



**NEW ZEALAND HEALTH
PRACTITIONERS
DISCIPLINARY TRIBUNAL**

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BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HPDT NO: 1384/Phar21/533P

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

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

BETWEEN **A PROFESSIONAL CONDUCT COMMITTEE appointed by
the PHARMACY COUNCIL OF NEW ZEALAND**

Applicant

AND **Mr JAYANT PATEL**, of Auckland, Registered Pharmacist

Practitioner

TRIBUNAL Ms A J Douglass (Chair)
Mr T Burns, Dr B Lu, Mrs J Dawson, Ms K Shaw

HEARING held by Audio-Visual Link (AVL) on 19 February 2024 (Liability) and
4 March 2024 (Penalty)

IN ATTENDANCE Ms C Pope, Executive Officer

COUNSEL Ms G Weir for the PCC
Mr I Brookie for the Practitioner

**DECISION OF THE TRIBUNAL
23 April 2024**

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Introduction

- [1] Mr Jayant Patel (Mr Patel) is a Registered Pharmacist based in Auckland. He faces two Charges laid by the Professional Conduct Committee (PCC) of the Pharmacy Council of New Zealand (Pharmacy Council).
- [2] The first Charge (Charge 1) is that Mr Patel has been convicted of a criminal offence, theft in a special relationship,¹ and this conviction reflects adversely on his fitness to practise as a pharmacist pursuant to s 100(1)(c) of the Health Practitioners Competence Assurance Act 2003 (the Act). The conviction relates to theft of products from [the Pharmacy] on [location], (the Pharmacy) where he was employed.
- [3] The second Charge (Charge 2) alleges that Mr Patel breached his professional and legal obligations as a pharmacist by selling or supplying the stolen products from the Pharmacy during his employment there between 2016 and 2020. These sales included pharmacy-only medicines not sold from a pharmacy.
- [4] Charge 2 is one of professional misconduct as the PCC allege that either separately or cumulatively, Mr Patel's conduct amounts to malpractice or negligence in relation to his scope of practice as a registered pharmacist and / or is conduct that has brought or is likely to bring discredit to the pharmacy profession pursuant to sections 100(1)(a) and (b) of the Act.
- [5] An amended Charge was filed on 2 November 2023 and is set out in Schedule A to this decision.²
- [6] Mr Patel largely admits both Charges and accepts that professional misconduct is established for both Charges, but only on the "discredit" limb of Charge 2.³ He has

¹ Crimes Act 1961, ss 220 and 223(a).

² Schedule A to this decision shows the Particulars of Charge but does not include "Schedule One", the list of pharmacy products referred to in particular 3(a) of the Charge. Schedule B to this decision is the Agreed Summary of Facts with Schedule One, as annotated by the practitioner.

³ Charge 2 is admitted only under s 100(1)(b) of the Act, not s 100(1)(a) of the Act.

signed an Agreed Summary of Facts (ASOF)⁴ which is set out in full in Schedule B of this decision.

[7] Mr Patel attended the hearing held by Audio-Visual Link (AVL) with his counsel, Mr Brookie. The liability hearing was held on 19 February 2024. The Tribunal indicated that the Charges were established and subsequently reconvened on 4 March 2024 for a penalty hearing.⁵

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

Background

[9] The following background is taken from the ASOF set out in Schedule B to this decision.

[10] Mr Patel is 38 years of age. He completed a Bachelor of Pharmacy at the University of Auckland in 2007 and was first registered with the Pharmacy Council to practise as a pharmacist in 2008.

[11] Mr E (the Complainant) started his pharmacy business at the Pharmacy in 2009.

[12] Mr Patel and the Complainant had been very close friends since studying together for their pharmacy degree at University and then working together for almost eight years.

[13] On 18 May 2012 Mr Patel was employed by the Complainant as a pharmacist.

[14] During the relevant period of the Charge, from January 2016 to April 2020, he was employed by the Complainant.

[15] Mr Patel was responsible for ordering dispensing stock and would often work as sole charge in the Pharmacy.

⁴ Document 3, Agreed Summary of Facts (ASOF).

⁵ Minute as to liability and an indication of penalty dated 7 March 2024.

- [16] The Pharmacy had a computer system that is used to place orders with suppliers. The offending occurred when Mr Patel would place an on-line order that included stock he knew was not required by the Pharmacy. When the items were delivered to the Pharmacy he would “zero” the stock ordered on the computer system. He would then place the ordered stock into his vehicle to take home at the end of his shift, thereby committing theft.
- [17] Mr Patel then listed and sold the stolen items on Trade Me for a financial gain. He used two Trade Me accounts for this purpose, called “Pharmintrade” and “Winners1”.
- [18] The Pharmacy calculated that he stole items valued at \$126,000.76, these items being the property of the Pharmacy.
- [19] The Complainant engaged a private investigator, Mr Toresen. On 2 April 2020 during an interview with Mr Toresen, Mr Patel admitted to the theft of the products from the Pharmacy and provided a statement.
- [20] On 9 April 2020 the Complainant reported the practitioner’s conduct to the Pharmacy Council.
- [21] On 7 May 2020 the Pharmacy Council requested that Mr Patel voluntarily surrender his practising certificate. Mr Patel did so and provided an undertaking not to practise.
- [22] On 20 May 2020, a PCC was appointed by the Pharmacy Council to investigate the matter.
- [23] During its investigation, the PCC identified that Mr Patel had been operating a second Trade Me account called “Winners1” and had made other sales outside the Trade Me platform. Additional reparation of \$15,629.35 was then paid by Mr Patel to the Complainant.
- [24] On 8 November 2021 a charge of professional misconduct was laid by the PCC against Mr Patel in the Tribunal.

- [25] In July 2022 Mr Patel was charged in the District Court with theft by a person in a special relationship in relation to the theft of the pharmacy products (including the pharmacy-only medicines) from the Pharmacy during the relevant period.
- [26] At the time of the criminal charge Mr Patel admitted the facts and apologised to the Complainant for his actions. Mr Patel subsequently entered a guilty plea to the one representative charge of theft by a person in a special relationship. He paid full reparation to the Complainant plus a further \$13,904 for the private investigator fees.
- [27] On 18 May 2023 he was convicted and sentenced to six months' community detention, 120 hours community work and an emotional harm payment of \$1,500 to the Complainant.
- [28] On 24 July 2023 the Pharmacy Council referred the practitioner's conviction to the PCC that had laid the original professional misconduct charge under sections 100(1)(a) and (b) of the Act.
- [29] On 24 October 2023 the PCC laid a further Charge upon referral of the criminal conviction pursuant to s 100(1)(c) of the Act.
- [30] An amended charge was filed in the Tribunal on 2 November 2023.
- [31] In the ASOF, Mr Patel has admitted Charge 1, that his conviction reflects adversely on his fitness to practise pursuant to s 100(1)(c) of the Act.
- [32] Mr Patel has also admitted Charge 2, as it relates to professional misconduct, to the extent that his conduct has brought or is likely to bring discredit to the profession, pursuant to s 100(1)(b) of the Act.

The Charges

- [33] The first Charge (Charge 1) concerns the criminal conviction Mr Patel received in the District Court on 8 May 2023. He was charged with one representative charge of theft by a person in a special relationship pursuant to ss 220 and 223(a) of the Crimes Act

1961. The offence for which Mr Patel was convicted was punishable by a maximum of seven years imprisonment.

[34] The conviction relates to the theft of pharmacy products (including pharmacy-only medicines) by Mr Patel on various dates in the relevant period between 1 January 2016 and 2 April 2020, when employed as a pharmacist by the Pharmacy. The PCC alleges that Mr Patel went on to sell or supply (including on Trade Me) to members of the public and / or other pharmacists.

[35] Charge 1 then proceeds to state that the conviction “either separately or cumulatively” reflects adversely on Mr Patel’s fitness to practise as a pharmacist. The Tribunal infers that the words “either separately or cumulatively” add nothing to this Charge as while Charge 1 has two particulars, the PCC need only establish that there is an eligible conviction and that that conviction reflects adversely on the practitioner’s fitness to practise as a pharmacist.

[36] Mr Brookie, counsel for the practitioner confirmed that Charge 1 was admitted and took no issue with Charge 1 being established as a ground for discipline under s 100(1)(c) of the Act.

[37] In respect of Charge 2, professional misconduct, the PCC allege that between 1 January 2016 and 2 April 2020 when employed as a pharmacist by the Pharmacy, Mr Patel failed to act with honesty and integrity and / or abused his position as a Registered Pharmacist. Particular 3 is divided into two parts as follows:

(a) Firstly, that Mr Patel sold or supplied stolen pharmacy products as set out in the Schedule attached to the Charge. Particular 3(a) relates to the sale of stolen pharmacy products to members of the public and pharmacists on at least 2,000 occasions, and that these included pharmacy-only medicines sold or supplied to members of the public in breach of the Medicines Act 1981; and

- (b) Secondly, with respect to pharmacy-only medicines in particular 3(b) of Charge 2, that Mr Patel sold or supplied these medicines to members of the public in breach of the Medicines Act 1981 and / or the Medicines Regulations 1984.

[38] At the commencement of the hearing the Tribunal granted leave to the PCC and amended the Schedule to the Charge. Items numbered 54 and 68 were removed as these items were not stocked by the Pharmacy. The amended Charge with an annotated Schedule of the itemised products (reduced from 68 to 66 products) is annexed to the ASOF in Schedule B of this decision.

[39] Counsel for the practitioner submitted that the core conduct in this case is divided into two categories. These are:

- (a) The practitioner stole items from his employer over an extended period of time and sold them for his own benefit; and
- (b) A small proportion of the items taken and sold were pharmacy-only medicines which were not sold from a pharmacy.

[40] Mr Brookie submitted that the PCC's approach to the Charges introduced a level of complexity to the case that was unnecessary. This was apparent from the division of the theft conduct into theft (Charge 1 – referral of conviction) and the sale of stolen items (part of Charge 2).

[41] In essence, Mr Brookie submitted that there was an overlap of the Charges because the sale of the stolen items – at least 2,000 items– as set out in particular 3(a) of Charge 2 related to Charge 1 – the referral of conviction.

[42] Mr Brookie submitted that the pursuit of the professional misconduct by the PCC under Charge 2, as malpractice and negligence under s 100(1)(a), when discredit to the profession under s 100(1)(b) is accepted by the practitioner adds nothing to the totality of the case.

