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BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HPDT NO	**1232/Med21/531P**
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 MEDICAL COUNCIL OF NEW ZEALAND** **Applicant**
AND	**DR PREECHAPON** (also known as Pleayo) **TOVARANONTE**, of Christchurch, Registered Medical Practitioner **Practitioner**

HEARING	held in Christchurch 12-14 July 2022
TRIBUNAL	Ms A J Douglass (Chair) Mr C Nichol, Dr A von Biel, Dr K Good and Dr K de Silva (Members)
IN ATTENDANCE	Ms G Fraser, Executive Officer Ms J Kennedy, Stenographer
APPEARANCES	Ms K Rouch and Mr H Wilson for the Professional Conduct Committee (PCC) Mr P Shamy and Mr G Riach for the Practitioner

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DECISION OF THE TRIBUNAL
7 November 2022

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Introduction

[1] This case concerns the ethical and professional standards that doctors should adhere to when using social media and online posts in a public or private capacity. Doctors, and all health practitioners, should be cautious in their use of social media and ensure that their personal conduct does not risk adversely affecting the reputation of their profession.

[2] Dr Preechapon Tovaranonte is a registered medical practitioner in Christchurch. He faces one Charge of professional misconduct with four particulars (the Charge).

[3] The Professional Conduct Committee (PCC) says that Dr Tovaranonte acted in an unprofessional manner and that his conduct is both negligence and malpractice in his scope of practice and that he has brought discredit to the medical profession under ss 100(1)(a) and (b) of the Health Practitioners Competence Assurance Act 2003 (the Act).

[4] The Charge concerns online public posts and comments made by Dr Tovaranonte between 2017 and 2019 with an alias[1] "Paul Tavern", about former colleagues, employers and two medical centres. It also concerns a complaint Dr Tovaranonte submitted to the Office of the Health and Disability Commissioner (HDC) under this pseudonym and information that he published on his website "Beyond the Stethoscope" and his LinkedIn profile.

[5] Although there is an Agreed Summary of Facts (ASOF) signed by Dr Tovaranonte, he denies the Charge. Dr Tovaranonte says that while he did make a series of online posts with a pseudonym and submitted a complaint to the HDC about a medical centre among other allegations, his actions were not conduct that amount to professional misconduct.

[6] The hearing proceeded over three days and evidence was heard from three PCC witnesses and Dr Tovaranonte. At the conclusion of the hearing the Tribunal found the Charge established. The reasons for our decision in respect of liability and penalty are set out below.

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1 The Charge refers to the "alias" "Paul Tavern." We use the terms "alias" and "pseudonym" interchangeably to refer to a fictitious name.

The Charge

[7] The Charge and four particulars are set out in the Schedule to this decision.[2]

[8] Particular 1 alleges that on several occasions between 2017 and 2019, Dr Tovaranonte made online public posts and/or comments about former colleagues, employers and other health practitioners and in respect of two medical practices in circumstances where the comments were made with an alias, "Paul Tavern". The PCC says the comments were disparaging and amounted to unprofessional criticisms of the third parties. The comments detracted or had potential to detract from the reputation of the third parties and/or potential to encourage criticisms of them.

[9] In particular 2, the PCC says that Dr Tovaranonte acted in an unprofessional manner in that on or around 14 July 2019 he submitted a complaint to the HDC about a Practice which formerly employed him. The complaint was submitted using the alias "Paul Tavern".

[10] In particular 3, the PCC says that in 2020 Dr Tovaranonte published, or allowed information to be published on his website "Beyond the Stethoscope" (BTS) which was inaccurate and/or misleading in relation to his qualifications. These qualifications relate to three university degrees which although Dr Tovaranonte had embarked on the study, he had not completed the qualifications. It is also alleged that the identities of the purported co-founders of BTS were misleading as stock images were used on the website of two people who were not co-founders and did not have the stated qualifications.

[11] Particular 4 concerns Dr Tovaranonte's publication in his LinkedIn profile on 4 August 2020. The PCC says that Dr Tovaranonte's qualifications cited there were inaccurate or misleading or had potential to mislead because as at that date he had not completed or obtained the three qualifications – an LLM, LLB and MBA – from three separate universities.

[2] Schedules 1, 2 and 3 annexed to the Charge are not included in the Schedule however these particulars are referred to in this decision. Schedule 1 sets out posts made by Dr Tovaraonte using the "Paul Tavern" pseudonoym (particular 1) Schedule 2 are the screenshots taken of Dr Tovaranonte's profile on his website, "Beyond the Stethescope"(particular 3); and Schedule 3 are screenshots of his LinkedIn profile (particular 4).

[12] The PCC says that the conduct itemised in each of the four particulars of the Charge is conduct by Dr Tovaranonte contrary to the New Zealand Medical Association *Code of Ethics* and the New Zealand Medical Council's professional standards including, *Good Medical Practice* and *Use of Internet and Electronic Communications*. This conduct either separately or cumulatively amounts to malpractice or negligence in relation to Dr Tovaranonte's scope of practice and has brought or is likely to bring discredit to the medical profession.

Background facts

[13] Although Dr Tovaranonte has denied the Charge he has signed the following Agreed Summary of Facts.[3]

AGREED STATEMENT OF FACTS

Professional background

1. Dr Preechapon Tovaranonte (**Dr Tovaranonte**) is, and at all material times was, a registered medical practitioner.

2. Dr Tovaranonte graduated from the University of Otago in 2008 with a Bachelor of Medicine and Bachelor of Surgery (MBChB). He obtained general scope of practice registration with the Medical Council of New Zealand on 4 May 2010.

3. Dr Tovaranonte was contracted at [Health Centre A] from 21 October 2013 until his contract was terminated on 8 November 2016. He then worked at [Health Centre B] as a locum general practitioner (GP) contractor from 28 September 2015 until his contract was terminated on 18 April 2019. Between 8 May 2017 and 18 April 2019, Dr Tovaranonte worked solely for [Health Centre B] as a locum GP contractor.

4. Since 30 May 2019, Dr Tovaranonte has worked as a locum GP contractor at multiple medical practices.

Dr Tovaranonte uses, or has used, the pseudonym "Paul Tavern" online

5. Prior to commencing work at [Health Centre B], Dr Tovaranonte created the pseudonym "Paul Tavern" to use online.

6. Over the years, Dr Tovaranonte has used his pseudonym to make posts

[3] ABOD, pp 11-16, not including Appendix 1 - Posts made by Dr Tovaranonte using the "Paul Tavern' pseudonym.

and/or comments on social media, leave "Google reviews" and for business purposes, such as posting advertisements for rental properties on TradeMe. The online posts and/or comments that Dr Tovaranonte has made using this pseudonym that are relevant to this proceeding are set out in **Appendix 1**.

Background to PCC investigation

Online posts regarding [Health Centre A]

7. In or around May 2017, following the termination of his contract at [Health Centre A], Dr Tovaranonte posted a Google review on [Health Centre A]'s Google page using his 'Paul Tavern' pseudonym. A screenshot of this review is located at page 260 of the ABOD. Dr Tovaranonte's Google review reads:

> There is no continuity of care at this medical practice. I had different doctors each time I called in. The waiting time was astronomically long to the point of being dangerous to operate as an 'urgent' medical centre. The reception staff are clueless and not very helpful. Each time I made a complaint it went to a different manager. I think they have had 3 managers over the last year. There must be something intrinsically wrong in this organisation or the higher management. We rang on behalf of a friend to ask for an immigration medical and this place is a lot more expensive than others. I do not recommend this medical practice to anybody

8. Despite stating that he 'had different doctors each time [he] called in' to [Health Centre A], at no time has Dr Tovaranonte been a patient at the Centre.

9. On or around 18 December 2017, Dr Tovaranonte, using his "Paul Tavern" pseudonym, commented on a post published by [Health Centre A] on its public Facebook page. A screenshot of this post is located at page 261 of the ABOD. The post reads as follows:

> Opening everyday til 8pm but the door shuts at 6pm coz the doctors/ nurses are always behind and the waiting list is more than 2 hours. The receptionists are not making the situation any better and neither the practice manager (3rd one for this year). There is a new After Hours where you can make an appointment online and the service is much better. www.afterhoursgp.co.nz.

First online post about [Health Centre B]

10. On or around 25 May 2019, following the termination of his contract with [Health Centre B], Dr Tovaranonte made a post in the [ ] Community Facebook page under the pseudonym "Paul Tavern". A screenshot of this post is set out at page 272 of the ABOD. The post reads as follows

> Just asking here if anyone else had a similar experience. Took my sick child to [Health Centre B] the other day and we were turned down because the practice was about to close.

11. Despite stating that he had taken his sick child to [Health Centre B], at no time has Dr Tovaranonte or any of his family members been patients at [Health Centre B].

Complaint to the HDC

12. On or around 14 July 2019, following the termination of his contract with [Health Centre B], Dr Tovaranonte submitted a complaint to the Office of the Health and Disability Commissioner (**HDC**) about [Health Centre B]. This complaint was submitted under the pseudonym "Paul Tavern" and stated that [Health Centre B]

   (a) adopted policies for financial gain; that deviated from other medical practices in the region rather than for its patients' best interests;

   (b) these policies deviated from those adopted by other medical practices in the region;

   (c) dismissed concerns about its policies when raised by patients.

13. A copy of this complaint is located at page 281 of the ABOD.

Other online posts/comments about [Health Centre B]

14. On or around 30 August 2019, Dr Tovaranonte made several posts, and responded to several other comments, about [Health Centre B] and other practices and practitioners in the [ ] Community Facebook page using the pseudonym "Paul Tavern" as set out in **Appendix 1**. Screenshots of these posts and comments were taken and copies of these are located at pages 273-278 of the ABOD. The posts and/or comments read as follows:

   (a) [Health Centre B] is well-known for this kind of disgusting behaviour. I urge you to write a complaint directly to the HDC as they are unlikely to respond to your conplaint [sic] fairly. For after-hours have you been to the new online service www.afterhoursgp.co.nz. Book online and just turn up. No more waiting in ED or 24hr Surgery.

   (b) [Mr L] you mean [Health Centre C] (about our business and not your health!) [ ]!

   (c) (In response to a comment from another user who had recommended [Dr D], Paediatrician) [Ms N] This pediatrician has been singled out by the rest of the hospital department because he tends to give out unconditional unproven treatment and he charges your arm and your leg. Plus he is close to retirement and he has not been up to date with modern medicine.

   (d) [Mr I] have you heard of www.afterhoursgp.co.nz?"

(e) Do not overload ED with possible contagious and infectious diseases. They are alreadt [sic] overwhelmed. Reserve ED for when you are dying.

'Beyond the Stethoscope' website

15. In late 2014, Dr Tovaranonte founded a website called 'Beyond the Stethoscope' (**BTS**) with two of his Australian colleagues. The initial aim of BTS was to provide career advice for doctors considering non-clinical careers.

16. In or around March or April 2020, Dr Tovaranonte decided to "revamp" the BTS website and engaged Wix.com, a template website company, for that purpose. As part of this "revamp", two fictional profiles, Drs Chris Le Cordon and Vivian Leigh, were posted on the BTS 'Our Board and Team' page alongside Dr Tovaranonte's profile. This webpage listed:

    (a) Dr Tovaranonte as the 'Co-founder/CEO' and as holding qualifications including a Bachelor of Laws (**LLB**) from the University of Essex and a Master of Laws (**LLM**) from the University of Edinburgh;

    (b) Dr Chris Le Cordon as the 'Co-founder/Director of Innovation' and as holding a MBBS, MPH and PhD; and

    (c) Dr Vivian Leigh as the 'Co-founder/Director of Strategies' and as holding a MD, FRACP (Infectious Diseases and Internal Medicine), PhD (Epidemiology) and PGDipTropMed.

