NEW ZEALAND HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL
TE RŌPŪ WHAKATIKA KAIMAHI HAUORA

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BEFORE THE HEALTH PRACTIONERS DISCIPLINARY TRIBUNAL
TARAIPUINARA WHAKATIKA KAIMAHI HAUORA

HPDT No:	**1294/Nur22/566P**
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 OF THE NURSING COUNCIL OF NEW ZEALAND** **Applicant**
AND	**ASHWANI AJESHINI LAL**, of Auckland, Enrolled Nurse **Practitioner**

Hearing:	25 January 2023
Tribunal:	Mr R D C Hindle (Chair) Mr M Mcllhone, Ms J Byford-Jones, Ms J Molesworth and Ms A Kinzett (Members)
Executive Officer:	Ms D Gainey
Stenographer:	Ms H Hoffman
Appearances:	Ms H de Montalk & Mr M McClelland KC for Professional Conduct Committee Mr D Fleming for Practitioner

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DECISION OF TRIBUNAL

INTRODUCTION

[1] This is a case about dishonesty that was calculated to, and did, mislead the Tribunal when it dealt with a charge that Enrolled Nurse Ashwani Ajeshini Lal (the '**practitioner**') was facing in 2020.

[2] The Tribunal's decision in the matter was given in writing on 9 December 2020: see *PCC v Lal* HPDT 1129/Nur20/478P.[1] The practitioner had presented that Tribunal with a document that she claimed to be a reference given by her then employer. The document was presented in support of a plea in mitigation of the penalties that were available to the Tribunal. In truth, the employer had refused to give her a reference. The document had been fabricated and then forged by the practitioner. It was presented to the Tribunal without anyone who was involved in the 2020 case knowing that it was anything other than what it appeared to be. [2]

[3] The practitioner would have succeeded in her subterfuge, had it not been for publicity which followed the 2020 decision.

[4] At the hearing of this matter, the practitioner admitted that her conduct in respect of the 2020 case amounted to professional misconduct which was deserving of a disciplinary sanction. For reasons which follow, the Tribunal considers that the appropriate disciplinary response is to cancel the practitioner's registration. It is therefore appropriate to set the facts out in some detail, notwithstanding the practitioner's guilty plea.

BACKGROUND

[5] The practitioner was first enrolled in August 2012. That gave her the first chance to practice as a nurse.[3]

[1] It is convenient to refer to this as the '**2020 decision**', and to the proceedings that gave rise to the 2020 decision as '**the 2020 case**'.
[2] The practitioner aside, of course.
[3] The significance of this comment will emerge below.

[6] In August 2017, the Nursing Council became aware that she had been convicted of two charges of dishonestly using a document for pecuniary advantage. The charges arose out of her use of:

(a) a credit card belonging to a patient at a hospital where the practitioner was working in mid-2016, to obtain the sum of $1,266.14; and

(b) a debit card belonging to colleague at the same hospital in November 2016, to obtain the sum of $291.93.

[7] The Police brought charges under s 228 of the Crimes Act 1961.[4] The practitioner pleaded guilty and was sentenced to pay reparation as well as to complete community work. The Police also referred the matter to the Nursing Council.

[8] That gave rise to the charge that came before the Tribunal in 2020. The hearing took place on 20 October 2020. In its written decision dated 9 December 2020, the Tribunal:

(a) censured the practitioner;

(b) suspended her registration for a period of nine months, noting that in doing so that it was recognising *"… the efforts Ms Lal has made towards rehabilitation in the four years since the conduct occurred and the trust she has been able to achieve with new employers";*

(c) required the practitioner to undertake an approved course in ethics within six months of any return to practise, and to notify prospective employers about the Tribunal's decision for a period of 12 months; and

(d) made orders in relation to costs and name suppression to protect the privacy of the patients who had been the victim of her theft. The Tribunal observed:[5]

[4] The offences each carry a maximum period of imprisonment of a term not exceeding seven years.
[5] At paragraph [56].

The Tribunal believes that Ms Lal has learnt her lesson and will not commit any act like this again against a patient or a colleague. She must recognise that this is a "once only" second chance.

[9] It is appropriate to note a number of passages from the 2020 decision:

(a) at paragraph [19]:

On numerous occasions, the Tribunal has held that dishonesty convictions reflect adversely on a practitioner's fitness to practice. This has included cases involving fraudulent claims for Government funding, such as Murdoch,[6] *and also cases of theft from individuals. For example, in Condon, an enrolled nurse had taken and used a credit card belonging to a colleague. The Tribunal said:*[7]

"It was accepted by the Tribunal that any breach of trust and especially the dishonesty offences for which Ms Condon has been convicted is conduct which must be regarded as totally unacceptable behaviour for any enrolled nurse. It is also the Tribunal's view that members of the public are entitled to expect to be able to trust and have confidence in the honesty of all members of the nursing profession. In this case, Ms Condon has let both herself down and the public. Accordingly, the Tribunal believes that Ms Condon's actions are ones that reflect adversely on her fitness to practise in the wider sense even if they did not occur in the workplace."

(b) in relation to evidence that was given by the practitioner in respect of the penalties under consideration at that time:[8]

Since July 2019, Ms Lal has worked for two different employers as a medical practice receptionist. These roles have involved liaising with patients, general administrative tasks and managing payments, cash and banking. In her current role, Ms Lal is sometimes the sole charge receptionist. Ms Lal voluntarily disclosed her theft convictions to both employers. Her current employer is aware she is facing this disciplinary charge and Ms Lal

[6] *Murdoch,* 76/PhyS06/45P.
[7] *Condon*, 23/Nur05/13P at [27].
[8] Paragraph [32].