- [43] Mr Brookie cited *Vohora v A Professional Conduct Committee*⁶ in support of this position. The Tribunal notes however, that in *Vohora*, in contrast to the present case, the disciplinary charges were laid “in the alternative” as opposed to “and / or”. The High Court held that a Tribunal cannot lawfully convene a hearing with a charge laid “in the alternative” but then discipline the professional on a cumulative basis.⁷
- [44] The Tribunal agrees with Mr Brookie’s analysis in part. There is substantial overlap between the conviction for theft of stolen items in Charge 1 and the sale of those stolen items as set out in the Schedule to Charge 2, particular 3(a).
- [45] The Tribunal observes that where there is a Charge upon referral of a conviction under s 100(1)(c) it is common for the PCC to also lay a Charge for professional misconduct that brings discredit to the health profession under s 100(1)(b) of the Act.⁸ Whether the PCC then choose to additionally lay the professional misconduct charge as malpractice and negligence under s 100(1)(a) is less common. This is not a conflation of the two sections that relate to professional misconduct.
- [46] There is inevitably a degree of overlap where the criminal offending results in a disciplinary charge for the conviction under s 100(1)(c) and for professional misconduct under sections 100(1)(a) and s 100(1)(b) of the Act.
- [47] The Tribunal accepts Ms Weir, counsel for the PCC’s submission that there is nothing jurisdictionally inappropriate in charging a health practitioner under both subsections, s 100(1)(a) and s 100(1)(b) of the Act in relation to the same conduct.
- [48] It remains open for the PCC to charge the practitioner for professional misconduct under both negligence and malpractice (s 100(1)(a)) and also conduct that has brought discredit to the profession (s 100(1)(b)). If the practitioner is found liable on both

⁶ *Vohora v A Professional Conduct Committee* [2012] NZHC 507

⁷ *Vohora v A Professional Conduct Committee* [2012] NZHC 507, per Whata J at [75].

⁸ See for example, *PCC v Knox Med21/515P*.

grounds it may not make any difference at the penalty stage. This is because there is a totality approach to the misconduct in arriving at a final penalty.⁹

Evidence and witnesses before the Tribunal

[49] The parties provided an Agreed Bundle of Documents¹⁰ (ABOD / Bundle) that included:

- (a) Mr Patel's registration details with the Pharmacy Council;
- (b) The private investigator's job sheets, emails and statements signed by Mr Patel;
- (c) Correspondence between Mr Patel and his lawyer at the time and to and from the Pharmacy Council;
- (d) A signed voluntary undertaking dated 7 May 2020 that Mr Patel would not practise as a pharmacist;
- (e) Correspondence from the PCC to other pharmacies;
- (f) Correspondence from and to the PCC and to Trade Me;
- (g) Documents relating to the conviction on 18 May 2023 and an extract of Court record;
- (h) Relevant legislation guidelines and statements;
- (i) A spreadsheet setting out the Trade Me account summaries of the two websites Mr Patel sold from – "Pharmintrade" and "Winners1"; and
- (j) A Schedule of Products prepared by counsel for the PCC.¹¹

⁹ *Vohora v A Professional Conduct Committee* [2012] NZHC 507, per Whata J at [73].

¹⁰ Document 1, Agreed Bundle of Documents (ABOD / Bundle).

¹¹ Document 5, Addendum to PCC Submissions on Liability.

[50] The ASOF confirms Mr Patel's admission to Charges 1 and 2. In relation to Charge 2, he admits that his conduct amounts to professional misconduct and that it has separately or cumulatively brought or is likely to bring discredit to the profession pursuant to s 100(1)(b) of the Act and is conduct of a nature that warrants the imposition of a disciplinary sanction.

[51] The ASOF is set out in Schedule B to this decision. Mr Patel annotated the Schedule attached to the Charge (Annotated Schedule) and annexed it to the ASOF to show those product lines that he did not admit to stealing. These disputed items include items 24-27, 38, 40-48, 50-52, 54-58, 61-62, and 64-68.¹²

[52] The annotated Schedule has a number of product lines identified in the following categories:

- (a) Pharmacy-only medicines (Product lines 1-16);
- (b) General sale medicines (Product lines 17-27); and
- (c) Other products (Product lines 28-68).

[53] Mr Patel disputed four of the product lines in the "Other General Sale Medicines" and the items highlighted under "Other Products".

[54] Mr Patel also filed an affidavit setting out these disputed items.¹³

[55] The Complainant's affidavit sets out how the discovery of the missing stock was made through CCTV footage of Mr Patel, the private investigation and the report to the Pharmacy Council.¹⁴

¹² ASOF, paragraph 11, Fn 1.

¹³ Document 7, Affidavit of Jayant Patel dated 9 February 2024.

¹⁴ Document 4, Statement of [Mr E] dated 7 January 2024.

[56] The Complainant has explained the impact that Mr Patel's theft has had on his business and his personal relationship with Mr Patel. The Complainant provided his victim impact statements from the criminal proceedings.

Charge 1 – referral of conviction

Relevant law

[57] Charge 1 is laid under s 100(1)(c) of the Act which provides:

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 s 91 against a health practitioner, it makes 1 or more findings that –

...

- (c) the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise;

[58] The Tribunal may make a finding under s 100(1)(c) only if the conviction is of a kind described in s 100(2).

[59] Section 100(2)(b) of the Act provides that where there has been a conviction that

- (b) has been entered by any Court in New Zealand or elsewhere for an offence punishable by imprisonment for a term of 3 months or longer.

[60] The PCC must establish two elements in relation to s 100(1)(c). These are:

- (a) Has the practitioner been convicted of an offence punishable by imprisonment for a term of 3 months or longer? and if so -
- (b) Does the conviction reflect adversely on his fitness to practise?

[61] Unlike charges of professional misconduct under sections 100(1)(a) and (b) it is not necessary for the Tribunal to determine that the conviction requires a disciplinary sanction to maintain standards or to protect the public.

Qualifying conviction

[62] Mr Patel pleaded guilty in the District Court to the one representative charge of theft by a person in a special relationship pursuant to ss 220 and 223(a) of the Crimes Act 1961.

[63] This offence is punishable by a term of imprisonment for a term not exceeding seven years.

[64] The conviction relates to the theft of pharmacy products (including pharmacy-only medicines) by the practitioner over a period of more than four years from 1 January 2016 to 2 April 2020, while he was employed as a pharmacist by the Pharmacy.

[65] On 18 May 2023 Mr Patel was sentenced to six months' community detention, 120 hours of community work and ordered to pay emotional harm in the sum of \$1,500 to the victim, the Complainant in this disciplinary proceeding.

[66] The first element of s 100(1)(c) is satisfied because the offence for which the practitioner was convicted is punishable by imprisonment for a term of three months or longer.

Reflects adversely on fitness to practise

[67] The second element of this Charge is whether the conviction reflects adversely on the practitioner's fitness to practise as a pharmacist.

[68] "Fitness to practise" is not defined in the Act. It is well established that the test for conduct that reflects adversely on a health practitioner's fitness to practise goes far beyond the health practitioner's clinical and technical competence and includes

consideration of whether the offending impacts on wider standards of professional conduct, and public and professional confidence in the profession.¹⁵

[69] Conduct which offends against the law will usually be regarded as adversely affecting the practitioner's fitness to practise, especially in relation to any serious criminal offences, breach of trust or dishonesty offences and is inconsistent with standards widely accepted of the profession.

[70] In *Hodgson*,¹⁶ the Tribunal said:

This Tribunal and the Courts have previously considered the meaning of "fitness to practise" under s 100(1)(c) of the Act, in relation to other practitioner conviction charges. It is clear from this body of case law that the conduct which offends the law will usually be regarded as adversely affecting the practitioner's fitness to practise. This is certainly the case in relation to any conviction for a dishonesty offence. "Fitness to practise" in the context of a conviction is not restricted to consideration of the practitioner's clinical ability. It involves the wider consideration of whether the practitioner's conviction reflects adversely on their overall fitness to practise, because the conduct leading to the conviction was either immoral, unethical or otherwise failed to uphold the law.

[71] In sentencing Mr Patel, Judge Maxwell noted that in terms of the magnitude and sophisticated manner of offending the sum that Mr Patel stole was significant and it occurred over a four-year period.¹⁷

Analysis and finding

[72] Mr Patel has admitted Charge 1 and accepted that his conviction reflects adversely on his fitness to practise as a pharmacist.¹⁸

[73] As the criminal charge was a representative charge there is very little detail in the criminal file about the extent of the offending. In the sentencing notes Judge Maxwell noted that "... the extent of the offending is also recognised by the value of items stolen

¹⁵ *Winefield* 60/Phar06/03P; *Mr R Phar*22/548P at [64], citing Justice Gendall in *PCC v Martin* CIV 2006-485-1461 High Court Wellington, 27 February 2007.

¹⁶ 740/Med15/315P at [58].

¹⁷ ABOD, Sentencing notes of Judge K Maxwell at [11], p 153.

¹⁸ ASOF at [52(a)].

at \$126,076". No reparation order was made because Mr Patel had already paid back the victim, who is the complainant in the disciplinary proceedings.

[74] The theft of the pharmacy products occurred from 1 January 2016 until 2 April 2020. On numerous occasions during the relevant period, the practitioner placed online orders for the Pharmacy with the Pharmacy's wholesaler in which he knowingly and without the Complainant's knowledge included additional stock that was not required by the Pharmacy and which he intended to sell for financial gain.

[75] These orders were paid for and delivered to the Pharmacy.

[76] Mr Patel would personally oversee the delivery, set aside the additional stock in nondescript cardboard boxes and then steal the additional stock by placing it in his vehicle and taking it to his home address, where he stored it in his bedroom.

[77] The overall dishonesty was disguised by "zeroing" the stock in the Pharmacy stock management system following delivery. This involved the practitioner manually editing each purchase order so that the additional stock was never recorded as having been received by the Pharmacy.¹⁹

[78] There are numerous cases before the Tribunal where convictions involving dishonesty by health practitioners have been acknowledged as reflecting seriously on the fitness of the health practitioner to practise their profession.²⁰

[79] The Tribunal accepts the PCC's submission that this was not a one-off spur of the moment error of judgement. Mr Patel's actions involved a deliberate and sophisticated system of deception and occurred once or twice a week over a period of more than four years.

¹⁹ ASOF at [6] – [10].

²⁰ For example, *Mr S* HP16/377P; *Blue Phar*19/464P; *Rich Nur*07/51P; and *Iskander Phar*14/277P.

[80] The theft involved a gross breach of trust as Mr Patel stole from his employer, a fellow pharmacist. He was trusted to work sole charge in the Pharmacy and to place online orders with the wholesaler.

[81] The stolen products included pharmacy-only medicines which are not available for general purchase and are subject to specific obligations on pharmacists.²¹

[82] Mr Patel failed to conduct himself in accordance with the law and as a consequence failed to uphold the integrity of the profession by abusing his position as a Registered Pharmacist.

[83] The Tribunal is satisfied that the second element of s 100(1)(c) is established and that this conviction for theft in a special relationship reflects adversely on the practitioner's fitness to practise.

[84] Charge 1 is established and is a ground for discipline under s 101 of the Act.

Charge 2 – Professional misconduct

Relevant law

[85] Charge 2 (particulars 3 and 4) is laid under s 100(1)(a) and / or s 100(1)(b) of the Act which provides:

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

²¹ ASOF at [11] and [15].

or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred;

[86] 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*,²² 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.

[87] Malpractice is conduct that is immoral, illegal or where there is conduct that is unethical or neglect of professional duties.