17. The BTS website was published online and stock images were displayed on the webpage next to Drs Le Cordon and Leigh's profiles that had been used on a number of different websites. These are set out at pages 293-298 of the ABOD.

18. Screenshots of the BTS website were taken by the PCC on 3 August 2020, copies of which can be found at pages 290-292 of the ABOD.

LinkedIn profile

19. As at 4 August 2020, Dr Tovaranonte's LinkedIn profile listed the following qualifications, amongst others:

    (a) LLB from the University of Essex.

    (b) LLM from the University of Edinburgh.

    (c) Master of Business Administration (**MBA**) from Edinburgh Business School.

20. Dr Tovaranonte published this information on his LinkedIn profile. Screenshots of Dr Tovaranonte's LinkedIn profile are set out at pages 308-316 of the ABOD.

21. At the time Dr Tovaranonte published the qualifications listed at paragraph 16 (a) and 19 (a) – (c) above, he had not obtained those qualifications.

Notification to Council and disciplinary charge

22. On 13 September 2019, [Health Centre B] notified the Council with concerns about Dr Tovaranonte's conduct in making the online posts outlined above, and about his complaint to the HDC under the pseudonym "Paul Tavern".

23. Following consideration of the notification and Dr Tovaranonte's responses, the Council resolved to refer the information to a Professional Conduct Committee (**PCC**) under section 71 of the Health Practitioners Competence Assurance Act 2003 (the **Act**).

24. On 25 May 2021 the PCC determined that a charge be brought against Dr Tovaranonte before the Health Practitioners Disciplinary Tribunal (the **Tribunal**).

25. The Tribunal issued a Notice of Intention to Bring Disciplinary Proceedings on 23 September 2021.

Admissions

26. Dr Tovaranonte confirms and admits the facts in this Agreed Statement of Facts are true and accurate.

Relevant law

Professional misconduct

[14] Section 100 of the Act defines the grounds on which the health practitioner may be disciplined. Dr Tovaranonte has been charged with professional misconduct under both s100(1)(a) and/or (b) of the Act as follows:

> 100 Grounds on which health practitioner may be disciplined
>
> (1) The Tribunal may make any 1 or more of the orders authorised by section 101 if, after conducting a hearing on a charge laid under section 91 against a health practitioner, it makes 1 or more findings that—

> (a) the practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time that the conduct occurred; or
>
> (b) the practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred;

[15] 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,*[4] Gendall J described negligence and malpractice as follows:

> 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.

[16] "Malpractice" is defined in the *Collins English Dictionary* as:[5]

> The immoral, illegal or unethical conduct or neglect of professional duties. Any instance of improper professional conduct.

[17] Malpractice is defined in the New Shorter Oxford English Dictionary:[6]

> 1. Law. Improper treatment or culpable neglect of a patient by a physician or of a client by a lawyer … 2. Gen. A criminal or illegal action: wrongdoing, misconduct.

[18] Section 100(1)(b) of the Act creates another route by which a finding of professional misconduct may be made. This is where the practitioner's conduct has or is likely to bring discredit on the particular health profession. In *Collie v Nursing Council of New Zealand*, Gendall J considered the meaning of conduct likely to bring discredit on the nursing profession as follows:[7]

4 [2001] NZAR 74.
5 Collins English Dictionary (2nd Edition).
6 Shorter Oxford English Dictionary (1993 ed), as cited in *Dr E* 136/Med07/76D at [12]–[14].
7 *Collie v Nursing Council of New Zealand* [2001] NZAR at [28].

> To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard with the question to be asked by the Council being whether reasonable members of the public, informed and with 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.

Burden and standard of proof

[19] The burden of proof is on the PCC. This means that it is for the PCC to establish that the practitioner is guilty of professional misconduct.

[20] The PCC must produce evidence that establishes the facts on which the Charge is based to the civil standard of proof; that is, proof which satisfies the Tribunal that on the balance of probabilities the particulars of each Charge are more likely than not. The Tribunal must apply a degree of flexibility to the balance of probabilities taking into account the seriousness of the allegation and the gravity of the consequences flowing from a particular finding.[8]

Threshold test for disciplinary sanction

[21] There is a well-established two-stage test for determining professional misconduct in this jurisdiction.[9] The two steps are:

(a) First, did the proven conduct fall short of the conduct expected of a reasonably competent health practitioner operating in that vocational area? This requires an objective analysis of whether the health practitioner's acts or omissions can reasonably be regarded as being negligence and/or malpractice or, having brought or are likely to bring discredit to the practitioner's profession; and

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

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8 *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [112].

9 *PCC v Nuttalll* Med 08/04/03P; *F v Medical Practitioners Disciplinary* Tribunal [2005] 3 NZLR 774 (CA), as applied in *Johns v Director of Proceedings* [2017] NZHC 2843 at [78].

[22] In *Martin v Director of Proceedings*[10] the High Court has said that the threshold should not be regarded as "unduly high" but that "a notable departure from acceptable standards" is required; and that the threshold is to be reached with care, having regard to both the purpose of the Act and the implications for the practitioner.[11]

Professional standards and Code of Ethics

[23] There are several applicable professional standards and a Code of Ethics that are required to be observed by doctors. We outline the relevant standards and guidelines below.

Good medical practice

[24] The Medical Council statement on *Good Medical Practice* (2016)[12] sets out a medical practitioner's professional obligations. These are the standards that the public and the profession can expect of a competent medical practitioner. It requires doctors to treat colleagues with respect, maintain their trust, and work in partnership to best serve patients' interests.

[25] Under the heading "Working with colleagues" it states:

> 39. You must be aware of the impact of your conduct on members of your practice team and colleagues, and how that may affect quality care and treatment for patients.
>
> 40. You should respect the skills and contributions of your colleagues.
>
> 41. Treat your colleagues courteously, respectfully and reasonably. Do not bully or harass them. You must not discriminate against colleagues.
>
> 42. Do not make malicious or unfounded criticisms of colleagues that may undermine patients' trust in the care or treatment they receive, or in the judgement of those treating them.

[26] The statement also requires doctors to work cooperatively with managers:

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10 [2010] NZAR 33.

11 *Martin v Director of Proceedings* [2010] NZAR 33, Courtney J at [32].

12 Medical Council of New Zealand *Good Medical Practice* (2016).

> 43. You must always strive to work with managers and administrators in a constructive manner to create and sustain an environment that upholds good medical practice:
>
> And: [13]
>
> …be honest, open and constructive in [their] dealings with managers, employers, the Medical Council and other authorities.

[27] Doctors are required to act ethically and with integrity by never abusing the public's trust in the profession. *Good Medical Practice* is addressed to doctors, but it is also intended to let the public know what they can expect from doctors.[14]

[28] The Medical Council statement on *Unprofessional behaviour in a healthcare team*[15] defines "unprofessional behaviour" as:

> Chronic and repetitive and inappropriate behaviour that adversely affects the effective functioning of other staff and teams;

[29] "Disruptive behaviour" is described as:

> A style of interaction with other doctors, medical staff, patients, family members or others that interferes with patient care.

[30] Disruptive behaviour can include an unwillingness to discuss issues with colleagues in a cordial and respectful manner. This statement of the Medical Council stresses that inappropriate interprofessional behaviour can negatively impact, among other things:[16]

> *Patient care* – such behaviour may contribute to adverse events and compromises patient safety
>
> *Relationships with colleagues* – colleagues may avoid a health professional exhibiting such behaviour, resulting in professional isolation

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13 Medical Council of New Zealand, *Good Medical Practice* (2016) at [43] and ABOD pp 384 and 398.
14 ABOD at 381.
15 Medical Council of New Zealand, *Unprofessional Behaviour in Health Care Team* (2009) [ABOD 353].
16 ABOD 354.

> *Staff morale* – more time and effort is spent responding to morale problems and dealing with resignations, creating an environment that is unappealing to other health professionals
>
> *Staff retention and financial costs* – the behaviour affects the reputations of employers, the medical profession and health care organisation. Also, resources are consumed in frequent recruiting.

New Zealand Medical Association Code of Ethics

[30] The New Zealand Medical Association *Code of Ethics* (2014) is the applicable Code of Ethics at the time of Dr Tovaranonte's conduct.[17] The relevant provisions of the *Code of Ethics* include:

> 33. Doctors should ensure that their personal conduct does not risk adversely affecting their reputation or that of the profession.
>
> …
>
> 40. Doctors should avoid impugning the reputations of colleagues. …
>
> 41. Doctors have an obligation to draw the attention of relevant bodies to inadequate or unsafe services. Where doctors are working within a health service they should first raise issues in respect of that service through appropriate channels, including the organisation responsible for the service, and consult with colleagues before speaking publicly.
>
> …
>
> 45. Doctors should exercise caution when using social media in a professional or private capacity. The risk of boundary violations in this area is considerable. All the ethical obligations set out in this Code, such as confidentiality and appropriate doctor-patient relationships, are applicable to social media.

Social media and the medical profession

[31] The Medical Council Statement on the *Use of the Internet and Electronic Communication* (2016)[18] refers to the principles of the *Health on the Net Foundation (HON) Code of Conduct* which in turn refers to a resource jointly developed by medical associations in New Zealand and Australia. The social media and the medical profession statement provides a guide to

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17 New Zealand Medical Association, *Code of Ethics for the New Zealand Medical Profession* (2014) at [33], [38], [40]-[41], ABOD, p 366.

18 ABOD, pp 416-7.

online professionalism for medical practitioners and medical students on the use of social media. The resource discusses a number of cases where doctors and other health professionals faced employment or disciplinary action after posting unprofessional content online.

Evidence and witnesses

[32] The parties provided an Agreed Bundle of Documents (Bundle/ABOD).[19]

[33] There are a number of background documents in relation to particulars 1 and 2 of the Charge. These include: the notification by [Health Centre B] to the Medical Council about Dr Tovaranonte and his responses to the Council, the transcript of Dr Tovaranonte's interview with the PCC, the online post using the "Paul Tavern" pseudonym, Dr Tovaranonte's complaint to the Health and Disability Commissioner about [Health Centre B] and the Commissioner's response.

[34] The Bundle included screen shots and information regarding Dr Tovaranonte's website, BTS (particular 3) and the screen shots and correspondence regarding his LinkedIn page (particular 4).

[35] The PCC called the following two witnesses during the hearing, with the third witness' evidence being taken as read:

(a) [Dr R], the Managing Clinical Director at [Health Centre B].[20] [Dr R] explained how Dr Tovaranonte was hired as a GP locum from September 2015 until he was dismissed in April 2019. [Dr R] said he discovered Facebook posts in May 2019 concerning [Health Centre B]. He described how he found out that they were posted by Dr Tovaranonte using his pseudonym "Paul Tavern" and the effect of these posts on his practice.

[19] Document 1, Agreed Bundle of Documents dated 10 June 2020 (Bundle/ABOD).
[20] Documents 3 and 4, Brief of Evidence of [Dr R] and in Reply.

(b) [Dr H], the Medical Director at [Health Centre A], which employed Dr Tovaranonte from October 2013 until his contract was terminated in 2016.[21] [Dr H] explained how he discovered negative Google reviews of [Health Centre A] in June 2015 and how he found out that they were posted by Dr Tovaranonte using his pseudonym "Paul Tavern". He described the harmful effect these posts had on his staff and colleagues.

