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

HPDT NO	**1213/Nur21/513D**
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	**THE DIRECTOR OF PROCEEDINGS designated under the Health and Disability Commissioner Act 1994**
	Applicant
AND	**[A], registered nurse of [X]**
	Practitioner

HEARING held via audio-visual link 2 December 2021

TRIBUNAL	Ms T Baker (Chair) Ms C Neilson-Hornblow, Ms L Corlett, Ms H Pocknall, Mr C Nichol, (Members) Ms G Fraser (Executive Officer)
APPEARANCES	Mr G Robins, Acting Director of Proceedings and Ms D Roche for the Director of Proceedings Ms S Eglinton and Mr F Biggs for the practitioner

PENALTY DECISION OF THE TRIBUNAL

Introduction

[1] In a decision dated 8 October 2021 the Tribunal found that a charge of professional misconduct laid by the Acting Director of Proceedings (**the Director**) against the practitioner, [A] had been established under section 100 of the Health Practitioners Competence Assurance Act 2003 (**the Act**) and met the threshold to warrant a disciplinary sanction.

[2] The parties were invited to file submissions on penalty, costs and name suppression. The practitioner also requested an oral hearing which took place by audio-visual link on 2 December 2021.

Penalty

[3] Section 101(1) of the Act provides:

> **101 Penalties**
>
> (1) In any case to which section 100 applies, the Tribunal may—
>
> (a) order that the registration of the health practitioner be cancelled:
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> (b) order that the registration of the health practitioner be suspended for a period not exceeding 3 years:
>
> (c) order that the health practitioner may, after commencing practice following the date of the order, for a period not exceeding 3 years, practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise that are specified in the order:
>
> (d) order that the health practitioner be censured:
>
> (e) subject to subsections (2) and (3), order that the health practitioner pay a fine not exceeding $30,000:
>
> (f) order that the health practitioner pay part or all of the costs and expenses of and incidental to any or all of the following:

(i) any investigation made by the Health and Disability Commissioner under the Health and Disability Commissioner Act 1994 in relation to the subject matter of the charge:

(ii) any inquiry made by a professional conduct committee in relation to the subject matter of the charge:

(iii) the prosecution of the charge by the Director of Proceedings or a professional conduct committee, as the case may be:

(iv) the hearing by the Tribunal.

[4] In *Roberts v Professional Conduct Committee,*[1] His Honour Justice Collins discussed eight relevant factors in determining an appropriate penalty in this jurisdiction. These factors have been summarised in the decision of *Katamat v Professional Conduct Committee* [2012] NZHC 1633:

1. Most appropriately protects the public and deters others;
2. Facilitates the Tribunal's "important" role in setting professional standards;
3. Punishes the practitioner;
4. Allows for the rehabilitation of the health practitioner;
5. Promotes consistency with penalties in similar cases;
6. Reflects the seriousness of the misconduct;
7. Is the least restrictive penalty appropriate in the circumstances; and
8. Looked at overall, is a penalty which is "fair, reasonable and proportionate in the circumstances".

Director of Proceedings' submissions

[5] For the Director, Ms Roche sought the following penalty:

(a) a three to six month suspension or a fine of $5,000;

(b) conditions on practice, namely:

(i) a Nursing Council-approved competency assessment;

(ii) a requirement to advise the Nursing Council of any new employer for three years;

(iii) a requirement to advise any new employer in that time of the Tribunal's decision;

[1] [2012] NZHC 3354 at [44] to [51]

(c) censure; and

(d) costs.

[6] For the Director, Ms Roche submitted that RN [A] has failed to fully appreciate the significance of his actions and lacks insight into the same. In particular, he gave unreliable evidence in an attempt to minimise his own culpability:

(a) His version of events on the day in question bears little resemblance to the CCTV footage. For example, it seems unrealistic that RN [A] spoke with Mr [D]; asked him if he was in pain; or asked him "three or four times" to go to his room before taking hold of him.

(b) When asked in cross-examination whether Mr [D] had a chair in the lounge, he said that he would have. When it was pointed out to him that Mr [D] could have been redirected to that chair (instead of his room) RN [A] then suggested no such chair existed.

(c) RN [A] failed to appreciate that it was the use of force that caused Mr [D] to drop the cup (rather, he says it was the 'surprise' of his actions) and he maintains that he "followed [Mr [D]'s] pace" down the hall.

