NEW ZEALAND HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL
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BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HPDT NO	**1101/Phys20/475P**
UNDER	the Health Practitioners Competence Assurance Act 2003 ("the Act")
IN THE MATTER	of a disciplinary charge laid against a health practitioner under Part 4 of the Act.
BETWEEN	**A PROFESSIONAL CONDUCT COMMITTEE** appointed by the Physiotherapy Board of New Zealand
	Applicant
AND	**MR O** of X, registered physiotherapist
	Practitioner

HEARING held via videoconference on 24 June 2020

TRIBUNAL	Ms A J Douglass (Chair) Ms S Baddeley, Ms K Davie, Mr A Schmidt and Ms S Stewart (Members) Ms G J Fraser, Executive Officer
APPEARANCES	Dr J Coates for the Professional Conduct Committee Ms J Stafford for the Practitioner.

DECISION OF THE TRIBUNAL

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Introduction

[1] Mr O is a registered physiotherapist, previously practising in [ ]. He has been registered since [ ].

[2] On 2 March 2020, a Professional Conduct Committee (PCC) of the Physiotherapy Board of New Zealand (Physiotherapy Board) laid a disciplinary charge of professional misconduct (the Charge) against Mr O pursuant to s 100(1)(a) and/or s 100(1)(b) of the Health Practitioners Competence Assurance Act 2003 (the HPCA Act).

The Charge

[3] Particulars of the Charge are as set out in the Schedule to this decision.

[4] The Charge includes three particulars that allege: firstly, that he failed to maintain clinical records for treatments provided to patients for which he had not complied with his contractual requirements for ACC to keep clinical records that met the standards set by the Physiotherapy Board; secondly, that he failed to comply with the obligation to advise the Board about his mental health condition in 2016 and 2017; and thirdly, making false declarations regarding the same.

[5] The Charge alleges that Mr O's conduct either separately or cumulatively amounts to professional misconduct in that it amounts to malpractice or negligence and/or has brought or was likely to bring discredit to the profession.

[6] The practitioner accepts the particulars of the Charge and that they are 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.

The hearing

[7] The hearing proceeded by way of videoconference before the Tribunal. Mr O attended the hearing and was represented by counsel.

[8] Prior to the hearing, Mr O's counsel applied for interim name suppression of the practitioner and identifying details. The PCC was opposed to the application. The Tribunal made the interim order on the papers.[1]

Agreed summary of facts

[9] The parties provided an Agreed Bundle of Documents (ABOD) which included: correspondence between ACC and Mr O, and the Physiotherapy Board; correspondence between Hazel Armstrong, Mr O's former lawyer, and the PCC; ACC claim data showing which clinical records were missing; the relevant Standards and Guidelines issued by the Physiotherapy Board; extracts from the ACC Treatment Provider Handbook and Mr O's own summary of his mental health issues.[2]

[10] A Supplementary Agreed Bundle of Documents was later filed to show conditions that were placed on Mr O's Annual Practising Certificate, the supervision agreement and reports provided to the Physiotherapy Board.[3]

Background facts

[11] The hearing proceeded on the basis of an agreed summary of facts (ASOF) dated 3 June 2020 and signed by Mr O.

[12] The ASOF includes an acknowledgement by Mr O that the conduct described in the Charge constitutes professional misconduct and that such conduct is of a nature that warrants the imposition of a disciplinary sanction.[4]

[13] The factual background set out below is based on the ASOF filed with the Tribunal.

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1 Order for interim name suppression of the practitioner and identifying details dated 25 May 2020.
2 Document No 1 Agreed Bundle of Documents (ABOD), p 291.
3 Document No 3 Supplementary Bundle of Documents 15 June 2020.
4 Document No 2 Agreed Summary of Facts (ASOF), ABOD, p 9. At [36].

[14] Mr O holds a Bachelor of Health Science from AUT and was first registered with the Physiotherapy Board on [ ].

[15] At the material time that this Charge relates to, from 1 November 2015 to 31 October 2017 Mr O was a director and co-owner of a physiotherapy business in [ ].

[16] On 1 December 2017, ACC visited Mr O at his practice to discuss the volume of services he provided to ACC clients.

[17] ACC asked Mr O to generate a report from his practice management system showing all claims he had invoiced to ACC for which there was no clinical record.

[18] On 8 May 2018, ACC wrote to the Physiotherapy Board to raise concerns about the missing records. ACC advised that the report generated a list of 2,784 treatments between 1 November 2015 and 31 October 2017.

[19] On 9 May 2018, ACC wrote to Mr O and formally notified him that it considered him to be in breach of his ACC contract.

[20] On 24 May 2018, Mr O's then legal counsel, Ms Armstrong, wrote to the Board and said "Mr O accepts that his clinical records for the period that you are investigating are inadequate. For this he apologises."

[21] ACC provided the PCC with a spreadsheet that recorded the "status" of each treatment visit. There are 2,735 treatment visits recorded as "No Exam'". "No Exam" "means that there are no clinical notes or records for the appointments listed."

