



**NEW ZEALAND HEALTH
PRACTITIONERS
DISCIPLINARY TRIBUNAL**

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**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL
TE RŌPŪ WHAKATIKA KAIMAHI HAUORA**

HPDT NO: 1269/Chiro22/540D

UNDER the Health Practitioners Competence Assurance Act 2003
("the Act")

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

BETWEEN **THE DIRECTOR OF PROCEEDINGS** designated under the
Health and Disability Commissioner Act 1994

Applicant

AND **DR WILLIAM JOHN DONALDSON**, of Auckland, Registered
Chiropractor

Practitioner

HEARING held by way of audio-visual Link (AVL) on 1 August 2022

TRIBUNAL Ms A J Douglass (Chair)
Mrs D McKinnon, Dr S Bansal, Dr A Taare and Dr J Cleave
(Members)

IN ATTENDANCE Ms D Gainey, Executive Officer
Mr J Roberts, Video Technician

APPEARANCES Ms K Eckersley and Ms C McCulloch for the Director of Proceedings
Mr P Napier and Mr W van Roosmalen for the Practitioner

**DECISION OF THE TRIBUNAL
Dated this 20th day of September 2022**

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Introduction

[1] Dr Donaldson is a registered chiropractor formerly practising in Auckland.

[2] On 10 January 2022 the Director of Proceedings laid a disciplinary charge (the Charge) against Dr Donaldson pursuant to s 91 of the Health Practitioners Competence Assurance Act 2003 (the Act).

[3] The Charge alleges that over a period of two years Dr Donaldson engaged in a sexual relationship with his patient, [Mrs O], while also providing ongoing and regular chiropractic treatment to her and her child after she sought treatment in 2016.

[4] The particulars of the Charge are set out in the **Schedule** annexed to this decision.

[5] The Director says that Dr Donaldson's conduct is in breach of the New Zealand Chiropractic Board's (Chiropractic Board) Code of Ethics and that each of the three particulars of the Charge either separately or cumulatively amounts to malpractice and / or negligence and / or is conduct that has brought or is likely to bring discredit to the chiropractic profession pursuant to sections 100(1)(a) and (b) of the Act.

[6] Although Dr Donaldson has admitted that his actions as set out in the Charge amount to professional misconduct and are sufficiently serious to warrant a disciplinary finding against him, it remains for the Tribunal to be satisfied that the Charge is established.

[7] The hearing proceeded by way of audio-visual link (AVL). At the conclusion of the hearing the Tribunal found the Charge established and indicated the decision and orders on penalty, costs and the application for permanent name suppression.

[8] We set out the reasons for our decision and the orders made below.

The Facts

[9] The parties provided an Agreed Bundle of Documents (ABOD / Bundle).¹ The Bundle included Dr Donaldson's clinical notes relating to [Mrs O], text messages between [Mrs O] and Dr Donaldson and the correspondence regarding Dr Donaldson's voluntary undertaking to the Chiropractic Board in relation to his practice.

[10] Dr Donaldson filed two affidavits.² He also provided a number of affidavits from family, friends, colleagues and former patients as character references.³

[11] The Director filed an affidavit from the complainant, [Mrs O].⁴

[12] The parties filed an Agreed Summary of Facts (ASOF) signed by Ms Eckersley, Director of Proceedings and Dr Donaldson, the practitioner. The relevant agreed facts are set out below:⁵

Agreed Summary of Facts

THE PARTIES

Dr William (Bill) Donaldson

1. William Donaldson ("Dr Donaldson") graduated as a chiropractor in 1982 in Melbourne. He registered with the New Zealand Chiropractic Board in 1992 and established the Real Health Clinic in Auckland in 2004, of which he is the sole director.
2. In addition to chiropractic treatment, Dr Donaldson practises kinesiology, including Total Body Modification.

¹ Document 2, Agreed Bundle of Documents (ABOD).

² Documents 4 and 24, Affidavit of William John Donaldson dated 11 July 2022 (redacted) and Affidavit of William John Donaldson in support of application for prohibition of publication of details dated 11 July 2022.

³ Documents 11-23 inclusive.

⁴ Document 3, Affidavit of [Mrs O] dated 23 June 2022.

⁵ Document 1, Agreed Summary of Facts (ASOF), paras 1-15 and 26-27. The complaint and subsequent events at paras 16-22 and the relevant standards set out at paras 23-25 are not agreed facts relating to the Charge. These parts of the ASOF are referred to below in this decision.

[Mrs O], [Mr O] and [O]

3. [] ("Mrs O") was Dr Donaldson's patient between early 2016 and late 2018.
4. [Mrs O] is married to [Mr O]. Their [child] is [O]. [Mr O] and [O] were also patients of Dr Donaldson:
 - 4.1. [Mr O] was a patient of Dr Donaldson and his colleague in 2015 and 2016. Dr Donaldson's treatment of [Mr O] ended before the events that are the subject of the charge.
 - 4.2. [O] was a patient of Dr Donaldson from [] December 2016 until [] November 2018. At the time of these events, [O] was aged [].

BACKGROUND

5. [Mrs O]'s first consultation with Dr Donaldson was on [] January 2016, for treatment in relation to [].
6. [Mrs O] attended appointments with Dr Donaldson approximately every two weeks from early 2016 until October 2018. [Mrs O]'s treatment included chiropractic spinal corrections, muscle balancing techniques, kinesiology and Total Body Modification.
7. At first, the treatments provided were those of a normal provider/consumer relationship.
8. After several months of treatments in 2016, an attraction formed between Dr Donaldson and [Mrs O] that was personal and sexual in nature.
9. The clinical notes for the appointment on [] October 2016, which took place just prior to the commencement of a relationship, include reference to [Mrs O] having a melt-down at [] on her way home from a family holiday [Mrs O] has a documented fear of [] which Dr Donaldson was treating). The notes record that [Mrs O] reported having to be sedated. There is also reference to the recent passing of [Mrs O]'s [].
10. Dr Donaldson and [Mrs O] do not agree as to who initiated the attraction or when. Nonetheless, Dr Donaldson accepts that on [] October 2016 he discussed with [Mrs O] commencing a sexual relationship with her.

11. Dr Donaldson and [Mrs O] then commenced and maintained a sexual relationship from November 2016 until late November 2018. Initially, Dr Donaldson and [Mrs O] met two to three times a week in the morning to conduct their sexual relationship. Contact increased over time to the point where Dr Donaldson and [Mrs O] would typically meet every weekday morning and either every weekday lunch or briefly after work.
12. The relationship also took other forms:
 - 12.1. Throughout the sexual relationship, Dr Donaldson and [Mrs O] exchanged text messages of a personal and sexual (or intimate) nature. [Mrs O] often expressed her love for Dr Donaldson in those messages.
 - 12.2. Dr Donaldson gave [Mrs O] a birthday card expressing his love for her, reading "Happy Birthday Darling, hope you have a wonderful day! All my love, forever ... " x".
13.
14. The clinical relationship continued throughout the sexual relationship but ended around this time. The clinical notes record that [Mrs O]'s last appointment was [towards the end of] 2018.
15. In all, Dr Donaldson accepts the relationship occurred over the course of around two years.

...