(c) Dr Veronica Lamplough, the Convenor of the PCC appointed to investigate Dr Tovaranonte. She interviewed Dr Tovaranonte on 8 April 2021 in respect of the Charge.[22]

[36] Dr Tovaranonte gave evidence in his defence of the Charge.[23] He also provided several references and letters in support from both patients and colleagues.[24]

Liability – Tribunal's consideration of the Charge

The Charge – s 100(1)(a) and (b)

[37] The Tribunal must decide whether the alleged conduct is made out under section 100(1)(a) negligence and /or malpractice and s 100(1)(b) discredit to the profession, or both.

[38] In this case, there is no significant factual dispute. The conduct that is the subject of the Charge is set out in the Agreed Summary of Facts. The Tribunal must make an evaluative judgement of the facts, based on the evidence and submissions and its own expertise in reaching findings in respect of each of the four particulars of the Charge individually, and all four particulars cumulatively.

[39] Mr Shamy submitted that Dr Tovaranonte has never denied the actions of which he is accused. Dr Tovaranonte has at all times been open and honest with the Medical Council and the PCC about what he did and why. Counsel submitted that Dr Tovaranonte has acted with

21 Documents 4 and 5, Brief of Evidence of Dr Neil James Beumelburg and in Reply.
22 Document 6, Brief of Evidence of Veronica Mary Lamplough. Dr Lamplough did not attend the hearing and her brief of evidence was taken as read.
23 Document 8, Brief of Evidence of Dr Preechapon Tovaranonte dated 27 May 2022.
24 ABOD, Tab 39-49, Dr Tovaranonte's references.

genuine motivation and, in his view, in accordance with the duties imposed on him as a medical practitioner. Thus, counsel submitted that even if Dr Tovaranonte was misguided in his actions, these actions were consistent and with a genuine motivation.

[40] When assessing the online media posts and HDC complaint in Particulars 1 and 2, the Tribunal is not required to determine the truth of the comments made by Dr Tovaranonte under the alias Paul Tavern, whether these comments are defamatory of the medical centres and the health professionals that work there or whether they are Dr Tovaranonte's honestly held opinions.

[41] The issue for determination by the Tribunal in respect of all four particulars is whether, on the balance of probabilities, each particular to the charge is established as conduct that has departed from the professional and ethical standards expected of doctors and if so, whether this conduct amounts to professional misconduct that warrants a disciplinary sanction.

[42] We now turn to consider each particular of the Charge.

Particular 1 – Social media posts

[43] Dr Tovaranonte has admitted that prior to commencing work at [Health Centre B] he created the alias or pseudonym "Paul Tavern" to use online. Over the years he used this pseudonym to make posts and comments on social media, Google reviews and for business purposes such as posting advertisements for rental properties on Trade Me.[25]

[44] The seven social media posts (posts) are itemised in Schedule 1 to the Charge. We set each of these out in turn.

Post 1 – Google review of [Health Centre A] in May 2017

[45] Dr Tovaranonte's post was as follows: [26]

[25] ASOF, paras 5 and 6.
[26] ASOF, paras 7 and 8.

> There is no continuity of care at this medical practice. I had different doctors each time I called in. The waiting time was astronomically long to the point of being dangerous to operate as an 'urgent' medical centre. The reception staff are clueless and are not very helpful. Each time I made a complaint it went to a different manager. I think they have had three managers over the last year. There must be something intrinsically wrong in this organisation or the higher management. We rang on behalf of a friend to ask for an immigration medical and this place is a lot more expensive than others. I do not recommend this medical practice to anyone.

[46] These comments are disparaging as Dr Tovaranonte called the [Health Centre A] reception staff "clueless" and "not very helpful". He is alleging systems failures at this medical centre, "to the point of being dangerous". We find that these are derogatory comments about Dr Tovaranonte's former colleagues and employer.

[47] The criticisms made by Dr Tovaranonte are unprofessional because to say that issues faced by [Health Centre A] are "at the point of being dangerous" affects patient trust in the health centre. Dr Tovaranonte conceded that this review post was hearsay evidence as at no point had he personally experienced these issues. Rather he considered that the contents of the review were an accurate expression of experiences he had been informed of whilst at [Health Centre A] by patients.[27]

[48] The Tribunal consider that it is unethical to make a statement using the pseudonym, and then drawing on material others have told him, and then to falsely caste this statement as being his own personal experience.

[49] Dr Tovaranonte's comments were unprofessional because they were not raised in accordance with the *Code of Ethics* for the medical profession. There is a mandatory obligation on doctors to draw attention to inadequate or unsafe practices. The *Code of Ethics* provides:[28]

> Doctors have an obligation to draw the attention of relevant bodies to inadequate or unsafe services. Where doctors are working within a health service they should raise an issue in respect of that service through appropriate channels, including the organisation responsible for the service, and consult with colleagues before speaking publicly.

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[27] Document 8, Brief of Evidence of Dr Preechapon Tovaranonte, para 13.
[28] ABOD, p 366. New Zealand Medical Association Code of Ethics, para 41.

[50] These comments were made in May 2017 after his contract was terminated with [Health Centre A] on 8 November 2016. He was at this time working for [Health Centre B] as a locum general practitioner (GP).[29]

[51] Dr Beumelburg gave evidence about the extensive opportunities available to Dr Tovarnonte to arrange meetings or talk to a practice manager about his concerns, yet he declined to do so.[30]

[52] By using the pseudonym "Paul Tavern" Dr Tovaranonte has not disclosed that he is a doctor himself. Dr Tovaranonte accepted that despite stating "he had a different doctor each time he called in" to [Health Centre A] at no time has he himself been a patient at the Centre.[31]

[53] These comments detract from the reputation of [Health Centre A] and are written in a disparaging way about this organisation – "I do not recommend the medical practice to anybody". Comments such as these could reasonably encourage further criticism from the community that this general practice serves. This practice provides 24/7 care for those in urgent need so the potential impact is greater than the general practice population.

Post 2 – Facebook comment dated 16 December 2017 about MMC

[54] Dr Tovaranonte's post under the name "Paul Tavern" was as follows:[32]

> Opening every day til [sic] but the door shuts at 6pm coz the doctors/nurses are always behind and the waiting list is more than 2 hours. The receptionists are not making the situation any better and neither the practice manager (3rd one for this year). There is a new After Hours where you can make an appointment online and the service is much better. www.afterhoursgp.co.nz.

[55] We are satisfied that this comment misrepresents this medical centre's opening hours by suggesting that the practice is open until 8pm but the doors close at 6pm. It alleges that

29 ASOF, para 3.
30 Transcript, p 51, l 7-14.
31 ASOF, para 8.
32 ABOD, p 261, Schedule 1 to Disciplinary Charge, Post 2.

the doctors and nurses are always behind schedule and recommends an alternative service that is "much better".

[56] We find that this is unprofessional behaviour as Dr Tovaranonte is criticising his colleagues under the pseudonym and these comments are likely to reduce trust and confidence in the medical profession.

Post 3 – Facebook post-dated 25 May 2019 about [Health Centre B]

[57] Dr Tovaranonte's post under the name "Paul Tavern" was as follows: [33]

> Just asking here if anyone else had a similar experience. Took my sick child to [Health Centre B] the other day and we were turned down because the practice was about to close.

[58] [Dr R] explained in his evidence that this post was misleading. He said that in this case "given the severity of this child's respiratory symptoms the nurse who triaged this patient appropriately recommended the patient request an ambulance call-out right away."[34]

[59] We accept [Dr R]'s explanation that there is a triage by nurses. He explained that if the clinic is unable to accommodate a patient (whether a child or an adult) on any given day then that patient will be referred to a funded urgent care clinic. This clinic is funded to provide "walk-in" general practice in an effort to protect the Christchurch Hospital Emergency Department to be used for emergency care only.[35]

[60] [Dr R] explained that after Dr Tovaranonte posted about the sick child the postings went up "like a crescendo". [36] In [Dr R]'s opinion, Dr Tovaranonte's comments were fabricated and aimed at creating maximum disruption to their GP service in the community.

[33] ABOD p 36, Schedule 1 to Disciplinary Charge, Post 3.
[34] Transcript, p 31.
[35] Document 4, Brief of Evidence of [Dr R] in reply, para 12.
[36] Transcript, p 32, lines 27-32.

[61] These comments are disparaging and misrepresented the medical practice procedure at [Health Centre B] for triaging and managing acute presentations, including those at the end of the day.

Post 4 – Facebook comment dated on or around 30 August 2019 about [Health Centre B]

[62] Dr Tovaranonte's post under the name "Paul Tavern" was as follows:

> [Health Centre B] is well-known for this kind of disgusting behaviour. I urge you to write a complaint directly to the HDC as they are unlikely to respond to your conplaint [sic] fairly. For after-hours have you been to the new online service www.afterhoursgp.co.nz. Book online and just turn up. No more waiting in ED or 24hr Surgery.

[63] This is a highly unprofessional criticism. By using the emotive words "disgusting behaviour" Dr Tovaranonte is encouraging patients to complain directly to the Health and Disability Commissioner rather than first go through the internal complaints process at [Health Centre B] as he says that "they (the practice) are unlikely to respond to your complaint fairly".

[64] Dr Tovaranonte justified these comments on the basis that "I either had seen first-hand or observed accounts from patients who had experienced similar conduct". Dr Tovaranonte conceded that he couldn't recall the detail of what the specific disgusting behaviour had been exhibited by [Health Centre B].[37]

[65] It is also unprofessional behaviour for this practitioner to advertise the new alternative online health provider where he was working. He had a conflict of interest. The Medical Council's *Statement on Advertising*[38] says that where doctors are acting as agents their interests should be declared.

Post 5 – Facebook comment dated 30 August 2019 about "[Health Centre C]"

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[37] Brief of Evidence of Dr Tovaranonte, para 26.

[38] ABOD, p 375, Medical Council of New Zealand *Statement on Advertising* (November 2016), para 18, citing the NZMA Code of Ethics.

[66] On 30 August 2019 Dr Tovaranonte, under the pseudonym "Paul Tavern" in response to a comment on Facebook from another user stated:[39]

> [Mr L], you mean [Health Centre C] (about our business and not your health!) [ ]!.

[67] This was unprofessional behaviour. Dr Tovaranonte said that he was a director and shareholder of [Health Centre C] (later renamed []) until he left in 2014 due to his concern with the direction the business was going. He described being left alienated when the business began to prioritise profits to which he objected.[40]

[68] In this post Dr Tovaranonte appears to be criticising colleagues of an organisation he helped set up in 2014, some five years later in 2019.

Post 6 - Facebook comment dated or around 30 August 2019 about [Dr D]

[69] Dr Tovaranonte made comments on the competence of his specialist colleague. His post under the name "Paul Tavern" was in response to a comment on the competency of [Dr D], paediatrician as follows:[41]

> [Ms N] This pediatrician [sic] has been singled out by the rest of the hospital department because he tends to give out unconditional unproven treatment and charges your arm and your leg. Plus he is close to retirement and he has not been up to date with modern medicine.

[70] Dr Tovaranonte went as far as saying that this health practitioner "..had a history of providing unproven treatment and charging extremely high rates for his treatment".[42]

[71] These comments were unsubstantiated and are unprofessional comments about a colleague.