(d) He coded Mr [D]'s behaviour as "3" on the Behaviour Monitoring Chart – the most serious code available – but in cross-examination RN [A] explained this was due to Mr [D] being resistive when being redirected to his room. But in the summary of facts, RN [A] had agreed that Mr [D] did not resist his actions; and in cross-examination, RN [A] failed to appreciate that any resistance may have been due to the method of restraint and use of force.

(e) In cross-examination, RN [A] agreed only that his use of force "might be thought to be reasonable". He then agreed it was unreasonable when put to him by his counsel.

(f) Finally, it appears RN [A] also sought to minimise his culpability by insisting (during questions from the Tribunal) he had undertaken only two hours of

"informal" training on challenging behaviour and restraint minimisation. The reality appears to be significantly different.

[7] Ms Roche listed the following aggravating features:

(a) Mr [D], by virtue of his age, diagnoses of vascular dementia and chronic schizophrenic disorder, and indefinite compulsory treatment order, was particularly vulnerable, including by comparison with healthcare consumers in other settings. He was entirely reliant on the staff at [hospital/rest home], such as RN [A], to meet his needs, protect his rights, and provide him with appropriate care and treatment.

(b) There was no clinical reason for any force to be used against Mr [D] at the time of the incident, as there was no physical threat to himself, other residents and/or staff. Mr [D] showed no provocation or physical resistance to RN [A]'s intervention. The use of force was deliberate and not reflexive.

(c) At the time of the incident, RN [A] was the most senior nurse on shift. He was an experienced nurse and ought to have had the skill and expertise to manage patients who exhibited challenging behaviours without resorting to physical force and/or restraint. He also had a duty to demonstrate a high level of care, and to set an appropriate example to the other staff on shift.

(d) RN [A] did not realise or readily acknowledge that he had acted inappropriately until he was questioned about the incident. Even then, RN [A]'s statements during the HDC investigation and in evidence in this proceeding were inconsistent with the CCTV footage, and bring in to question his credibility and true understanding of his actions. His continued lack of awareness of the inappropriateness of his conduct is concerning.

[8] In mitigation, the Director acknowledged the following factors:

(a) RN [A] sent a written apology to Mr [D], in compliance with the recommendations of the Health and Disability Commissioner.

(b) RN [A] has taken steps to undertake further education about de-escalation, restraint minimisation and safe practice by undertaking courses through the

Auckland District Health Board and Waikato District Health Board. RN [A] took these steps in compliance with the recommendations of the Health and Disability Commissioner.

(c) RN [A] lost his job following the incident, although he was immediately reemployed in his current role at [T].

[9] Ms Roche submitted that the minimisation of his conduct was seen also in his reporting of the event, which the Tribunal has described as "disingenuous and misleading". A lack of a proper admission of culpability is concerning, suggesting that RN [A]'s training and the disciplinary process itself has not brought home the seriousness of his actions.

[10] It was submitted that a period of suspension is consistent with the Tribunal's approach in cases where "unwarranted physical force" has been applied to an elderly and vulnerable patient.

[11] At the substantive hearing, Ms [E] of [T] gave evidence of how valued an employee Mr [A] has been. She had not been involved in his employment interview, and the personnel who had been were no longer employed at [T]. Therefore, Ms Roche submitted that, although at the time of employing Mr [A] [T] were aware of the incident involving Mr [D], it is unclear what Mr [A] had actually communicated regarding it. There is a risk that his reporting to [T] has led to an incomplete picture being formed of both the seriousness of the event involving Mr [D] and RN [A]'s suitability for the [ ] position. Accordingly, a Nursing Council approved competency assessment is warranted to assure [T], RN [A] and the public that RN [A] is fit to hold such a role.

[12] Finally, censure was sought, to signal to the profession and the wider public the serious nature of the professional misconduct in this case.

Practitioner submissions

[13] Ms Eglinton submitted that an appropriate penalty would be a censure and a small fine.:

[14] Ms Eglinton submitted the following in mitigation:

(a) This is the first time in 30 years that Mr [A] has faced disciplinary proceedings;

(b) Throughout these proceedings, Mr [A] has accepted that his actions were a departure from acceptable standards. However, that departure is less serious than in at least two of the three comparable cases discussed below.

(c) At all times Mr [A] has willingly co-operated with the investigation by his employer, the HDC and the Director of Proceedings, which has consumed the last three and a half years of his life. This lengthy process has taken its toll on Mr [A] and has, without a doubt, already punished him.