> *produced a reference from her current employer. This reference confirms the employer is interested in employing Ms Lal as an enrolled nurse in the medical practice in the future and would be willing to support Ms Lal in her return to practise.*

(c) when considering whether the practitioner's registration should be cancelled, the Tribunal listed a number of mitigating factors including the following:

> *Ms Lal admitted her wrongdoing in the District Court and before this Tribunal. She has been willing to own up to her conduct and does not seek name suppression. She voluntarily disclosed her offending to her current and previous employer, both in the health sector.* [9]
>
> *…*
>
> *The amount taken was relatively small (by comparison to other cases before the Tribunal) and was used to pay utility bills when the practitioner was in financial difficulty. It is accepted that these were isolated and desperate acts stemming from Ms Lal's personal circumstances at the time. The offending was not calculated, sophisticated or systematic.*[10]
>
> *…*
>
> *Ms Lal has engaged in the disciplinary process and taken steps towards rehabilitation.*[11]
>
> *…*
>
> *Finally, positive changes in Ms Lal's personal life mean that the risk of reoffending appears to be low. She is supported by family, friends and her current employer in her desire to return to nursing.*[12]

[10] The Tribunal concluded that cancellation of the practitioner's registration was unnecessary. It saw no need to protect the public. It said that the practitioner had demonstrated that she was capable of rehabilitation.[13]

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[9] Paragraph [50](a).
[10] Paragraph [50](d).
[11] Paragraph [50](e).
[12] Paragraph [50](f).
[13] Paragraph [54].

[11] As can be seen, the Tribunal's understanding that the practitioner had the support of her employer was a significant element in its reasoning.

[12] The order for suspension ran from the date of delivery of the Tribunal's written decision, i.e., 9 December 2020. It follows that it ended on 9 September 2021.

[13] Of significance to these outcomes was the document that was produced to the Tribunal by the practitioner, and which purported to be a reference from her then employer. The document is dated 3 October 2020. It was addressed to 'To Whom it May Concern', and was headed as a reference for the practitioner. The employing doctor's name was given. She described herself as a GP, and an owner of the medical centre where the practitioner was said to be working as a receptionist. The document then stated:

> *I am aware that Ashwani is facing a disciplinary charge before the Health Practitioners Disciplinary Tribunal and that this letter will be provided as a reference for her at the hearing.*
>
> *When I met and interviewed Ashwani for the receptionist role earlier this year, she openly told me about her convictions and that she was facing a disciplinary charge before the Health Practitioners Disciplinary Tribunal. I was happy that she told me about this background as it showed me that she was transparent and honest with me. Her last employer gave her a good reference. Ashwani was remorseful and told me a bit about her ex husband and the circumstances around it. I really felt for her. I could see that to be bound in a controlling relationship is not easy and it is very hard to get out of it …*
>
> *We run a GP practice in Flat Bush which is very busy and we are open five days a week between 8.30 and 5.00pm. Ashwani works three days a week and looks after the running of the clinic on her own after 2.00pm when the senior receptionist leaves. Her main responsibilities are booking patient appointments, balancing the books for the total cash we receive at the clinic each day and banking the total cash we received at the end of the week. She also has other responsibilities like admin filing, transferring patients in and out of the practice, taking payments from patients (including cash), daily banking (counting the total cash for each day, writing in the book then putting the money in the safe) and completing ACC and Maternity claims as well as General Medical Services subsidy and Immunisation subsidy claims with the Ministry of Health.*
>
> *Ashwani has been working for me for about four months now. Ashwani is a responsible, reliable and hardworking employee. She is a very nice,*

> *kind natured girl and as an employer, I would say she has good integrity. I have also noted that she has a good relationship with her colleagues at the practice. She has taken up a lot of responsibilities in her role as a receptionist but she has mentioned she wants to return to nursing as she misses it. I have advised her that I would be able to take her on as a part-time nurse, if she could obtain a practising certificate. I would also be prepared to support her in getting back into this role.*
>
> *I hope this letter is helpful and helps Ashwani in some way.*

[14] At the foot of the typed document, the former employer's signature purports to have been given underneath her name.

[15] The practitioner now admits that she fabricated this document in its entirety. The purported signature is a forgery by the practitioner. More than that, it is now clear that not only did the former employer not give a reference, but that she refused to do so despite having been asked by the practitioner at least twice.

[16] The document was prepared by the practitioner and proffered to the Tribunal in a deliberate (and successful) attempt to deceive the Tribunal.

[17] Given the seriousness of the practitioner's actions, it is appropriate to make it clear that:

(a) no criticism can possibly attach to the former employer. She had no idea what the practitioner had done. It was her signature that the practitioner forged. She is a victim of the practitioner's dishonesty;

(b) similarly for the lawyers who acted and appeared for the practitioner at the October 2020 hearing. There is no suggestion that any of them had the faintest idea that the document that was provided by the practitioner was a forgery.[14]

[18] At the hearing before this Tribunal, the practitioner gave the following explanation for her actions:

[14] Very much to the contrary. The steps that were taken by the practitioner to conceal what she was doing from the lawyers are set out in more detail below.

> *After I was charged with theft, my world fell apart. I had to appear before the Tribunal and I faced losing everything.*
>
> *I was desperate. I had letters from a lot of other people, but not the person I worked for. She had told me she would give me one but then she didn't. She was in a dispute with her practice partner … and I think she was afraid of what he would say if she supported me.*
>
> *I panicked, and I did not think.*
>
> *I made a fake reference, and it was put forward in the last hearing.*
>
> *This was a big mistake. I wish I could turn back time and not do it but I panicked and I which obviously* [sic] *I am not proud of and which I have regretted ever since.*

[19] This evidence leaves an impression that a reason why the practitioner's former employer did not give a reference had to do with some complication in the relationship between doctors at the practice in question. In fact, it is now clear that the doctor was asked to give a reference and had refused, twice. The practitioner's statement of evidence at the present hearing does not seem to the Tribunal to be an entirely candid explanation of what really happened.