Post 7 – Facebook comment dated 30 August 2019 about afterhours GP

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[39] ABOD, p 274.
[40] Brief of Evidence of Dr P Tovaranonte, paras 30-32.
[41] ABOD, pp 275 and 276.
[42] Brief of evidence of Dr Tovaranonte, para 35.

[72] Dr Tovaranonte, under the pseudonym "Paul Tavern" commented on the Emergency Department's backlog as follows: [43]

> [Mr I] have you heard of www.afterhoursgp.co.nz? "Do not overload ED with possible contagious and infectious diseases. They are alreadt [sic] overwhelmed. Reserve ED for when you are dying."

[73] Dr Tovaranonte described his comments about the emergency department's backlog as "purely factual".[44] However, in answer to a question from a Tribunal member, Dr Tovaranonte agreed that he should not have written this comment as it was not in the best interests of patients' safety.[45] He accepted that people should not go to an Emergency Department only "if dying" as if that were the case, some patients may only present in extreme circumstances.

[74] In respect of particular 1, we are satisfied on the balance of probabilities each of the seven online posts as itemised in Schedule 1 to the Charge were disparaging comments and unprofessional.

[75] This is conduct that viewed objectively members of the public would reasonably conclude has brought, or is likely to bring, discredit to the medical profession.

[76] These statements using a pseudonym were in breach of the medical profession's professional standards and *Code of Ethics,* and the requirement for doctors to bring any concerns they have about inadequate or unsafe services first to that service and to consult with colleagues before speaking publicly. Instead, in all seven examples, Dr Tovaranonte put these comments directly on social media using a pseudonym to hide that he was the author of these criticisms.

[77] We are satisfied that particular 1, and the seven sub-particulars cumulatively, is established and is a significant departure from professional standards.

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[43] ABOD, p 277.
[44] Brief of evidence of Dr Tovaranonte, para 41.
[45] Transcript, p 120/1-21.

Particular 2 – Dr Tovaranonte's HDC complaint

[78] Dr Tovaranonte accepted that on or about 14 July 2019, following the termination of his contract with [Health Centre B] he submitted a complaint to the HDC about this practice. This complaint was submitted under the pseudonym "Paul Tavern".[46]

[79] Under cross-examination, Dr Tovaranonte confirmed that he completed the HDC's online complaint form using the pseudonym "Mr Paul Tavern" and under the heading "Complaint About Organisation", "[Health Centre B]" is named. Under the heading, "Relationship to this Person/Organisation" he responded, "Service user".[47] Dr Tovaranonte accepted that a "service user" refers to a consumer or a patient in this context yet he had never been a patient of [Health Centre B].[48]

[80] Dr Tovaranonte even went as far as providing a letter attached to the complaint under the pseudonym "Paul Tavern" in which the letter states that the complaint is made:

> On behalf of the patients of [Health Centre B] we have been noticing that this medical centre has engaged in a number of concerning business practices.[49]

[81] Dr Tovaranonte maintained that the complaint represented the [Health Centre B] community as a whole and that [Mr Y]'s experience was one of several and in particular:

> The Practice refuses to give repeated prescriptions for patients without ongoing chronic medical conditions by phone which has frustrated a lot of patients and their family members.[50]

[82] Not only did Dr Tovaranonte mislead the HDC as to the identity of "the patients and their family members" he misled the nature of the patient [Mr Y]'s concerns about his denial of access to opiate medication. Dr Tovaranonte did not disclose in the complaint that the basis for refusing this patient's medication was due to issues of addiction.

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[46] ASOF, para 12.
[47] ABOD, p 283; Transcript, cross examination of Dr Tovaranonte, p 101.
[48] Transcript, p 101, lines 13-20.
[49] ABOD, p 287.
[50] ABOD, p 287.

[83] The complaint stated that [Health Centre B] medical practice, among other things, adopted policies for financial gain that “adversely deviated from other medical practices in the region” rather than for its patients’ best interests. [Health Centre B] dismissed concerns about these policies when raised by patients.[51]

[84] The Tribunal is satisfied that this HDC complaint was misleading and provided inaccurate information. The complaint used Dr Tovaranonte’s pseudonym “Paul Tavern” which does not disclose Dr Tovaranonte’s identity or that he is a doctor.[52]

[85] On 25 July 2019 [Dr R] received the complaint letter from the HDC in his capacity as Managing Director of [Health Centre B]. The letter informed him that the HDC had received a complaint from “Mr Paul Tavern” about the care provided by [Health Centre B] to him and other patients.[53] Dr Tovaranonte had been dismissed from [Health Centre B] on 18 April 2019.

[86] The HDC complaint form completed online records that he is a “community representative”. Dr Tovaranonte admitted that he had never been elected as a community representative in any formal meeting. He believed that if he submitted the complaint under his own name it would not have been taken as seriously as he had recently been terminated from his position at [Health Centre B].[54] He explained that he based his mandate to represent the [Health Centre B] community on having received approximately 20 Facebook comments. [55] There is no evidence to show that Dr Tovaranonte had permission or indeed any consent from those patients to use their information for the purpose for which was used, that is, a complaint with the HDC about [Health Centre B].

[87] Dr Tovaranonte relied on [Mr Y]’s concerns to support this complaint despite knowing that [Mr Y] had already been through the HDC process and that his complaint had been unsuccessful and resulted in no further action.[56] The complaint was in relation to this patient’s

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51 ABOD, p 287. ASOF, para 12.
52 Transcript Cross-examination of Dr Tovaranonte, p 103, 17-22.
53 ABOD, p 288, letter from Deputy Health and Disability Commissioner to [Dr R] dated 25 July 2019.
54 Brief of Evidence of Dr P Tovaranonte, para 44.
55 Transcript pp 100-101.
56 ABOD, p 265. Letter dated 14 September 2018.

"drugs of addiction" but this matter was not mentioned in Dr Tovaranonte's letter supporting the complaint.

[88] It was of particular concern to the Tribunal that Dr Tovaranonte said that the earlier complaint by [Mr Y], was used as a "foundation" for the complaint when this had already been an unsuccessful complaint. Despite Dr Tovaranonte knowing that [Mr Y] had an unsuccessful complaint and there was no further action taken, he nevertheless recorded his interview with [Mr Y]. He even offered [Mr Y] the opportunity to give evidence before the Tribunal in relation to this disciplinary Charge.[57]

[89] The Commissioner confirmed that no further action was to be taken on the complaint. As far as the Tribunal is aware the HDC were neither informed that the complaint considered by the Commissioner was from Dr Tovaranonte under a pseudonym nor that he was a doctor purporting to be a community representative.

[90] The Tribunal finds that Dr Tovaranonte's use of the pseudonym and failure to disclose to the HDC his identity as a doctor was in breach of the *Code of Ethics* and professional standards.[58] He did not raise his concerns through the appropriate channels, that is, directly with the service involved, [Health Centre B]. Instead, he went to the [ ] community under a false name to find out more evidence and did not disclose that he was a doctor or a former employee of [Health Centre B].

[91] The Tribunal is satisfied that Dr Tovaranonte's conduct was likely to discredit the profession because he misused the HDC process by providing misleading and inaccurate information involving a vulnerable patient.

[57] Document 10, Transcript of audio file; and ABOD Tab 10, Recording of Dr Tovaranonte's interview of previous patient (undated).

[58] New Zealand Medical Association *Code of Ethics for the New Zealand Medical Profession,* para 41.

Was the HDC complaint a protected disclosure?

[92] Counsel for the practitioner submitted that Dr Tovaranonte's action, by bringing the complaint to the HDC on 14 July 2019, was a "protected disclosure" under the Protected Disclosures Act 2000 (Protected Disclosures Act).[59]

[93] The Protected Disclosures Act – referred to as "whistleblowing" legislation— provides protection to employees who disclose information in accordance with the Protected Disclosures Act. This law was replaced by the Protected Disclosure (Protection of Whistleblowers) Act 2022 (2022 Act), which came into force on 1 July 2022.[60] As the 2022 Act applies to qualifying disclosures made after its commencement,[61] Dr Tovaranonte's disclosure must be considered under the provisions of the earlier legislation.

[94] Section 6 of the Protected Disclosure Act provides:[62]

> (1) An employee of an organisation may disclose information in accordance with this Act if—
>
> (a) the information is about serious wrongdoing in or by that organisation; and
>
> (b) the employee believes on reasonable grounds that the information is true or likely to be true; and
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> (c) the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and
>
> (d) the employee wishes the disclosure to be protected.

[59] Transcript, p 163 line 22 – p 167 line 25.
[60] The Protected Disclosure (Protection of Whistleblowers) Act 2022.
[61] Protected Disclosure (Protection of Whistleblowers) Act 2022, Schedule 1, s 5, transitional provisions.
[62] Protected Disclosures Act 2000, s 6.

[95] All four criteria in s 6 must be met for a disclosure to be a protected disclosure under the Act.

[96] Disclosures under the Protected Disclosures Act are also required to be made in accordance with any applicable internal procedures.[63] They may be made to an appropriate authority in certain circumstances (which could include the HDC),[64] such as, if the employee believes on reasonable grounds that the head of the organisation may be involved in the alleged serious wrongdoing.[65]

[97] Mr Riach submitted that if the complaint to the HDC qualified as a protected disclosure then it would be immune from these disciplinary proceedings. Immunity from disciplinary proceedings is one of the protections provided in s 18 of the Protected Disclosures Act. As Dr Tovaranonte was a contractor of the [Healthcare Centre B] at the time the complaint was made to the HDC, he falls within the definition of an "employee".[66]

[98] Counsel for the PCC argued that because Dr Tovaranonte used the pseudonym "Paul Tavern" when lodging the complaint, it was not a disclosure made by an employee.[67]

[99] The Tribunal accepts that despite the use of a pseudonym, the disclosure was made by Dr Tovaranonte. It would be a fiction to say that the disclosure was made by Paul Tavern, a non-existent community representative. The real issue is whether the HDC complaint alleged "serious wrongdoing" and whether there is evidence Dr Tovaranonte, as an employee, wished the disclosure to be protected.

[100] Counsel for Dr Tovaranonte acknowledged that the complaint itself did not make any reference to its being a protected disclosure, but submitted that the complaint was nonetheless a protected disclosure by virtue of s 6A of the Protected Disclosures Act, which provides (relevantly):

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63 Protected Disclosures Act 2000, s 7.
64 Protected Disclosures Act 2000, s 3(1)(a)(c)
65 Protected Disclosures Act 2000, s 9.
66 Protected Disclosures Act 2000, s 3.
67 Transcript p 183 lines 15-26.

(1) A disclosure of information is not prevented from being a protected disclosure of information for the purposes of this Act merely because—

(a) of a technical failure to comply with sections 7 to 10 if the employee has substantially complied with the requirement in section 6 to disclose the information in accordance with this Act; or

(b) the employee does not expressly refer to the name of this Act when the disclosure is made.

[101] For the reasons that follow, the Tribunal does not consider Dr Tovaranonte's complaint to the HDC was a protected disclosure under the Protected Disclosures Act.

[102] Firstly, the HDC complaint does not allege "serious wrongdoing" as defined in s 3 of the Act. Section 3 provides:

Serious wrongdoing includes any serious wrongdoing of any of the following types:

…….