PROFESSIONAL MISCONDUCT

26. Dr Donaldson accepts that his actions as particularised in the charge amount to professional misconduct.
27. For the removal of doubt, Dr Donaldson accepts that on the basis of the above facts, his actions are a departure from the accepted professional standards for chiropractors and are sufficiently serious to warrant a disciplinary finding against him.

Background to the complaint

[13] The complainant, [Mrs O], through counsel, complained to the Health and Disability Commissioner on 14 June 2019.⁶

[14] After an initial assessment of the complaint, the Deputy Health and Disability Commissioner commenced an investigation on 22 October 2019 into "[w]hether William Donaldson provided [Mrs O] with an appropriate standard of care in 2016 to 2019".

[15] The Deputy Commissioner released her report on 6 November 2020, finding Dr Donaldson in breach of Right 4(2) of the Code of Health and Disability Services Consumers' Rights (HDC Code).⁷

[16] The Deputy Commissioner recommended that Dr Donaldson establish a six-month mentoring and continuing education plan with the Chiropractic Board, in relation to its Code of Ethics and with an emphasis on professional boundaries.

[17] The Deputy Commissioner also recommended that the Chiropractic Board consider this complaint and whether further action was warranted.

[18] On 11 December 2019 the Chiropractic Board made a decision to impose a condition on the scope of Dr Donaldson's practice under s 69 of the Act.

[19] Following submissions to the Board and changes in his practice, Dr Donaldson made several voluntary undertakings on 20 March 2020, namely that:

- (a) He would continue to practise four half-days per week.
- (b) All new patients would be shared among the practising chiropractors at Real Health Clinic.

⁶ Document 1, ASOF, paras 16-22..

⁷ The parties did not produce the Deputy Commissioner's Opinion and her report is not part of the evidence before the Tribunal.

- (c) Every new patient would be under the care of more than one chiropractor in the clinic.
- (d) He would continue to attend clinical review meetings on a weekly basis to discuss all aspects of treatment and procedures.
- (e) He would provide the Board with quarterly reports confirming that those arrangements continue.
- (f) He would advise the Board of any proposed changes to his working arrangements.
- (g) He would inform the Board of any complaints against him and any other matters where it is necessary or appropriate for him to report.

[20] The Director of Proceedings subsequently laid the Charge following the investigation and opinion by the Health and Disability Commissioner that Dr Donaldson's actions were in breach of the HDC Code.

[21] Before we make findings on the particulars of the Charge, we first consider the law as it applies to professional misconduct under the Health Practitioners Competence Assurance Act 2003 and the professional standards that apply to the chiropractic profession.

Relevant law and professional standards

[22] The primary purpose of the Tribunal's disciplinary powers is the protection of the public by the maintenance of professional standards.

[23] Section 100 of the Act defines the grounds on which the health practitioner may be disciplined:

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;

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

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.

[25] “Malpractice” is defined in the *Collins English Dictionary* as:⁹

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

[26] Malpractice is defined in the *New Shorter Oxford English Dictionary*:¹⁰

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.

[27] 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*,

⁸ [2001] NZAR 74.

⁹ Collins English Dictionary (2nd Edition).

¹⁰ Shorter Oxford English Dictionary (1993 ed), as cited in *Dr E 136/Med07/76D* at [12]–[14].

Gendall J considered the meaning of conduct likely to bring discredit on the nursing profession as follows:¹¹

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

[28] The burden of proof is on the Director of Proceedings (Director). This means that it is for the Director to establish that the practitioner is guilty of professional misconduct.

[29] The Director 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 the Charge are more likely than not. The Tribunal must apply a degree of flexibility to the balance of probabilities taking into account the seriousness of the allegation and the gravity of the consequences flowing from a particular finding.¹²

Threshold test for disciplinary sanction

[30] There is a well-established two-stage test for determining professional misconduct in this jurisdiction.¹³ 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

¹¹ *Collie v Nursing Council of New Zealand* [2001] NZAR at [28].

¹² *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [112].

¹³ *PCC v Nuttall 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].

- (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?

[31] In *Martin v Director of Proceedings*¹⁴ 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.¹⁵

[32] The practitioner’s personal circumstances, including the subjective reasons for their conduct, are not relevant at the threshold stage, but instead go to the question of penalty.¹⁶

Professional and ethical standards

[33] The following are the relevant ethical and professional standards that apply to this case involving a breach of professional boundaries with a patient.

[34] Right 4(2) of the Code of Health and Disability Services Consumers' Rights (HDC Code) provides:

Right 4

Right to services of an appropriate standard

...

- (2) Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.

[35] Similarly, the Competency-Based Professional Standards for Chiropractors requires practitioners to be "aware of statutory and ethical health and safety requirements".¹⁷

¹⁴ [2010] NZAR 33.

¹⁵ *Martin v Director of Proceedings* [2010] NZAR 33, Courtney J at [32].

¹⁶ *McKenzie v MPDT* [2004] NZAR 47 at [71]; *Cole v PCC* [2017] NZHC 1178, [128]–[130]; *Paltridge 382/Med11/172P* at [118].

¹⁷ New Zealand Chiropractic Board *Competency-Based Professional Standards for Chiropractors* (2010) [4.1.2].

[36] The current version of the *New Zealand Chiropractic Board Code of Ethics* was adopted in February 2013. It provides:

1. General Considerations

...

1.4 All chiropractors have a duty to ensure that the care of patients is their first concern.

1.5 All chiropractors have a duty to ensure that their health status does not impede their ability to provide chiropractic care and maintain public safety.

1.6 Chiropractors should strive to attain the highest degree of professional competence and integrity in the application of chiropractic care. Chiropractors should aim to use appropriate clinical judgment and management to seek the best outcome for their patients.

...

2. Chiropractor's Interactions

2.1.1 Interactions with Patients – General

...

2.1.1.4 A chiropractor should ensure that all conduct in the practice of chiropractic is beyond reproach and that no advantage is taken of any patient including exploitation of a sexual, physical, emotional, financial nature or for personal gain.

...

2.1.4 Interactions with Patients – Sexual Misconduct

A chiropractor cannot have a sexual relationship with a patient unless that patient is the chiropractor's spouse or partner. Sexual behaviour in a professional context is abusive. Sexual behaviour includes but is not limited to the following:

2.1.4.1.1 the use of language (whether written, electronic or spoken) of a sexual nature;

2.1.4.1.2 the use of visual material of a sexual nature;

2.1.4.1.3 physical behaviour of a sexual nature.

The Board condemns all forms of sexual misconduct in the chiropractor/patient relationship. The Board impresses on chiropractors the need for open and clear communication to avoid misinterpretations and misperceptions. The consent of a patient to sexual contact does not necessarily preclude a finding of misconduct against the chiropractor by the Board.¹⁸

Liability

Tribunal's consideration of the Charge

[37] The Charge comprises three particulars set out in the Schedule to this decision.

[38] [Mrs O]'s first consultation with Dr Donaldson was on [] January 2016 for treatment in relation to a []. She subsequently attended appointments with Dr Donaldson approximately every two weeks from early 2016 to October 2018. [Mrs O]'s treatment included chiropractic spinal corrections, muscle balancing techniques, kinesiology and Total Body Modification.

[39] The first treatments provided were those of a normal consumer (patient) relationship between the practitioner and [Mrs O]. After several months of treatments in 2016, an attraction formed between Dr Donaldson and [Mrs O] that was personal and sexual in nature.