[88] In respect of negligence, the objective test is as described in *Cole* is as follows:²³

Whether or not in the Tribunal’s judgment, the practitioner’s acts or omissions fall below the standards reasonably expected of a health practitioner in the circumstances of the person appearing before the Tribunal. Whether or not there has been a breach of the appropriate standards is measured against the standards of a responsible body of the practitioner’s peers.

[89] In respect of bringing discredit to the profession under s 100(1)(b), this is another route by which professional misconduct may be established. In *Collie v Nursing Council of New Zealand*, Gendall J considered the meaning of conduct likely to bring discredit on the nursing profession as follows:²⁴

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 the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned.²⁵

²² [2001] NZAR 74 at [21].

²³ *Cole v Professional Conduct Committee* [2017] NZHC 1178 at [41].

²⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28].

²⁵ [2001] NZAR 74(HC) at [28].

[90] There is a well-established two-stage test for determining professional misconduct in this jurisdiction.²⁶ The two steps are:

- (a) First, did the proven conduct fall short of the conduct expected of a reasonably competent health practitioner operating in that vocational area? This requires an objective analysis of whether the health practitioner's acts or omissions can reasonably be regarded as being negligence and/or malpractice or, having brought or are likely to bring discredit to the practitioner's profession; and
- (b) Secondly, if so, whether the departure from acceptable standards has been significant enough to warrant a disciplinary sanction for the purposes of protecting the public and/or maintaining professional standards?

[91] In respect of the second step, the Tribunal must be satisfied that a disciplinary sanction is necessary in the particular circumstances to protect the public and maintain professional standards.²⁷ This is not an unduly high threshold – the relative seriousness of the conduct beyond warranting sanction, is a matter for penalty.²⁸

[92] The Pharmacy Council's Code of Ethics (Pharmacy Council of New Zealand *Code of Ethics* 2011 and 2018) (*Code of Ethics*) are relevant to establishing the appropriate standards and professional ethics of practitioners in the disciplinary jurisdiction.

Particular 3(a) - sale and supply of stolen goods

PCC's submissions

[93] In relation to the sale and supply of the stolen goods under 3(a), the PCC alleges that Mr Patel sold or supplied stolen pharmacy products to members of the public and pharmacists on at least 2,000 occasions, and that these included pharmacy-only medicines.

²⁶ *PCC v Nuttall* 08/Med04/03P; *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA), as applied in *Johns v Director of Proceedings* [2017] NZHC 2843 at [78].

²⁷ *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 (CA) at 17.

²⁸ *Martin v Director of Proceedings* [2010] NZAR 333, Courtney J at [32].

- [94] Ms Weir submitted that the practitioner stored the stolen goods in his bedroom at home and advertised them for sale on Trade Me for his own personal gain.
- [95] Ms Weir identified the Trade Me records that showed the practitioner advertised in excess of 6,000 separate listings over a period of more than four years, which resulted in approximately 2,000 sales.²⁹ The disputed items which Mr Patel says were not stolen products only accounted for 32 of the approximately 2,000 sales.³⁰ These disputed items are shown in the Annotated Schedule attached to the ASOF.³¹
- [96] The PCC does not accept the explanations given by the practitioner for these disputed items and submitted that on the balance of probabilities all of the items in the Schedule were stolen.
- [97] Ms Weir submitted that when first interviewed by the private investigator, the practitioner said that all the items listed for sale on the “Pharmintrade” account were stolen. At that time this was understood to be the practitioner’s only Trade Me account.³² He subsequently disclosed that he used a second Trade Me account called “Winners1”.
- [98] Counsel submitted that Mr Patel made repeat sales to Trade Me outside that platform, including to other pharmacists. For example, over a period of several years he sold almost \$1,000 worth of CareSens N test strips (for diabetes) to one pharmacy owner. Email exchanges were provided in support of these repeat orders.³³
- [99] The PCC submitted further that that some of the stolen products were pharmacy-only medicines. The sale of those products was unlawful because they were not sold from a licensed pharmacy.

²⁹ ASOF at 20; Trade Me spreadsheets, pp 239 and 336.

³⁰ ASOF at 11.

³¹ Schedule B to this decision.

³² ABOD p 9, Private investigator’s job sheet.

³³ ASOF at 22, ABOD p 74.

Practitioner's submissions

[100] Mr Brookie identified that there were two key issues regarding Mr Patel's liability for particular 3(a). Firstly, whether the PCC can establish to the required standard that the disputed items identified by the practitioner in the Schedule to the ASOF were stolen (as shown in Schedule B). Counsel submitted that the PCC could not do so and further that this factual point is not a crucial part of the overall case.

[101] Secondly, counsel for the practitioner took issue with whether the evidence justifies a finding of misconduct for Charge 2 on the basis of s 100(1)(a) malpractice and negligence as well as the accepted ground under s 100(1)(b). Mr Brookie submitted that the additional finding sought by the PCC is duplicitous and adds nothing to the totality of the case.

[102] Despite this submission, Mr Patel still accepts that the sale of stolen items would constitute misconduct under s 100(1)(b), namely conduct that has brought discredit to the pharmacy profession.

[103] Mr Brookie described as "subsidiary" the alleged breaches of the *Code of Ethics* which it was submitted added nothing to the dishonesty element of the case that is made stark from Charge 1.

[104] The crux of Mr Brookie's submission was that it is difficult to discern what the Charge under s 100(1)(a) (malpractice and negligence) adds to the case that s 100(1)(b) (discredit to the profession) does not already provide because of this overlap. Mr Brookie submitted that this particular of the Charge was not something that warrants disciplinary sanction.

Analysis and finding

[105] After careful consideration of all of the relevant evidence in respect of the sold pharmaceutical items, the Tribunal is not satisfied on the balance of probabilities that selling or supplying "various" stolen pharmacy products (including items on Trade Me) amounts to "at least" 2,000 occasions as set out in particular 3(a) of the Charge.

[106] This is for two reasons. Firstly, the word “various” does not mean that *all items* are to be included.

[107] The Tribunal is not satisfied that the 30 disputed items were stolen by Mr Patel from the Pharmacy.³⁴

[108] Mr Patel set out in his affidavit the disputed items that were variously sourced including items from his family and free sample items that he was given by the pharmaceutical firm representatives.

[109] Mr Patel also identified disputed items which were not stocked by the Pharmacy at the relevant time, including:

- (a) The Santis SP10 Outdoor Heart Rate monitor – item 54;
- (b) The 50ml sleep drops for adults – item 55; and
- (c) The Hismile Day & Night Toothpaste – item 68.

[110] Secondly, the Tribunal cannot be satisfied on the balance of probabilities that there were “at least” 2,000 occasions as identified in particular 3(a) where such sales occurred.

[111] In the job sheet recorded by the private investigator, Mr Gwilliam, Mr Patel spoke to another investigator, Mr Toresen. Mr Patel strongly denies Mr Toresen’s note that:

All items sold by “Pharmintrade” had been stolen from [the Pharmacy].

[112] This statement does not feature anywhere in the transcript of the interview between Mr Toresen and Mr Patel on 2 April 2020 when admissions were made by Mr Patel.³⁵

³⁴ Note that two items were deleted in the Amended Charge.

³⁵ ABOD, pp 11-34.

[113] Moreover, in Mr Patel's formal statement dated 3 April 2020 where Mr Patel listed the stolen items from memory none of the disputed items are included in that list.

[114] There is a letter dated 11 June 2017 and a list dated 30 March 2021 where it stated that:

Products sold by [the Pharmacy] appear on the "Winners1" Trade Me account.

[115] These items are not an allegation of all stolen items during the relevant period. As the PCC sets out, the 32 disputed items are .01% approximately of the occasions when Mr Patel is said to have stolen these items.

[116] Nor do we accept Ms Weir's submission that Mr Patel had plenty of opportunity to raise his objection to these disputed items before now.

[117] The Charge was laid in November 2021 before being referred to the Police for prosecution in the District Court. Counsel referred to a letter in June 2021 and the list of pharmacy items stocked at the Pharmacy. Mr Patel did not dispute these items at that time.

[118] The burden of proof lies on the PCC, not Mr Patel. Mr Patel has identified the disputed items in the Schedule to the ASOF as he is entitled to do so.

[119] The Tribunal is mindful that the standard of proof is the civil standard, namely on the balance of probabilities – whether it is more probable than not that these items were stolen.

[120] In *Z v Complaints Assessment Committee*,³⁶ the Supreme Court noted that in the disciplinary context 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.

³⁶ [2009] 1 NZLR 1 (SC) at [112].

[121] The Tribunal cannot confidently make a finding, on the balance of probabilities, based on the Trade Me spreadsheets and statements made by Mr Patel (that have not been tested in evidence) that there were *at least* 2,000 occasions when these products were sold to members of the public or other pharmacists.

[122] In relation to the two websites there were sales of 993 and 1,165 on Trade Me, a total of 2,158. If the disputed items (now 30) are removed, there is at least 2,128 products. However, the spreadsheets provided by Trade Me show that there were a lot of personal items identified that are not pharmaceutical items.

[123] For example, on the “Winners1” account there was a tower fan, a handbag and a barbecue.³⁷ Moreover, there is evidence that there were sales to other pharmacists. It is difficult to identify whether all of these items could be said to fit into the category of “pharmacy items” or whether they are personal items.³⁸

[124] Charge 2, particular 3(a) is not established.

Particular 3(b) – pharmacy-only medicines

Regulation of pharmacy-only medicines

[125] In relation to particular 3(b), the PCC allege that Mr Patel sold pharmacy-only medicines. The Tribunal turns to consider the relevant law and regulation of the sale of pharmacy-only medicines.

[126] Section 3 of the Medicines Act 1981 provides that certain medicines are classified as pharmacy-only medicines.³⁹ The sale of pharmacy-only medicines is restricted as set out in s 18(1)(c) as follows:

³⁷ ABOD, pp 651, Trade Me spreadsheet Tower Fan, # 658, and #667 Barbecue.

³⁸ Airport Oaks, p 117 offline sales for diabetic strips were sold outside of the Trade Me selling platform.

³⁹ ABOD, p 158.

18. Sale of medicines by retail

- (1) ... no person shall, in the course of any business carried on by that person, sell by retail, or supply in circumstances corresponding to retail sale, ...—

...

- (c) any pharmacy-only medicine unless the medicine is sold, supplied, or distributed by—
 - (i) a person under the supervision of a pharmacist in a pharmacy or a hospital;

[127] The medicines are classified as pharmacy-only medicines in Schedule B, Part 3 of the Medicines Regulations 1984.⁴⁰

[128] The Pharmacy Council has issued two standards and one set of guidelines that are relevant. They are: *The Promotion and Supply of Medicines over the Internet Statement* (November 2015), *Statement on Telehealth and Supply of Pharmacy Services over the Internet* (March 2019) and *Advertising Guidelines* (January 2014, updated April 2018). These documents set out the obligations on pharmacists when supplying medicines via the internet. These obligations include:

- (a) All legal requirements for the supply of the relevant medicine, and any additional requirements for selling over the internet, must be complied with;
- (b) Medicines may only be supplied from a licensed pharmacy as required by s 18 Medicines Act 1981;
- (c) The name and address of the contact details of the pharmacy and the name of the charge pharmacist must be provided; and
- (d) The standard of advice and services must be the same level to which that would be received by a patient consulting directly with the pharmacist.