(b) an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial; or

[103] Counsel for Dr Tovaranonte relied on s3(b)— that the complaint alleged an act, omission, or course of conduct by [Healthcare Centre B] that constitutes a serious risk to public health or safety.[68]

[104] We do not consider that the information disclosed by [Mr Y] to Dr Tovaranonte regarding his previous complaint to the HDC that was later dismissed, is a matter of serious wrongdoing such as to create a serious risk to public health or public safety. Dr Tovaranonte also attempted to justify the complaint to the HDC on the basis of second-hand information

[68] The other grounds for "serious wrongdoing" under s 3 are not relevant to this case.

he had obtained from Google reviews. He sought to justify his actions later in his submission to the PCC and again when interviewed.[69]

[105] We accept that PCC's submission that the definition of "serious wrongdoing" sets a very high threshold.[70] The substance of the allegations made to the HDC relate to the "business practices" of [Health Centre B], including: the charging of extra fees, the enrolment fee, frustration by patients for [Health Centre B] not giving repeated prescriptions by phone and refusing to fax to pharmacies, a policy of using extra costs on many items and increasing their consultation fees. [71] These are not matters of public health or safety.

[106] Secondly, Dr Tovaranonte did not have reasonable grounds to conclude that the information is likely to be true. This is an objective test. He did not verify a number of hearsay statements posted in the Google reviews. In respect of [Mr Y], Dr Tovaranonte knew that this patient's complaint had already been dealt with by the HDC.

[107] Thirdly, there is nothing to suggest that the HDC were aware that this complaint was a protected disclosure. Indeed, the HDC do not appear to be aware that Dr Tovaranonte was using a pseudonym. [72] There was no "technical failure" where the employee does not refer to the name of the Act.[73] Dr Tovaranonte did not say it was a protected disclosure (or words to that effect) when he made the complaint to the HDC or when the PCC was investigating, nor can such failure be inferred.

[108] Fourthly, s 7 of the Act requires an employee to disclose information in accordance with the organisation's internal complaint procedures at first instance. We have found that Dr Tovaranonte elected not to use the [Health Centre B]'s internal procedures and preferred to

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69 ABOD, Tab 12, Transcript of Dr Tovaranonte's interview with the PCC, p 215.

70 *Culturesafe NZ Limited v Turuki Health Care Services Charitable Trust* [2020] ERNZ 396, Judge Holden at [64].

71 ABOD, p 287.

72 Protected Disclosures Act 2000, s 6(1)(b).

73 Protected Disclosures Act 2000, s 6A(1)(b).

go directly to the HDC. The limited exceptions that permit a disclosure to be made directly to an appropriate authority, such as the HDC,[74] do not apply.[75]

[109] The Tribunal finds that Dr Tovaranonte's complaint to the HDC is not a protected disclosure because it does not meet the s 6 criteria: the threshold for serious wrongdoing has not been met; Dr Tovaranonte did not have reasonable grounds to believe that the information is likely to be true; and he did not communicate a wish for the disclosure to be protected. In addition, the disclosure was not made in accordance with [Health Centre B]'s internal procedures as required by s 7 of the Act and this was not a situation where there was a technical failure to comply with the Act that could be remedied.[76]

[110] Accordingly, Dr Tovaranonte is not immune from prosecution for this disciplinary charge under the Health Practitioners Competence Assurance Act 2003.

[111] Particular 2 is established.

Particular 3 – "Beyond the Stethoscope" website

[112] In relation to particular 3, these allegations involve the posting of qualifications that Dr Tovaranonte said he had but he did not have them at the time in question.

[113] In late 2014 Dr Tovaranonte founded a website called "Beyond the Stethoscope" with two colleagues in Australia. The initial aim of this website was to provide career advice for doctors considering non-clinical careers.

[114] Subsequently in March and April 2020, Dr Tovaranonte decided to revise the BTS website. He engaged Wix.com, a template website company for that purpose. He says that the publication of the website in an unfinished state was an oversight on his part.

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74 Protected Disclosures Act 2000, s3(1)(a)(x)).

75 Protected Disclosures Act 2000, s 9. This section provides that a disclosure may be made to an appropriate authority in certain circumstances, including if the employee believes on reasonable grounds that the head of the organisation is, or may be involved in the serious wrongdoing alleged in the disclosure.

76 Protected Disclosures Act 2000, s 6A.

[115] The website records Dr Tovaranonte as the "Co-founder/CEO" of BTS. The qualifications listed under his name included a LLB from the University of Essex and an LLM from the University of Edinburgh.

[116] Dr Tovaranonte has admitted that at the time that the BTS website was published, he did not hold either a LLB or LLM as stated on the website but rather was studying towards them.[77]

[117] The profiles of "Chris LeCordon" and "Dr Vivien Leigh" are misleading as the images of these purported co-founders were "stock images" obtained from the internet.[78]

[118] Dr Tovaranonte accepted that someone might see the website and think that these people were doctors.[79] The website was taken down and placed back in draft in mid-August 2020 after the publishing of the website came to his attention. [80]

[119] Having reviewed the website information and screenshots provided the Tribunal is satisfied that the BTS website is misleading or potentially misleading as any visitor to the website could reasonably believe that the organisation was founded and run by three highly qualified individuals which was not the case. Dr Tovaranonte did not have all of the qualifications he had listed at this time and the two "colleagues" were fictitious as they were drawn from stock images.

[120] Particulars 3(a) and (b) are established.

Particular 4 – LinkedIn profile

[121] Particular 4 concerns Dr Tovaranonte's publication on 4 August 2020 on his LinkedIn profile.

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77 Brief of Evidence of Preechapon Tovaranonte, at [55(e)].
78 Particular 3(b)(i).
79 Transcript, p 106.
80 Brief of Evidence of Dr Tovaranonte, paras 56 and 57.

[122] The Tribunal is satisfied that Dr Tovaranonte published on LinkedIn qualifications that he had not completed.

[123] First, Dr Tovaranonte had not completed or obtained the qualification of Master of Laws from the University of Edinburgh or completed or obtained the qualification of Bachelor of Laws (LLB) from the University of Essex. At the time he only had a letter of offer and no proof of enrolment was provided to the Tribunal.

[124] Secondly, in respect of the qualification of Master of Business Administration (MBA) from the Edinburgh Business School at Heriot-Watt University Dr Tovaranonte agreed that he had not even enrolled for the MBA.[81]

[125] Dr Tovaranonte stated that these publications were inadvertent errors on his part.

[126] The Tribunal is satisfied that these three posts on the LinkedIn website were misleading. They were misleading because viewers could reasonably think that Dr Tovaranonte had obtained an MBA and was at the date of publication – 4 August 2020 – involved in studying towards an LLB and LLM which was not the case.

[127] Particular 4 is established.

Comparable cases

[128] Counsel for the PCC drew the Tribunal's attention to cases involving the publication of disparaging remarks:

(a) In *Tiller*[82] Mrs Tiller was a pharmacist who published a media release entitled "Massive Mark-ups Make Medicine Difficult for Families to Afford" which related to the prices that pharmacies were charging for pharmaceuticals and promoted the pricing approach of her own pharmacy. Mrs Tiller published the article in a number of online forums. The Tribunal concluded that Mrs Tiller's conduct

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[81] Transcript, p 106, 25-30. Schedule 3 to the Charge describes the screenshots and content of each of the three posts on the LinkedIn website.

[82] 45/Phar11/195P.

amounted to professional misconduct because she had practised in an unprofessional manner, brought the pharmacy profession into disrepute and impaired the public's confidence in the pharmacy profession. The Tribunal noted that the statements were strongly critical of other pharmacists and were disparaging as to the quantum of prices they charged and the level of profits obtained.

(b) In *Mendel,*[83] a psychiatrist was charged with (amongst other things) unprofessional conduct towards his colleagues. Dr Mendel made a number of derogatory claims about other doctors, including that they were "a psychopath", "a narcissist", "an alcoholic" and "a nasty piece of work".[84] While the Tribunal noted that the statements were opinions, the Tribunal nonetheless held that they were opinions about colleagues that should not have been made in the way that they were. The Tribunal accordingly found that the comments amounted to misconduct which cumulatively (although not separately) warranted disciplinary sanction.[85]

(c) In *Dr E*[86] Dr E stated on her CV that she had a post-graduate diploma in surgical anatomy when she had not completed that qualification. She altered a letter from the University of Otago to state that she had completed all of the required papers for her diploma when it originally read that she had completed three of the four necessary papers. Professional misconduct was established as Dr E's conduct did not comply with accepted professional standards including NZMA Code of Ethics. The Tribunal cited the principles of probity, including trust, honesty and for practitioners to act with integrity, not only in relation to the doctor/patient relationship but also in a practitioner's dealing with others, including her own professional body.[87]

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83 977/Med17/394P
84 *Mendel* 977/Med17/394P at [46].
85 *Mendel* 977/Med17/394P at [151].
86 *Dr E* 1074/Med19/451P.
87 Ibid at [50].

(d) In *Dr McCaig,*[88] the practitioner falsified documents that she provided to the Medical Council during her general registration application. In particular she typed and signed a letter of support in the name of another doctor and forged another doctor's signature on an "End of Assessment" form. Dr McCaig admitted her conduct amounted to professional misconduct. The Tribunal stressed the importance of honesty in all medical practice dealings and stated it had "no difficulty" in finding Dr McCaig guilty of professional misconduct. It also noted that the "use of forged documents for Dr McCaig's own benefit" made matters worse and would be viewed objectively by the public as bringing the profession into disrepute.

Liability findings

[129] We summarise our liability findings in respect of each of the four particulars as set out in the Charge firstly, in respect of the ground of bringing discredit to the profession (s 100(1)(b)), and secondly, in respect of malpractice or negligence (s100(1)(a)).

Discredit to the profession: s 100 (1)(b)

[130] The first particular concerns comments that were made by Dr Tovaranonte on social media about various medical centres, including: [Health Centre B], [Health Centre A] and [Health Centre C]as well as a health practitioner, [Dr D]. These comments are particularised in the Schedule attached to the Charge and a series of seven comments listed in that Schedule.

[131] The Tribunal is satisfied on the balance of probabilities that each of the seven comments were disparaging comments and unprofessional. We find that there has been a serious departure from the *Code of Ethics* and professional standards including, *Social Media and the Medical Profession.*[89]

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88 Med14/299P.

89 Medical Council of New Zealand, *Social Media and the Medical Profession: A Guide to Online Professionalism for Medical Practitioners and Medical Students.*

[132] In a journal article, *Social Media and the Medical Profession* the authors reinforce that doctors should exercise caution when using social media in a professional or private capacity. This article emphasises that the professional integrity of doctors and medical students can be damaged through problematic interprofessional online relationships. These professional standards form the cornerstone of the quality of patient care and are based on the expectation of the community and medical peers.

[133] In respect of preserving reputation, it notes the potential risk of inappropriate online comments that may damage the reputation of another individual or organisation. The article states:

> Professional codes of conduct specify that doctors must not engage in behaviours that can harm the reputation of colleagues or the profession. Care should be taken when commenting on any colleague or health organisation in the online environment, even when using the thin layer of anonymity provided by a pseudonym. Acts of defamation may result in loss of employment and civil claims and may put public confidence in the profession at risk.
>
> The traditional expectations regarding the conduct of the medical profession still apply when using social media and therefore must be re examined in the context of such technologies. (p 43).

[134] Dr Tovaranonte's actions by posting comments online in social media has used this thin layer of anonymity provided by his pseudonym. He has made harmful comments about his colleagues and their GP services. By making disparaging comments he is likely to undermine the public trust and confidence in the medical profession.