[20] More importantly, the Tribunal does not accept the practitioner's assertions that the document was written as an act of panic, or that she did not think about what she was doing, or any implicit suggestion that producing the document was something like a spur of the moment decision. One only has to read the document to see that it is a carefully constructed piece of writing. To achieve her objective, the practitioner had to write the document, forge the signature, present it to the lawyers representing her, and then stand by the fiction that it was a genuine reference throughout the hearing in 2020.

[21] This was a calculated and sustained exercise in putting false evidence before the Tribunal.

[22] Confirmation, if needed, is to be found in the steps the practitioner took at the time to conceal what she was doing:

(a) on 24 September 2020 the lawyers representing the practitioner in the 2020 proceedings received an email, apparently from the doctor who was said to be employing the practitioner at the time. It is now accepted that in fact the practitioner had fabricated the email address that was used to send the email. The doctor knew nothing about it. As far as the lawyers were aware, however, this was a request from the practitioner's employer to *"… outline for me what I need to provide in the letter for Tribunal to help Ashwani in her Nursing*";

(b) the lawyers responded, setting out topics a reference might cover, such as the referee's role at the practice, her relationship with the practitioner, her knowledge of the conviction or offending, her understanding of the purpose of the reference, any observations about the practitioner's character, and as to her aspirations in terms of future practice. The response also made it clear that the document should be signed and dated;

(c) on 28 September 2020 there was another email purporting to come from the practitioner's then employer. It provided a draft of the proposed reference and asked the lawyers to check it. Again, this was fiction. The email was in fact sent by the practitioner from the email address she had set up;

(d) the lawyers responded on 1 October 2020. Later the same day the practitioner used the false email address to provide further information including reference to banking and other aspects. Again, she asked for confirmation that the information was what was needed;

(e) the lawyers gave that confirmation on 3 October 2020. That is also the date that appears on the document that was later produced by the practitioner;

(f) on 6 October 2020 the practitioner sent two emails from the false email address to her lawyers. The first was to say that the document would be sent; the second was to send the document that she had created and forged in the name of her employer. That email said "*Attached is letter signed by me thank you."* That was untrue.

[23] At risk of belabouring the point, this was nothing like a spur of the moment, panicked reaction. The practitioner set about finding out what a reference might most usefully say, she then fabricated a document, and forged the signature on it. In doing so she paid obvious attention to the advice that had been given. She also created an email address for the purpose of concealing the fact that the document was not being given by her employer at all: the address was not, and has never been, an email address of the employer.

[24] The Tribunal that dealt with the case in 2020 had no reason to believe that the document was anything other than what it purported to be – i.e., a reference from a supportive employer, which was indicative of capacity for rehabilitation on the part of the practitioner, and reflecting considerable trust being reposed by the employer in the practitioner.

[25] The discussion in the Tribunal's 2020 decision, and the outcome on penalty, serves to establish that the practitioner's subterfuge was effective.

[26] The practitioner's dishonesty would likely have gone undetected but for a report of the Tribunal proceedings that was published in the New Zealand Herald in mid-March 2021. One of the doctors at the practice in question saw the article. He contacted the Nursing Council. He said that he had been the practitioner's employer but was not aware of her theft convictions, or that she had been facing disciplinary charges. He asked to see the reference that had been described in the New Zealand Herald article.

[27] The practitioner's deception was uncovered.

[28] The matter was referred to the Professional Conduct Committee (PCC) for investigation. The doctor whose signature had been forged by the practitioner provided the PCC with a statement saying that she did not write the document, that it was not her signature at the end of it, and that in fact the practitioner was not even working at the medical practice on the date given on the document i.e., 3 October 2020. The doctor's statement also makes it clear that she knew nothing about the convictions referred to. To the contrary, the doctor says that if she had known of the dishonesty convictions, she would not have given the practitioner a job or responsibility to deal with money.

[29] The doctor's first statement is dated 18 June 2021. It was made available to the practitioner.

[30] The practitioner nonetheless persisted with her false assertions. On 13 October 2021 she provided the PCC with the email chain referred to above, in purported proof of the fact that the document had been given by her former employer. She also provided a half-page statement[15] in which she repeated that the document had been provided by her former employer, again gave the explanation that the doctor's failure to give a reference was a reflection of a conflict between the doctors at the practice, and said:

> *… I just want this to be over, if I wanted I would have written all fake letters but that didn't even occur to me so I humbly beg you not to take this to HPDT as this is an outside matter that can be dealt with*.
>
> and, later,
>
> *"… I humbly request that this complaint be disregarded as it's wrong and unjust".*

[31] The PCC then obtained a further statement from the doctor. It is dated 5 November 2021. In it, the doctor made it clear that the email address that had been used by the practitioner was not hers (the doctors'), and that she had never had that address.

[32] The practitioner was asked to attend a Zoom meeting with PCC representatives. On 10 November 2021, she wrote in response:

> *Look, she wrote the damn letter ok. Starting to piss me of now! It's basically he said she said nursing council is so shit! Being accused of shit when it's not true and my lawyer corresponded with her it's all there and you calling me a liar ha ha ha … you need to change the meeting sorry.*

[33] That was then followed by a further message:

> *Again, I ask again stop all this and investigate properly. Bloody doctor … typical Indian lady being dishonest wtf.*

[15] The timing of the provision of this statement is not entirely clear, but it was before the PCC met to consider the matter; the practitioner accepted in evidence at this hearing that the document had been created to mislead the PCC.