⁴⁰ ABOD, p 172.

Analysis and finding

[129] With respect to the pharmacy-only medicines in particular 3(b), Mr Patel has admitted that he sold these products in breach of the Medicines Act 1981 and that he failed to comply with the Pharmacy Council's statements.⁴¹

[130] The Tribunal is satisfied that Mr Patel did supply pharmacy-only medicines to members of the public in breach of the Medicines Act.

[131] The practitioner advised Trade Me that he was a pharmacist. However, he did not disclose that he was not a "pharmacy" as required under the s 18 of Medicines Act 1981. Mr Patel was conducting the retail sale of pharmacy-only medicines that were not sold, supplied or distributed by "a person under the supervision of a pharmacist in a pharmacy".

[132] Although such products are allowed to be sold by pharmacies via the internet, the Pharmacy Council's Standards and Guidelines require pharmacies to provide contact details and the name of the charge pharmacist so that customers are able to access the same level of service they would receive in person at a pharmacy.⁴²

[133] With respect to pharmacy-only medicines, we are satisfied on the balance of probabilities that Mr Patel did sell or supply to members of the public the medicines in breach of the Medicines Act 1981 and Medicines Regulations 1984.

[134] Mr Patel's conduct was deliberate, repeated and highly unethical and is malpractice in his scope of practice.

[135] Charge 2, particular 3(b) in relation to the sale of pharmacy-only medicines is established as malpractice and discredit to the profession.

⁴¹ ASOF at 17-18 and 52(b)(iii) and (iv).

⁴² *Statement on Promotion and Supply of Medicines over the Internet* (2015), Pharmacy Council of New Zealand Code of Ethics (2018).

[136] Mr Patel's conduct, by selling and supplying stolen pharmacy items from his employer, including pharmacy-only items, is a significant departure from professional standards and the regulation of medicines. The Tribunal has no doubt that this conduct is sufficiently serious to warrant a disciplinary sanction.

Particular 4 – breach of professional obligations

[137] In relation to particular 4, we are satisfied that Mr Patel breached his professional obligations as a pharmacist including the standards of ethical conduct set out in the Pharmacy Council's *Code of Ethics* and the applicable standards for the sale of these pharmacy-only items on the internet.⁴³

[138] The Tribunal does not accept Mr Brookie's submission that the applicable professional standards for pharmacists are subsidiary matters. Rather, these professional standards serve as the very purpose of professional discipline.

[139] The Tribunal has at the forefront of its deliberations that the primary purpose of its disciplinary powers is the protection of the public and the maintenance and the setting of professional standards. This requires an assessment of whether the conduct of the practitioner conforms to the standards generally expected of them and whether there has been a departure of those standards.

[140] In *B v Medical Council*,⁴⁴ Elias J (as she then was) said:

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

⁴³ See Standards and Guidelines set out at paragraph 137 above.

⁴⁴ *B v Medical Council* [2005] 3 NZLR 810.

[141] Principle 4 of the *Code of Ethics* requires a pharmacist to act with honesty and integrity, and to maintain public trust and confidence in the profession. It further requires pharmacists to demonstrate accepted standards of professional and personal behaviour.⁴⁵

[142] Principle 5 requires a pharmacist only to practise under conditions which uphold the professional independence, judgement, integrity of themselves and others. Relevantly, this includes an obligation to fulfil “all legal obligations” and to behave in a manner that “clearly demonstrates responsibility and accountability for all decisions made and actions taken” in their professional practise. It is highly relevant therefore that Mr Patel was acting unlawfully and in breach of s 18 of the Medicines Act 1981.

[143] Principle 7E states that a pharmacist:

attains and maintains the highest possible degree of ethical conduct and avoids any conduct that might bring the profession into disrepute or impair the public’s confidence in the pharmacy profession, colleagues or other healthcare professionals.

[144] The Tribunal is satisfied that these departures from professional standards by Mr Patel are not only in breach of the law but are highly unethical and unprofessional conduct that warrants a disciplinary sanction.

[145] Charge 2, particular 4 is established.

Summary of findings on liability

[146] Charge 1 (particulars 1 and 2) is established. The theft of pharmacy products (including pharmacy-only medicines) is a qualifying conviction, namely theft by a person in a special relationship pursuant to ss 220 and 223(a) of the Crimes Act 1961. Mr Patel went on to sell or supply the pharmacy products to members of the public and other pharmacists and this reflects adversely on the practitioner’s fitness to practise.

⁴⁵ ABOD, p 221.

[147] In respect of Charge 2 (particulars 3 and 4), while the Tribunal is satisfied that Mr Patel failed to act with honesty and integrity and abused his position as a registered pharmacist by selling or supplying various stolen pharmacy products (including some of these items on Trade Me). The Tribunal is not satisfied that all of the products as shown in the Schedule to the Charge (annexed as Schedule B to this decision) were sold to members of the public and pharmacists. Nor can we be satisfied, on the balance of probabilities, that the selling or supplying of the stolen pharmacy products was at least on 2,000 occasions. Therefore Charge 2, particular 3(a) is not established.

[148] The Tribunal is satisfied that in relation to Charge 2, particulars 3(b) and 4 is conduct that is malpractice in Mr Patel's scope of practice. This conduct was deliberate, repeated and unethical, and a serious departure from professional standards expected of a registered pharmacist.

[149] Mr Patel's conduct in respect of Charge 2 is conduct that is likely to bring discredit to the profession. His conduct offends against the trust and confidence that members of the public are entitled to assume when holding himself out as a registered pharmacist.

[150] Charge 2 is therefore established under particulars 3(b) and 4, both separately and cumulatively, as malpractice in Mr Patel's scope of practice and conduct that has brought discredit to the profession. Mr Patel's conduct is a serious departure from professional standards and warrants a disciplinary sanction.

Penalty

Penalty principles

[151] Having found the two Charges established, the Tribunal must go on to consider the appropriate penalty order under s 101 of the Act. The penalties may include:

- (a) Cancellation of the practitioner's registration;
- (b) Suspension of the registration for a period not exceeding three years;

- (c) An order that the practitioner may only practise with conditions imposed on employment, supervision or otherwise;
- (d) Censure;
- (e) A fine of up to \$30,000; and
- (f) An order that the costs of the Tribunal and / or the PCC to be met in part or in whole by the practitioner.

[152] The Tribunal adopts the principles contained in *Roberts v Professional Conduct Committee*,⁴⁶ where Collins J identified the following eight factors as relevant whenever the Tribunal is determining an appropriate penalty. The Tribunal should always 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 the rehabilitation of the health practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty "fair, reasonable and proportionate in the circumstances".

⁴⁶ [2012] NZHC 3354 per Collins J at [44]-[51].

[153] There are a number of authorities that deal with the issue of cancellation and suspension where a practitioner has been referred to the Tribunal following a criminal conviction and/or found guilty of professional misconduct.

[154] In *PCC v Martin*,⁴⁷ the High Court noted:

Removal from the Register or striking off may have the consequences of a punishment but as has been made clear in many cases the order is not made by way of punishment but because the person was not a fit and proper person to remain registered as a professional person. If the conviction and the actions of the practitioner lead to the conclusion that he/she is not fit to be registered as a nurse, or to practise in a particular profession, then deregistration or suspension is inevitable.

[155] In *A v A Professional Conduct Committee*⁴⁸ the Court discussed the range of sanctions available to the Tribunal, particularly cancellation and suspension.⁴⁹ Keane J adopted the relevant principles from the Privy Council's decision in *Taylor v General Medical Council* and said that:

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 disproportionate. Fourthly, suspension is most apt where there is "some condition affecting the practitioner's fitness to practise which may or may not be amendable to cure". Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.

[156] In *Bainbridge v PCC*⁵⁰ Gordon J noted that in cases of possible cancellation of the practitioner's registration, the following principles are particularly relevant:

- (a) The primary purpose of cancellation or suspension is to protect the public and the choice between the two turns on what is proportionate;⁵¹

⁴⁷ *PCC v Martin* HC Wellington CIV-2006-485-1561, 27 February 2007 per Gendall J.

⁴⁸ *Taylor v General Medical Council* [1990] 2 All ER 263.

⁴⁹ *A v A Professional Conduct Committee* CIV-2008-404-2927 5 September 2008, Keane J at [81].

⁵⁰ Also referred to as *JD v PCC* [2022] NZHC 3289, 8 December 2022.

⁵¹ *A v A Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].

- (b) Cancellation is ordered not by way of punishment but because the person is not a fit and proper person to remain registered;⁵² and
- (c) The Tribunal must consider the available alternatives to cancellation and explain why less severe options have not been adopted in the circumstances of the case.⁵³

PCC submissions

[157] The PCC's primary submission is that cancellation of the practitioner's registration is the appropriate penalty in this case.

[158] In the event that cancellation is not ordered, counsel for the PCC submitted that a lengthy period of suspension from practice for 18-24 months and conditions on return to practise ought to be imposed by the Tribunal, for a further 12 months.⁵⁴ These conditions would include that the practitioner not:

- (a) be in sole charge of a pharmacy;
- (b) supervise other pharmacists or intern pharmacists; and
- (c) he must disclose the Tribunal's decision on penalty to any employer or agencies with whom he engages for the provision of pharmacy services.

[159] Counsel for the PCC submitted that Mr Patel's conduct represents an extraordinary level of dishonesty. The duration of the conduct, the volume of products involved and the sophisticated nature of the operation are all relevant to the question of penalty.

[160] Ms Weir submitted that much of the liability hearing focused on whether Mr Patel stole approximately 30 individual pharmacy items from the Pharmacy, which he claimed he had sourced elsewhere (the "disputed items"), in relation to particular 3(a). This was a very small part of the overall total of items stolen. However, as the practitioner has

⁵² *Professional Conduct Committee v Martin* HC Wellington CIV-2006-485-1461, 27 February 2007 at [24].

⁵³ *Patel v Dentist Disciplinary Tribunal* HC Auckland AP 77/02 8 October 2002 at [31].

⁵⁴ Document 8, Penalty submissions for Professional Conduct Committee dated 21 December 2023 and Further Penalty Submissions for Professional Conduct Committee dated 28 February 2024.

acknowledged, the disputed items are *“dwarfed by the other sales of stolen medicines”*.⁵⁵

[161] Ms Weir summarised the scale of Mr Patel’s offending during the relevant period as follows:

- (a) Mr Patel stole from the pharmacy the 39 product lines that are not highlighted in the Annotated Schedule to the ASOF. These are defined in the ASOF as the “Stolen Products”;
- (b) The thefts occurred once or twice a week over a period of more than four years.¹⁰ Mr Patel’s method of concealing his stealing was sophisticated;
- (c) He listed the Stolen Products for sale on Trade Me on approximately 6,000 separate occasions and concluded at least 2,000 separate sales to members of the public and / or other pharmacists;
- (d) This included the theft and on-sale of approximately 340 to 400 packs of pharmacy-only medicines (i.e. 17-20% of overall sales);
- (e) He made additional sales outside of the Trade Me platform. The sales to [a Pharmacy] were only one example of this conduct, which the PCC uncovered during its investigation through an analysis of Mr Patel’s bank records; and
- (f) The total value of the Stolen Products was significant: \$126,076.