[40] In respect of particular 1, Dr Donaldson accepts that on [] October 2016 he discussed with [Mrs O] commencing a sexual (and therefore intimate) relationship with her.¹⁹

[41] On [] 2016, three days prior to the discussion, [Mrs O]'s clinical notes indicate that she had had a "meltdown" at [] on her way home from a family holiday. Dr Donaldson was treating her in relation to her anxiety and fear of [].²⁰ The notes record that [Mrs O] was reported to be sedated and there was a recent bereavement in her family.

¹⁸ New Zealand Chiropractic Board *Code of Ethics* (2013).

¹⁹ Document 1, ASOF, para 10.

²⁰ Document 2, ABOD, Tab 3, p 12.

[42] Although Dr Donaldson and [Mrs O] do not agree about who initiated the attraction or when, there is agreement that the discussion about entering into an intimate relationship took place on [] October 2016. Particular 1 is established.

[43] The allegations in particular 2 are the substance of the Charge. Dr Donaldson has admitted that over the approximately two-year period between November 2016 and [] October 2018 while caring for [Mrs O] that he engaged in a sexual relationship with her.²¹

[44] Throughout the sexual relationship, Dr Donaldson and [Mrs O] initially met two or three times a week in the morning and increased contact to every weekday. They exchanged text messages of a personal and sexual or intimate nature.²² In these messages, [Mrs O] often expressed her love for Dr Donaldson. Dr Donaldson gave [Mrs O] a birthday card which expressed his love for her.²³

[45] By engaging in a sexual relationship with his patient, Dr Donaldson failed to set and maintain professional boundaries, as required by his professional regulatory body, the Chiropractic Board. The clinical and sexual relationship spanned two years. During this time when [Mrs O] was his patient, Dr Donaldson continued to provide chiropractic services to her. Particular 2 is established.

[46] In respect of particular 3, Dr Donaldson and [Mrs O] began their sexual relationship in November 2016. On [] December 2016, soon after commencing the sexual relationship with [Mrs O], Dr Donaldson began providing chiropractic treatment to [Mrs O]'s child.

[47] Dr Donaldson's sexual relationship with [Mrs O] ended on or about [] October 2018, with the last documented chiropractic appointment recorded in the clinical notes on [] October 2018. He continued to care for [Mrs O]'s child for another month during November 2018.

²¹ Schedule, Particulars of the Charge, 2(b).

²² ABOD, Tab 4, pp 32-41.

²³ ABOD, Tab 5, pp 42-43.

[48] The Director submitted that the additional provision of chiropractic treatment to [Mrs O]’s child was a further deepening of the clinical relationship and therefore a further breach of professional boundaries. We accept that by continuing to treat [Mrs O]’s child there was a deepening of the clinical relationship by Dr Donaldson with her family, however, this was an aggravating feature of Dr Donaldson’s conduct rather than a separate or further breach of professional boundaries. Nonetheless we are satisfied that while Dr Donaldson was in a sexual relationship with [Mrs O], he was caring for [Mrs O]’s child. Particular 3 is established.

[49] We accept the Director’s submission that Dr Donaldson’s sexual relationship with his patient was not a one-off momentary lapse in judgement but rather a sustained breach of professional ethics over two years. There is no evidence before us that Dr Donaldson sought advice from either his colleagues or professional body about his professional and ethical obligations.

[50] Dr Donaldson had ample opportunity to end the clinical or sexual relationship or to seek counsel or support from his colleagues or professional body. He would have been well aware of the expectations and obligations placed on him by the Chiropractic Board, and his transgression of the Code of Ethics by having a sexual relationship with a patient.

[51] There is an extensive body of case law regarding health practitioners’ transgressions of professional boundaries by engaging in a sexual relationship with a patient and that such conduct amounts to professional misconduct.²⁴ It is clear that a patient’s consent and the issue of who initiated the relationship is not relevant to the Tribunal’s assessment of whether the Charge is established.

[52] *The New Zealand Chiropractic Board Code of Ethics*,²⁵ regard a sexual relationship with a patient as sexual misconduct and state: “A chiropractor cannot have a sexual relationship

²⁴ For example, *Gulliver 61/Nur06/35P*; *Ms O 47/Nur05 25P*; and more recently, *Dr L 1176/Med20/489P*.

²⁵ *Code of Ethics, 2.1.4* The exception of “spouse and partner” does not apply in this case. No other health profession appears to have this exception. For example, the Medical Council of New Zealand have a “zero tolerance” position in relation to sexual transgression of professional boundaries.

with a patient unless that patient is the chiropractor's spouse or partner, and that "the Board condemns all form of sexual misconduct in the chiropractor/patient relationship".²⁶

[53] On an objective analysis, the Tribunal finds Dr Donaldson's conduct in respect of all three particulars of the Charge are established. We are satisfied that Dr Donaldson's conduct in respect of all three particulars cumulatively amount to malpractice. While Particular 1 in relation to the initial discussion may not separately stand on its own, we are satisfied that cumulatively all three particulars establish that Dr Donaldson's behaviour was unethical and a serious departure from expected standards.

[54] These failures fall well short of the standards expected of a chiropractor. His conduct has also brought and is likely to bring disrepute to the chiropractic profession. Reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the chiropractic profession was lowered by Dr Donaldson's behaviour.

Is professional misconduct established?

[55] The parties agree that the conduct amounts to malpractice under section 100(1)(a) of the Act and/or has brought or is likely to bring discredit to the chiropractic profession under section 100(1)(b) of the Act.

[56] Particular 1 relates to Dr Donaldson's initial discussion with [Mrs O] about entering into a sexual relationship. Particular 2 relates to Dr Donaldson entering and continuing a sexual relationship with his patient, [Mrs O] in breach of the Chiropractic Board's Code of Ethics, and is the main aspect of the Charge. Particular 3 concerns the extended nature of Dr Donaldson's clinical relationship to [Mrs O]'s child mainly during the period of the sexual relationship.

²⁶ *Code of Ethics, 2.1.4.*

[57] In respect of the second step of our assessment, the departures from professional standards are significant enough to warrant a disciplinary sanction for the purposes of protection of the public and maintaining professional standards.

[58] Breaches of professional boundaries, and in particular sexual misconduct, are particularly serious cases of professional misconduct. The rationale for clear professional boundaries is to foster safe and effective therapeutic relationships. A breach of sexual boundaries in the doctor-patient relationship, for example, has proven to be harmful to patients and may cause emotional and/or physical harm to both the patient and the doctor. The public, and patients in particular, must be able to trust that all health practitioners will adhere to ethical and professional standards.²⁷

[59] The Charge of professional misconduct in respect of particulars 2 and 3 separately, and all three particulars cumulatively, is established. Dr Donaldson's conduct is a significant departure from professional standards and warrants a disciplinary sanction.

Penalty

Penalty principles

[60] The Tribunal is satisfied that the Charge of professional misconduct has been established, and we turn to consider the appropriate penalty under s 101 of the Act.

[61] The principal purpose of the Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practice their profession.²⁸ The Tribunal's role is to determine the appropriate penalty, given the nature of the conduct, to ensure that both the public interest and the integrity of the profession are maintained.