[22] On 8 August 2018, Ms Armstrong responded to questions from the PCC and confirmed that "Mr O did not keep clinical notes for 2,784 cases identified by ACC".[5]

[5] The discrepancy between the number of visits referred to in ACC's notification to the Board and the number of visits listed in the spreadsheet provided to the PCC is not able to be explained. Mr O has therefore been charged with the lesser amount.

[23] At the time, the procedure at Mr O's practice was for the receptionist to complete the appointment on Gensolve[6] and initiate billing as soon as the patient was with the physiotherapist. This system did not require clinical notes to be entered before an appointment was billed to ACC.

[24] The PCC investigation concluded that there was no evidence to suggest that Mr O had made claims to ACC for patients who were not actually clinically treated.

[25] When Ms Armstrong responded to the concerns about Mr O's clinical records, she advised the Physiotherapy Board:

> There are mitigating circumstances relating to his mental health. He wishes to provide evidence to you that during this period of time he was not well, and since then he has obtained treatment.

[26] On 14 June 2018, Mr O was assessed by Dr Dean, consultant psychiatrist, who provided a comprehensive and independent report to the Board. Dr Dean's report was made available to the PCC and to the Tribunal.[7]

Relevant law under the HPCA Act

Professional misconduct

[27] Section 100 of the Act provides the grounds on which a health practitioner may be disciplined. The section provides that malpractice and/or negligence (s 100(1)(a)) and/or conduct likely to bring discredit to the profession can constitute professional misconduct (s 100(1)(b)).

[28] The Tribunal and the Courts have considered the term "professional misconduct" under s 100(1)(a) on many occasions. In *Collie v Nursing Council of New Zealand,*[8] Gendall J described negligence and malpractice as follows:

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6 Gensolve is practice management software commonly used by physiotherapists.
7 Dr Peter Dean, Report dated 19 June 2018, ABOD, p 15.
8 [2001] NZAR 74.

> Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.[9]

[29] "Malpractice" is defined as:

> Immoral, illegal or unethical conduct or neglect of professional duties. Any instance of improper professional conduct"[10] and, "*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]

[30] In *B v the Medical Council of New Zealand*,[12] a case decided under the previous legislation, a case decided under the previous legislation, the Court stated:

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

[31] Under s 100(1)(b) of the Act, the Tribunal must also consider whether the alleged conduct has or is likely to bring discredit on the medical profession. In *Collie*,[13] 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 being whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the nursing profession was lowered by the behaviour of the nurse concerned.

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9 [2001] NZAR 74 at [21].
10 Collins English Dictionary (12th ed).
11 Shorter Oxford English Dictionary (1993 ed) as cited in *Dr E* 136/Med07/76D at [12] – [14].
12 Noted [2005] 3 NZLR 810 per Elias J.
13 *Collie v Nursing Council of New Zealand* at [28].

[32] At the forefront of the Tribunal's deliberations is that the primary purpose of its disciplinary powers is the protection of the public and the maintenance of professional standards. There is also a punitive element, although it is accepted that punishment is of secondary importance.[14]

Burden and standard of proof

[33] The burden of proof is on the PCC.

[34] The appropriate standard of proof is the civil standard, that is, to the satisfaction of the Tribunal on the balance of probabilities, and on the evidence that the events alleged by the PCC are more likely than not to have occurred. The degree of satisfaction called for will vary according to the gravity of the allegations. The greater the gravity of the allegations, the stronger the evidence required to satisfy the burden.[15]

Professional misconduct – the threshold test

[35] There is a well-established two-stage test for determining professional misconduct and the threshold is "inevitably one of degree".[16] These 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 to the profession; and

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[14] *Katamat v PCC* [2012] NZHC 1633 at [53] and *Roberts v Professional Conduct Committee* [2012] NZHC 3354.

[15] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

[16] *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA), where the Court of Appeal endorsed the earlier statement of Elias J in *B v Medical Council* (High Court, Auckland 11/96, 8 July 1996) noted at [2005] 3 NZLR 810, as applied for example, in *Johns v Director of Proceedings* [2017] NZHC 2843.

(b) Secondly, if so, whether the departure from acceptable standards has been significant enough to warrant a disciplinary sanction for the purposes of protecting the public by maintaining professional standards and/or punishing the health practitioner.

[36] The threshold for justifying a sanction has been described as "not unduly high", as the measure of seriousness beyond the mere fact that the conduct warrants sanction is a matter to be reflected on in penalty. As Moore J observed in *Johns v Director of Proceeding*:[17]

> … given the wider range of conduct which might attract sanction in this jurisdiction the threshold should not set [sic] unduly high. It is a threshold to be reached with care having regard to the purposes of the Act and the implications for the practitioner.

Tribunal's consideration of the Charge

[37] The Tribunal has considered all of the evidence, including Mr O's statement set out in his own summary and representations made by his previous and current lawyer in relation to the PCC's investigation.

[38] Even though the practitioner has admitted each of the particulars to the Charge, the Tribunal nonetheless must be satisfied that those admissions are appropriate, based on the evidence before us.