[162] While Mr Patel has admitted that his sales of stolen pharmacy-only medicines were in breach of the law and amounted to professional misconduct, Ms Weir submitted that in his evidence to the Tribunal he sought to minimise this by saying that he supervised the sales as a registered pharmacist and that customers were able to ask questions.

⁵⁵ Affidavit of Jayant Patel at [2.3].

[163] Mr Patel has provided no evidence of this happening (for example, emails to buyers providing advice) and, for obvious reasons, he does not appear to have identified himself to buyers by name or profession. It is not the PCC's role to prove any matters raised in mitigation or defence.

Practitioner's submissions

[164] Mr Brookie, counsel for the practitioner submitted that cancellation was not appropriate in this case and that suspension with conditions was a preferable option.⁵⁶

[165] Mr Brookie rejected the PCC's characterisation of the seriousness of the conduct. Counsel submitted that the pharmacy-only medicine breach in particular is not serious misconduct.

[166] Mr Brookie initially submitted that if cancellation was ordered by the Tribunal, a 12-month period prior to re-application, as opposed to 18 months sought by the PCC, before he could reapply under s 102. Counsel later revised this submission to a period of 9 months before which Mr Patel could re-apply for registration.

[167] Mr Brookie submitted that suspension should be preferred. Mr Patel's suspension from practice of no more than 12 months would be the least restrictive outcome that is appropriate in the circumstances.

[168] Although Mr Patel accepts the pharmacy-only medicines that he sold were not sold from the Pharmacy, those sales were supervised by a qualified pharmacist – himself.

[169] Mr Brookie submitted that the delay involved in this case of nearly four years due to the matter being referred to the criminal court and then back to the PCC has taken a toll on the practitioner.

⁵⁶ Document 11, Supplementary memorandum regarding media coverage and penalty.

[170] Counsel disputed the PCC's submissions where the PCC identified the alleged ongoing dishonesty of holding back the full details of his offending, a lack of insight, no evidence of rehabilitation and ongoing risk to the public.

[171] In August 2020, Mr Patel consulted Mr Jim Van Rensburg, a clinical psychologist. Mr Rensburg's report was provided to the Tribunal.⁵⁷ Mr Brookie submitted that the report confirms that this practitioner presents with a low risk of reoffending and that his remorse is genuine.⁵⁸ Mr Patel has apologised to the Complainant.

[172] Mr Patel provided two references, one from a pharmacy retail manager and another from his brother-in-law.⁵⁹

[173] Mr Brookie further submitted that the publicity arising from these disciplinary matters should have a bearing on the outcome of penalty.

Comparable cases

[174] The Tribunal was presented with a large number of cases involving criminal offending by health practitioners. Every case must be considered on its own facts.

[175] Mr Brookie submitted that several cases relied on by the PCC involved more serious offending for theft of *prescription* medicines, not pharmacy-only medicines.

[176] The PCC submitted that those decisions are nevertheless relevant. Both prescription and pharmacy-only medicines are regulated due to the risk of harm. Also, the cases cited all involved pharmacists stealing medicines from their workplaces. This is relevant because a pharmacist's role includes that of a medicines manager and the practice of pharmacy expressly includes the custody of medicines.⁵

⁵⁷ Document 7, Affidavit of Jayant Patel, Exhibit A, Report of Mr Jim Van Rensburg.

⁵⁸ Further submission from practitioner's counsel.

⁵⁹ Bundle, pp 139-140.

[177] The Tribunal considers the following cases are relevant to Charge 1 and the referral of conviction for dishonesty offending.

[178] In *Blue*,⁶⁰ the pharmacist's registration was cancelled following a conviction under the Misuse of Drugs Act 1975 for stealing a controlled drug, Rubifen (for his own use). Mr Blue had indicated that he did not intend to return to the pharmacy profession but the Tribunal cancelled his registration in any event in order to send a clear message that it treated convictions such as Mr Blue's seriously. Mr Blue was also fined and ordered to pay costs.

[179] In *Mr S*,⁶¹ following a conviction for theft of a prescription medication (namely Propofol to the value of \$4,669) the Tribunal ordered suspension for a period of 12 months. The Tribunal outlined the steps Mr S had proactively taken to not only demonstrate his insight but, also, his ability to be rehabilitated. The Tribunal also imposed conditions upon Mr S' return to practice, including supervision for 12 months, education and monitoring by the Health Committee for whatever period it considered to be necessary.

[180] In *Campbell*,⁶² a pharmacist was convicted of stealing medication worth approximately \$130 from his employer primarily for his own personal use. Mr Campbell was censured and his registration cancelled. The Tribunal noted that "Dishonesty on the part of a professional person is regarded very seriously by this Tribunal"⁶³ and that Mr Campbell "Not only stole from his employer, but stole drugs".⁶⁴ The Tribunal concluded that cancellation of the practitioner's registration was the only way it could discharge its responsibilities to the public.

[181] In *Wilson*,⁶⁵ a registered nurse was convicted in a District Court on four counts of causing loss by deception and one count of theft by a person in a special relationship in the context of his employment as manager of a facility and as a nurse. In relation to theft

⁶⁰ Phar19/464P.

⁶¹ HP16/377P.

⁶² Phar14/296P.

⁶³ At [67.3].

⁶⁴ At [67.4].

⁶⁵ Nur11/194P.

conviction, Mr Wilson took \$1,191.21 from the petty cash account of his employer for his own use. Mr Wilson, who did not attend the hearing, was censured, his registration was cancelled and he was ordered to pay costs. In respect of penalty, the Tribunal considered that in dishonesty cases cancellation may be the only means of providing sufficient protection to the public. It also considered that cancellation sent a strong deterrent message to other members of the profession.

[182] In addition, the Tribunal has also ordered cancellation in a number of cases involving theft / dishonesty in general (i.e. not specific to the theft of medicines). For example:

(a) In *Pellowe*,⁶⁶ a pharmacist who was convicted on charges for over-claiming against HealthPAC funding of approximately \$200,000. After pleading guilty he was sentenced to a term of imprisonment for 18 months. Mr Pellowe was found guilty of the charge in the Tribunal upon referral of the conviction and that his actions reflected adversely on his fitness to practise. Mr Pellowe's registration was cancelled by the Tribunal with a recommendation that any application for reinstatement not be considered by the Pharmacy Council for a period of three years. The Tribunal took into account that there was prompt recognition of guilt, an early guilty plea to both the criminal charges and to the disciplinary charge and frank recognition of his errors. Mr Pellowe was given credit for his early guilty plea and cooperation by reducing the costs from 50% to 35% of the costs.

(b) In *Bain*,⁶⁷ a nurse who was convicted for various thefts from her workplace had her registration cancelled by the Tribunal. The Tribunal stated:

In the serious circumstances of the present case, the only responsible outcome is an order of cancellation of registration. Ms Bain behaved dishonestly and on multiple occasions. Any lesser outcome would not provide sufficient protection to the health and safety of the public.

(c) Likewise, in *Condon*,⁶⁸ an enrolled nurse who was convicted on charges relating to dishonest use of a colleague's credit card (purchases totalling \$1,222.47), the

⁶⁶ Phar07/74P.

⁶⁷ Nur11/176P at [23].

⁶⁸ Nur05/13P at [35].

Tribunal considered the full range of penalty options, and had regard to the fact that the enrolled nurse was a first-time offender, and decided to cancel her registration:

The Tribunal has given careful consideration to imposing a penalty less severe than cancellation of registration. In particular, the Tribunal has reflected on the possibility of suspension, or even conditions being imposed on Ms Condon's registration. However, the Tribunal has concluded Ms Condon's offending was so serious that the Tribunal is bound to impose the maximum penalty available under the Act

Aggravating and mitigating factors

[183] The Tribunal considers the following are relevant aggravating factors identified by the PCC:

- (a) Duration of the conduct: Mr Patel stole products and then sold them for personal gain over a period of over four years. As submitted by the PCC, this was not a one-off error of judgement. The theft involved a sophisticated system of deception within a retail pharmacy by altering on-line orders, physically diverting shipments and hiding excess stock. Mr Patel then transferred the stock off the premises and altered electronic records to hide the offending;
- (b) Volume of listings, sales and products: The PCC submitted that the volume of transactions on Trade Me was very significant (6,000 listings and approximately 2,000 sales) and the Pharmacy had estimated the value of the products as over \$125,000. The PCC submitted that many hundreds if not thousands of members of the public unknowingly purchased stolen goods.
- (c) Abusing privilege of registration: Mr Patel was able to access pharmacy products through his employment as a pharmacist and then provide his registration details to Trade Me in order to sell pharmacy-only products to members of the public. This was a deliberate abuse of his registration status as a pharmacist.

[184] The PCC acknowledges, and the Tribunal agrees, that the following are mitigating factors:

- (a) The practitioner admitted his wrongdoing when confronted by the private investigator and has repaid the Pharmacy \$126,076. This is the full amount of reparation sought by the Pharmacy;
- (b) The practitioner has provided several apologies to the Complainant but declined to participate in restorative justice as part of the criminal process. The pre-sentencing report records that the practitioner was willing to take part, but he later declined.
- (c) Overall Mr Patel has been cooperative with the PCC and admitted the Charges and signed an Agreed Summary of Facts.
- (d) The practitioner has provided references and he has undertaken some volunteer work.

Analysis

[185] Cancellation of the practitioner's registration is the most significant penalty that may be imposed by the Tribunal. At the forefront of the Tribunal's decision is the protection of the public.

[186] The Tribunal has an obligation to consider whether a lesser penalty than cancellation is appropriate.

[187] Neither cancellation nor suspension is intended to punish, but to protect the public because the person is not a fit and proper person to remain registered in the profession.⁶⁹

[188] After careful consideration and applying the principles in *Roberts*, the Tribunal has decided the appropriate penalty for Mr Patel is to cancel his registration pursuant to s 101(1)(a) of the Act.

⁶⁹ *G v New Zealand Psychologists Board* HC Wellington CIV-2003-485-2175, 5 April 2004.

[189] The Tribunal does not accept that this is a “no harm” case. While there was no clinical harm to patients clearly, the breach of trust and integrity by this pharmacist is a significant factor and a measure of the seriousness of the conduct.

[190] An aggravating feature in this case is the sale of pharmacy-only medicines on Trade Me in clear breach of professional standards and the Medicines Regulations. Regulation of medicines and how and in what circumstances a pharmacist can sell or supply these medicines, including pharmacy-only medicines, is for the purpose of protecting the public.

[191] Mr Brookie is incorrect to suggest that *Vohora v A Professional Conduct Committee*⁷⁰ stands for the principle that in the absence of patient harm and where the practitioner has a clean record, suspension should be tried first before cancellation.