[62] The penalty may include cancellation of registration; suspension for a period not exceeding three years; imposition of conditions on practice for a period not exceeding three

²⁷ See for example, Medical Council of New Zealand *Sexual Boundaries in the Doctor/Patient Relationship* (2009).

²⁸ Health Practitioners Competence Assurance Act 2003, s 101(3).

years; a fine not exceeding \$30,000; censure and an order as to costs and expenses of the Director of Proceedings and the Tribunal to be met in part or in whole by the practitioner.²⁹

[63] The Tribunal adopts the principles contained in *Roberts v Professional Conduct Committee*³⁰ where Collins J identified the following eight factors as relevant whenever the Tribunal is determining an appropriate penalty. In particular the Tribunal should also consider the penalty that:

- (a) Most appropriately protects the public and deters others;
- (b) Facilitates the Tribunal's important role in setting professional standards;
- (c) May punish the practitioner, though this is not the objective of any penalty;
- (d) Allows for rehabilitation of the practitioner;
- (e) Promotes consistency with the penalties in similar cases;
- (f) Reflects the seriousness of the misconduct;
- (g) Is the least restrictive penalty appropriate in the circumstances; and
- (h) Looked at overall, is the penalty "fair, reasonable and proportionate in the circumstances".

Submissions on penalty

[64] The Director submitted that both cancellation and suspension are penalties that are available to the Tribunal in the circumstances of this case, and at the very least, a period of suspension is required in order to meet the purposes of the Act. The Director also sought conditions on Dr Donaldson's practice, censure and an order for costs.

²⁹ Health Practitioners Competence Assurance Act 2003, s 101(1).

³⁰ [2012] NZHC 3354 at [44]-[51].

[65] Should a term of suspension be imposed, the Director sought conditions upon Dr Donaldson's return to practice³¹ or alternatively, if cancellation is imposed then recommendations to be made to the Chiropractic Board as pre-conditions for re-registration.³²

[66] Counsel for Dr Donaldson, Mr Napier's primary submission is that the appropriate penalty is suspension, not cancellation.

[67] Initially Dr Donaldson did not accept that the Director's proposed conditions on his practice were necessary due to the rehabilitative steps that he has already taken through his voluntary undertaking with the Chiropractic Board. However, following discussion between counsel, Dr Donaldson accepted that a condition involving supervision as directed by the Chiropractic Board was appropriate should the Tribunal impose a period of suspension upon his practice.

[68] Affidavit and other evidence was provided to the Tribunal that is relevant to the assessment of the appropriate penalty.

[69] Dr Donaldson's affidavit reflected on what he called his "affair" with [Mrs O] and the steps he has taken as a result of the relationship with [Mrs O]. Dr Donaldson states:

The affair with [Mrs O] is something that I deeply regret in both a personal and professional sense. I accept that it was inappropriate and wrong for me to have an affair with a patient. It is something that has never happened before. I have never had an allegation of inappropriate behaviour in a professional context made against me before or since and I believe that I have never behaved inappropriately in a professional context before or since. It will never happen again. Relevant to my last statement, I have worked as a Kinesiologist and Chiropractor for approximately 40 years. Throughout most of this period the majority of my patients, colleagues and employees have been women.

³¹ Health Practitioners Competence Assurance Act, s 101(1)(c).

³² Health Practitioners Competence Assurance Act, s 102.

[70] Thirteen affidavits from family members, former colleagues and patients were provided to the Tribunal.³³ Although there are hearsay statements made in some of these affidavits, the tenor of them was to speak highly of Dr Donaldson's clinical competence and as personal references to his good character.

[71] A letter from Dr Ian Goodwin, Consultant Liaison and Forensic Psychiatrist, confirms that Dr Donaldson has consulted him on 19 occasions since June 2019.³⁴ Dr Donaldson is described as having a significant background history of anxiety and depression over the past 10 years. At the time of the professional boundary transgression Dr Goodwin opines that Dr Donaldson was significantly depressed and feeling both socially and professionally isolated. Dr Donaldson is described as being engaged and transparent with Dr Goodwin about his boundary transgressions. He has expressed considerable regret and remorse for his actions.

[72] In Dr Goodwin's professional opinion, Dr Donaldson's offending occurred at a time when he was vulnerable and his judgement was impaired. In relation to Dr Donaldson's risk to the public, Dr Goodwin says:³⁵

I am of the opinion that Dr Donaldson's risk of reoffending in a similar manner remains low. There is no history of prior boundary violations or unprofessional behaviour.

[73] As acknowledged by the Director, on 20 March 2020, Dr Donaldson provided to the Chiropractic Board a written undertaking that:³⁶

- (a) He would continue to practice four half-days per week (only); and
- (b) All new patients would be shared among the practising chiropractors in the clinic;
and

³³ Documents 11- 23 inclusive.

³⁴ Document 4, Dr Ian Goodwin, Consultant Psychiatrist, letter dated 7 July 2022, annexed to Affidavit of William John Donaldson dated 11 July 2022.

³⁵ Ibid.

³⁶ ABOD, Tab 7, p 46.

- (c) Every patient will be under the care of more than one chiropractor in the clinic;
and
- (d) He would continue to attend clinical review meetings on a weekly basis to discuss
all aspects of treatment and procedure; and
- (e) He will provide the Board with quarterly reports confirming that those
arrangements would continue; and
- (f) He would advise the Board of any proposed changes to his working arrangements;
and
- (g) He would inform the Board of any complaints against him and any other matters
where it is necessary or appropriate for him to so report.

[74] At the conclusion of the Health and Disability Commissioner’s (HDC) investigation, it was recommended that Dr Donaldson establish a 6-month mentoring and continuing education plan with the Chiropractic Board in relation to the Code of Ethics and with an emphasis on professional boundaries.

[75] Dr Donaldson subsequently advised the Chiropractic Board that he had completed the on-line courses, “Obligations of Health Practitioners under the HDC Act” and “Maintaining Professional Boundaries”, that he had reviewed the Chiropractic Board’s documents on scope of practice, the Code of Ethics, and the competence-based Professional Standards for Chiropractors.

[76] Dr Donaldson subsequently participated in a mentoring session carried out by Dr Matthew Sherson, chiropractor.³⁷ In his report Dr Sherson states:

Following the submission of his final reflection it is my opinion that Dr Donaldson has a solid understanding of the importance of maintaining

³⁷ Document 4, Annexure to Affidavit of William John Donaldson dated 11 July 2022.

professional boundaries as well as the concepts of power imbalance and the fiduciary (high trust) nature of the doctor-patient relationship.

He now fully understands that establishing a personal sexual relationship between doctor and patient is almost never acceptable (including being previously de facto or married relationships) and in all cases not recommended, as consent to begin a relationship cannot be given where this power imbalance exists.

Dr Donaldson appears to have had some serious reflection, and in his submission has acknowledged his remorse over the actions he took, and I believe to the best of my knowledge that he is sincere.

If Dr Donaldson returns to practice, I have provided him with the following recommendations on maintain boundaries. These were discussed during the mentoring session.

[77] Dr Sherson recommended that no personal mobile phones were used and all communications with patients were used strictly in the professional setting and that further consideration be given to risk management training.

[78] On 23 November 2021 the Chiropractic Board advised Dr Donaldson that having fulfilled the requirements of the mentoring programme he was no longer required to continue the voluntary undertaking. The Board confirmed it would review the outcomes. Although initially it was considered that a chaperone would be necessary, following submissions by Dr Donaldson to the Chiropractic Board and the outcome of the mentoring report, no further steps were required.