(d) This lengthy period has also been a time for personal reflection, growth and development. Mr [A] has become the [ ] at [T], and has also completed significant professional development.

(e) For the past three and half years, while Mr [A] has worked at [T], he has been an exemplary nurse, providing safe and sympathetic nursing care to the residents and their families. He is also a great mentor to the other staff and students. As a consequence, Mr [A] is invaluable in his role.

(f) Mr [A] did not harm Mr [D] and has apologised to Mr [D] for his actions that day.

[15] In response to the Director's submissions regarding inconsistencies in Mr [A]'s evidence, Ms Eglinton submitted that allowance should be made for nerves and anxiety giving evidence, particularly bearing in mind that he was giving evidence via AVL.

[16] Ms Eglinton submitted that cancellation is not supported by the comparable cases discussed below; Suspension is not supported by two of the three comparable cases, and the loss of Mr [A] from [T], even for a short period, would greatly impact on the quality of care provided to [T]'s residents as well as on staff satisfaction. Mr [A] has been practising without incident since the events in question. Consequently, there are no current public safety concerns justifying suspension. Finally, conditions and/or a competency assessment are not necessary, given the rehabilitation already completed in the form of reflection, growth and development.

[17] It was submitted that Mr [A] would be able to pay a small fine if the Tribunal considered that appropriate.

[18] Ms Eglinton submitted that the purpose of costs is not to punish the practitioner but to recover a reasonable contribution to the cost of the investigation and hearing. In the comparable cases the proportion of costs varied from 10% - 30%. In this case, Mr [A] has attempted to minimise the costs by agreeing that his conduct was malpractice, negligent and/or brought the profession into disrepute. He also went to Wellington for the hearing, rather than expecting the Tribunal and the Director of Proceedings to come to [ ], where he resides, and agreed to continue with the hearing, even though [X] went into lockdown, which meant Mr [A] and Ms [E] had to give their evidence by AVL instead of in person. It was therefore submitted that in these circumstances an order for minimal costs should be awarded.

Comparable cases

[19] Both parties referred to other Tribunal decisions involving a nurse's rough or inappropriate physical handling of patients.

[20] Cancellation was ordered in *Bishop* 263/Nur09/124P, where a registered nurse had dragged a patient from a couch in a forcible manner when there was no justification for doing so; the nurse failed to record this and she used threatening language towards the patient. The nurse had a disciplinary history for stealing a patient's money and did not engage in the proceedings.

[21] Suspension was ordered in the following cases:

(a) In *PCC v S* 135/Nur07/62P, after a patient, Mr N, had become agitated, Ms S wheeled Mr N through the hospital into the nursing office while holding Mr N's left arm down. When she arrived at the office Ms S was holding Mr N's left hand and arm behind his back and he was very distressed. When Ms S released his arm it was red where she had been holding it. There was subsequently some bruising. In imposing suspension, the Tribunal took into account the nurse's lack of insight and understanding of the power imbalance, and the fact she had not nursed since the event.

(b) In the case of *Edwards* 28/Nur05/12P, 18 months' suspension was imposed for dragging a patient along the floor by the wrist to remove her from her prone position in front of a set of doors. The practitioner did not attend the hearing of the charge. In written penalty submissions, he told the Tribunal that he had a history of medical problems (the details of which were suppressed) and said that he was becoming unwell again at the time of the incident complained of.

(c) Twelve months' suspension was imposed in *Geevarghese* 576/Nur13/241P, where the Tribunal found that the registered nurse had shouted and hit a patient on the face and shoulder on two occasions. She had not worked as a nurse since.

(d) The Tribunal ordered only eight weeks' suspension in *Dieudonne* 253/Nur09/115D for a nurse who had pushed an elderly and irate dementia patient in the chest with a closed fist. The patient then fell to the ground and the Nurse left him lying on the ground for 30 minutes so he could 'calm down'. The Tribunal observed:

> The cases where lesser penalties have been imposed have generally involved nurses who have undertaken appropriate rehabilitative actions following the incident.

[22] The examples given by the Tribunal in *Dieudonne* of lesser penalties were:

(a) Director of Proceedings v *Schreiber* (Nursing Council 10 September 1999) where it was accepted that the nurse's actions were an isolated event that did not result in any injuries. The Council found that Ms Schreiber did not pose a significant risk to the public as she had taken steps including supervision by her employers, undertaking an anger management programme, and on-going psychological care.