[192] In *Vohora*, the pharmacist was openly protesting about his professional obligations to comply with the Standard Operating Procedures required of him and he failed to keep a drugs register. On appeal, the High Court found that the Tribunal had failed to consider that there was no reasonable alternative to cancellation.⁷¹ The Tribunal was subsequently required to consider whether suspension was appropriate. The circumstances the practitioner faced in *Vohora* are very different to the disciplinary Charges faced by Mr Patel who has been found guilty of very serious theft from his employer, including the unlawful sale of pharmacy-only medicines.

[193] The PCC provided an affidavit from Mr E, the Complainant including his Victim Impact Statement.⁷²

[194] The Complainant described the impact of Mr Patel’s theft on him personally and the emotional toll that it took on him given that he had been his best friend and he trusted him implicitly.

⁷⁰ *Vohora v A Professional Conduct Committee* [2012] NZHC 507.

⁷¹ *Vohora* Whata J at {100} (f).comparing the approach taken by Lang J In *Patel v Complaints Assessment Committee* HC Auckland CIV 2007-404-1818, 13 August 2007 at{82}.

⁷² Document 4, Statement of [Mr E] dated 7 January 2024.

[195] The Tribunal acknowledges that Mr Patel did apologise to the Complainant and did pay back the reparation of all of the money involved.

[196] Mr Patel was said to be in the very low category for risk of reoffending and as noted by Mr Van Rensburg “Risk assessment is not an exact science. The ability to predict long-term risk of recidivism remains limited”.⁷³

[197] In respect of Mr Patel’s fitness to practise as a pharmacist, Mr Van Rensburg noted that Mr Patel has let himself down and those around him through a breach of trust in financial integrity. Mr Van Rensburg made a number of recommendations including engaging in counselling to assist Mr Patel in dealing with his life goals and personal issues that may hinder him.

[198] Unfortunately, the psychologist’s report has not been updated. There is no evidence before the Tribunal of Mr Patel actively addressing his potential for rehabilitation and to put himself in position to re-enter the pharmacy profession. Mr Patel himself has stated that he undertook some counselling but did not find it helpful.

[199] The Tribunal considers that this case is aligned with the decision in *PCC v Pellowe*,⁷⁴ where there was also serious dishonesty offending related to the practice of pharmacy. In *Pellowe*, a term of imprisonment had been imposed by the court. Mr Pellowe also entered guilty pleas in both the criminal court and in the Tribunal and was described as cooperative.

[200] The distinguishing factor in *Pellowe* and other cases cited by the PCC⁷⁵ is where the practitioner does not intend to return to practise and the practitioner’s potential for rehabilitation is not a relevant factor in the Tribunal’s assessment of an appropriate penalty.

⁷³ At p 10.

⁷⁴ Phar07/74P.

⁷⁵ See for example, *Blue* Phar19/464P and *Wilson* Nur11/194P.

[201] Mr Patel refers to not making this “mistake” again. By comparison with *Mr S*⁷⁶ for example, The Tribunal is concerned that over the past four years since disclosure of this offending, Mr Patel has not demonstrated any insight into his offending or his ability to rehabilitate.

[202] While Mr Patel may be capable of being rehabilitated, the Tribunal considers there are significant steps he will need to take to re-enter the pharmacy profession so that he would be fit to practise and pursue his career in pharmacy.

[203] To be consistent with cases of a similar high-end criminal dishonesty offending, a significant period term of suspension between two to three years would need to be imposed to reflect the seriousness of his professional misconduct.

[204] On 7 May 2020, Mr Patel signed a voluntary agreement with the Pharmacy Council to suspend his Practising Certificate.⁷⁷ Mr Patel’s time out of practice is a direct consequence of his criminal offending and the length of time required for the due criminal process to then be referred to the disciplinary jurisdiction. The Tribunal does not consider that the short term of suspension sought by him for a period of six months fairly reflects the seriousness of the misconduct here.

[205] Applying a “discount” for the lengthy period of voluntary suspension in these circumstances does not meet the purposes of professional discipline, which is to protect the health and safety of the public and to maintain professional standards.

[206] As Mr Patel has been out of practice for some time and he would in any event be required to meet the Pharmacy Council’s return to pharmacy practice criteria.⁷⁸

[207] The Tribunal cannot impose a lesser penalty of a fine as this is prohibited under s 101(2) of the Act where a practitioner has a criminal conviction.

⁷⁶ *Mr S* Phar 19/464P.

⁷⁷ ABOD, p 71.

⁷⁸ Pharmacy Council of New Zealand, *Returning to practice, requirements of returning to practising register* <https://pharmacycouncil.org.nz/pharmacist/returning-to-practice/>.

[208] If the Tribunal orders cancellation with a shorter term for applying for re-registration under s 102 of the Act then that meets the Tribunal's obligations to protect the public. Paradoxically, an order for cancellation will potentially expedite Mr Patel's rehabilitation and is a less restrictive outcome.⁷⁹

[209] By comparison, if Mr Patel were to be suspended, the period of suspension would need to be for a lengthy term, at least two years, even if a modest discount applied in respect of the voluntary suspension since the offending.

[210] The Tribunal considers that cancellation of the practitioner's registration is appropriate to protect the public from Mr Patel's dishonest and untrustworthy behaviour. He will need to satisfy his profession that he is fit to practise.

[211] The Tribunal will impose a term of six months from the date of this decision, a relatively short period before Mr Patel can re-apply for registration under s 102 of the Act. An order for cancellation will mean that Mr Patel can begin to prepare himself for an application for re-registration. This will allow Mr Patel to move ahead so that he can demonstrate his ability to rehabilitate and re-enter the pharmacy profession. It will then be over to the Pharmacy Council to establish if he is fit to practise and whether, given our finding of professional misconduct, he no longer poses a risk to the public.

[212] Public perception and appreciation of risk is a considerably challenging factor in this case given the seriousness of the dishonesty by Mr Patel. Mr Patel will be able to re-enter the pharmacy profession should he be able to satisfy the Pharmacy Council that he is fit to practise and to work under supervision. This is the least restrictive outcome for him and is proportionate to the seriousness of the offending.

[213] A further condition will be that Mr Patel, must, at his own cost, successfully complete a course of training or instruction addressing the legal and professional obligations for

⁷⁹ See, for example, *PCC v Elias* 1318/Med22/562P at [141].

pharmacists, as approved by the Pharmacy Council, before applying for re registration pursuant to s 102(1)(b) of the Act.

[214] In the overall assessment of the Tribunal, censure to mark the Tribunal's disapproval of Mr Patel's conduct and cancellation of his registration with the condition that Mr Patel may not reapply for registration with the Pharmacy Council for a period of six months from the date of this decision pursuant to s 102 of the Act, is fair, reasonable and proportionate in the circumstances of this practitioner's offending.

Costs

[215] The Tribunal may order the practitioner to pay part or all of the reasonable costs and expenses of and incidental to the PCC's investigation and prosecution, so far as they relate to the subject matter of the Charge, and the costs of the hearing by the Tribunal.⁸⁰

[216] An order for costs in any health professional disciplinary proceeding involves a 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.⁸¹

[217] When considering the appropriate quantum 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.⁸² An award of costs is not intended to be punitive and the practitioner's means, if known should be considered.⁸³

[218] The PCC's costs for its investigation and prosecution are estimated at \$115,257.37 and the Tribunal's costs of \$21,536.31, a total of \$136,793.68.

⁸⁰ Health Practitioners Competence Assurance Act 2003, s 101(f).

⁸¹ *Cooray v Preliminary Proceedings Committee* HC Wellington AP23/4 Doogue J, 14 September 1995.

⁸² *Cooray v Preliminary Proceedings Committee* HC Wellington, AP 23/94, Doogue J, 14 September 1995.

⁸³ *Vatsyayann v PCC* [2012] NZHC 1138.

[219] The PCC submitted that its costs were reasonable and full details of the costs incurred have been provided to the Tribunal.

[220] It is a difficult task for the Tribunal to assess whether the PCC's costs are reasonable in the circumstances of this case. The Tribunal accepts that the PCC provided a detailed Schedule,⁸⁴ and that while this matter started with the PCC when the complaint was laid with the Pharmacy Council in 2020, it was necessarily referred to the District Court so that the criminal charge could be dealt with. Those are delays that neither party can control.

[221] The PCC were presented with the criminal file based on a representative charge and there remained some items that were in dispute, as set out in Charge 2, particular 3(a). The PCC undertook further investigation and pursued this aspect of charge as malpractice under Charge 2, particular 3(a).

[222] The Tribunal considers that this is a relevant factor in reducing the practitioner's contribution by 10%. As made clear by the practitioner in the ASOF, nearly the entire Charge was admitted except for the approximately 30 items shown in the annotated Schedule, shown in Schedule B to this decision. Mr Patel was successful in defending that aspect of the Charge. Particular 3(a) was not established.

[223] Mr Patel has been co-operative with the PCC and the Tribunal's disciplinary process which justifies a further reduction of 10%, a total reduction of the total costs by 20%.

[224] The Tribunal is satisfied that it is fair, just and proportionate for the practitioner to pay a contribution of 30% of the total costs of \$136,793.68, to be fixed at \$41,000.

Result and orders of the Tribunal

[225] Charge 1 is established as a qualifying conviction, namely theft by a person in a special relationship pursuant to ss 220 and 223(a) of the Crimes Act 1961. The theft of pharmacy products (including pharmacy-only medicines) which Mr Patel went on to sell

⁸⁴ Document 10, Updated estimate of costs by PCC.

or supply to members of the public and other pharmacists reflects adversely on this practitioner's fitness to practise pursuant to s 100(1)(d) of the Act.

[226] Charge 2 is established as malpractice and negligence in Mr Patel's scope of practice in relation to the pharmacy-only medicines (particular 3(b)) but not in relation to particular 3(a) – the sale of the stolen items. In relation to Charge 2, the Tribunal is satisfied that the practitioner's conduct is a departure from the standards of ethical conduct prescribed by the Pharmacy Council and is conduct that has brought, and is likely to bring, discredit to the profession and is under s 100(1)(b) of the Act.

[227] The Tribunal makes the following penalty orders:

- (a) The practitioner's registration will be cancelled effective from the date of this decision pursuant to s 101(1)(a) of the Act;
- (b) The practitioner:
 - (i) must not apply for re-registration with the Pharmacy Council for a period of six months from the date of cancellation of his registration pursuant to s 102(1)(a) of the Act;
 - (ii) must, at his own cost, successfully complete a course of training or instruction addressing the legal and professional obligations for pharmacists, as approved by the Pharmacy Council, before applying for re-registration pursuant to s 102(1)(b);
- (c) The practitioner is censured pursuant to s 101(1)(d) of the Act to mark the Tribunal's disapproval of the serious dishonesty offending by the practitioner while employed as a pharmacist and that his conduct has brought discredit to the pharmacy profession; and

- (d) The practitioner will be ordered to pay a contribution of 30% of the estimated costs of the PCC, \$115,257.37 and the Tribunal's costs of \$21, 536.31, a total of \$136,793.68. This amount will be fixed at \$41,000.