Particular 1(a) – Failure to keep clinical records

[39] Mr O has acknowledged and admitted that he failed to keep accurate and/or adequate patient records in respect of 2,735 treatments to patients. Mr O explained in a statement that because of how busy he had been in his practice over the previous three years, ACC audited a period of his clinical notes and found significant gaps.[18]

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[17] [2017] NZHC 2843, Moore J at [82]–[83], concurring with Courtney J in *Martin v Director of Proceedings* [2010] NZAR 333 (HC).

[18] Timeline of mental health issues (undated) ABOD, p 291.

[40] This admission is evidenced by the spreadsheet noting the status of the 2,735 visits as "No Exam". As confirmed by Mr O to ACC, "No Exam" indicated that there were no clinical records for that visit.

[41] Mr O was not able to produce clinical records for review by ACC, or in turn, the PCC. When asked through his lawyer whether he had kept clinical notes in any form for the 2,784 instances of missing note-taking identified by ACC (for example, handwritten notes) the reply confirmed:[19]

> Mr O did not keep clinical notes for the 2,784 cases identified by ACC.

[42] As accepted by Mr O, maintaining clinical records is a core obligation of physiotherapy practice.

[43] The Physiotherapy Board's position statement confirms that:[20]

> Documenting and maintaining an appropriate patient/client health record is important for the following reasons:
>
> - To ensure patient/client safety.
> - To provide continuity of care.
> - To provide a standardised way of communicating between physiotherapists and other health professionals.
> - To provide an accurate record of the care of the patient/client received in the event of a dispute or investigation health records provide vital information and
> - As required by third party funders (e.g. ACC).

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[19] Hazel Armstrong Law to Adele Garrick, Luke Cunningham Clere for the PCC dated 8 August 2018, ABOD, p 250.

[20] Physiotherapy Board of New Zealand Position Statement: Physiotherapy Health Records (July 2013 and May 2016, ABOD, p 368 and 372.

[44] The obligation to maintain clinical records is a mandatory obligation – the term "must" is used in the Code of Ethics. This obligation is a minimum standard that all physiotherapists are obliged to adhere to. The Code of Ethics states:[21]

> … Physiotherapists must … keep contemporaneous, accurate and legible records of patient/client treatment and progress.

[45] The obligation to maintain clinical records is also found in other standards and competencies that apply to registered physiotherapists such as Mr O.[22]

[46] The Tribunal is satisfied that Mr O's failure to comply with his obligation to maintain clinical records relating to 2,735 individual treatments is on such a scale as to be a serious breach of his professional obligations for a period of nearly two years. In respect of these patients that were treated there were no records *at all* resulting in the patients' treatment and progress (including examination data and treatment provided at each appointment).

Particular 1(b) – Invoicing ACC

[47] The failure to keep clinical records during this time was also in breach of Mr O's contractual obligations with ACC.[23]

[48] Mr O has acknowledged and admitted that he invoiced ACC for these treatments when he had not complied with the contractual requirements for ACC service providers. These contractual obligations include keeping clinical records that met the standards set by the Physiotherapy Board to demonstrate that all treatments are necessary, appropriate, timely and of the required quality for his primary funder, ACC.

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[21] Code of Ethics and Professional Conduct (2011) at clause 5.7 and ABOD pp 323 and 333.

[22] Physiotherapy Board of New Zealand Physiotherapy Competencies for Physiotherapy Practice in New Zealand, May 2009, Competency 6.5, ABOD, p 359; Physiotherapy New Zealand Standards of Practice (November 2012), ABOD, p 404; and Physiotherapy Practice Thresholds in Australia and Aotearoa New Zealand (1 May 2015), Key Competence 2.1 and 3.2, ABOD, pp 433 and 434.

[23] ACC Treatment Provider Handbook (2015), pp 29-32 and (2016), pp 26-29.

[49] As acknowledged by the PCC, there was no evidence to suggest that Mr O made claims to ACC for patients that were not actually treated.

[50] As a supplier to ACC, Mr O had an obligation to comply with ACC's Standard Terms and Conditions and Schedule of Services. The ACC Treatment Provider Handbook states:[24]

> All services that you provide and for which you invoice must be supported by clinical records that meet the professional standards and ACC's recommendations.

[51] Mr O's conduct in invoicing ACC for treatments for which he had not maintained clinical records is a clear breach of his professional and contractual obligations.

[52] In respect of Particulars 1(a) and (b), the Tribunal is satisfied that Mr O's failure to maintain such a large number of patient records amounts to negligence and malpractice and brings discredit to the profession under s 101(a) and (b) of the HPCA Act. Patient records are a vital source of communication between health professionals providing care to a patient, the consent given by the patient, and treatment carried out by the practitioner. Patient records are also vital for documenting the history of a patient's condition. ACC, for example, will often refer to them for determining whether a patient with a long-standing condition is entitled to ongoing cover or not. The absence of any record-keeping for these patients is conduct that falls seriously short of conduct expected of a reasonably competent health practitioner practising as a physiotherapist.

Particulars 2 and 3 – Renewal of Annual Practising Certificates

[53] Mr O has acknowledged and admitted Particular 2 that at the time he made his 2016 and 2017 applications for an Annual Practising Certificate (APC), he knew he was suffering from a mental health condition and that he did not disclose this information to the Board.