(b) 75/Nur/06/40P, where a nurse admitted one charge of assault of an elderly patient. She was at the time under severe stress and had just found out that she was seriously ill. The Tribunal found that she posed no risk to the public and did not require any ongoing supervision or conditions on practice.

[23] Other cases where suspension was not imposed include:

(a) *de Bruin* 533/Nur12/226P*,* where a nurse slapped a patient who had spat at him, and failed to advise a medical practitioner carrying out an assessment that this had occurred or document the situation. The nurse was censured, ordered to continue with supervision for 3 years as well as make a contribution of $12,000.00 to costs.

(b) *Jury* 572/Nur13/244D which involved a nurse who left a patient in a bath for 5 minutes, having removed the bathwater while making derogatory remarks to her; applied his knee to the small of her back to propel her when transferring; and failed to adequately document the care provided. As well as a censure and costs contribution, the Tribunal ordered conditions requiring Mr Jury to undertake a course in managing challenging situations, calming and de-escalation before returning to practice; and a period of 6 months supervision. A competence assessment was recommended.

(c) *Ms N* 86/Nur06/47D where a nurse in the aged care setting entered into a loud and/or aggressive verbal exchange with her patient when they asked for more pudding and, after the patient fell to the floor, failed to examine him for injury before lifting him from the floor and/or failed to document examining him. The penalty was censure, a condition requiring a mentor and a contribution of 10% of the costs.

Discussion

[24] Although the Tribunal has not imposed the penalty sought by the Director, the Tribunal agrees with most of the submissions made on the Director's behalf. In particular, the Tribunal is concerned at Mr [A]'s lack of insight and minimisation of his actions. The Director's arguments summarised in paragraph 6 above are well-made. The stress of being under cross-examination via an audio-visual link and dealing with technical issues might account for a degree of muddle or fluster over whether there was a chair to which the patient might have been re-directed, but the Tribunal would have been reassured if Mr [A] had acknowledged that his recollection of the incident is not supported by the events as seen in the video. As noted in the Tribunal's liability decision, we expect any visitor to the residence would have been horrified to see a patient being

handled in the way Mr [D] was on the video evidence. It is concerning that, although Mr [A] has expressed remorse, he has not expressed the degree of alarm or shame we would have expected on seeing the way an elderly patient was manhandled.

[25] The Director's submissions on aggravating features as outlined in paragraph 7 are also accepted. The Tribunal agrees that Mr [D] was particularly vulnerable, not only because of his age and diagnoses, but the fact that he was under a compulsory treatment order. Such orders made under the Mental Health (Compulsory Assessment and Treatment) Act 1992 involve an erosion of some basic personal choices where there is a risk of serious harm to the patient or others as a result of a mental disorder. Mr [A]'s actions were a gross abuse of the trust that the justice system places in the health system when a compulsory treatment order is made.

[26] As found in the Tribunal's liability decision, there was no justification for any force to be used against Mr [D] at the time of the incident, as there was no physical threat to himself, other residents and/or staff.

[27] The Tribunal agrees that, as the most senior nurse on shift, Mr [A] ought to have had the skill and expertise to manage patients who exhibited challenging behaviours without resorting to physical force and/or restraint and he had a duty to set an appropriate example to the other staff on shift.

[28] And finally, Mr [A] did not immediately realise he had acted inappropriately, and when questioned, his explanations, right up to and including the evidence he gave at the hearing, were inconsistent with the CCTV footage. This brings into question his credibility and insight.

[29] As for mitigation, Ms Eglinton's submission that Mr [A] has accepted that his actions were a departure from acceptable standards is somewhat tenuous. Although he accepted that the first part of the test for professional misconduct was met, his persistence with an argument that his conduct did not warrant a disciplinary sanction is again evidence of his lack of appreciation of the enormity of his actions. Based on that and his evidence at the hearing, it is difficult to accept that during the intervening period he has engaged in adequate personal reflection.

[30] The argument that no patient was harmed is somewhat misleading. There was no evidence that Mr [D] sustained a physical injury, but he was the object of rough handling and other vulnerable residents witnessed it. In that sense there was a degree of patient harm.

[31] That said, it has been 3½ years since these events. In the intervening time Mr [A] has been employed at [T] and has become the [ ]. Ms [E] provided evidence that Mr [A] has been an exemplary nurse, providing safe and sympathetic nursing care to the residents and their families. He is described as a great mentor to the other staff and students. He is viewed as invaluable in his role.