[135] The second particular relates to the practitioner's admitted submission of a complaint to the Health and Disability Commissioner (HDC) following the termination of his contract with the [Health Centre B] on or around 14 July 2019. Dr Tovaranonte submitted a complaint under the pseudonym of "Paul Tavern". Dr Tovaranonte has admitted in his own evidence that he did not disclose that he was a doctor and, indeed, in the submission that he wrote in support of the complaint to the HDC he misrepresented himself as a "community representative".

[136] The conduct in particular 2 was unprofessional behaviour and a significant departure from professional standards. The HDC complaint mechanism is a cornerstone of patients' rights under the Health and Disability Commissioner Act. It provides for a process that ought to be followed to give consumers' trust and confidence in the complaint process. Dr Tovaranonte falsely mislead the HDC by representing himself as a community representative when he did not have the authority or consent of individuals to hold himself out in this way.

[137] We are satisfied that separately particular 2 is established under s 100(1)(b) as again these actions are conduct that has brought and is likely to bring discredit to the medical profession.

[138] In relation to particular 3, these allegations involve the posting of qualifications on his website "Beyond the Stethoscope" that Dr Tovaranonte said he had but did not have at the time in question. We find that on the balance of probabilities that the information provided by Dr Tovaranonte was inaccurate, misleading and had potential to mislead. However, in respect of particular 3, we do not find that this particular on its own is conduct that brings discredit to the medical profession.

[139] Particular 4 concerns the publication of Dr Tovaranonte's purported qualifications on the website LinkedIn that he had not completed. We are satisfied to the requisite standard of proof that these posts were inaccurate and misleading or had the potential to mislead.

[140] In comparison to the practitioner's postings on his own website in particular 3, we find that particular 4 is a more serious departure from expected professional standards. Dr Tovaranonte stated that he was a doctor in his introduction on his LinkedIn website page and this raised expectations as to his honesty and professionalism by putting forward this publication on the LinkedIn website. We are satisfied on the balance of probabilities that this particular separately amounts to conduct that discredits the medical profession.

[141] In our overall assessment, particulars 1, 2 and 4 separately, and all four particulars cumulatively, are established as conduct that has brought or is likely to bring discredit to the medical profession.

Malpractice or negligence: s 100(1)(a)

[142] The Charge also alleges malpractice or negligence by the practitioner in the scope of his practice pursuant to s 100(1)(a) of the Act.

[143] Section 100(1)(a) appears on its face to be directed to conduct related to clinical rather than non-clinical practice. In *Vohora v Professional Conduct Committee,* the High Court stated that: [90]

> First, s 100(1)(a) is concerned with "professional misconduct because of any act or omission that … amounts to malpractice or negligence in relation to the scope of practice …". The section is not exclusively concerned with misconduct within the scope of practice. Rather, it is concerned with a slightly broader concept of misconduct relating or directly connected to that scope of practice. This does not include conduct extraneous to performance of specialist clinic functions. But it literally and logically includes any conduct directly incidental to the performance of those functions.

[144] Counsel for the practitioner submitted that none of Dr Tovaranonte's alleged conduct occurred within his "scope of practice" and none could reasonably be considered as "conduct directly incidental to the performance of those functions".

[145] Counsel for the PCC accepted that only Particular 2, in relation to making the HDC complaint using a pseudonym, is the focus of this ground of professional misconduct.

[146] Having reviewed all of the evidence and relevant case law, the Tribunal is satisfied that all of the particulars to the Charge can be considered under s 100(1)(a) in relation to malpractice as conduct indirectly connected to the practitioner's scope of practice.[91] All of the alleged conduct occurred when Dr Tovaranonte was working, or had been working, as a medical practitioner at the various medical centres to which his online criticisms and the HDC complaint under the pseudonym "Paul Tavern" were directed. On the one hand, he did not disclose that he was a doctor (particulars 1 and 2), and on the other hand, he misrepresented

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[90] [2012] 2 NZLR 668 at [42].

[91] *Vohora v Professional Conduct Committee* [2012] 2 NZLR 668, as cited above at [42]. *PCC v Tovaranonte* 870/Med16/344P at [83].

his qualifications and expertise as a doctor on his own and the LinkedIn websites (particulars 3 and 4).

[147] We are satisfied that the social media posts (particular 1) and the submission of a complaint to the HDC under a pseudonym (particular 2) is highly unethical and unprofessional behaviour by Dr Tovaranonte and is malpractice. This conduct is in breach of the professional standards in relation to the use of social media and the requirement for practitioners in *Good Medical Practice*[92] to act honestly and ethically in their dealings with managers, employers and other authorities, such as the HDC.

[148] [Dr R] gave evidence that there was a very open policy at [Health Centre B], including weekly meetings which were a place for Dr Tovaranonte to bring any concerns of patients' situations he was having difficulty with. The peer group in practice talks about patients' situations. [Dr R] stated that despite these meetings Dr Tovaranonte never raised any information, including the subject of the HDC complaint, with him.[93]

[149] Dr Tovaranonte stated that he used the pseudonym "in accordance with the guidance from both the *NZMA Code of Ethics* and the *Statement on Use of Internet and Electronic Communication from the Medical Council*".[94] The Code of Ethics requires doctors to draw to the attention of relevant bodies inadequate or unsafe services. The first port of call for a doctor who has concerns when they are working within a health service is to raise the issues in respect of that service through the appropriate channels, including the organisation responsible for that service, before speaking publicly.

[150] When making the comments on social media and in the HDC complaint Dr Tovaranonte has taken the narrative from third parties, worked these into a first person narrative and used language which is highly emotional. While he did not believe he was creating a fiction in doing so, he failed to take into account that his behaviour, viewed objectively, does not comply with the practitioner's ethical obligations.

92 *Good Medical Practice* (December 2016), ABOD at 384.
93 Transcript, pp35-36 Cross-examination of [Dr R].
94 Brief of Evidence of Dr Tovaranonte, para 8.

[151] We are satisfied that Dr Tovaranonte acted in an unprofessional and unethical manner. This is a significant departure from professional standards and separately warrants a finding of professional misconduct.

[152] In our assessment, the practitioner's misrepresentation of himself and his qualifications on the respective websites in particulars 3 and 4, do not of themselves amount to malpractice or negligence. This finding does not prevent these particulars from being included in our cumulative assessment of the four particulars.[95] The Tribunal is satisfied that cumulatively, in relation to all four particulars of the Charge, Dr Tovaranonte's conduct is also malpractice.

[153] Accordingly, we are satisfied that the Charge is also made out on the ground of malpractice in the practitioner's scope of practice.

Is the disciplinary threshold met?

[154] The Tribunal is required, having found that the Charge and its particulars established, to decide whether any individual particular, or the particulars cumulatively, are a departure from expected standards and warrant a disciplinary sanction. The second step of the Tribunal's assessment is for the maintenance of standards in the profession, the protection of the public and to the extent necessary, the imposition of a penalty.

[155] Mr Shamy submitted that Dr Tovaranonte's actions were done with the health and safety of the public in mind and that he was, in his mind, acting within the applicable *Code of Ethics* and the Medical Council's *Use of the Internet and Electronic Communication* document.

[156] Counsel submitted that Dr Tovaranonte had no commercial or malicious intent when making these comments and he based them on real experiences of patients and things that he had seen first-hand and genuinely held opinions as presented. In the absence of any ulterior motives, malicious intent, commercial gain or proof of falsity, his conduct cannot warrant a sanction.

[95] *PCC v Tovaranonte* 870/Med16/344P at [83].

[157] Dr Tovaranonte's motivation for falsely representing himself in social media and to the HDC and what he believes to be his honestly held views, are not relevant to the Tribunal's decision about the disciplinary threshold. These are subjective considerations and may be considered at the penalty stage.[96]

[158] In our overall objective assessment, we find that there has been a significant departure from professional and ethical standards by Dr Tovaranonte. His style of interaction with patients and the public by using a pseudonym to hide his true identity and the use of social media was particularly disruptive behaviour that negatively impacted on his former colleagues and their medical practices.[97] Importantly, such unprofessional behaviour had the potential to interfere with patient safety in these medical practices.

[159] The Tribunal has no hesitation in concluding that each established particular individually, and all four particulars cumulatively, are a significant departure from professional standards that does require a disciplinary sanction.

[160] In our view, reasonably minded members of the public would be justifiably concerned that this practitioner did not first raise any concerns he had with the medical practices he criticised purportedly on behalf of the patients at the medical practice. He then used the pseudonym to avoid disclosing that he is a doctor when making public online posts and in his dealings with the HDC.

[161] It is an essential feature of the trust that is placed in the medical profession that doctors carry out their duties in a way that does not breach the ethical and professional standards set for the profession. The misuse of social media and misleading representations to the HDC is undoubtedly conduct that brings discredit to the medical profession and is unethical behaviour so as to amount to malpractice. Standards can only be maintained, and the public can only be protected by the imposition of a penalty in this matter.

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96 *PCC v McKenzie* [2004] NZAR 47, Venning J at [71]; *Cole v PCC* [2017] NZHC 1178, Gendall J at [128].
97 Medical Council of New Zealand, *Unprofessional behaviour in a healthcare team* (2009).

[162] The Tribunal is satisfied the Charge is established as malpractice and conduct that brings discredit to the medical profession under both s 100(1)(a) and (b) of the Act.

Penalty

Legal principles

[163] As the Tribunal is satisfied that the Charge and all four particulars are established, it must go on to consider the appropriate penalty under s 101 of the Act. The available penalties under s 101 may include:

(a) Cancellation of the health practitioner's registration;

(b) Suspension of the registration for a period not exceeding three years;

(c) An order that the practitioner may only practise his profession in accordance with conditions imposed as to employment, supervision or otherwise;

(d) Censure;

(e) A fine up to $30,000; and

(f) An order as to costs of the Tribunal and/or for the PCC to be met in part or in whole by the practitioner.

[164] In *Roberts v Professional Conduct Committee*[98] Collins J identified the following eight factors as relevant whenever the Tribunal is determining an appropriate penalty. In particular the Tribunal is bound to consider what penalty:

(a) most appropriately protects the public and deters others;

(b) facilitates the Tribunal's important role in setting professional standards;

98 [2012] NZHC 3354 at [44-51], also followed in *Katamat v Professional Conduct Committee* 2012 NZHC 1633, 21 December 2012, Williams J.

(c) may punish the practitioner, though this is not the objective of any penalties;

(d) allows for the rehabilitation of the practitioner;

(e) promotes consistency with penalties in similar cases;

(f) reflects the seriousness of the misconduct;

(g) is the least restrictive penalty appropriate in the circumstances; and

(h) looked at overall, is the penalty which is "fair, reasonable and proportionate in the circumstances".

[165] In a subsequent decision of the High Court in *Katamat*,[99] Williams J adopted the eight sentencing principles as set out in the *Roberts* decision and went on to summarise the case law in this way:

> [53] In summary, the case law reveals that several factors will be relevant to assessing what penalty is appropriate in the circumstances. Some factors, such the need to protect the public and to maintain professional standards, are more intuitive in their application. Others, such as the seriousness of offending and consistency with past cases, are more concrete and capable of precise evaluation. Of all the factors discussed, the primary factor will be what penalty is required to protect the public and deter similar conduct. The need to punish the practitioner can be considered, but it is of secondary importance. The objective seriousness of the misconduct, the need for consistency with past cases, the likelihood of rehabilitation and the need to impose the least restrictive penalty that is appropriate will all be relevant to the enquiry. It bears repeating, however, that the overall decision is ultimately one involving an exercise of discretion.

[166] The Tribunal adopts the above guidance of the Courts in considering the appropriate penalty in this case.