[24] ACC Treatment Provider Handbook, (2015) and (2016), ABOD, p 18, pp 451 and 456.

[54] In respect of Particular 3, he has further admitted that this conduct was contrary to his professional obligation to make a truthful declaration on his APC application and his obligation to inform the Board about his mental health issues.

[55] The APC application is a form that is completed by practitioner's online. The declaration to be completed by the practitioner includes the following question:[25]

> Question 3: Have you suffered from any mental or physical condition or impairment which has potential to affect fitness to practise physiotherapy?

[56] The Physiotherapy Board's Practitioner "Dashboard Reports" record that Mr O did not declare his mental health issues on these APC applications.[26]

[57] The form of declaration is very wide and requires practitioners to disclose any *potential* physical or mental health condition when renewing an APC.

[58] In a statement provided to the PCC, Mr O summarised his health issues at the material time. There is also supporting medical evidence from Mr O's GP and a consultant psychiatrist who provided an independent report to the Physiotherapy Board.[27]

[59] The Tribunal is satisfied that in February 2016 and March 2017 Mr O was aware that he was suffering from a mental health issue and that it did have potential to impact his work as a physiotherapist.

[60] At the time of his APC renewals Mr O was seeking help for his health issues and was aware of the potential impact on his physiotherapy practice. As an experienced physiotherapist, Mr O should have realised he needed to inform the Physiotherapy Board of the health issues he was facing at the time. This step in turn would have allowed the Board to properly assess his condition and how it was being managed and/or how he could be supported in his practice.

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[25] Practicing Status Forms and Application for Annual Practising Certificate, ABOD, p 295.
[26] Practitioner Dashboard Reports, ABOD, pp 306-317.
[27] Dr Peter Dean Report dated 19 June 2018, ABOD, Tab 15.

[61] Subsequently, in March 2018, Mr O's practice manager did in fact notify the Physiotherapy Board that he was being treated for his mental health condition and that there were appropriate systems in place with medication and specialist intervention.

[62] As noted in *Harrison,*[28] where a nurse failed to admit she had been convicted of a drink driving conviction when applying for an APC:

> Applications for an APC renewal must be accurate. It is only by comprehensive and accurate disclosure by the practitioner that the responsible authority is able to make an informed decision as to whether an APC can be issued for the succeeding practising year. If there are matters not disclosed which are not taken into account, there is the risk that an APC will be issued to a practitioner who should not have one. This puts the public are [sic] at risk and standards are not maintained in the profession.

[63] The Tribunal acknowledges that there is a significant difference in failing to declare a health condition in an APC from failing to declare a criminal conviction. Mr O was actively seeking treatment for his health condition during the period in question. For that reason, the Tribunal finds his failure to inform the Board of his mental health issues and, in turn, complete false declarations on two separate applications for an APC is negligence, malpractice and brings discredit to the profession.

Liability finding on the Charge

[64] The Tribunal is satisfied in respect of each of the three particulars, and as accepted by Mr O in the ASOF, that the Charge of professional misconduct is established as negligence and malpractice and brings discredit to the profession.

[65] In respect of Particular 1, the Tribunal is satisfied that the failure to keep any clinical records and the sheer volume of missing records is a significant departure from professional standards. The failures in this regard – relating to 2,735 individual

[28] *Harrison* (867/Nur16/364P) at [92].

treatments – is on such a scale as to be a clear breach of the practitioner's professional obligations and is sufficiently serious to warrant disciplinary sanction.

[66] In *Houlding,*[29] for example, there were approximately 2,000 treatments for which the physiotherapist did not keep records, and this was described by the Tribunal as "significant" and warranting disciplinary action.

[67] In respect of Particulars 2 and 3, the Tribunal is satisfied these particulars are established. Mr O was aware of his obligations to notify the Board of any health condition that might, (or had potential), to impact upon his ability to practise as a physiotherapist, and that he was making false declarations. The Tribunal is not satisfied that this professional misconduct alone in the circumstances of this case is sufficiently serious to separately justify imposing a penalty. We accept Dr Dean's expert evidence that Mr O's health issues did impact upon his work and at least in part contributed to these failures. However, when Particulars 2 and 3 of the Charge are considered cumulatively with the gross failures in record-keeping in Particular 1, the professional misconduct is significant so as to warrant a disciplinary sanction.

[68] The Tribunal has no hesitation in finding that the Charge and the three Particulars cumulatively are established. By failing to have clinical records for such a large number of patients, the quality of his clinical practice suffered. Mr O conducted himself in an unprofessional manner and contrary to his professional obligations, including his contractual obligations to ACC.[30] Failure to make a proper, honest declaration on an application for an APC is also professional misconduct.[31]

[69] Mr O's professional misconduct taken as a whole is serious and warrants a penalty to be imposed for the purposes of protection of the public and maintaining professional standards.

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[29] 1061/Phys19/461P at [53].
[30] See, for example, *Nonoa* 1013/Phys18/427P.
[31] See, for example, *Harrison* 867/Nur16/364P and *Moore* 998/Phys/18/423P at [53].