[79] Dr Donaldson confirmed that he ceased clinical practice on 24 December 2020. He has not practised since. He is currently residing in Australia.

[80] [Mrs O], the complainant, states that her relationship with Dr Donaldson had a significant impact on both herself and her family, noting that her child continued to be treated by Dr Donaldson during this time.³⁸

³⁸ Document 3, Affidavit of [Mrs O] dated 23 June 2022.

[81] The sexual relationship commenced at a time in [Mrs O]’s life when she was extremely vulnerable. Just prior to the commencing of the sexual relationship [Mrs O] and her family returned from [] and a close family member died soon after. She felt emotionally and physically exhausted, fragile and particularly vulnerable. It was during this time or shortly thereafter that the sexual relationship with Dr Donaldson commenced. [Mrs O] is receiving ongoing psychological counselling.

[82] In June 2019 [Mrs O] made a complaint and the Health and Disability Commissioner’s investigation began in October 2019.

Comparable cases

[83] The Tribunal was provided with a number of decisions involving cases where there has been a breach of professional boundaries where the practitioner has entered into a consensual sexual relationship whilst continuing their clinical practice.

[84] Although each case rests on its own facts, the following cases fall within the range of sexual and intimate relationships that we consider are relevant to our assessment of a penalty in the present case:³⁹

- (a) *PCC v Nuttall*:⁴⁰ A GP had been counselling his patient (and initially her husband) through marital problems and then entered into a relationship with his patient that lasted a number of years including treatment of the patient’s children and prescription of medication. Dr Nuttall’s registration was cancelled and the Tribunal ordered that before he applied for re-registration he must undergo an assessment by the Medical Council’s Sexual Misconduct Assessment Team.
- (b) *PCC v Bennett*:⁴¹ For a period of approximately 2 years, a GP entered into and continued a sexual relationship with a patient who had recently been a patient of his at the time of commencing the relationship and was 30 years younger than the

³⁹ The tribunal was also referred the following two cases by Mr Napier: *PCC v Dr K* 349/Med10/157P 17 January 2011; and *PCC v Rosie* 294/Nur09/141P, 13 April 2010.

⁴⁰ *Nuttall* 8/Med04/03P.

⁴¹ *Bennett v PCC*, 1148/Med20/488P, upheld on appeal to the High Court: *PCC v Bennett* [2022] NZHC 876.

practitioner. The Tribunal also found that the Doctor misled the Medical Council in denying the relationship. The Doctor was censured and his registration was cancelled;⁴²

- (c) *PCC v Roberts*:⁴³ A nurse developed a relationship with a patient (Ms N) who was admitted to the ward. The parties began exchanging text messages and two days after Ms N's discharge from hospital she and Mr Roberts engaged in sexual intercourse and a relationship which continued for almost three years. On appeal to the High Court, the Tribunal's penalty of three years' suspension was reduced to 18 months suspension from practice. The High Court also noted that the close proximity of the sexual intercourse and the hospital discharge, and that the relationship appeared otherwise to be genuine and loving.

- (d) *PCC v Williams*:⁴⁴ A physiotherapist was found guilty of professional misconduct for entering into a sexual relationship with two patients over a six-month period and the patients were members of a rugby club. Ms Williams initiated the first relationship, and entered into the second relationship despite being warned against doing so and there was no overt vulnerability on the part of either patient. The Tribunal suspended her registration for 12 months, censured her and imposed conditions on her return to practice for a maximum period of three years. Ms Williams was also ordered to pay costs of nearly \$10,000.

- (e) *PCC v Dr L*:⁴⁵ Dr L, a GP, first began treating Ms M in 2013, her former husband in 2016 and their children in 2015. In late 2017 after Dr L disclosed he had feelings for Ms M they agreed that she should see a different GP. The parties met for lunch at which they kissed for a period of time. Dr L recalls a brief period of penetrative sex, although Ms M denied this occurred. Ms M then indicated she did not want

⁴² The Doctor appealed the Tribunal's penalty and non-publication orders to the High Court: *Bennett v PCC* [2022] NZHC 876. The Court dismissed the appeal except for the condition upon reregistration which was quashed and referred back to the Tribunal for reconsideration of its powers under s 102 of the Act. The appeal against the suppression refusal was refused.

⁴³ *Roberts v PCC* [2012] NZHC 3354.

⁴⁴ *Williams* 856/Phys/16/345P.

⁴⁵ *Dr L* 1176/Med20/489P.

Dr L to contact her further. Dr L treated Ms M before, during and for six months after the relationship ended. In mitigation, the Tribunal noted that Dr L had self-reported the incident to the Medical Council (albeit after he became aware that Ms M's husband had made a verbal complaint). Dr M was suspended from practice for three months in addition to having a number of conditions imposed on his practice.

Aggravating and mitigating factors

[85] The Director referred to six aggravating features in this case. Taking into account the practitioner's submissions, we have distilled the following four aggravating factors:

- (a) The sexual relationship arose out of the clinical relationship. We accept Mr Napier's submission that a clinical relationship was first in time and that Dr Donaldson and [Mrs O] met through the clinical relationship. However, this was not the sole factor, as submitted by the Director. It is the fact of the entering into and continuing with a sexual relationship with a patient that is an aggravating feature.
- (b) There was a power imbalance in the relationship. Both parties accept that while it was a consensual relationship, this is not relevant to the breach of professional boundaries. [Mrs O] was a vulnerable patient, who at the time of consulting Dr Donaldson was suffering from sensitive mental health issues. From the available evidence, we accept that Dr Donaldson does not appear to have been motivated to take advantage of [Mrs O]'s vulnerability. There is no suggestion that this was predatory behaviour on his part. It is not helpful to distinguish between the different kinds of health professions to debate the vulnerability of patients receiving "hands on" treatment such as those that occur in the chiropractic setting.
- (c) The sexual relationship spanned two years and was intense. It cannot be characterised as a one-off lapse in judgement. As noted above, Dr Donaldson had ample opportunity to end both the sexual and clinical relationships, or to seek

counselling support from his peers or regulatory body. Dr Donaldson through his counsel conceded and accepted that he should have brought the relationship to an end before he did.

- (d) Dr Donaldson continued to treat [Mrs O]'s child while he was having an intense sexual relationship with [Mrs O] and for a month once his clinical and sexual relationship with [Mrs O] ended. This deepened the complexity of the relationship Dr Donaldson had with [Mrs O] and her family.

[86] In mitigation the Tribunal accepts the following factors:

- (a) Dr Donaldson has complied with the recommendation of the HDC, and offered a voluntary undertaking to the Chiropractic Board. Whilst the Board indicated it was minded to impose a chaperone condition on his practice, we accept that Dr Donaldson responsibly agreed to the voluntary undertaking and completed the steps required of him; and
- (b) Dr Donaldson has appropriately admitted the disciplinary Charge and that his actions amount to professional conduct warranting sanctions. He has co-operated fully in the disciplinary proceedings and signed an Agreed Summary of Facts. This has reduced the time and costs associated with proceedings and avoided the need for oral evidence to be given by the complainant or by either party.