[99] *Katamat v Professional Conduct Committee* [2012] NZHC 1633, 21 December 2012, Williams J at [53].

Submissions on penalty

[167] The PCC submitted that the maintenance of professional standards and protection of the public would be best achieved with a penalty including censure, a fine of $5,000 and conditions on Dr Tovaranonte's practice.

[168] Ms Rouch submitted that while there were a number of aggravating features in relation to Dr Tovaranonte's conduct, there were no mitigating factors. Counsel for the PCC referred to Dr Tovaranonte's previous disciplinary history.[100] Dr Tovaranonte expressed no remorse for his actions, has denied any wrongdoing, and put the PCC to the cost of preparing briefs of evidence (where those witnesses were busy practice managers) before agreeing to the Statement of Facts.

[169] Counsel for the practitioner submitted that the appropriate penalty taking into account the facts as set out in *Roberts,*[101] a fine and censure could be imposed coupled with a condition that the practitioner attend an appropriate course on ethical obligations.

[170] Mr Shamy submitted that Dr Tovaranonte's conduct was at the lower end of the spectrum of cases discussed below. He has been consistent throughout in terms of his motivation which is based, in his view, on the need to protect and enhance the interests of the public. Therefore, the Tribunal ought to take a cautious approach when punishing individuals in the profession for publicly denouncing conduct of others lest this be seen as squashing fair and honest criticism of practices adopted by medical practitioners.

[171] As a mitigating factor, Dr Tovaranonte provided several letters of character reference to the Tribunal.[102] These references include a letter from a senior colleague and mentor who describes Dr Tovaranonte as "a very good doctor who cares for his patients and provides safe and competent care".[103] Mr Shamy submitted that these references confirm the ability of Dr Tovaranonte as a doctor, not just in terms of clinical ability but in terms of client

[100] 870/Med16/344P.
[101] *PCC v Tovaranonte* 870/Med16/344P.
[102] ABOD, Tabs 39-49, pp 325-352.
[103] ABOD, pp347-348.

relationships. He has a lot to offer the medical profession and should be encouraged in his endeavours albeit with some redirection as to his ethical responsibilities and duties.

[172] In the course of the hearing, counsel conferred, and Dr Tovaranonte consented to the final conditions to be imposed on him. These conditions include the requirements that he is to engage with a clinical psychologist regarding his pattern of professional misconduct and that for three years he is supervised by a practitioner approved by the Medical Council.[104]

Comparable cases

[173] The Tribunal has not dealt with any directly comparable cases. While each case turns on its own facts, the previous decisions of the Tribunal provide some guidance in terms of assessing the appropriate penalty.

[174] In relation to the misuse of public online comments about others the following cases are relevant:

(a) In *PCC v Tiller*[105] Ms Tiller, a pharmacist published a media release on several online forums, including *NZ Doctor* and *Infonews.co.nz*, accusing other pharmacies of "price gouging". The Tribunal found professional misconduct and ordered that Ms Tiller be censured and that she pay 30% costs. Ms Tiller accepted that the conduct was unacceptable and had offered no opposition to the Charge. She had agreed to publish an apology and to remove, if possible, the original statement from the website.

(b) In *PCC v Amarsee*[106] Mr Amarsee was a pharmacist who made disparaging or derogatory comments about other GP practices to his customers. These comments included words to the effect that a different medical centre "guaranteed better service than where you are now" and that the customer would not have to wait to see a doctor at the other practice. Mr Amarsee's registration was cancelled in the context of liability also being found on several other Charges

[104] The terms of the conditions are set out in the Orders below.
[105] 425/Phar11/195P.
[106] 715/Phar14/290P.

including supplying medicines without prescription and providing false and misleading information to the Ministry of Health.

(c) In *PCC v Hugill* [107] Ms Hugill, a registered nurse, made offensive, inappropriate and/or derogatory comments on Facebook accusing Māori nurses in Taranaki of being lazy, dishonest and unprofessional. The Tribunal cancelled her registration, taking into account another established Charge where Ms Hugill had practised while suspended. At the time that the comments were posted, Ms Hugill already had conditions imposed on her practise after similar conduct in 2018 and had failed to undertake the cultural competence training required of her. The Tribunal found that Ms Hugill had failed to show a sustained and genuine understanding or remorse and that this was not an isolated incident or misjudgement.

(d) In *PCC v Dr I*[108] Dr I, a psychologist who had in a telephone conversation with a father involved with a Family Court proceeding made certain disparaging comments about another practitioner. The Tribunal found professional misconduct established and there were reservations about the level of insight by the practitioner into the seriousness of her conduct, and imposed the penalty of censure together with a condition that she took a course of training on ethics and boundaries.

[175] In relation to misrepresentations by the practitioner in a professional capacity the following case is relevant:

(a) In *PCC v Dr E,*[109] Dr E intentionally altered a letter from the University of Otago that stated she had completed three of the four papers required for a surgical diploma so that it read that she had completed all four of the paper required. Dr E misled the UK General Medical Council by providing it with the falsified letter and a copy of her CV knowing that it incorrectly stated she had obtained the diploma. The Tribunal ordered a 1-month suspension, $3,000 fine, and conditions

[107] 1114/Nur20/468P.
[108] 961/Psy17/397P.
[109] 1074/Med19/451P.

on Dr E's practice, noting that Dr E had made significant effort to rehabilitate herself and to refocus her career in an area of practice where she felt supported.

Aggravating and mitigating factors

[176] The Tribunal has considered the aggravating factors submitted by the PCC and the practitioners response in relation to them. We have distilled the following relevant aggravating factors:

(a) *Misleading conduct and use of an alias*: Dr Tovaranonte posted his public online comments under the pseudonym "Paul Tavern" and in doing so misled the public, the profession and the HDC. The Tribunal has found that these comments were misleading in that he posed as a patient of both Practices, and publicly stated that he had "brought [his] sick child to [Health Centre B]" and had "been turned down".[110] The fact that a pseudonym itself was used is not the issue but rather its improper use.[111]

(b) *Disparaging comments about other health practitioners and former colleagues*: In his public online comments, Dr Tovaranonte referred to reception staff at [Health Centre A] as "clueless",[112] described [Health Centre B]'s behaviour as "disgusting"[113], said [Health Centre C] cared about business and not health,[114] and said that [Dr D] "Had been singled out by the rest of the hospital department because he tends to give out unconditional unproven treatment and he charges your arm and your leg. Plus he is close to retirement and he has not been up-to-date with modern medicine".[115] Dr Tovaranonte's audience reached approximately 4,000 people on the [Health Centre B] Facebook page.

(c) *Repetitive and prolonged nature of conduct*: Dr Tovaranonte posted his Google review about [Health Centre A] in May 2017 and then commented in [Health

[110] ABOD, p 272, Dr Tovaranonte's Facebook postdated 25 May 2019.
[111] Particular 1 of the Charge refers to "pseudonym" and "alias" and these terms are used interchangeably.
[112] ABOD, p 260, Dr Tovaranonte's Google review dated May 2017.
[113] ABOD, p 273, Dr Tovaranonte's post on Facebook dated 30 August 2019.
[114] ABOD, p 274, Dr Tovaranonte's post on Facebook dated 30 August 2019.
[115] ABOD, p 275, Dr Tovaranonte's post on Facebook dated 30 August 2019.

Centre A]'s public Facebook page in December 2017. Dr Tovaranonte made multiple online posts about [Health Centre B] and submitted his complaint to the HDC over a period of approximately three months until a complaint was made by [Health Centre B] to the Medical Council in September 2019. This was not a one-off incident or a one error of judgement or an aberration, as was found, for example in *PCC v Tiller*.[116]

(d) *Employment context*: Dr Tovaranonte's comments about [Health Centre A] and [Health Centre B] all occurred in the context of his contracts with these practices being terminated, and in the case of [Health Centre A] with immediate effect. Dr Tovaranonte's first online post about [Health Centre B] occurred approximately one month after his contract was terminated in April 2019. Dr Tovaranonte's conduct follows a clear pattern of breakdown in his employment relationship with a Practice followed by a sense of retaliation by him under the guise of protecting the public or acting as a "whistle-blower". The Tribunal has not accepted that these public comments were made under a protected disclosure but rather demonstrate a pattern of the breakdown of his relationships with colleagues and the medical practices that employed him.

(e) *Lack of insight*: Dr Tovaranonte appears to have a complete lack of understanding of the professional standards and the impact of his actions on his colleagues and indeed the vulnerability of the patients for whom he purported to represent in his complaint to the HDC.

(f) *Previous medical disciplinary history*: Dr Tovaranonte has previously been the subject of proceedings in the Tribunal for dishonest conduct.[117] The current offending occurred while still under the conditions of the previous determination by the Tribunal.[118]

[116] 425/Phar11/195P.
[117] 870/Med16/344P.
[118] *PCC v Tovaranonte*, 870/Med16/344P.

[177] In respect of the previous disciplinary Charge, in *PCC v Tovaranonte*,[119] the conduct occurred between November 2011 and April 2012 when Dr Tovaranonte claimed payment from the Accident Compensation Corporation (ACC) for sums totalling $3,553.44 for treatment of patients that he had not undertaken and for which he was not entitled. During the same period Dr Tovaranonte copied and removed confidential electronic patient records from Canterbury District Health Board for the purposes of seeking personal payment from ACC. He later claimed payment from ACC for treatment of patients who had participated in the Christchurch marathon on 3 June 2012, again being treatment he had not undertaken and for which he was not entitled to receive payment.

[178] Some two years later between May and September 2014 Dr Tovaranonte conducted private medical aviation examinations in a publicly funded clinic which included seeking payment from patients and using the DHB facilities and resources when he was not entitled to do so.

[179] The Tribunal found there was a significant element of dishonesty in Dr Tovaranonte's actions and did not accept that his youth or inexperience was any excuse. The Tribunal found that cumulatively all particulars amounted to professional misconduct as both malpractice and negligence and acts which were likely and in fact did bring discredit to the medical profession.

[180] The Tribunal ordered censure, a 3-month suspension, a fine of $5,000 and an order for $50,000 costs. There were conditions placed on Dr Tovaranonte's practice for a period of three years from 23 December 2016.

[181] In respect of the current Charge, Dr Tovaranonte's public comments, the Google reviews and the HDC complaint in respect of particulars 1 and 2 all took place while the conditions from the previous disciplinary Charge were in place.[120]

[119] 870/Med16/344P.

[120] Document 19, Letter from Medical Council to Dr Tovaranonte dated 1 May 2020 confirming the conditions imposed pursuant to s 101(1)(c) of the Act were effective from 1 May 2017 to 1 May 2020.

[182] The PCC submitted that there are no mitigating factors in this case. We accept in part the mitigating factors submitted by counsel for the practitioner. These include:

(a) Dr Tovaranonte accepted the facts at the initial investigating meeting with the PCC. He denied the Charge and defended it as he is entitled to do. The extent to which he was open and co-operative with the PCC in reaching an Agreed Summary of Facts is a mitigating factor.

(b) Dr Tovaranonte stated that he regrets his actions and he apologised at his PCC interview and in his evidence before the Tribunal. Dr Tovaranonte has not shown any genuine remorse for this conduct to substantiate his apology. That he continues to maintain that his disparaging comments on social media are honestly held views demonstrates that he has a lack of insight into the effect of his actions on others. We therefore do not accept this is a mitigating factor.