[34] After a further letter from representatives of the PCC, on 14 October 2021 the practitioner wrote:

> *This getting ridiculous now. I have not impersonated anyone thank you people do have two emails sometimes this is really dum now I don't accept this goodbye, Indians always bring Indians down, just because she's dr you dont believe me stuff that.*

[35] The short point is that, not only did the practitioner proffer a false and forged reference to the Tribunal at the hearing in October 2020, when first challenged about it in the course of the PCC investigation she stuck doggedly and even aggressively to a story which she knew to be entirely false.

THE CHARGE/ADMISSIONS

[36] The PCC charges the practitioner as follows:

> *1.0 It is alleged that following the laying of charges against you with the Tribunal by the PCC appointed by the Nursing Council of New Zealand in March 2020, you created and/or used the email address* [details are given] *in the name of* [the former employer] *to communicate with … a Senior Associate of Claro Law for the purposes of the hearing before the Health Practitioners Disciplinary Tribunal on 20 October 2020, knowing the email address and attached documents were false. In particular:*
>
> *1.1 On 24 September 2020 you wrote and/or provided an email purporting to be from* [the former employer] *describing herself as Ashwani Lal's employer.*
>
> *1.2 On 28 September 2020 you wrote and/or provided an email purporting to be from* [the former employer] *attaching a draft of a letter.*
>
> *1.3 On 1 October 2020 you wrote and/or provided an email purporting to be from* [the former employer].
>
> *1.4 On 6 October 2020 you wrote/or provided an email purporting to be from* [the former employer].
>
> *1.5 On 6 October 2020 you wrote/or provided an email purporting to be from* [the former employer] *attaching a reference letter dated 3 October 2020 purporting to be from* [the former employer].
>
> *2.0 It is alleged that at a hearing of the Health Practitioners Disciplinary Tribunal (the Tribunal) held in Auckland on 20 October 2020 you misled the Tribunal by providing through counsel a reference purporting to have been written by* [the former employer] *dated 3 October 2020 knowing it to be false.*

3.0 *It is alleged that during an investigation by a PCC appointed by the Nursing Council of New Zealand to investigate a complaint that you had produced a false reference to the Tribunal on 20 October 2020, you attempted to mislead the PCC by producing documents you knew to be false. In particular:*

3.1 *An email dated 24 September 2020 purporting to be from* [the former employer] *describing herself as Ashwani Lal's employer.*

3.2 *An email dated 28 September 2020 purporting to be from* [the former employer] *attaching a draft of a letter.*

3.3 *An email dated 1 October 2020 purporting to be from* [the former employer].

3.4 *An email dated 6 October 2020 purporting to be from* [the former employer].

3.5 *An email dated 6 October 2020 purporting to be* [the former employer] *attaching a reference letter dated 3 October 2020 purporting to be from* [the former employer]

The conduct alleged in Charges 1.0, 2.0 and 3.0 amounts to professional misconduct pursuant to section 100(1)(a) and/or (b) of the Act and particulars 1.1 - 1.5 and 3.1 - 3.5 either separately or cumulatively, are particulars of that professional misconduct.

[37] At the hearing before this Tribunal, the practitioner admitted all these particulars. She also accepted that her conduct was professional misconduct deserving of a sanction. It could hardly have been otherwise.

[38] The Tribunal has no hesitation in finding professional misconduct to be established in the sense of conduct which brings discredit to the nursing profession (see section 100(1) (b) of the Act) and – more seriously – in the sense of that which is malpractice (see section 100(1)(a) of the Act). It is also clear that the conduct as charged, both separately and cumulatively, is deserving of a disciplinary sanction.

[39] There are two further matters that may usefully be noted here.

[40] The first is that a point was taken in relation to the third of the particulars charged, and timing. Specifically, Mr Fleming submitted that the Tribunal did not have jurisdiction to deal with particular 3, because the events in question took place at a time when the practitioner had been suspended. He relied on s 148(2) of the Act which provides:

> ***148. Cancellation or suspension not to affect existing liabilities***
> *…*
> *(2) The suspension of a registered health practitioner's registration does not affect his or her liability for any act or default occurring before the suspension.*

[41] The argument is that, by inference, this wording means that liability for acts or defaults occurring after suspension *is* affected, and in such a way that the Tribunal in this case is unable to deal with the third of the particulars charged.

[42] The Tribunal has significant reservations about the submission. Taken to an extreme, it would mean that any practitioner who has been suspended has something close to an immunity from further charge for acts undertaken or purportedly undertaken during the period of suspension. It seems an unlikely result. It is not, however, necessary for the Tribunal to decide the issue in this case. That is because it became clear on investigation that the events which make up the third particular of charge took place in and after October 2021. By then the practitioner's period of suspension had expired. Even if the point is available as a matter of law,[16] it does not assist the practitioner on the facts in this case.

[43] The second aspect to note relates to a submission that was made for the practitioner to the effect that[17] her conduct in putting the false email trail to the PCC (i.e., the conduct in particular 3) is less serious than the conduct of misleading the Tribunal in 2020 (i.e., the conduct in particulars 1 and 2). This was on the basis that she did not create any new falsified documents in 2021, and that by the time of the first case management conference in the Tribunal she had admitted that the reference and email trail were falsified, and had cooperated with the PCC thus averting the need for an evidential hearing as to liability.