[87] The Director submitted that Dr Donaldson's absence of a prior disciplinary finding is not a mitigating factor, but simply a neutral one.⁴⁶ In *Dr L* the Tribunal was urged to take into account the four months where the practitioner had voluntarily stood down from practice. However, the Tribunal indicated it had not found this to be relevant to the determination.⁴⁷

[88] Mr Napier referred us to Tribunal decisions where the Tribunal has taken into account the fact that a practitioner has a self-imposed suspension from practice as a relevant factor.

⁴⁶ *Dr L* 1176/Med/20/489P at [42].

⁴⁷ *Ibid* at [51].

See for example, *Ms I*,⁴⁸ where Ms I's self-imposed suspension from practice was a relevant factor as she had not been employed as a nurse over the preceding two years. In *McCaig*⁴⁹ the Tribunal noted that the offending warranted a suspension of four months but gave credit to the period of time in which the doctor was not working.

[89] We consider that if a practitioner does have a prior history of disciplinary offending, then that is an aggravating feature. In this case, Dr Donaldson has no prior history. He has made some rehabilitative steps and taken 18 months taken out of clinical practice as part of his rehabilitation. This is a relevant factor in our overall assessment of a proportionate penalty.

Penalty finding

[90] At the forefront of the Tribunal's consideration is the protection of the public. The Tribunal must tailor the penalty required to the circumstances of this case and in doing so is mindful of the need to ensure some consistency with previous cases.

[91] Applying the principles in *Roberts*⁵⁰ and having the protection of the public as the overriding consideration, any penalty imposed should first and foremost have regard to the safety of the public.

[92] When considering suspension or cancellation, the comments made by the High Court in *A v Professional Conduct Committee* are relevant.⁵¹

[81] First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element'. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practise which may or may not be amendable to cure'.

⁴⁸ 1218/Nur21/521P.

⁴⁹ 704/Med14/299P.

⁵⁰ *Roberts v PCC* [2012] NZHC 3354.

⁵¹ HC Auckland, [2008] NZHC 1387 at [81]-[82].

Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.

[82] Finally the Tribunal cannot ignore the rehabilitation of the practitioner: *B v B* (HC Auckland, 4/92, 6 April 1993) Blanchard J. Moreover, as was said in *Giele v The General Medical Council* [2005] EWHC 2143, though ‘... the maintenance of public confidence ... must outweigh the interests of the individual doctor’, that is not absolute – ‘the existence of the public interest in not ending the career of a competent doctor will play a part’.

[93] In *Katamat v Professional Conduct Committee*⁵² the High Court confirmed that the primary factor in determining the penalty will be what penalty is required to protect the public and to deter similar conduct. The overall decision is ultimately one involving an exercise of discretion.

[94] Having regard to the aggravating and mitigating factors, the seriousness of the professional misconduct and the penalty imposed in similar cases, the Tribunal is satisfied that cancellation of Dr Donaldson’s registration would be disproportionate to the factors that apply in this case.

[95] The starting point in the comparable cases⁵³ where there has been a breach of professional boundaries involving a sexual relationship between the practitioner and the patient is cancellation of the practitioner’s registration unless there are strong mitigating and factual circumstances which justify a less restrictive penalty.

[96] The penalty may include the practitioner’s suspension from practice or suspension and a fine, to reflect the seriousness of the offending and departure from professional standards. Our assessment of the financial information provided by Dr Donaldson is that he is not in a position to pay a fine.

[97] We consider that the penalty in this case should be closer to the case of *Williams*,⁵⁴ where 12 months suspension from practice was ordered by the Tribunal, and ought to require

⁵² *Katamat v Professional Conduct Committee*, HC, Auckland, [2012] NZHC 1633, Williams J.

⁵³ Above at [87].

⁵⁴ 856/Phys/16/345P

a term of suspension for more than four months as ordered in *Dr L*.⁵⁵ The main distinguishing factor in *Dr L* is in that case the sexual conduct during the doctor's six-month clinical relationship with the patient was brief, albeit unwanted by the patient.

[98] The Tribunal is satisfied that a term of 12 months suspension from practice reflects the seriousness of the offending and to act as deterrent to other practitioners. We also consider it appropriate to reduce the term of the suspension to eight months to reflect that Dr Donaldson has already taken considerable steps towards his rehabilitation. He has complied with the Chiropractic Board's voluntary undertaking and agrees to recommence practice with the condition of ongoing supervision as set out in the Orders below.⁵⁶

[99] A significant feature in this case is the rehabilitative steps that Dr Donaldson has already taken to address his breach of professional boundaries. The period of time he has been not working in clinical practice is relevant to our assessment as during this time he has undergone significant psychological and psychiatric counselling. We accept that Dr Donaldson is capable of rehabilitation and provided that he continues on the rehabilitation pathway (with ongoing supervision) that a period of suspension from practice is a proportionate penalty.

[100] A penalty of suspension from practice for a period of 8 months and conditions with ongoing supervision will address the Tribunal's responsibility to protect the public, is the least restrictive penalty in all the circumstances, and is fair, reasonable and proportionate.

[101] Dr Donaldson will be censured to mark the Tribunal's severe disapproval of his conduct and his breach of professional boundaries.

⁵⁵ *PCC v Dr L* 1176/Med20/489P.

⁵⁶ At [144].

Costs

[102] The Tribunal may order the practitioner to pay part or all of the costs and expenses of and incidental to the HDC investigation and prosecution in respect of the Charge, and the costs of the hearing by the Tribunal.⁵⁷

[103] When considering the appropriate amount of costs, the Tribunal must consider the need for the practitioner to make a proper contribution towards the costs. In doing so, the Tribunal takes 50% of the total reasonable costs as a starting point.⁵⁸ An award of costs is not intended to be punitive and the practitioner's means, if known, should be considered.⁵⁹

[104] The Director provided a schedule of the HDC costs.⁶⁰ This schedule capped the Commissioner's investigation at 20 hours (\$2,000) and combined with the Director's hearing costs is a total of \$17,740. The estimate of the Tribunal's costs is \$12,268.80, a total of an approximate \$30,000 costs for both the HDC and the Tribunal costs.

[105] The Director sought a "nominal" contribution to her costs, between \$1,500 to \$2,000. She submitted that a starting point in relation to the Tribunal's costs is to take into account that Dr Donaldson has accepted the Charge and that this hearing has been able to proceed on the basis of an Agreed Summary of Facts, then 30% would be a reasonable contribution to the Tribunal's costs.

[106] Mr Napier initially submitted that Dr Donaldson was not in a position to contribute "much, if anything," to an award of costs.

[107] Evidence of Dr Donaldson's inability to pay a contribution to costs included two bank statements annexed to his affidavit that showed he has no savings or money held in them.⁶¹ These statements did not confirm, as Dr Donaldson deposed in his affidavit, that he is

⁵⁷ Health Practitioners Competence Assurance Act 2003, s 101(1)(f).

⁵⁸ *Cooray v Preliminary Proceedings Committee* HC Wellington, AP 23/4 Doogue J, 14 September 1995.

⁵⁹ *Vatsyayann v PCC* [2012] NZHC 1138.

⁶⁰ Document 9, Health and Disability Commissioner's Schedule of Costs.

⁶¹ Document 4, Affidavit of William John Donaldson dated 11 July 2022.

currently receiving payments under an Income Protection insurance policy of \$8,000 a month which stops when he turns 65 in November this year.