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

- (a) To publish this decision, and a summary, on the Tribunal's website; and
- (b) To request the Pharmacy 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 a reference to the Tribunal's website so as to enable interested parties to access the decision.

DATED at Dunedin this 23rd day of April 2024



A J Douglass
Chair
Health Practitioners Disciplinary Tribunal

SCHEDULE A
PARTICULARS OF CHARGE

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge against Mr Jayant Patel, registered pharmacist, that:

Charge one: Referral of Conviction

1. On 18 May 2023 Mr Patel was convicted in the District Court on one representative charge of theft by a person in a special relationship pursuant to sections 220 and 223(a) of the Crimes Act 1961. The offence for which Mr Patel was convicted was punishable by a maximum of 7 years imprisonment.
2. The conviction relates to the theft of pharmacy products (including pharmacy-only medicines) by Mr Patel on various dates between on or around 1 January 2016 and 2 April 2020, when employed as a pharmacist by [the Pharmacy] (trading as [the Pharmacy]), which Mr Patel went on to sell or supply (including on Trade Me) to members of the public and/or other pharmacists.

The conviction either separately or cumulatively reflects adversely on Mr Patel's fitness to practise as a pharmacist. This is a ground on which a health practitioner may be disciplined under section 100(1)(c) of the Act.

Charge two: Professional Misconduct

3. Between on or around 1 January 2016 and 2 April 2020, when employed as a pharmacist by [the Pharmacy] (trading as [the Pharmacy]), Mr Patel failed to act with honesty and integrity and/or abused his position as a registered pharmacist by:
 - (a) Selling or supplying various stolen pharmacy products (including on Trade Me), as set out in schedule one, to members of the public and/or other pharmacists on at least 2,000 occasions; and/or
 - (b) With respect to pharmacy-only medicines, selling or supplying to members of the public in breach of the Medicines Act 1981 and/or Medicines Regulations 1984.
4. In acting in the manner alleged in paragraph 3 above, Mr Patel breached his professional obligations as a pharmacist (including, without limitation, the standards of ethical conduct prescribed by the Pharmacy Council in its Code of Ethics 2011 and Code of Ethics 2018 and/or statements of the Pharmacy Council regarding the supply of pharmacy services and/or medicines over the internet (November 2015 and March 2019) and/or breached his legal obligations as a pharmacist.

The alleged conduct amounts to professional misconduct in that, either separately or

cumulatively, it amounts to malpractice or negligence in relation to Mr Patel's scope of practice pursuant to section 100(1)(a) of the Act and/or has brought or is likely to bring discredit to the profession, pursuant to section 100(1)(b) of the Act.

SCHEDULE B

AGREED SUMMARY OF FACTS

Agreed Bundle of Documents

1. This agreed summary of facts (**ASOF**) should be read in conjunction with the agreed bundle of documents (**ABOD**). The parties agree that each document in the ABOD:
 - (a) is what it purports to be on its face;
 - (b) was signed by any purported signatory shown on its face;
 - (c) was sent by any purported author to, and was received by, any purported addressee on its face; and
 - (d) is admissible evidence.

Background

2. Mr Jayant (Jay) Patel (the **Practitioner**) is 38 years old. He completed a Bachelor of Pharmacy at the University of Auckland in 2007 and was first registered with the Pharmacy Council (**Council**) to practise as a pharmacist in 2008.
3. The Practitioner commenced employment as a pharmacist at [the Pharmacy] (trading as [the Pharmacy]) (the **Pharmacy**) on 18 May 2012 after being made redundant from another pharmacist role. Among other things, the Practitioner was responsible for ordering and dispensing stock and would often work in sole charge of the Pharmacy. The Practitioner remained employed at the Pharmacy until 2 April 2020.
4. The Pharmacy is owned and operated by Mr E (the Complainant). The Complainant has owned and operated the Pharmacy since opening it in 2009.
5. Prior to the events to which the charge relates, the Complainant and the Practitioner had been very close friends, having studied pharmacy together at university and then working together for almost eight years.

Theft of pharmacy products

6. From 1 January 2016 until 2 April 2020 (Relevant Period) the Practitioner was often in charge of placing the Pharmacy's stock orders with suppliers.
7. On numerous occasions during the Relevant Period, the Practitioner placed online orders for the Pharmacy with the Pharmacy's wholesaler in which he knowingly and without the Complainant's knowledge included additional stock that was not required by the Pharmacy and which he intended to steal and sell for financial gain.
8. These orders were paid for by, and delivered to, the Pharmacy.
9. When each order arrived, the Practitioner would:
 - (a) personally oversee the delivery;
 - (b) set aside the additional stock in non-descript cardboard boxes; and

- (c) steal the additional stock by placing it into his vehicle and later taking it to his home address, where he stored it in his bedroom.
- 10. The Practitioner disguised the additional ordering from the Complainant by "zeroing" the stock in the Pharmacy's stock management system following delivery. This involved the Practitioner manually editing each purchase order so that the additional stock was never recorded as having been received by the Pharmacy.
- 11. Other than as noted in the copy of Schedule One attached to this ASOF, the Practitioner acknowledges that he stole the product lines listed in Schedule One to the charge in this way.¹ The Practitioner listed stolen product lines for sale on Trade Me (the Stolen Products).²
- 12. The Stolen Products included pharmacy-only medicines (as defined in the Medicines Act 1981 and Medicines Regulations 1984) as listed in schedule one to the charge.

Medicines Act and Regulations

- 13. Section 3 of the Medicines Act 1981 defines various categories of medicines, including pharmacy-only medicines. Section 3(3) provides: **pharmacy-only medicine** means a medicine that is declared by regulations made under this Act or by a notice given under section 106 to be one that, except as may be permitted by the regulations, may be-
 - (a) sold by retail only
 - (i) in a pharmacy or hospital; or
 - (ii) in any shop described in section 51(2) and in accordance with a licence issued under Part 3; or
 - (b) supplied in circumstances corresponding to retail sale only
 - (i) in a pharmacy or hospital; or
 - (ii) in any shop described in section 51(2) and in accordance with a licence issued under Part 3; or
 - (iii) in accordance with a standing order
- 14. Schedule 1, Part 3 of the Medicines Regulations 1984 lists those medicines designated as pharmacy-only medicines.
- 15. The Practitioner acknowledges that the medicines identified as pharmacy-only medicines in schedule one to the charge are pharmacy-only medicines as detailed below.

¹ The practitioner says he did not steal the product lines highlighted in the attached copy of Schedule One (i.e. items 24-27, 38, 40-48, 50-52, 54-58, 61-62, 64-68) from the Pharmacy and evidence will be filed from the Practitioner to that effect.

² The same caveat as to Schedule One to the Charge applies.

Pharmacy-only Medicines		Active Ingredient	Sch 1, Part 3 reference
Allergy relief:			
1.	Loratadine 10mg Tabs 100s	Loratadine	101
2.	Alanase Nasal Spray 50mcg 200 Sprays	Beclometasone	16
3.	Flixonase Hayfever Nasal Spray - 120 doses	Fluticasone	65
	Razene 90 Tablets	Cetirizine	29
5.	Telfast 180mg 10 tablets	Fexofenadine	62
6.	Zetop (Cetirizine 10mg) - 100 Tablets	Cetirizine	29
7.	Zista (Cetirizine 10mg) - 100 Tablets	Cetirizine	29
Anti-fungal treatments:			
8.	APO-Ciclopirox Nail Lacquer Topical Solution 7ml	Ciclopirox	34
9.	MycoNail Anti - Fungal Nail Lacquer Kit 5ml	Amorolfine	10
10.	Pevaryl Foaming Solution Sachets 3x10g	Econazole	55
11.	Rejuvenail Anti-Fungal Nail lacquer 6.6ml	Ciclopirox	34
Iron supplements:			
12.	Ferrograd C Iron Tablets 30	Iron	85
13.	Ferrograd Iron Tablets 30	Iron	85
Other Pharmacy-only medicines:			
14.	Emla Cream 30g	Prilocaine	146
15.	Losee Extra 20mg 28 Tablets	Omeprazole	124
16.	Laxsol 200 tablets	Sennosides	156

16. Section 18 of the Medicines Act 1981 restricts the sale and supply of medicines by retail. In particular, section 18(1)(c)(i) states that pharmacy only medicines are only permitted to be sold or supplied *"by a person under the supervision of a pharmacist in a pharmacy or a hospital"*.
17. The Practitioner acknowledges that the Council issued statements relevant to the sale and supply of medicines over the internet: Promotion and Supply of Medicines over the Internet Statement (November 2015); and Statement on Telehealth and Supply of

Pharmacy Services over the Internet (March 2019).

Sale of Stolen Products

18. The Practitioner accepts that the pharmacy-only medicines listed above should have been sold and supplied only in accordance with the Medicines Act 1981 and Medicines Regulations 1984.
19. On numerous occasions in the Relevant Period the Practitioner listed the Stolen Products for sale on Trade Me. He used two Trade Me accounts for this purpose, called "Pharmintrade" and "Winners1".
20. The Practitioner listed the Stolen Products on approximately 6,000 separate occasions and concluded at least 2,000 separate sales to members of the public and/or other pharmacists.
21. The Practitioner provided his current practising certificate (APC) details to Trade Me so that Trade Me would allow him to sell pharmacy-only medicines on the platform.
22. While most sales occurred through Trade Me, the Practitioner also approached some Trade Me customers and arranged to make further sales of general sale medicines to them outside the Trade Me platform. For example, between 7 October 2016 and 5 March 2019 the Practitioner sold CareSens testing strips (for diabetics) to another pharmacist on 11 separate occasions.
23. The Practitioner did not account to the Pharmacy for the financial gain he made on any of the sales.

Private investigation

24. In late March 2020, the Complainant noticed that a large quantity of Habitrol lozenges were being stored at the Pharmacy. This prompted him to check the stock and ordering history for this product on the Pharmacy computer and, subsequently, to check the CCTV footage, which indicated that the Practitioner had been responsible for ordering excess stock and removing it from the Pharmacy.
25. The Complainant engaged a private investigator, Daniel Toresen of The Investigators, to undertake further enquiries.
26. The Practitioner was interviewed by Mr Toresen on 2 April 2020. During the interview, the Practitioner admitted to the theft of products from the Pharmacy and to selling those products on Trade Me using his "Pharmintrade" account. The Practitioner provided a formal statement recording these matters, which he also signed.
27. During the investigation, the private investigator also recovered Stolen Products from the Practitioner's car and bedroom which were subsequently destroyed.
28. On 2 April 2020 the Practitioner paid \$100,000 to The Investigators as partial reparation

for the theft while the quantum was calculated.

29. On 3 April 2020 the Practitioner emailed Mr Toresen with a list of the product lines he had stolen.
30. On 6 April 2020 Mr Toresen asked the Practitioner to pay \$25,351.22 comprising: further reparation for the theft (\$11,446.72); investigation costs (\$12,944.50); and legal fees (\$960).
31. On 18 April 2020 the Practitioner wrote a letter of apology to the Complainant.

Report to Pharmacy Council.

