to re-enforce his ethical and funder obligations for a period of 18 months.

## Costs

[61] In considering the appropriate quantum of costs, the Tribunal must take into account the need to make a proper contribution towards the costs. In doing so, it takes 50% of the total reasonable costs as a starting point, in accordance with the dicta in *Cooray v Preliminary Proceedings Committee*.<sup>19</sup>

[62] The PCC costs were \$87,776.94 and the Tribunal costs were \$24,684.18.<sup>20</sup> The PCC submitted that the practitioner should contribute 50% of the total PCC and Tribunal costs combined. For Mr Evans, it was submitted that a contribution of 30% was appropriate.

[63] The Tribunal recognises the cooperation received from Mr Evans, in particular the fact that the Charge was able to be dealt with on the basis of an Agreed Summary of Facts. Taking all factors into account, the Tribunal orders that Mr Evans pay the sum of \$33,738 in costs to be paid half each to the PCC and Tribunal. This is equivalent to approximately 30% of the total costs.

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<sup>18</sup> 870/Med16/344P.

<sup>19</sup> HC Wellington, AP 23/94, Doogue J, 14 September 1995.

<sup>20</sup> GST is not payable on any award of costs in the Tribunal.

## **Tribunal decision on name suppression**

[64] Mr Evans did not make an application for permanent name suppression. Accordingly, the interim suppression orders in respect of Mr Evans' name and any identifying particulars is lifted upon publication of this decision.

[65] The interim suppression orders in respect of the names and any identifying features of any of Mr Evans' patients that are mentioned in the evidence and in particular, Mr Evans' wife and two children who are named in the Charge are now made permanent by consent.

## **Conclusion**

[66] The Charge is established as professional misconduct under section 100(1)(a) and (b) of the HPCA Act.

[67] The penalty orders made under s101 of the HPCA Act against the practitioner by this Tribunal are as follows:

- (a) Censure;
- (b) Suspension of his annual practising certificate for a period of 2 months, to take effect 5 working days after the date of this decision, as requested by the practitioner;<sup>21</sup>
- (c) A fine is to be paid by the practitioner of \$5,000;
- (d) Conditions will be imposed on the practitioner's practice to apply for a period of not more than 18 months from the date of his return to practice after his period of suspension, as follows:
  - i. Mr Evans will be required to undertake a course in professional ethics as approved by the Physiotherapy Board. This course is to be undertaken at Mr Evans' cost and within 12 months of this decision; and
  - ii. Mr Evans will be required to undertake 18 months of professional supervision by an independent professional supervisor appointed by the Physiotherapy Board. The professional supervision will have a particular focus on ethics and funder compliance to be undertaken at Mr Evans' cost. The supervision is to be not less than two monthly for the period of

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<sup>21</sup> This timeframe is ordered by consent at the request of Mr Evans.

18 months but otherwise in a manner to be determined by the Physiotherapy Board.

- (e) Costs of \$33,738 (being 30% of total costs) to be paid by the practitioner, being \$16,869.16 each to the Tribunal and the PCC.
- (f) The Tribunal directs the Executive Officer to publish this decision and a summary on the Tribunal's website. The Tribunal also directs the Executive Officer to request the Physiotherapy Board of New Zealand to publish either a summary of, or a reference to, the Tribunal's decision in its principal professional publications to members, in either case including a reference to the Tribunal's website so as to enable interested parties to access the decision.

**DATED** at Auckland this 9th day of August 2019



MJ Dew QC, Chairperson  
Health Practitioners Disciplinary Tribunal