[108] Dr Donaldson deposed that he has no assets whatsoever. He produced through counsel a settlement statement showing approximately \$227,000 being the balance of proceeds from the sale of his home in December 2019.⁶² He has sold his chiropractic practice. He has not been working in clinical practice since December 2020.

[109] In assessing the appropriate costs contribution by the practitioner, the Tribunal takes into account Dr Donaldson's admission to the disciplinary charge, his cooperation throughout with the Director and the Tribunal, and his limited financial means. Dr Donaldson gave a clear indication that he intends to re-commence chiropractic practice following the term of suspension as ordered by the Tribunal.

[110] An order for costs in any 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.

[111] In this case, the Director has capped the Commissioner's investigation fee and sought a modest contribution of \$1500 - \$2000 towards her costs. The proportion of costs borne by the chiropractic profession relates to the Tribunal costs only. The practitioner must still make a reasonable contribution to those costs.

[112] Balancing all these factors the Tribunal orders that a contribution of \$2,000 is made towards the Director's total costs of \$17,740. In relation to the Tribunal's costs the Tribunal is satisfied a contribution of 35% of the Tribunal's estimated total costs, \$12,268.80, is a material reduction from the 50% starting point. The contribution to the Tribunal's costs will be fixed at \$4,300.

⁶² Document 25, Settlement statement for assets.

[113] The Tribunal is satisfied that the total costs of \$6,300 to be paid by the practitioner is just and proportionate to the overall costs of the total costs of the Commissioner's investigation and the disciplinary hearing.

Applications for permanent non-publication orders

Application by the practitioner

[114] An interim order for non-publication of the practitioner's name and any identifying details was made by consent with the Director.⁶³

[115] At the conclusion of the hearing Dr Donaldson applied for permanent order prohibiting the publication of his and his wife's name and prohibiting the publication of any particulars that may lead to the identity of Dr Donaldson, his practice, or his wife.⁶⁴

[116] Dr Donaldson provided an additional affidavit in support of his application, as did his wife, Mrs Sue Ellen Donaldson in which she describes the potential effect of publication on her and their children.⁶⁵

[117] The Director opposed the orders sought by Dr Donaldson. She advised that [Mrs O], the complainant, is also opposed to this application.

Legal Principles

[118] The Tribunal's power to order non-publication is governed by s 95(2) of the Act. The test under s 95(2) requires the Tribunal to be satisfied that it is desirable to make one or more of the orders listed in s 95(2).

[119] Section 95 of the Act provides:

95. Hearings to be in public unless Tribunal orders otherwise

⁶³ Order of interim name suppression for the practitioner and complainant dated 25 February 2022.

⁶⁴ Chiropractor's Application for Orders Prohibiting Publication of Names or Particulars of Case dated 11 July 2022.

⁶⁵ Document 23, affidavit of Sue-Ellen Donaldson (undated).

- (1) Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section or unless section 97 applies.
- (2) If, after having regard to the interests of any person (including, without limitation, the privacy of the complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:

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

[120] The starting point in any consideration of name suppression is the fundamental principle of open justice, a principle which is reflected in s 95(1) of the Act. This principle requires the proceedings to be held in public unless the Tribunal orders otherwise. The principle of open justice was emphasised by the Supreme Court in *Erceg v Erceg*.⁶⁶

[121] The test of what may be considered “desirable” under s 95(2) in this disciplinary jurisdiction is a considerably lower threshold than the “exceptional” civil test or the “extreme hardship” test in the criminal law.⁶⁷

[122] The public interest factors inherent in s 95(2) include:⁶⁸

- (a) Openness and transparency of disciplinary proceedings;
- (b) Accountability of the disciplinary process;
- (c) The public interest in knowing the identity of a health practitioner charged with a disciplinary offence;

⁶⁶ [2016] NZSC 135.

⁶⁷ *Johns v Director of Proceedings* [2017] NZHC 2843, Moore J at [162]-[167].

⁶⁸ *Nuttall 8/Med04/03P*

- (d) Importance of free speech (enshrined in s 14 of the New Zealand Bill of Rights Act 1990); and
- (e) The risk of unfairly impugning other practitioners.

[123] A useful comparison of the competing public and private factors has been provided by the Court in *Anderson v Professional Conduct Committee*:⁶⁹

[36] Private interests will include the health interests of a practitioner, matters that may affect a family and their wellbeing, and rehabilitation. Correspondingly, interest such as protection of the public, maintenance of professional standards, both openness and “transparency” and accountability of the disciplinary process, the basic value of freedom to receive and impart information, the public interest knowing the identity of a practitioner found guilty of professional misconduct, the risk of other doctors’ reputations being affected by suspicion, are all factors to be weighed on the scales.

[37] Those factors were also referred to at some length in the Tribunal. Of course, publication of a practitioner’s name is often seen by the practitioner to be punitive but its purpose is to protect and advance the public interest by ensuring that it is informed of the disciplinary process and of practitioners who may be guilty of malpractice or professional misconduct. It reflects also the principles of openness of such proceedings, and freedom to receive and impart information.

[124] The Tribunal must weigh these public interest factors against the interests of the practitioner and his family members and decide if it is desirable to make an order for suppression of the practitioner’s name and identifying details.

Analysis

[125] Mr van Roosmalen, counsel for the practitioner submitted that the Tribunal can be satisfied that it is desirable to make the non-publication orders sought. Publication would have a significant impact on Dr Donaldson’s family, including his wife and his elderly mother, and his rehabilitation. Mr van Roosmalen submitted it would do very little to protect the public from any further offending.

⁶⁹ High Court, Wellington, CIV-2008-485-1646 (14 November 2008) per Gendall J at [36]-[37].

[126] Counsel further submitted that publication would also not be fair on the purchaser of Dr Donaldson's business, and a number of other associates that base their practices (at least in part) on Dr Donaldson's teaching in the chiropractic field.

[127] We acknowledge that publication would have an impact on Dr Donaldson's family, on Dr Donaldson himself and in particular his wife. This is an inevitable consequence of the practitioner being found guilty of professional misconduct.

[128] The personal and professional reputation impact as a result of professional misconduct is on its own insufficient basis for non-publication orders. Reputational impact from publication is inevitable. Non-publication orders should not be granted merely to avoid stress and embarrassment that may be associated with a finding of professional misconduct. In *X v Director of Proceedings*,⁷⁰ the Court stated that there must be something more - "sufficiently compelling" – than stress or embarrassment to justify suppression of a practitioner's identity. We also acknowledge the impact of publication on Mrs Donaldson's relationship with her husband and the possibility that her mental health would also be affected.

[129] Little evidence has been provided to support these grounds advanced by Dr Donaldson and that in large part rely upon Dr Donaldson and Mrs Donaldson's own assessment of the adverse impact of publication on each of them. The Tribunal has not received any compelling medical or psychological evidence in support of Mrs Donaldson's state of health that would justify non-publication of Dr Donaldson's name so as not to identify her.

[130] Mrs Donaldson refers to the ongoing support of a psychologist, however no report was provided in support of this aspect of Dr Donaldson's application. Mrs Donaldson has stated that her clients would be prejudiced against her and there would be impact on her own work. Once again, we are unable to assess this impact.