32. On 9 April 2020 the Complainant reported the Practitioner's conduct to the Council.
33. On 14 April 2020 the Council advised the Practitioner about the complaint. Due to the serious nature of the complaint, the Council requested the Practitioner's written confirmation that he would cease practise and not take steps to seek employment as a pharmacist until the Council made a decision about the complaint.
34. On 29 April 2020 the Practitioner through his then solicitor (Ms McCrimmon), provided:
 - (a) a letter to the Council agreeing to cease practice (letter dated 24 April 2020); and
 - (b) an apology to the Council.
35. On 7 May 2020 the Council invited the Practitioner to voluntarily surrender his practising certificate, failing which the Council advised that it would begin the process of referring the matter to the full Council for consideration of interim orders under s 69 of the Health Practitioners Competence Assurance Act 2003 (**HPCA Act**).

36. The Practitioner provided the requested undertaking.
37. On 20 May 2020 the Council referred the matter to a PCC for investigation.

Further repayment

38. During its investigation, the PCC identified that the Practitioner had been operating a second Trade Me account called "Winners 1" and had also made other sales outside the Trade Me platform.
39. In February 2021, following correspondence between the Practitioner, the private investigator and the Complainant, the Practitioner paid the Complainant additional reparation of \$15,629.35.
40. On 22 July 2021 the PCC determined to lay a charge of professional misconduct

against the Practitioner.

41. On 8 November 2021 a charge of professional misconduct was laid against the Practitioner in the Tribunal.

Criminal conviction

42. In November 2021 the Complainant reported the Practitioner's theft of products from the Pharmacy to police.
43. On 3 December 2021 the Tribunal stayed the proceedings before the Tribunal pending resolution of the criminal process.
44. In July 2022 the Practitioner was charged in the District Court with theft by a person in a special relationship pursuant to sections 220 and 223(a) of the Crimes Act 1961 in relation to the theft of pharmacy products (including pharmacy-only medicines) from the Pharmacy on various dates between on or around 1 January 2016 and 2 April 2020 as described above.
45. This offence is punishable by a term of imprisonment of up to 7 years.
46. The Practitioner subsequently entered a guilty plea on one representative charge of theft by a person in a special relationship. An agreed Summary of Facts was also filed with the Court by the parties. The Summary of Facts also records that the practitioner sold the products to third parties on Trade Me.
47. On 18 August 2023 the Practitioner was convicted and sentenced to:
 - (a) six months' community detention;
 - (b) 120 hours of community work; and
 - (c) An emotional harm payment of \$1,500 to the Complainant (as offered by the Practitioner).
48. In determining the sentence, Judge K Maxwell had before her:
 - (a) Defence sentencing memorandum, including the following attachments:
 - (i) Agreed summary of facts (tab 1)
 - (ii) Pre-sentence report (tab 2)
 - (iii) Support letters (tab 3)
 - (iv) Apology letter (tab 4)
 - (v) Letter regarding voluntary work (tab 5)
 - (b) Prosecution Sentencing submissions, including the following attachments:
 - (i) Agreed summary of facts (tab 1)
 - (ii) Victim impact statement (tab 2)

Further referral to PCC

- 49. On 24 July 2023 the Council referred the Practitioner's conviction to the same PCC that had laid the professional misconduct charge.
- 50. On 24 October 2023 the PCC determined to lay a further charge pursuant to s100(1)(c) of the HPCA Act.
- 51. An amended charge was filed on 2 November 2023.

Further admissions

- 52. In addition to the facts set out above, the Practitioner admits that:
 - (a) Charge One: his conviction reflects adversely on his fitness to practise pharmacy for the purposes of section 100(1)(c) of the HPCA Act;
 - (b) By engaging in the conduct to which Charge Two relates, he:
 - (i) failed to act with honesty and integrity;
 - (ii) breached his professional obligations as a pharmacist (including, without limitation, the standards of ethical conduct prescribed by the Council in its Code of Ethics 2011 and Code of Ethics 2018); and/or
 - (iii) failed to comply with the statements of the Council regarding the supply of pharmacy services and/or medicines over the Internet (November 2015 and March 2019); and/or
 - (iv) breached his legal obligations as a pharmacist by retail sale of certain pharmacy-only medicines in breach of s 18(1)(c) of the Medicines Act 1981.
 - (c) The Practitioner acknowledges that his conduct to which charge two relates amounts to professional misconduct in that, either separately or cumulatively, it has brought or is likely to bring discredit to the profession, pursuant to section 100(1)(b) of the HPCA Act and is conduct of a nature that warrants the imposition of a disciplinary sanction.

Schedule One - annotated

(a) Pharmacy-only Medicines		
Allergy relief:		
1.	Loratadine 10mg Tabs 100s	
2.	Alanase Nasal Spray 50mcg 200 Sprays	
3.	Flixonase Hayfever Nasal Spray - 120 doses	
4.	Razene 90 Tablets	
5.	Telfast 180mg 10 tablets	
6.	Zetop (Cetirizine 10mg) - 100 Tablets	
7.	Zista (Cetirizine 10mg) - 100 Tablets	
Anti-fungal treatments:		
8.	APO-Ciclopirox Nail Lacquer Topical Solution 7ml	
9.	MycoNail Anti - Fungal Nail Lacquer Kit 5ml	
10.	Pevaryl Foaming Solution Sachets 3x10g	
11.	Rejuvenail Anti-Fungal Nail laquer 6.6ml	
Iron supplements:		
12.	Ferrograd C Iron Tablets 30	
13.	Ferrograd Iron Tablets 30	
Other Pharmacy-only medicines:		
14.	Emla Cream 30g	
15.	Losee Extra 20mg 28 Tablets	
16.	Laxsol 200 tablets	
(b) General Sale Medicines		
Smoking cessation:		
17.	Habitrol Gum: 2mg 384 piece (fruit), 2mg 384 piece (mint); 4mg 384 piece (fruit); 4mg 384 piece (mint)	
18.	Habitrol Lozenges: 1mg 216 lozenges; 2mg 216 lozenges	
19.	Habitrol Patches: 7mg 28 patches; 14mg 28 patches; 21mg 28 patches	

Laxatives:		
20.	Lax-Sachets 30	
21.	MOLAXOLE Powder Sachets 30	
Other General Sale Medicines		
22.	HYLO-Forte Lubricating Eye Drops 10ml	
23.	NeuroTabs Iodine 90 Tablets	
24.	Voltaren Emulgel 100g	NOT STOLEN - single sale 2/11/16. Source – personal, unused.
25.	NEILMED Sinus Rinse 120 Sachets	NOT STOLEN - single sale 12/8/17. Source: free product from trainino
26.	NeilMed Sinus Rinse Starter Kit	NOT STOLEN - single sale 5/10/16 Source: free product from training
27.	Wartie Advanced Wart & Plantar Wart Remover 50ml	NOT STOLEN - single sale 14/11/18 Source: free product from training
(c) Other Products		
Diabetes-related:		
28.	Accu-Chek Ketur Test Strips	
29.	CareSens Dual Meter	
30.	CareSens Lancets	
31.	CareSens Strips	
32.	CareSens Blood Glucose Meter	
	Freestyle Optium Ketone Strips	
	KetoSens Test Strips	
35.	BO Micro-Fine Pen Needles	
Nutritional supplements:		
36.	Ensure Chocolate 850g	
37.	Ensure Vanilla 850g	
Dietary supplements:		
38.	BONVIT Psyllium Husk 500g x2 - Orange Flavour	NOT STOLEN-single sale 1/7/18 Source: sold on behalf of family member
39.	30 Plus NuWoman 120 Tablets	

40.	Clinicians DigestEase with Tolerase 60caps	NOT STOLEN - sold twice -14/12/18 and 30/10/18 Source: Free product from rep
41.	Clinicians MultiVitamin & Mineral Boost Capsules 180	NOT STOLEN - single sale 13/3/18\ Source: Free product from Clinicians rep
42.	Go Healthy GO Co-O10 400mg Capsules 30	NOT STOLEN-single sale 23/3/19 Source: free product from sales rep
43.	Good Health Fast Asleep 30 Capsules	NOT STOLEN-single sale 2/5/16 Source: free product from training
44.	Harker Herbals Deep Lung Support Emphysemol 500 ml	NOT STOLEN - single sale 11/2/20 Source: free product from Harkers Sales reo
45.	KiwiHerb De-Stuff for Kids	NOT STOLEN - single sale 6/6/16 Source: free product from kiwi herb trainina
46.	KiwiHerb StressCare 60 Capsules	NOT STOLEN - single sale 7/4/18 Source: free product from kiwi herb trainina
	Lifestream Biogenic Aloe Vera with Turmeric 500ml	NOT STOLEN-single sale 12/2/20 Source: free product from lifestream sales rep
48.	Lifestream Digestive Enzymes (2x 60 caps)	NOT STOLEN - single sale 10/9/18 Source: free product from lifestream sales rep
49.	Lypo Spheric Vitamin C 1000mg 30s	
50.	MitoQ Targeted Anti-Oxidant 60 Capsules	NOT STOLEN-single sale 18/6/17 Source: free product from training seminar aoodie baa
51.	Nutralife Turmeric One-A-Day 60 Capsules	NOT STOLEN-single sale 13/5/18 Source: free product from Nutralife rep
52.	Radiance Ageless Beauty	NOT STOLEN-single sale 9/4/18 Source: sold on behalf of family member
53.	Remifemin Menopause Support 120s	
55.	Sleep Drops for Adults 50ml	NOT STOLEN-x 3 bottles sold 16/11/19, 6/11/19, 10/10/19 Source: Won three bottles in a competition

56.	Thompsons Allergen & Sinus Support 60 tablets	NOT STOLEN - single sale 5/1/16 Source: free product from Thompsons sales rep
57.	Zen Joint and Muscle Herbal Liniment Spray 100ml	NOT STOLEN - single sale 5/12/19 Source: given item
Skincare and make up:		
58.	Trilogy Cream Cleanser 100ml	NOT STOLEN - single sale 24/8/17 Source: free product obtained from personal purchase
59.	Trilogy Eye Contour Cream 20ml	
60.	Trilogy Rosapene Radiance Serum 30ml	
61.	Bio Oil Dry Skin Gel 100ml	NOT STOLEN - single sale 24/1/20 Source: free product from bio-oil sales rep
62.	MitoQ Cellular Energizing Cream Serum 50ml	NOT STOLEN - single sale 18/6/17 Source: Free product from training seminar goodie bag
63.	Innoxa Gift Set	
64.	Thin Lizzy flawless mineral foundation Missy	NOT STOLEN - single sale 29/5/19 Source: personally bought at discounted price then on-sold
65.	Thin Lizzy Mineral Foundation - Enchanted Rose	NOT STOLEN - single sale 23/10/18 Source: personally bought at discounted price then on-sold
Miscellaneous products:		
	Omron Forehead Thermometer	NOT STOLEN-single sale 26/9/17 Source: sold on behalf of family member
67.	Ultrasonic Vaporiser	NOT STOLEN - single sale 23/9/18 Source: sold on behalf of family member