[44] The Tribunal considers, however, that:

(a) even if it is debateable whether steps deliberately taken to mislead the PCC are more or less blameworthy than giving false evidence to the Tribunal, the point does not assist the practitioner here. Both are very serious acts of misconduct. As the email trail demonstrates, the fact is that the practitioner was trying to

[16] To be clear: this does not amount to accepting that it is.
[17] Putting any jurisdiction issue to one side.

dissuade the PCC from proceeding to a Tribunal hearing by using falsified documents; and

(b) as for the practitioner's acceptance of responsibility for her conduct, it is true that when she saw that a Tribunal hearing was inevitable she admitted what had really happened. But this was certainly not an immediate acceptance of responsibility. To the contrary, it only came after the practitioner had attempted to put the PCC off its investigation by producing the falsified email trail, and asserting her innocence aggressively and in a way that was intended to place blame on others.

HEARING

[45] Before turning to the assessment of penalty, it is relevant to include a note about what happened at the hearing of the matter on 25 January 2023.

[46] The focus of the hearing was always going to be the issue of penalty, including whether cancellation of the practitioner's registration was appropriate. In support of her position, the practitioner called the evidence of the business manager at the medical practice where she was working at the time of the January 2023 hearing. The business manager's statement recorded that the practitioner had informed the practice of her past offending, to explain why she would not get a clean Police vetting report. She said that the practitioner had initially been employed as a medical receptionist, but after her period of suspension had ended, she had moved into a nursing role. The business manager said that the practice regarded the practitioner as being a valuable member of the team.

[47] During the examination of the business manager's evidence, however, it became apparent that:

(a) the practitioner had told the business manager that the case about which she (the business manager) was being asked to give evidence had to do with claims by her former employer which she (the practitioner) regarded as false;

(b) the practitioner had not shown the business manager any of the documents in this case;

(c) the practitioner had not told the business manager what she had been charged with in this case; and

(d) the practitioner had not told the business manager that she had pleaded guilty to the charge.

[48] It is fair to say that the business manager was taken aback when told of the real nature of the charge being faced by the practitioner, and by the information that – far from contesting matters – in fact the practitioner had admitted guilt.

[49] The reality is that the practitioner was shown to have been very much less than candid about what she had told her employer about the case.[18] Even at the hearing in the Tribunal, the practitioner was demonstrating a propensity to tell half-truths, and to be less than candid, for perceived advantage.

PENALTY

[50] Mr Fleming properly accepted that a penalty is inevitable.

[51] The PCC's position was that the only appropriate penalty on these facts is cancellation of the practitioner's registration.[19] It was submitted that a lesser penalty would not protect the public, set appropriate standards, act as a deterrent, or punish the practitioner. Nor would any lesser penalty adequately reflect what were said to be the many aggravating features of the case.

[52] For the practitioner, Mr Fleming submitted that a further period of suspension, or cancellation of registration, would have a disproportionate impact having regard to the conduct giving rise to the charge; and that it would not be in the public interest to lose the

[18] The Tribunal attributes no responsibility to Mr Fleming for what happened. He was clearly working with the instructions he had been given. In the Tribunal's assessment, he conducted the case for the practitioner responsibly and with care. This was a situation entirely of the practitioner's making.

[19] Censure was also suggested, although not in any sense as an alternative to cancellation.

services of a nurse whose employer sees promise in her.[20] He suggested that it would be proportionate to make orders for censure, to impose a duty of disclosure of the offending for a period, and perhaps a modest fine.[21]

[53] Mr Fleming's submissions helpfully addressed the considerations relevant to assessment of penalty as summarised in *Katamat v Professional Conduct Committee*[22] and referred to in *Roberts v Professional Conduct Committee*[23] - i.e., as to what penalty:

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

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

(c) punishes the practitioner;

(d) allows for the rehabilitation of the practitioner;

(e) promotes consistency with penalties;

(f) reflects the seriousness of the misconduct;

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

(h) is the least restrictive penalty which is *"… fair, reasonable and proportionate in the circumstances"*.

Protection of the public

[54] Mr Fleming submitted that there is no evidence to show that by continuing to work as a nurse the practitioner will put the public at risk. He also and properly drew attention to the

[20] To be clear: this is a reference to the employer as at 2023, not to the practitioner's employer as at 2020. For reasons given, it is clear the business manager who gave evidence simply did not know what it was that the practitioner had been charged with, much less that she had pleaded guilty to the charge before the hearing began.

[21] Mr Fleming also suggested that there might be a requirement to pay costs, although as is noted below, that would be complicated by s 145(2) of the Legal Services Act.

[22] *Katamat v Professional Conduct Committee* [2012] NZHC 1633.

[23] *Roberts v Professional Conduct Committee* [2012] NZHC 3354.

fact that this case is not an exercise in punishing the practitioner again for the charges that were brought and dealt with in 2020. It is also correct to say that there is no evidence that the practitioner is clinically incompetent.

[55] For all that, the reality is that a dishonest practitioner is a danger to the public. The profession depends on the integrity of its members, particularly when there are adverse events. The circumstances of this case leaves the Tribunal with no confidence that this practitioner can be relied upon to give an honest account of events when it matters.

Professional standards

[56] Mr Fleming's submission accepted that there has been a breach of professional standards, with a penalty being warranted, but suggested that the penalty need not be harsh and that an outcome at the lower end of the options open to the Tribunal would be sufficient.

[57] The Tribunal does not agree that the circumstances here justify anything other than the most serious of penalties. It cannot be correct to say that sustained dishonesty of the character in this case is adequately addressed with a penalty at the lower end of the scale. That would be an inadequate reflection of the extent to which the practitioner's conduct has fallen below the standards of honesty, integrity and openness that the nursing profession is entitled to expect of its members. On this aspect, the Tribunal accepts the PCC's submission that the breaches established in this case point towards cancellation of the practitioner's registration.