Penalty

Principles

[70] Having determined that the Charge of professional misconduct is established against Mr O the Tribunal turns to address the question of penalty.

[71] The available penalties under s 101(1) of the Act are: cancellation of registration; suspension for a period not exceeding three years; a fine not exceeding $30,000, imposition of conditions on practice for a period not exceeding three years; and censure.[32]

[72] The Tribunal's role is to determine the appropriate penalty, given the nature of the conduct, to ensure that both the public interest and the integrity of the profession are maintained.

[73] The principles for imposition of a penalty are well established. In *Roberts v PCC,* Collins J set out the relevant principles and a summary is as follows:[33]

(a) The first consideration requires the Tribunal to assess the penalty that most appropriately protects the public.

(b) The Tribunal must be mindful of the fact that it plays an important role in setting professional standards.

(c) The penalties imposed by the Tribunal may have a punitive function, although protection of the public and setting professional standards are the most important factors.

(d) Where appropriate, the Tribunal must give consideration to rehabilitating health professionals.

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[32] Health Practitioners Competence Assurance Act 2003, s 101(1).
[33] [2012] NZHC 3354 per Collins J at [44]-[51].

(e) The Tribunal should strive to ensure that any penalty it imposes is comparable to other penalties imposed in similar circumstances.

(f) The Tribunal must assess the health professional's behaviour against the spectrum of the sentencing options available.

(g) The Tribunal should endeavour to impose the penalty that is the least restrictive that can reasonably be imposed in the circumstances.

(h) The Tribunal must assess whether the penalty imposed is fair, reasonable and proportionate in the circumstances.

[74] In *A v Professional Conduct Committee*,[34] the Court discussed the range of sanctions available to the Tribunal, particularly cancellation and suspension. The Court observed that four points could be expressly, and a fifth impliedly, derived from the authorities:[35]

> [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 amendable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.

[75] In *Katamat v Professional Conduct Committee,*[36] the High Court confirmed that the primary factor in determining a penalty will be what penalty is required to protect the public and to deter similar conduct. The overall decision is ultimately one involving an exercise of discretion.

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[34] *A v Professional Conduct Committee*[2008] NZHC 1387.
[35] [2008] NZHC 1387 per Keane J at [81]-[82].
[36] [2012] NZHC 1633 Williams J at [53].

Submissions

[76] The PCC submitted that Mr O's conduct shows a pattern of behaviour which falls significantly short of that which is considered acceptable or appropriate for a physiotherapist. The PCC submissions reinforced that keeping up-to-date clinical records must be regarded as fundamental to the safe and effective care of a patient.

[77] Counsel for the PCC submitted that the appropriate penalty in this case is a censure, a fine of $5,000, suspension from practice for three-six months and a condition that Mr O complete a course on ethics and professional responsibility at his own expense and as approved by the Physiotherapy Board.

[78] The PCC submitted that the aggravating features in this case are as follows;

(a) The length of time during which Mr O failed to comply with his professional obligations. The evidence demonstrates that Mr O failed to maintain complete clinical records for a period of over two years;

(b) The scale of Mr O's offending: it is relevant that Mr O's failure in relation to maintaining records relates to a total of 2,725 individual treatments and two separate applications for an APC;

(c) The possible risk to Mr O's patients where there was either no record, or no adequate record, of the treatment provided; and

(d) The apparent seriousness of Mr O's mental health issues.

[79] The PCC acknowledges that Mr O actively sought treatment which demonstrates he was aware of the seriousness of his mental health issues and potential for them to impact on his work as a physiotherapist. Mr O has co-operated fully with ACC, the PCC and the Tribunal process.

[80] For the practitioner, it was submitted that a censure, together with a minimal fine, would take into account the significant impact that this matter has had on Mr O and the distress he will experience if the Tribunal were to publish its decision. A period of suspension was not warranted as Mr O has already sought appropriate clinical support as evidenced by the GP and supervision reports. As Mr O already had interim conditions on his practice imposed by the Physiotherapy Board it would be overly restrictive for the Tribunal to impose additional conditions.

[81] Mr O accepts he should have advised the Physiotherapy Board about his health condition earlier than he did and he should have included reference to this in the declarations that he made in relation to his renewal of his APC in 2016 and 2017. However, whilst in the midst of suffering from his health condition, he had limited ability to assess and appreciate the extent to which his illness had impacted on his professional practice. That has since changed. In March 2018, Mr O's APC declaration included reference to a health condition impacting on his ability to practise.

Comparable cases

[82] With regard to inadequate record keeping and claiming from ACC, the PCC drew the Tribunal's attention to a number of cases which demonstrate the range of penalties imposed.

[83] In *Houlding*[37], Mr Houlding was censured, fined $5,000 and had his registration cancelled. The Tribunal expressly noted the unique circumstances of Mr Houlding's case that by the time of the hearing, Mr Houlding was retired. Cancellation had no deterrent consequence for Mr Houlding and the Tribunal concluded that a fine was warranted.