[32] The Director of Proceedings did not seek cancellation in the present case, and the Tribunal agrees that is not warranted. The conduct is not as serious as in *Bishop,* where cancellation was ordered; this is Mr [A]'s first appearance before a disciplinary body and he has engaged fully in the proceedings.

[33] In *Roberts*, Collins J referred to the following passage from *A v Professional Conduct Committee* regarding cancellation and suspension:

> 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.

[34] A penalty of suspension in some circumstances may protect the public but it is somewhat problematic when being considered so long after the events. This is particularly so when Mr [A] has been employed by the same employer for 3½ years and that employer endorses his performance. It would serve the purpose of punishment and therefore deterrence, but not rehabilitation. Absence from work at this stage is unlikely to bring about the reflection that the Tribunal agrees is required.

[35] It is hoped that will be achieved by the conditions that have been made. Although Mr [A] has undertaken considerable professional development, he struggled to articulate that to the Tribunal. That is why specific training provided by Safe Practice Effective Communication (SPEC) is warranted.

[36] The penalty of censure, conditions, fine and costs as outlined below is the least restrictive in the circumstances and is consistent with other Tribunal decisions where a nurse who has been found guilty of an inappropriate use of force or restraint has been employed as a nurse at the time of the decision.

[37] The practitioner is censured under section 101(1)(d). This marks the Tribunal's severe disapproval of Mr [A]'s conduct, sentiments that we expect to be shared by his peers.

[38] A fine of $3,500 is imposed under section 101(1)(e). This is a form of punishment for the practitioner's behaviour.

[39] Under section 101(1)(c) the following conditions are imposed on Mr [A]'s practice to help protect the public and maintain standards for the profession:

(a) At his own expense, by 30 September 2022, Mr [A] must have completed a Safe Practice Effective Communication course on managing challenging behaviours in situations, calming and de-escalation techniques.

(b) For a period of 12 months commencing no later than 1 February 2022, at his own expense, Mr [A] must engage in monthly professional supervision, with a supervisor to be approved by the Nursing Council, and the supervisor will provide quarterly reports to the Nursing Council, including, but not limited to observations on Mr [A]'s progress with reflective practice.

(c) By 30 September 2022, Mr [A] is to show evidence to the Nursing Council of completion of his Professional Development and Recognition Portfolio at "proficient" level.

Costs

[40] The starting point for costs should be 50%.[2] Where there has been a guilty plea and co-operation with a disciplinary prosecution, some reduction is usually made.

[2] *Cooray v Preliminary Proceedings Committee* (unreported, AP 23/94, Wellington Registry, 14 September 1995)

[41] An estimate of the Tribunal costs came to $20,855, and the Director's costs were $25,921. It was acknowledged that the practitioner was in the position to meet a financial penalty and no statement of his means was provided.

[42] Under section 101(1)(f) Mr [A] is ordered to pay a total of $18,710.40, being 40% of the total costs, to be apportioned equally between the Tribunal and the Director of Proceedings.

Non-publication

[43] Mr [A] applied for an order prohibiting publication of his name on the grounds that:

(a) Publication of his name would likely bring damage to the reputations of both Mr and Mrs [A].

(b) The flow on effect from damage to reputation is that it will likely have a negative effect on current and future therapeutic relationships Mr [A] has with his residents and their families and Mrs [A] has with her patients. There will also likely be a negative effect on the relationship Mr [A] has with the staff he mentors at [T].

(c) Both Mr and Mrs [A] fear for their personal safety.

(d) Mr [A] has a health issue for which he had [ ] surgery in 2011. While he has been symptom free since the surgery, the stress he has experienced as a result of both the HDC and the HPDT processes has resulted in symptoms returning. Given this, Mr [A] saw his GP and the [specialist], [ ] who have confirmed that the stress Mr [A] is feeling could trigger [ ] events such as [ ].

Principles

[44] Both parties provided helpful submissions on the law regarding non-publication of names and other information in this jurisdiction.

[45] Section 95(1) of the Act provides that all Tribunal hearings are to be in public.[3] Section 95(2) provides:

[3] This is subject to section 97 which provides for special protection for certain witnesses

(2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:

…

(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person.