[131] There is no evidence provided from the purchaser of Dr Donaldson's clinic, the Real Health Clinic. There is potentially a greater risk that if Dr Donaldson's name is not published

⁷⁰ [2014] NZHC 1798 at [14]-[15].

then other chiropractors such as the purchaser of his business could be impugned. The purchaser may be subject to suspicion that he is the chiropractor at the centre of the proceeding, not Dr Donaldson.

[132] Mr van Roosmalen submitted that there will be a detrimental effect on Dr Donaldson's students and other associates who attracted patients based on their knowledge acquired from Dr Donaldson and the reputation that precedes him in the chiropractic field. The transparency and accountability of the professional disciplinary process requires that senior practitioners such as Dr Donaldson who are involved in teaching and mentorship must be prepared to be accountable for their actions. These are matters that go to the reputation of the chiropractic profession.

[133] Having considered all of the evidence before us and weighed the competing factors we conclude that it is not desirable that Dr Donaldson's name and identifying details are suppressed. Public accountability through publication of the practitioner's name is one way in which professional standards are maintained.

[134] We are not satisfied that there is a real risk that publicity would have a significantly adverse impact on Dr Donaldson's ongoing rehabilitation. At the point in time that he recommences practice on the conditions set out in the penalty orders he will be under the supervision of a senior practitioner.

[135] The affidavits filed in support of Dr Donaldson show that there are a number of people, both colleagues and former patients, who are aware of Dr Donaldson's professional misconduct and that notwithstanding, they think highly of him and have offered their full support. With respect to Dr Donaldson's patients, if his name is published then they will have the ability to make an informed choice as to whether to utilise his services.

[136] A finding of professional misconduct necessarily entails a finding that the conduct was not trivial and reflects adversely on fitness to practise and the conduct is such that it requires

a response for the purposes of protection of the public.⁷¹ The disciplinary process needs to be accountable so members of the public and profession can have confidence in its processes.⁷²

[137] It is important that Dr Donaldson and other chiropractic practitioners understand that one of the consequences of a breach of professional boundaries and serious misconduct as has been found in this case can be that the public and professional peers become aware of the professional misconduct.

[138] The application for permanent name suppression for non-publication of Dr Donaldson's name and identifying details is declined.

[139] Mr van Roosmalen confirmed to us that it would make no difference if Mrs Donaldson's name was suppressed as she would be directly identified as the wife of Dr Donaldson. However, there will be redaction of paragraph 13 of the ASOF as this is unnecessary information for the purpose of establishing the Charge and may minimise the impact of publication on Mrs Donaldson.

[140] The non-publication order for the suppression of the names and identifying details of the complainant, [Mrs O], [Mr O] and their child [O] is to be made permanent pursuant to sections 95 and 98 of the Act.

Result and orders of the Tribunal

[141] The Charge of professional misconduct being malpractice pursuant to s 100(1)(a) of the Act and conduct that has brought and is likely to bring discredit to the chiropractic profession pursuant to s 100(1)(b) of the Act is established.

[142] The Tribunal makes the following orders pursuant to s 101 of the Act:

⁷¹ *F v Medical Practitioners Disciplinary Tribunal* HC Auckland AP21-SWO1, 5 December 2001 at [105]. This case was decided under the Medical Practitioners Act 1995, s 106 is materially similar in terms to s 95 of the Health Practitioners Competence Assurance Act 2003.

⁷² *Beer v A Professional Conduct Committee* [2020] NZHC 2828 at [40].

- (a) An order that Dr Donaldson's registration be suspended for a period of eight (8) months from the date of this decision pursuant to s 101(1)(b) of the Act;
- (b) An order that the following conditions apply when Dr Donaldson recommences practice as a registered chiropractor following his period of suspension pursuant to s 101(c) of the Act:
 - (i) Dr Donaldson, at his own cost, and for a period two years undergo professional supervision with a senior and experienced supervisor approved by the New Zealand Chiropractic Board. The supervision is to consist of monthly meetings (whether remotely or in person) to discuss Dr Donaldson's current workload, any issues arising of an ethical nature, and to discuss his stress levels and any issue which might potentially impact on his ability to practise in a competent and ethical way including adherence to professional expectations; and
 - (ii) For a period of two years, notify any prospective employers, chiropractic educational services, contracting parties for the provision of chiropractic services or professional partners of the Tribunal's decision.
- (c) An order for censure to mark the Tribunal's disapproval of the practitioner's breach of professional boundaries with a patient and Code of Ethics for Chiropractors pursuant to s 101(1)(d) of the Act;
- (d) An order that the practitioner pay a \$2,000 contribution to the costs of \$17,740 of the Director of Proceedings and a contribution of 35% of the estimated costs of the Tribunal being \$12,268.80, fixed at \$4,300; a total contribution of \$6,300 costs by the practitioner.

[143] The application for a non-publication order in respect of the practitioner's name and identifying details pursuant to s 95 of the Act is declined.

[144] The interim non-publication order in respect of Dr Donaldson's name and identifying details will continue for 21 days from the date of this decision to allow for the appeal period.

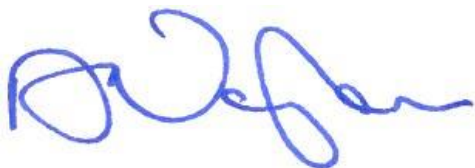
[145] The interim non-publication order for the suppression of the names and identifying details of [Mrs O], [Mr O] and [O] are to be made permanent pursuant to sections 95 and 98 of the Act.

[146] The Tribunal recommends that the Registrar of the New Zealand Chiropractic Board make this decision available to the Chiropractic Board of Australia.

[147] Pursuant to s 157 of the Health Practitioners Assurance Act 2003 the Tribunal directs the Executive Officer:

- (a) To publish this decision and a summary on the Tribunal's website; and
- (b) To request the New Zealand Chiropractic Board to publish either a summary of, or a reference to, the Tribunal's decision in its professional publications to members, in either case including a reference to the Tribunal's website to enable interested parties to access the decision.

DATED at Dunedin this 20th day of September 2022



A J Douglass
Chair
Health Practitioners Disciplinary Tribunal

SCHEDULE

PARTICULARS OF CHARGES

Pursuant to sections 91 and 100(1)(a) and 100(1)(b) of the Health Practitioners Competence Assurance Act 2003, the Director of Proceedings has reason to believe that a ground exists entitling the Tribunal to exercise its powers against you and charges that between October 2016 and November 2018, whilst caring for your patients [Mrs O] and her child [O] you, being a chiropractor, acted in such a way that amounted to professional misconduct.

1. On [] October 2016, during a period of time in which you were caring for [Mrs O] you discussed with [Mrs O] commencing a sexual and/or intimate relationship with her.

AND / OR

2. Between November 2016 and [] October 2018, while caring for [Mrs O], you:
 - (a) failed to set and/or maintain appropriate professional boundaries with your patient;

and/or

 - (b) engaged in a sexual relationship with your patient.

AND / OR

3. Between [] December 2016 and [] November 2018, while caring for [O], you engaged in a sexual relationship with [Mrs O].

The conduct alleged in the above three sub particulars separately or cumulatively amounts to professional misconduct. The conduct is alleged to amount to malpractice and/or negligence and/or conduct that brings discredit to the chiropractic profession under s100(1)(a) and s100(1)(b).