[84] The Tribunal found that Mr Houlding's offending would not normally warrant cancellation of his registration and that while suspension may have been open to the Tribunal, its effect would have been nullified as Mr Houlding had retired. A

[37] *Houlding* 1061/Phys19/461P.

similar issue arose with regard to imposing conditions on his practice. A fine of $5,000 was imposed as the only effective penalty in the circumstances.

[85] In *Moore*[38] Ms Moore's transgressions included but were not limited to inadequate record keeping and took place over a four year period. They included repeated failures to engage with the Physiotherapy Board and the loss of a significant number (over 100) of patient records resulting in serious breaches of patient confidentiality and privacy.

[86] Ms Moore explained that her actions were due to a "very busy time in her life". The Tribunal noted that an aggravating feature of the offending was the evidence of previous cautions that she had received to maintain patient records by her employer.[39]

[87] In making orders regarding penalty, the Tribunal stated:

> We consider the practitioner was at the material risk of a suspension penalty given the extent of her failures to maintain patient files. However, Ms Moore's co-operation with the Tribunal and that there was no evidence of any incompetent physiotherapy practice have both assisted her to avoid such a penalty. [69].

[88] In *PCC v* Nonoa[40] the Tribunal identified the large number of claims (775) over an 11 year period and of relevance to this case is that the practitioner's clinical record keeping, and administration practices fell well below accepted practices and suggested public safety implications for his entire practice. The Tribunal ordered that Mr Nonoa be censured, a fine of $5,000 was imposed and conditions were placed on his practice for two years.

[89] With respect to failure to disclose mental health issues and making a false declaration on an APC application, the following cases are relevant.

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38 *Moore* 998/Phys/18/423P.
39 *Moore*, paras [61] and [65].
40 *Nonoa*, 1013/Phys/18/427P.

[90] In *Dr U*[41] the Tribunal was influenced by Dr U's humanitarian work overseas, retirement from her profession and her age determined to order no penalty other than a contribution to costs.

[91] In *Harrison*[42], the Tribunal found that the acts and conduct of Nurse Harrison involved dishonesty, were unethical and involved elements of illegality and deception. Her registration was cancelled and she was censured.

Tribunal's decision on penalty

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

[93] The aggravating factors in this case are the sheer volume of patient records – 2,725 individual treatments – where there were no patient records kept at all over a substantial period of nearly two years.

[94] Weighed against these aggravating factors, is that this is not a case involving deliberate or careless actions that has demonstrated a disregard for professional standards, but rather was a manifestation of the symptoms of the illness that the practitioner was suffering from at that time.

[95] In this respect, *Houlding*[43] can be distinguished where Mr Houlding put his lapse in clinical record-keeping down to "laziness",[44] having previously received a number of warnings from ACC but continued to fail to provide adequate notes.

[96] Similarly, in Moore,[45] the transgressions included inadequate record-keeping that took place over a four-year period. There were repeated failures to engage with

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41 *Dr U* 699/Med14/298P.
42 *Harrison* 867/Nur16/364P.
43 1061/Phys/19461P.
44 *Houlding* 1061/Phys/19461P at [10].
45 998/Phys/18423P.

the Physiotherapy Board and the loss of a significant number (over 100) of patient records resulting in serious breaches of patient confidentiality and privacy.

[97] The Tribunal accepts Ms Stafford's submission that in the circumstances of this case, this was not a deliberate attempt by Mr O to mislead the Physiotherapy Board at the time of his APC renewals, but was due to his health condition and that this impacted on his self-awareness and ability to self-report. That is no longer the case.

[98] The impact of Mr O's health condition on his practice and that he did seek treatment and take steps to improve his health and wellbeing is a mitigating factor in this case. His specialist subsequently confirmed that while Mr O's condition was in remission it should not have impacted on his ability to be a physiotherapist or work in a physiotherapy practice.

[99] Mr O has been fully co-operative with ACC and the Physiotherapy Board. As soon as the missing patient notes was drawn to his attention and discussed with ACC in December 2017, he implemented changes to his practice to ensure that all his patient notes were completed. This involved modifying the Gensolve software system so that the billing could not be processed until the clinical notes had been completed. He also employed more staff and has allocated additional time for each patient consultation from 15 to 30 minutes which allows him to have additional administration time to complete patient notes.

[100] ACC have confirmed that any breaches have been remedied and no further action was required in relation to Mr O's contractual arrangements with ACC. He has been meeting the requirements under current ACC contracts relating to his ongoing work in the vocational rehabilitation and he is enrolled in a post-graduate course.

[101] During the relevant time, Mr O was the joint owner of a physiotherapy business. He is now employed elsewhere, and he is no longer an owner director of his business. His personal circumstances have changed and he has been employed as a physiotherapist on a full time basis since September 2019. Mr O has shown that

he has successfully re-engaged with his profession and is committed to it as a physiotherapist.

[102] Importantly, the Tribunal acknowledges that Mr O has developed insight into his health condition. He has developed strategies to address them and is aware of how to obtain help if they reoccur.

[103] The Tribunal considers that suspension for a period of three-six months as sought by counsel for the PCC is not warranted in this case. It would only serve a punitive function. Mr O has already demonstrated his ability to seek medical support for his condition and his commitment to his physiotherapy practice. To impose a period of suspension would detract from his successful efforts to support his wellbeing achieved to date. We note also that ACC has accepted the remedial steps taken by Mr O.