Tribunal's finding on penalty

[183] In the Tribunal's overall assessment, the appropriate penalty is firstly, censure. This is to mark the Tribunal's disapproval of the unethical and unprofessional conduct by the practitioner in the use of social media and by misrepresenting the HDC complaints process and using a pseudonym to suggest that he was a community representative was not. Dr Tovaranonte also misrepresented his own qualifications online on his website "Beyond the Stethoscope" and in his LinkedIn profile.

[184] Despite agreeing to the facts, Dr Tovaranonte has denied the Charge and did not accept any shortcomings in his conduct that would amount to professional misconduct. He has displayed a lack of understanding of how his misuse of social media and the HDC complaint process impacts on his colleagues and importantly, the vulnerability of the patients whom he purports to represent.

[185] Taking into account the relevant cases, we consider that the conduct in this case is closer to *Hugill* [121] than *Tiller*[122]*.* This was not an isolated incident and there has been a pattern of behaviour involving the misuse of social media and the HDC complaint process that falls well short of the expected standards and ethical responsibilities of a doctor.

[186] The use of the pseudonym "Paul Tavern" and the failure to disclose to the public and the HDC that he was a doctor was highly misleading. While the comments posted on social media were not as derogatory and racist as those comments in, for example, *Hugill,*[123] they were nonetheless highly disparaging of other GP practices and other health practitioners. This is an aggravating factor because of the level at which the disparagement is pitched and a lack of professionalism demonstrated by the practitioner in his interactions with his colleagues.

[187] The Tribunal has given careful consideration to imposing suspension of Dr Tovaranonte's registration, particularly in light of his recent disciplinary history. Whilst suspension may be an appropriate penalty to reflect the seriousness of repeated findings of professional misconduct by the Tribunal, we consider a fine, conditions with supervision is a less restrictive penalty and should act as a deterrent.

[188] In reaching this decision, we place particular emphasis on the need for Dr Tovaranonte to take advantage of the supervision and mentoring that has, and continues to be, available to him to help him work collegially with his peers and in accordance with his ethical and professional responsibilities as a doctor.

[189] In the course of the hearing, counsel conferred, and Dr Tovaranonte consented to conditions to be imposed by the Tribunal under s 101(1)(c) of the Act. These conditions include the requirements that Dr Tovaranonte is to engage with a clinical psychologist regarding his pattern of professional misconduct and that for three years he is supervised by a practitioner approved by the Medical Council.

[121] 1114/Nur20/468P.
[122] 425/Phar11/195P.
[123] 1114/Nur20/468P.

[190] A fine of $8,000 will be imposed. This order will allow Dr Tovaranonte to immediately commit to ongoing rehabilitation. We place particular emphasis on the supervision conditions to be imposed on Dr Tovaranonte and that he should meaningfully engage in them. Should Dr Tovaranonte contravene similar professional standards in the future, the Tribunal is unlikely to be as lenient as the penalty orders we make in respect of the current Charge.

Costs

[191] The Tribunal may order the practitioner to pay part or all of the reasonable costs and expenses of and incidental to the PCC investigation and prosecution in respect of the Charge, and the costs of the hearing by the Tribunal.[124]

[192] An order for costs in any health professional disciplinary proceeding involves the judgement as to the proportion of the costs that should be properly borne by the profession (being responsible for maintaining standards and disciplining its own profession) and the proportion which should be borne by the practitioner who has caused the costs to be incurred.

[193] When considering the appropriate amount of costs, the Tribunal must consider the need for the practitioner to make a proper contribution towards the costs of disciplinary proceedings. In doing so, the Tribunal takes 50% of the total reasonable costs as a starting point.[125] An award of costs is not intended to be punitive and the practitioner's means, if known, should be considered.[126]

[194] The total costs incurred by the PCC, and counsel's cost for the hearing are $59,028.84.[127] The estimated costs of the Tribunal are $43,663.00,[128] a total of $102,692.84.

[195] The PCC, after referring to the costs principles, submitted it was not reasonable to expect that the profession to bear the entire costs of the prosecution, and given the nature of the conduct Dr Tovaranonte should contribute 50% of the costs.

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[124] Health Practitioners Competence Assurance Act 2003, s 101(1)(f).
[125] *Cooray v Preliminary Proceedings Committee* HC Wellington, AP 23/4 Doogue J, 14 September 1995.
[126] *Vatsyayann v PCC* [2012] NZHC 1138.
[127] Document 13 PCC Estimated Costs Schedule.
[128] Document 14 HPDT Estimated Costs Schedule.

[196] Counsel for the practitioner submitted that Dr Tovaranonte has never sought to avoid the disciplinary charge and he has cooperated fully with the Medical Council, including participating in a lengthy interview with the PCC.

[197] The Tribunal rejects the submission by the practitioner that any costs award against the practitioner should be modest to take into account that while Dr Tovaranonte has been found guilty of professional misconduct, his conduct was not grievous and is at the lower spectrum of professional misconduct. Dr Tovaranonte defended the disciplinary Charge as he is entitled to do over a three-day hearing. He must therefore accept the consequences that flow from a finding that the Charge of professional misconduct has been established regardless of the seriousness of the Charge.

[198] This is not a case where Dr Tovaranonte is unable to pay costs and he accepts the reasonableness of the costs submitted by the PCC and the Tribunal.

[199] The Tribunal takes into account that Dr Tovaranonte has co-operated with the hearing of the disciplinary Charge and there has been some saving in cost by the completion of the Agreed Summary of Facts.

[200] In the Tribunal 's overall assessment it is just and proportionate for the practitioner to pay a 40% contribution to the total costs of the PCC and the Tribunal. These costs will be fixed at $40,000.

Result and orders of the Tribunal

[201] The one Charge of professional misconduct with four particulars separately and cumulatively is established pursuant to sections 100(1)(a) and (b) of the Health Practitioners Competence Assurance Act 2003.

[202] The Tribunal makes the following orders in relation to penalty and costs:

(a) The practitioner is censured pursuant to s 101(1)(d) of the Act. This censure is to mark the Tribunal's disapproval of the unethical and unprofessional conduct by Dr

Tovaranonte in the use of social media, the improper use of the Health and Disciplinary Commissioner's complaint process and the practitioner's misrepresentations of his qualifications on-line;

(b) There will be a fine of $8,000 pursuant to s 101(1)(e) of the Act;

(c) There will be conditions imposed on the practitioner pursuant to s 101(1)(c), as follows:

(i) For a period of three years Dr Tovaranonte must at his own cost, at least every three months engage with a clinical psychologist approved by the Medical Council to address his pattern of professional misconduct and personal difficulties in professional relationships;

(ii) For a period of three years Dr Tovaranonte must advise future employers, organisations engaging him as a contractor, business partners (including medical business partners), or shareholders in a company conducting medical practice with him, of the Tribunal's decision and its orders;

(iii) For a period of three years Dr Tovaranonte must at his own cost, at least every month for the first year and 3-monthly thereafter, engage in professional monitoring, mentoring and supervision with a person approved by the Medical Council's Registrar in consultation with Dr Tovaranonte's collegial relationship provider; and

(iv) Dr Tovaranonte is to undertake a course of training on professional ethics approved by the Registrar and to provide the Registrar with Proof of Learning including self-reflection on how the learning will influence his practice.

(d) The practitioner is ordered to pay a contribution of 40% of the total estimated costs of the PCC and the Tribunal of $102,691.86, fixed at $40,000.00.

(e) The interim non-publication orders are to be made permanent pursuant to s 95 of the Act. The non-publication order includes: the Health Centres that are the subject of the Charge, the healthcare provider named in the Charge, and the persons associated with the Centres, which include: [Health Centre B], [Health Centre A], [Dr D], [Mr L], [Ms N], [Mr I], [Health Centre C], and [Mr Y]. The order is extended to ensure non-publication of any identifying details of patients in any of these practices including staff and the staff meeting notes at the [Health Centre B].

[203] The Tribunal recommends that the Medical Council refer Dr Tovaranonte to the Health Committee again as has been done in the past so that his mental and psychological health fall under the guidance of that Committee.

[204] The Tribunal also recommends that this decision is made available not only to Dr Tovaranonte's employers as set out in the orders above, but also to his appointed supervisor and the psychologist involved with the conditions on Dr Tovaranonte's medical practice.

[205] 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 Medical Council of New Zealand to publish either a summary of, or a reference to, the Tribunal's decision in its next available publication 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 November 2022

A J Douglass
Chair
Health Practitioners Disciplinary Tribunal

SCHEDULE

PARTICULARS OF CHARGES

Pursuant to sections 81(2) and 91 of the Act, the Committee lays a charge that Dr Preechapon Tovaranonte acted in breach of his ethical obligations and/or accepted standards of practice in the following manner:

1. On several occasions between 2017 and 2019, Dr Tovaranonte made online public posts and/or comments (as set out in Schedule 1) about former colleagues, employers, other health practitioners and/or medical practices (third parties) in circumstances where:

    a. The comments were made by Dr Tovaranonte using the alias "Paul Tavern";

    b. The comments were disparaging and/or amounted to unprofessional criticisms of the third parties;

    c. The comments detracted, or had the potential to detract, from the reputation of the third parties and/or had the potential to encourage criticism of the third parties; and/or

    d. The comments brought discredit, or were likely to bring discredit, to the profession.

2. Dr Tovaranonte acted in an unprofessional manner in that:

    a. On or around 14 July 2019, he submitted a complaint to the Office of the Health and Disability Commissioner (HDC) about [Health Centre B] in circumstances where:

        i. The complaint was submitted using the alias "Paul Tavern"; and/or

        ii. The complaint was submitted following the termination of his employment with [Health Centre B];

and in doing so, such conduct brought discredit, or was likely to bring discredit, to the profession.

3. In 2020, Dr Tovaranonte published information and/or allowed information to be published, on the website “Beyond the Stethoscope” (as set out in Schedule 2) that was inaccurate and/or misleading, or had the potential to mislead, in relation to:

   a. Dr Tovaranonte’s qualifications, in that the publication held Dr Tovaranonte out as having a Master of Laws (LLM) from the University of Edinburgh and Bachelor of Laws (LLB) from the University of Essex when he did not hold those qualifications; and/or

   b. The identity and qualifications of the purported co-founders of “Beyond the Stethoscope”, “Dr Chris Le Cordon” and Dr Vivian Leigh”, in that:

      i. The images of the purported co-founders were ‘stock images’ obtained from the internet; and/or

      ii. The individuals were not co-founders of “Beyond the Stethoscope”; and/or

      iii. The individuals did not hold the stated qualifications and experience.

4. On or about 4 August 2020, Dr Tovaranonte published and/or stated on his LinkedIn profile, qualifications that were inaccurate and/or misleading, or had the potential to mislead (as set out in Schedule 3), in that:

   a. As at 4 August 2020, Dr Tovaranonte had not completed and/or obtained the qualification of Master of Laws (LLM) from the University of Edinburgh; and/or

   b. As at 4 August 2020, Dr Tovaranonte had not completed and/or obtained the qualification of Bachelor of Laws (LLB) from the University of Essex; and/or

c. As at 4 August 2020, Dr Tovaranonte had not completed and/or obtained the qualification of Master of Business Administration (MBA) from the Edinburgh Business School, Herriot-Watt University.

The conduct alleged above at paragraphs 1 - 4 amounts to professional misconduct in that, either separately or cumulatively, it amounts to malpractice or negligence in relation to Dr Tovaranonte's scope of practice pursuant to section 100(1)(a) of the Act; and/or has brought or is likely to bring discredit to the profession, pursuant to section 100(1)(b) of the Act.