Punishment

[58] The practitioner has admitted that she caused falsified evidence to be given to the Tribunal, and that she then attempted to mislead the PCC about what she had done. Again, Mr Fleming accepts that a penalty will be imposed, but submits that it need not be 'particularly severe'. He also submitted that the fact that the practitioner has had to go through a second Tribunal hearing has been a significant hardship already.

[59] The Tribunal's response is effectively as for the standard setting consideration (above). The dishonesty here was calculated and sustained. The Tribunal does not see punishment in

the form of (for example) censure, imposing an obligation of disclosure on the practitioner, or even a fine as bearing any real relationship to the culpability of the practitioner's conduct. Nor does it consider that there is any mitigation arising out of the fact that the practitioner has been subjected to two separate processes. That is a function of her conduct, no more and no less.

Rehabilitation

[60] Mr Fleming submitted, correctly, that the rehabilitation of practitioners is an important consideration. He argued that the public interest is not served by ending the careers of competent practitioners, provided they are capable of rehabilitation, and that the Tribunal should endeavour to avoid that outcome.[24]

[61] It is, however, one thing to refer to a general need for competent nurses; it is an altogether different thing to consider the position of a practitioner who has shown herself to be as dishonest as the practitioner in this case. The Tribunal certainly does not see a generalised appeal to the need for nurses as lending any weight to the argument that this particular practitioner's registration should not be cancelled.

[62] Mr Fleming submitted that timing and context is important – as he said, this is not an exercise in imposing further penalties on the practitioner in respect of the criminal offending that brought her before the Tribunal in 2020. He also submitted that the practitioner has not been charged with a continuing course of conduct;[25] that the falsified evidence was provided before the Tribunal gave her a 'second chance'; that she has since completed the ethics course required of her in the 2020 decision, and that, far from 'blowing' her second chance she had *"… successfully returned to nursing, and she has in fact been rehabilitated."* He added that the practitioner had not done anything since returning to nursing that would give rise to any concerns, and that she had admitted the charges.

[63] The difficulties with this argument, however, are that:

[24] Referring to *Roberts v PCC* [2012] NZHC 3354 at [47].
[25] The point being that in this matter she is charged with having provided one falsified piece of evidence.

(a) the Tribunal in 2020 did not know what it was dealing with when it gave the practitioner a 'second chance;'

(b) it is not quite correct to say that the practitioner is not charged with a continuing course of conduct: the charges relate not only to the falsified reference given in 2020, but also to the creation and use of a false email address, and the steps taken by the practitioner in and around October 2021 to put forward and rely on a false email trail in answer to the PCC's investigation;

(c) far from demonstrating any rehabilitation, the practitioner's initial response to the PCC's investigation demonstrates an ongoing propensity for dishonesty; and

(d) there is no reassurance to be gained from the way in which the practitioner communicated with her 2023 employer in relation to the hearing in this matter: she certainly did not tell the employer what she was charged with or that she admitted guilt when she asked the employer to give supporting evidence in the Tribunal.

[64] There was some discussion as to whether what the Tribunal had referred to in the 2020 decision as the practitioner's 'second chance' should be seen as a first chance or something else – but the debate does not matter. There is very little about the way in which the practitioner has conducted herself in the lead up to the present hearing, and even in the evidence given at the hearing, to satisfy the Tribunal that she has any real insight into the seriousness of her misconduct, much less that she will or is likely to conduct herself differently in future.

[65] There is no sufficient evidence of actual rehabilitation, or the prospect that rehabilitation may be possible in future, to outweigh other considerations which point towards cancellation.

Consistency with other similar cases

[66] On the issue of penalty, the Tribunal was referred to the following more or less similar cases:[26]

(a) In *N* (Med19/454P) malpractice and conduct bringing discredit to the profession was established in the case of a doctor who was found to have been a good surgeon with a commendable career. Rehabilitation was seen as a realistic option. The PCC in that case had not sought cancellation, but the PCC in this case drew attention to the following observation by that Tribunal:

> *"Any inquiry by the MCNZ as the registration authority, or by a professional conduct committee appointed by it to inquire into matters of concern, must be treated significantly seriously. Those enquiries call for complete accuracy and honesty in their responses from the practitioner. It is only if that happens that the MCNZ or the professional conduct committee can be properly or accurately informed about the matters on which it has to make decisions."*[27]

(b) *Emmerson (Med16/358P).* This was a case involving the prescription of drugs of dependence to family members and friends, including a charge that the doctor misled or attempted to mislead the PCC in relation to the full extent of her own methamphetamine use. The practitioner was found to have lied to the PCC in its investigation, and to have *"… maintained that lie for as long as it was possible to do so."*[28] It was a significant factor in the Tribunal's decision that, cumulatively, the charges warranted cancellation. The act of maintaining a lie for as long as possible bears a strong similarity with the present case. The Tribunal in *Emmerson* referred to *Hart v Auckland Standards Committee*[29]. Although, as Mr Fleming submitted, that is a case about a legal practitioner who had deliberately obstructed an investigation into his professional conduct, the same principle applies. If anything, deliberately lying to the 2020 Tribunal

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[26] This list does not purport to be a complete list of all cases referred to.

[27] At para [128]. It is fair to say that the 2020 decision is an object lesson as to the correctness of this passage.

[28] At para [54].

[29] *Hart v Auckland Standards Committee* [2015] 3 NZLR 103.

and then to the PCC in the subsequent investigation[30] seems to this Tribunal to be the more serious misconduct.