[104] The Tribunal considers a less restrictive penalty that reflects the Tribunal's condemnation of the failure to adhere to professional standards and to recognise the practitioner's substantial efforts towards rehabilitation, is to impose a fine of $5,000. The amount of this fine recognises that no suspension will be imposed and is proportionate to the aggravating and mitigating factors that occurred in this case.[46]

[105] Initially, the PCC sought additional conditions in relation to ongoing supervision of Mr O's practice. Dr Coates, counsel for the PCC, later withdrew this submission. He accepted Ms Stafford's submission for the practitioner that as there were already interim (and ongoing) conditions imposed on Mr O's practice by the Physiotherapy Board under s 21(2) of the Act there was no need for the Tribunal to impose any further conditions on practice.

[106] The Tribunal was informed of the supervision agreement which has been in place since 3 September 2019 and the following interim conditions on Mr O's practice:

[46] See for example, *Nonoa* 13/Phys18/427P; and *Evans* Phys 18/433P.

1. Mr O must not practise as a solo practitioner, nor as a practice principal, but instead must practise under supervision.

2. Mr O must see his GP on a regular basis, not less frequently than monthly, and shall arrange for his GP to report to the Board within five (5) working days after each consultation regarding his fitness to practise physiotherapy.[47]

[107] These interim conditions have remained on Mr O's current APC and have been in place now for approximately ten months.

[108] The Tribunal was provided with information confirming that Mr O has complied with the interim conditions and that he had entered into a supervision agreement with a senior physiotherapist employed in the same workplace. The supervision reports demonstrated that Mr O's clinical record keeping was adequate, up-to-date and complete; there are no issues arising out of his practice now that had been identified as a result of the supervision arrangements. The Tribunal was informed that Mr O's health condition is stable and he is fit to practise.

[109] Counsel for the PCC and the practitioner have agreed by consent that the Tribunal need not impose any further conditions while the current supervision arrangements apply. The Tribunal considers that no order for further supervision need be imposed under s 101(1) of the Act.

[110] In light of Mr O's reintegration into the profession and successful supervision arrangements that are already in place, we recommend that the Board review its supervision conditions on Mr O's practice within three months of this decision.

[111] The Tribunal also recommends that the Physiotherapy Board provide clearer guidance to physiotherapists on what is expected of them when completing the APC declaration form when a health condition is very likely to have the potential to affect a practitioner's fitness to practise. It is important for the health and wellbeing of *any* practitioner in Mr O's position to be able to freely inform the Physiotherapy Board of any relevant health condition, particularly if there is a

[47] APC dated 3 September 2019, Supplementary ABOD, Tab 28, p 464.

possibility that their condition may deteriorate. This guidance would encourage practitioner's to be more forthcoming about their current state of health and wellbeing and provide them with the opportunity to advise the Physiotherapy Board of what support strategies they have in place should their health deteriorate.

Costs

[112] When considering the appropriate quantum of costs, the Tribunal must take into account the need for the practitioner to make a proper contribution towards costs. In doing so it takes 50% of the total reasonable costs as a starting point which can be reduced or increased depending on the circumstances, in accordance with the principles in *Cooray v Preliminary Proceedings Committee.* [48]

[113] The Tribunal is also mindful of the concern expressed by the physiotherapy profession in *PCC of the Physiotherapy Board v Chum,*[49] that those professionals who comply should not be required to subsidise the practitioners who breach their obligations and cause the Physiotherapy Board to incur additional costs. The justification for costs awards lies in the unfairness of requiring the profession as a whole to bear the full cost of professional disciplinary proceedings.

[114] The PCC investigation and prosecution costs were estimated at $43,743.05.[50] The Tribunal's costs are estimated at $13,455.00.[51] The PCC and Tribunal's costs are a total of approximately $58,000.

[115] Counsel for the PCC sought a contribution towards costs of 50% from Mr O.

[116] Counsel for the practitioner submitted that an order for a 30% contribution towards costs would be appropriate in the circumstances. Counsel for the

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[48] *Cooray v Preliminary Proceedings Committee* (unreported) AP 23/94 Wellington Registry, 14 September 1995, Doogue J at [9]; *Vatsyayann v PCC* [2012] NZHC 1138, Priestly J at [34].
[49] HPDT 895/Phys17/379P at [49].
[50] Document No 4 Submissions of counsel for PCC as to Liability and Penalty, Schedule.
[51] Document No 6 HPDT Estimate of costs in relation to disciplinary hearing.

practitioner submitted that the PCC's opposition to the interim name suppression order, which was granted, should be taken into account and reduced from the PCC's costs.

[117] Mr O did not provide a financial statement of his means.

[118] In assessing the appropriate contribution by the practitioner, the Tribunal takes into account that Mr O has co-operated with the authorities from the outset. This includes an admission of the Charge in the ASOF. He has been entirely forthcoming about his health condition and provided the relevant reports and information to the Tribunal. This has significantly reduced the preparation and hearing time in this matter.