[46] Therefore, in considering an application prohibiting publication, the Tribunal must consider the interests of the practitioner, his wife and the public interest. If we think it is desirable to make an order for non-publication, we may then exercise our discretion to make such an order.

[47] The public interest factors have been established:[4]

(a) Openness and transparency of disciplinary proceedings;

(b) Accountability of the disciplinary process;

(c) The public interest in knowing the identity of a health practitioner charged with a disciplinary offence;

(d) Importance of free speech (enshrined in section 14 of the New Zealand Bill of Rights 1990); and

(e) The risk of unfairly impugning other practitioners.

[48] There has been much discussion of the principle of open justice in the Courts and legal commentary. The principle of open justice has been described as a fundamental principle of common law and is manifested in three ways:

> [F]irst, proceedings are conducted in 'open court'; second, information and evidence presented in court is communicated publicly to those present in the court; and, third, nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media. This includes reporting the names of the parties as well as the evidence given during the course of proceedings.[5]

[49] In *Erceg v Erceg*[6] the Supreme Court said:

> [2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been

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4 As set out in *Nuttall 8Med04/03P* and subsequent Tribunal decisions

5 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12 (2013) 35 *Sydney Law Review* 674.

6 *Erceg v Erceg* [2016] NZSC 135.

> described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language.
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> [3] However it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.

[50] The disciplinary process needs to be accountable so that members of the public and profession can have confidence in its processes.[7]

[51] The public interest in knowing the identity of a practitioner charged with a disciplinary offence includes the right to know about proceedings affecting a practitioner, but also the protection of the public and their right to make an informed choice.[8]

[52] The High Court has said the statutory test for what is desirable is flexible:[9]

> Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases. Thus, the statutory test of what is "desirable" is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may include in favour of the private interests of the practitioner. After the hearing, by which time the evidence is out and findings have been made, what is desirable may well be different, the more so where the professional misconduct has been established.

[53] We acknowledge the stress caused by disciplinary proceedings can adversely affect a practitioner's mental wellbeing. As France J observed in *Dr X v Director of*

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7 *Nuttall* 8Med04/03P para [26], referring to *Director of Proceedings v Nursing Council* [1999] 3NZLR 360*; Beer v A Professional Conduct Committee* [2020] NZHC 2828 at [40]

8 *Nuttall* 8Med04/03 para [27], [28], referring to *Director of Proceedings v Nursing Council* [1999] 3NZLR 360

9 *A v Director of Proceedings* CIV-2005-409-2244, Christchurch 21 February 2006 at [42] (also known as *T v Director of Proceedings* and *Tonga v Director of Proceedings*)

Proceedings,[10] the "inevitable embarrassment" caused by publicity of disciplinary proceedings does not usually overcome the imperatives behind publication. France J considered that there must be something more "sufficiently compelling" than stress or embarrassment to justify suppression of a practitioner's identity.

[54] The more serious the offending, the greater the stress to the family, but at the same time, the public interest factors may also have greater weight. Where the established conduct has an unethical and/or sexual component there is an added embarrassment and humiliation for a practitioner's family if their name is associated with it, and yet there may be strong public interest factors in publication. That includes flushing out any unknown similar complaints.

Practitioner submissions

[55] In support of the application, Mr [A] provided an affidavit, a statement from his wife and two letters from his [specialist]. He also referred to Ms [E]'s evidence at the hearing that she supported his name suppression because she would not like his good close relationships with residents, staff and families to be impacted.

[56] Ms Eglinton submitted that publication of the Tribunal's decision would meet public interest requirements, without the need for publication of the practitioner's name. She further submitted that impugning other nurses is unlikely to occur as Mr [A] is the only nurse on the Nursing Council's register of nurses with his surname. Also, the events in question occurred over three years ago so it is unlikely that other nurses' reputations will be affected by suspicion.

[57] It was submitted that the personal considerations of Mr [A], his wife and the residents and staff at [T] outweighed any public interest in publication of his name.

[58] Ms Eglinton referred to *ANG v A Professional Conduct Committee*. where Fogarty J acknowledged that the principle of openness will "usually" reveal the name of the practitioner but went on to hold that this principle did not justify publication of a practitioner's name where no-one had been harmed and the practitioner remained fit to practise. His Honour said:

[10] Dr X v Director of Proceedings [2014] NZHC 1798 at [14]

> [78] In my judgment, there was an error in the analysis of the Tribunal; being significant overweighting of the public interest to know just who it was being disciplined, even in a case where the professional was not prevented from continuing to practise, and was assessed as being of no risk to the public. Nowhere is s 95 predicated on the need for the doctor to be held to account publicly."