(c) *Jury* (272/ Psy09/130D*)*. In this case there had been an inappropriate personal relationship between a psychologist and a patient. Registration was ordered to be cancelled, there was an order for censure and a fine and costs;

(d) *PCC v Mrs O* (Psy07/58D). Here the practitioner's registration was cancelled, but the charge of misleading conduct would not have warranted cancellation in isolation from the other elements of the charge that were established;

(e) *Martin Med05/15D*. In contrast, in this case the Tribunal determined that the practitioner's conduct in misleading the Commissioner was the most culpable of the charges under consideration. The practitioner was censured and fined. Although the Tribunal did not cancel the practitioner's registration it did note that, had the practitioner not admitted her mistakes, then the possibility of suspension or *"even a more severe penalty"* would have been a real possibility:

> *"The Tribunal accepts that Dr N was not frank and completely honest with the Commissioner … because she was 'shocked, scared and worried'. Nevertheless the Tribunal must send a clear message to Dr N and all health practitioners that the Tribunal will punish those who are less than frank and honest with the Commissioner and others investigating complaints."*[31]

The Tribunal considers the conduct of the practitioner in this case to have been considerably more serious, in the senses that (for reasons given) her reaction was not a panicked response, but a calculated and sustained exercise in dishonesty; she did not admit to her dishonesty when it first came to light; and her dishonesty included giving false evidence on oath in the Tribunal.

(f) *Singh* (Nur12/212P), in which the practitioner's registration was cancelled. The Tribunal said:

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[30] For example, by purporting to rely on the email chain that the practitioner had fabricated in October 2020.
[31] Para [165].

> *"Having reviewed this material the Tribunal is concerned about Ms Singh's insight into her offending. She has now, in rapid succession, had two appearances before the Tribunal relating to dishonesty …there appears to be a continuing concern about Ms Singh's honesty. Honesty is a vitally important part of being a registered health professional for the protection of the public safety and the maintenance of standards. The Tribunal concludes that a period of suspension is not appropriate for this charge. Ms Singh has had an opportunity to rehabilitate herself and (after the 2011 hearing) has chosen not to do so."*

[67] The high points of these cases (at least, from the PCC's perspective) are the decisions in *Emmerson* and *Singh*.

[68] For the practitioner, Mr Fleming invited the Tribunal to see the practitioner's conduct in this case as being closest to Dr Martin's case, in which the admission of a practitioner's mistakes had effectively saved her registration. But, for reasons given, this Tribunal considers the conduct here to have been calculated and sustained; and the admission of liability only came when it became obvious to the practitioner that her account of events would not be accepted.

[69] In addition to these cases, the Tribunal also raised and sought submissions in relation to the decision in 1246/Nur21/506P. That decision is the subject of an appeal to the High Court. It will suffice to say here that, despite Mr Fleming's argument to the contrary, the Tribunal sees that case as being comparable to the present case: this case is at least as serious, if not more so.

[70] There is of course one other case to be noted under this heading, and it is the Tribunal's decision in the 2020 proceedings. On the evidence that it had before it at the time, the Tribunal suspended the practitioner's registration for 9 months. The outcome would obviously have been considerably less favourable to the practitioner at the time if the Tribunal had known that the employer's reference was a forgery.

[71] In all, the Tribunal agrees with the PCC that cancellation of this practitioner's registration is not out of step with other comparable cases.

Reflects seriousness of misconduct

[72] In *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2),*[32] Cooper J said of a lawyer's obligation to co-operate in disciplinary proceedings:

> *"… the provisions of [the Lawyers and Conveyancers Act] dealing with complaints and discipline are central to achieving the purposes of the Act. I consider that legal practitioners owe a duty to their fellow practitioners and to the persons involved in administering the Act's disciplinary provisions … to comply with any lawful requirements made under the Act. There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives.*
>
> *… The purpose of disciplinary procedures is to protect the public and ensure there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must cooperate with those tasks with dealing with the complaints made, even if the practitioners consider that the complaints are without justification."*[33] *…*

[73] The principle applies to cases under the Act. Deliberately giving false evidence is the antithesis of the obligations of candour and professionalism that lay on the practitioner.

[74] The Tribunal acknowledges that there are a range of options including fining and suspending the practitioner. The difficulty is that the practitioner has already been suspended for nine months, and after that period has shown no real improvement in her propensity to obfuscate and mislead.[34] It is true that by the time of the hearing she had admitted the charges against her but, as the account of events above shows, at least initially she not only rejected the charges but she did so aggressively. At the hearing she acknowledged that she did so in the hope that the problem would 'go away'.

[75] If the conduct here had been charged under s 108 of the Crimes Act, it would have carried a term of imprisonment for up to 7 years. Deliberately giving evidence under oath that is known to be untrue at the time it is given strikes at the heart of any judicial process, and the administration of justice.

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[32] *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2)* (HC Hamilton, CIV-2010-419-1209, 20 December 2010).

[33] Para's [108] and [109].

[34] That is notwithstanding the ethics course that she has attended.

[76] The Tribunal again agrees with the PCC that, in the somewhat extreme facts of this case, cancellation is an appropriate outcome notwithstanding that there are other options available.

Least restrictive alternative

[77] Mr Fleming is right to submit that suspension or cancellation are more restrictive than other available penalties. But for the reasons above, the Tribunal respectfully disagrees with his assessment of what proportionality requires in this case.

[78] In the Tribunal's view, cancellation is consistent with the seriousness of the conduct at issue.