[119] Balancing all of these factors the Tribunal considers that an order for Mr O to pay 35% of the total estimated costs, fixed at $20,000 is fair, just and proportionate to the costs of the hearing.

Permanent name suppression

[120] At the conclusion of the hearing Ms Stafford, counsel for the practitioner, did not seek to make the interim order for name suppression and identifying details permanent pursuant to s 95 of the Act. Instead, a non-publication order was sought to prevent publication of details regarding Mr O's medical records, the name and identifying features of his ex wife and his previous workplace. That application was consented to by the PCC.

[121] Following the hearing, the Tribunal issued a Minute proposing to make a permanent order prohibiting the publication of Mr O's name and identifying details, including details regarding Mr O's health condition.

[122] As the Tribunal proposes to make a permanent order on its own initiative under s 95(2), the parties to the proceedings and the complainant (ACC) were given an opportunity to make written or oral submissions on the proposal pursuant to s

95(4). Counsel for the practitioner and the PCC (including ACC) had no objection to the order for permanent name suppression.

[123] Having considered the particulars of the Charge, the Tribunal considers that suppression of Mr O's name and identifying details is desirable. The particulars of the Charge (particulars 2 and 3) relate to Mr O's failure to comply with his obligations to inform the Board about his mental health condition and mental health issues. The practitioner's privacy outweighs any public interest in identifying him.

[124] A non-publication order has enabled a frank discussion of the impact of the practitioner's mental health condition in this decision. This decision is also intended to assist the Board in considering how it can support practitioners and to avoid the stigma associated with mental health conditions that may affect a practitioner's fitness to practise. For this reason, the Tribunal considers it is desirable that a permanent suppression order is made on the terms set out below.

Result and orders

[125] The Tribunal finds that the Charge has been established. Mr O's conduct amounts to professional misconduct in that it separately and cumulatively is negligence and malpractice in the scope of the practitioner's profession and has brought and is likely to bring discredit to the profession. The particulars of the Charge considered cumulatively are sufficiently serious to warrant disciplinary sanction.

[126] In respect of the penalty, the Tribunal makes the following orders:

(a) A condition of practice that the practitioner undertake a course in ethics and professional responsibility at his own expense and as approved by the Physiotherapy Board within 12 months of the date of this decision pursuant to s 101(1)(c) of the Act;

(b) Censure of the practitioner to mark the Tribunal's disapproval and to send a signal to the physiotherapy profession of the importance of record-keeping

of patient records and that such a departure from accepted professional standards brings or is likely to bring discredit to the profession, pursuant to s 101(1)(d) of the Act;

(c) A fine of $5,000 pursuant to s 101(1)(e) of the Act;

(d) The practitioner will pay an approximately 35% contribution towards the total reasonable costs of the Tribunal and the PCC fixed in the sum of $20,000 pursuant to s 101(1)(f) of the Act; and

(e) There is a permanent order prohibiting the practitioner's name and identifying details, including the name and identifying details of his ex-wife and the practitioner's previous workplace.

[127] Pursuant to s 157 of the Act the Tribunal directs the Executive Officer:

(a) To publish this decision and a summary on the Tribunal's website; and

(b) To request the New Zealand Physiotherapy Board to publish either a summary of, or a reference to, the Tribunal's decision in its 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 Dunedin this 7th day of August 2020



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A Douglass
Chair
Health Practitioners Disciplinary Tribunal

SCHEDULE

PARTICULAR OF CHARGE

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Mr O, when practising as a physiotherapist at [ ] in [ ], a practice owned and operated by him, conducted himself in an inappropriate and/or unprofessional manner; and/or contrary to his professional obligations as follows:

1. Between on or about 1 November 2015 to 31 October 2017, in respect of 2,735 treatments to patients, and in breach of his legal and professional obligations, Mr O:

    (a) failed to keep clinical records of the treatment provided to his patients; and/or

    (b) invoiced the Accident Compensation Corporation (**ACC**) for physiotherapy services when he had not complied with the contractual requirement for ACC service providers to keep clinical records that met the standards set by the Physiotherapy Board to demonstrate that all treatments are necessary, appropriate, timely and of the required quality.

AND/OR

2. On or around 11 February 2016, when he completed his application for a renewal of his Annual Practising Certificate, Mr O:

    (a) failed to comply with his obligation to inform the Board about his mental health issues; and/or

    (b) completed a declaration which he knew, or ought to have known, was false and/or incomplete because he knew, or ought to have known, that he was suffering from a mental health condition.

AND/OR

3. On or around 23 March 2017, when he completed his application for a renewal of his Annual Practising Certificate, Mr O:

    (a) failed to comply with his obligation to inform the Board about his mental health issues; and/or

    (b) completed a declaration which he knew, or ought to have known, was false and/or incomplete because he knew, or ought to have known, that he was suffering from a mental health condition.

The conduct alleged above either separately or cumulatively amounts to professional misconduct pursuant to section 100(1)(a) and/or 100(1)(b) of the Act in that it amounts to malpractice or negligence and/or has brought or was likely to bring discredit to the profession.