[59] And in B v B,[11] Blanchard J. observed:

> But where the orders made by a disciplinary tribunal in relation to the future practice of the defendant are directed towards that person's rehabilitation and there is no striking off or suspension but rather, as here, a decision that practice may continue, there is much to be said for the view that publication of the defendant's name is contrary to the spirit of the decision and counter-productive. It may simply cause damage which makes rehabilitation impossible or very much harder to achieve."

[60] Ms Eglinton submitted that these cases recognise that, in some instance, slavish adherence to the principle of openness does very little to protect or promote the public interest. In such instances, the private interest of the practitioner must, as a matter of logic, exert greater relative force in the balancing exercise to be conducted under section 95.

Director of Proceedings Submissions

[61] In reply, Mr Robins submitted that *ANG* does not establish a general rule that name suppression should follow where there is no perceived risk to the public. Rather, the Court found the Tribunal gave excessive weight to the public interest in that particular case. In finding there was a case for name suppression, the Court also made particular note of the practitioner's immediate family coping with "an extremely challenging, traumatic, family tragedy"; and the fact that the practitioner's patients and colleagues seemed well briefed on the proceedings before the Tribunal, which does not appear to be the case with RN [A].

[62] The Director's position was that:

(a) the public is entitled to know that RN [A] has been found guilty of professional misconduct. That includes residents and staff.

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[11] B v B HC Auckland HC4/92, 16 April 1993 at 99

(b) Publication of RN [A]'s name would prevent unfair suspicion being cast on other practitioners. That would be the case here. His former and current nursing colleagues would be unfairly tarnished if he were to receive name suppression.

[63] In response to the specific grounds relied on by the practitioner, the Director submitted:

- The personal and professional reputational impact as a result of the professional misconduct is an insufficient basis for nonpublication orders. As noted by Palmer J in *M v A Professional Conduct Committee*:

  …the effects of the publicity about proven offending are the effects of the offending itself, not of the penalty imposed by the Court.

- Reputational impact from publication is inevitable. While it is unfortunate, much more than personal and professional embarrassment or detriment to reputation is required to displace the presumption of openness.

- Further, any decision would include Mr [A]'s first name and clearly identify him as being a registered nurse. These two details make it sufficiently clear that the charge relates to him and not his wife.

[64] It was submitted that Mr [A] has provided no evidence beyond speculation to establish a real risk of adverse consequences or harm to his current or past patients. Ms [E] makes no comments about risks to the wellbeing of [T] residents if he was to be named beyond a general fear that his relationships with them may be "impacted".

[65] In any event, the Director submitted that given the serious nature of Mr [A]'s misconduct, the public interest, and interests of those people who he is currently employed to care for, outweigh Mr [A]'s (speculative) concerns that his patients might be at risk of harm if he is named.

[66] It was submitted that it is speculative to suggest that publication would increase the risk of him and his family being targeted by racist or xenophobic attacks.

[67] Finally, the Director made the following comments on the medical evidence presented:

(a) It is inconclusive whether RN [A]'s recent symptoms were caused by stress or [ ] (the specialist is not definitive on the point).

(b) When giving evidence, RN [A] presented as a robust individual who could withstand and address criticism.

(c) Not all decisions of this Tribunal receive publicity and "extreme mental stress" is unlikely to follow as a result. To take a small sample, it seems the three most recent decisions in which the practitioner was named received minimal media attention.

Discussion

[68] In the present case, we must weigh the public interest factors against the personal interests of Mr [A], his wife, his patients and colleagues, and then decide if it is desirable to order non-publication of his name.

[69] The passage from *B v B* cited by Ms Eglinton regarding the impact of publication on rehabilitation should be considered in the context of the landscape of nearly 30 years ago. That case was heard under the provisions of the Dental Act 1988, which provided for hearings to be held in public, and there were provisions in that statute to deal with name suppression. This was quite different from the situation with some other professions where the legislation stipulated that the hearings were in private.[12] In other instances, the legislation was silent on whether hearings of complaints were in public. There was some provision for publication of orders in professional publications,[13] but no explicit provision for non-publication of names.