Overall fairness and reasonableness

[79] Mr Fleming referred to evidence given both by the practitioner and a family member as to the impact on the practitioner should her registration be cancelled. He also referred to evidence given by the practitioner's present employer, to the effect that its practice would be affected by the loss of a *"competent nurse in whom the practice has invested significantly, and who is seen as having great promise".*[35]

[80] The reality is that the evidence that was given by the practitioner's employer in those respects was given in ignorance to the Tribunal of what the practitioner had actually charged with, or what was really in issue in the Tribunal proceedings.

[81] It will suffice to say that the Tribunal sees no private interests that outweigh the importance of setting and maintaining standards in a case such as this.

Conclusion as to penalty

[82] Despite Mr Fleming's capable argument for his client, the Tribunal has no doubt that cancellation is the appropriate disciplinary response to the circumstances of this case. A

[35] The persuasive value of that evidence is clearly compromised by the fact that the business manager did not really know what this case was about when she gave her statement.

practitioner cannot come to this Tribunal, give evidence on issues of substantive importance which they know to be false when giving it, try to conceal what they have done, and then – when caught out - hope that the starting point for evaluation of penalty will be something less than cancellation.

[83] There is an order pursuant to s 101(a) of the Act cancelling the practitioner's registration.

[84] The PCC also asked for an order for censure, although no particular submissions were directed to that issue. In the Tribunal's view, its disapproval of the practitioner's conduct is sufficiently marked by the order for cancellation of her registration. An order for censure will add nothing to that.

COSTS

[85] The Tribunal records that costs were incurred in this matter as follows:

(a) the PCC's costs including in relation to the investigation and presentation of the hearing came to $15,231.20;

(b) the Tribunal's costs were estimated at $20,322.70.

[86] Mr Fleming advised the PCC in advance of the hearing, however, that his client was in receipt of legal aid for the purposes of the matter. In the circumstances, s 145(2) of the Legal Services Act applies: see *Shi v PCC*.[36]

[87] The Tribunal makes no orders as to costs.

LIMITS ON PUBLICATION

[88] There are several aspects of publication to be dealt with.

[36] *Shi v PCC* [2021] NZHC 1550.

[89] Taking the position of the practitioner first, application was made for an order permanently prohibiting publication of her name in connection with these proceedings and/or of any details that might serve to identify her.

[90] There was little substantive argument as to the application of the relevant principles.[37] Effectively, the submission for the practitioner depends on a proposition that publication of her name will cause embarrassment and even harm to members of her family. The Tribunal does not consider it to be either appropriate or necessary to discuss the details; it will suffice to say that:

(a) as far as the practitioner is concerned, the fact is that her name has already been published in connection with the 2020 proceedings;

(b) as for the possible impact of publication of the practitioner's name in connection with this decision on family members and her employers past or present, none of the evidence put forward by the practitioner justifies a decision to make a general order under s 95(2) of the Act.

[91] At the same time, however, there are some aspects of the evidence which should not be published. Specifically, pursuant to s 95(2) of the Act, the Tribunal orders that there is to be no publication of:

(a) any of the practitioner's personal health information, and/or

(b) any information relating to earlier episodes of abuse she suffered at the hands of her former husband;[38] and/or

(c) the circumstances of her family members as averted to in the statements that have been filed about that subject.

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[37] Ms de Montalk helpfully referred to *Karagiannis* (181/Phar08/91P, 3 October 2008) at para's 78 to 80; and *Anderson v PCC* (Wellington High Court, CIV 2008-485-1646, 14 November 2008 per Gendall J) at [36 & [37].

[38] This order effectively confirms and continues the effect of the order at paragraphs [67] and [71](b) of the 2020 decision.

[92] Beyond that, however, the application to prohibit publication of the practitioner's name in connection with this proceeding is declined.

[93] In order to protect her procedural rights, the existing interim order for name suppression will continue to apply for 30 days following the date on which this decision is delivered to the parties but will then lapse.

[94] That aspect aside, there was also an application made by the PCC for orders that would prohibit publication of the names or identifying details of both the employer at the time of the 2020 proceedings and/or of the counsel who appeared for the practitioner in that hearing. The practitioner consented.

[95] In our view, however, there is no justification for orders of that kind. There is no doubt that both are victims of the practitioner's dishonesty. Even so, there is nothing about their circumstances that seems to the Tribunal to justify the making of the orders sought.[39]

ORDERS

[96] For the foregoing reasons:

(a) the Tribunal finds the charge to be established, and that the practitioner's conduct is deserving of a disciplinary sanction;

(b) the practitioner's registration as a nurse is cancelled under s 101(a) of the Act;

(c) the Tribunal makes no orders as to costs;

(d) there are orders pursuant to s 95(1) of the Act permanently prohibiting the publication of:

(i) any of the practitioner's personal health information, and/or

[39] For completeness, the Tribunal notes that in fact the practitioner had consented to the Tribunal making orders of the kind sought by the PCC.

(ii) any information relating to earlier episodes of abuse she suffered at the hands of her former husband;[40] and/or

(iii) the circumstances of her family members as averted to in the statements that have been filed about that subject;

(e) the existing interim order for name suppression will continue to apply for 30 days following the date on which this decision is delivered to the parties, but will then lapse;

(f) in all other respects the applications for orders under s 95(2) of the Act are dismissed.

[97] The Tribunal asks the Executive Officer, when appropriate, to:

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

(b) ask the Nursing Council 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 reference to the Tribunal's website so as to enable interested parties to access this decision.

Dated at Auckland this 23rd day of February 2023

Royden Hindle
Deputy Chairperson
Health Practitioners Disciplinary Tribunal

[40] This order effectively confirms and continues the effect of the order at paragraphs [67] and [71](b) of the 2020 decision.