[70] *B v B* was decided in an environment where public hearings of disciplinary charges were not the norm. The enactment of the Medical Practitioners Act 1995 echoed the more transparent approach to professional discipline found in the Dental Act 1988, and all health professionals were treated alike with the enactment of the Health Practitioners Competence Assurance Act 2003, which took effect more than 10 years after *B v B* was issued. The first High Court decision on name suppression under the present Act was

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[12] See, for example, Nurses Act 1977 section 43 (7), Chiropractors Act 1982 section 33(7).

[13] For example, section 65 of the Medical Practitioners Act 1968 provided for publication of orders in the Medical Journal of New Zealand at the discretion of the Disciplinary Committee or the Medical Council

Tonga v Director of Proceedings.[14] In that case the practitioner remained in the profession, and the High Court did not allow an appeal against the Tribunal's refusal to grant permanent name suppression. The quote above at paragraph 53 has been repeatedly cited with approval including by the Full High Court in *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 2 NZLR 850.[15]

[71] The Tribunal accepts the Director's submission that it is Mr [A]'s own actions that may affect his reputation.[16] The Act's primary purpose under section 3 is "to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions". The starting point is that the name of a practitioner appearing before the Tribunal is published. If damage to reputation is a ground for non-publication of a practitioner's name, then it would be difficult to imagine a case where a practitioner's name is published.

[72] The same applies to the impact on patients and colleagues. If this is a proper ground for name suppression, again, publication would likely be prohibited in any case where the practitioner is continuing to work in their chosen field.

[73] The Tribunal has some sympathy for Mr [A]'s wife's situation. She currently works in the health sector and wants to embark on training and entry to a profession within health. However, it is difficult to see how publication of her husband's name will impede her career.

[74] The ground that gave the Tribunal more pause for thought is the impact of stress on Mr [A]'s documented [ ] condition and the risk of even greater stress should he or his wife be exposed to racist comments. The Tribunal accepts that the evidence of racial slurs may be speculative but does not dismiss that real possibility out of hand.

[75] Balancing the risk of a significant adverse impact on Mr [A]'s health against the public interest principles outlined above and in particular the need to protect the public, the Tribunal has decided by a narrow margin that it is desirable to order non-publication of the practitioner's name. This decision also recognises that there have been no other

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[14] Above, note 9
[15] At [60]
[16] As noted by Palmer J in *M v a Professional Conduct Committee* [2015] NZHC 3063 at [57]

incidents reported, that he has continued to work as a nurse with a very favourable reference, and further conditions have been placed on his practice.

[76] On balance the Tribunal decided that on this occasion, and by a narrow margin, it is desirable that publication of the practitioner's name is prohibited under section 95.

[77] The following details are also suppressed:

(a) Mr [A]'s roles as the [ ].

(b) Mrs [A]'s occupation and desired field of training.

(c) Mr [A]'s nationality and places of training.

[78] The Tribunal has not suppressed the names of the two organisations referred to in this decision.

Results and Orders

[79] The charge of professional misconduct was established.

[80] Mr [A] is censured under section 101(1)(d).

[81] A fine of $3,500 is imposed under section 101(1)(e).

[82] Under section 101(1)(c) the following conditions are imposed on Mr [A]'s practice:

(a) At his own expense, by 30 September 2022, Mr [A] must have completed a Safe Practice Effective Communication course on managing challenging behaviours in situations, calming and de-escalation techniques.

(b) For a period of 12 months commencing no later than 1 February 2022, at his own expense, Mr [A] must engage in monthly professional supervision, with a supervisor to be approved by the Nursing Council, and the supervisor will provide quarterly reports to the Nursing Council, including, but not limited to observations on Mr [A]'s progress with reflective practice.

(c) By 30 September 2022, Mr [A] is to show evidence to the Nursing Council of completion of his Professional Development and Recognition Portfolio at "proficient" level.

[83] Under section 101(1)(f) Mr [A] is ordered to pay a total of $18,710.40, being 40% of the total costs, to be apportioned equally between the Tribunal and the Director of Proceedings.

[84] Publication of the practitioner's name is prohibited under section 95.

[85] The following details are also suppressed:

(a) Mr [A]'s roles as the [ ].

(b) Mrs [A]'s occupation and desired field of training.

(c) Mr [A]'s nationality and places of training.

[86] Under section 157 2) 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 Nursing Council of New Zealand 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 Wellington this 20th day of December 2021

T Baker
Chair
Health Practitioners Disciplinary Tribunal