NEW ZEALAND HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL
TE RŌPŪ WHAKATIKA KAIMAHI HAUORA

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HPDT NO	**1401/Phar23/586P**
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	**SHANE CHAFIN** of Whangārei, registered pharmacist **Practitioner**

Hearing in Whangārei on 5 to 7 December 2023

TRIBUNAL:	Mr W McCarthy (Chair) Mr D Ananth, Ms S Drake, Ms J Dawson, Mr S Nand (Members) Ms G J Fraser, Executive Officer Ms K Lal, Assistant Executive Officer Ms J Kennedy (Stenographer)
ATTENDANCE:	Ms A Miller and Ms A Lane for the Professional Conduct Committee (PCC) No appearance by or for the practitioner

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Introduction

[1] In a Notice of Charge dated 2 May 2023, a Professional Conduct Committee (**PCC**) appointed by the Pharmacy Council of New Zealand (**the Council**) laid a disciplinary charge against Shane Chafin (**the practitioner**) pursuant to ss 100(1)(a) and 100(1)(b) of the Health Practitioners Competence Assurance Act 2003 (**the Act**).

[2] The charge relates to a range of conduct of the practitioner, including and arising from online and other public comments he made criticising the New Zealand government's public health response to Covid-19.

[3] A panel of the Tribunal convened on 5 – 7 December 2023 to hear the charge in Whangārei. As the practitioner did not attend the hearing, the hearing proceeded by way of formal proof.

The charge

[4] The charge laid by the PCC is set out in full in Appendix A of this decision. As drafted, the charge contains ten particulars. Seven of these particulars (particulars 1, 2, 4, 5, 6, 8 and 10) allege conduct of the practitioner that amounts to professional misconduct. The remaining three particulars (particulars 3, 7 and 9) allege that in acting in this manner, the practitioner failed to have regard to his professional responsibilities.

[5] The Tribunal is of the view that the assessment of whether or not a health practitioner had regard to or was acting consistently with their professional duties should be considered when determining whether professional misconduct is established, rather than being a particular of a charge in and of itself. Accordingly, the Tribunal has considered the seven particulars that allege conduct amounting to professional misconduct comprise the charge to be determined by the Tribunal. While the remaining particulars were technically established for the most part, we see it as a lens to assess the actual conduct.

[6] In summary, the PCC charges that the practitioner has acted in an unprofessional and/or inappropriate manner in the following ways:

Videos and /or communication about Covid-19

(a) In 13 videos and other communications between September 2021 and January 2022, the practitioner made various statements questioning the accuracy of the Covid-19 information provided by the Government and health officials, using negative or emotive language, and minimising the potential impact of Covid-19, when he knew or ought to have known that these had the potential to:

(i) undermine the public health response to Covid-19;

(ii) place the health and wellbeing of individuals at risk, or endanger public safety during a pandemic, by promoting or encouraging distrust of the public health response;

(iii) discourage the public from receiving the Covid-19 vaccine or would create distrust or fear about the vaccine (**particular 1**)

(b) On 2 November 2021, the practitioner attended a Northland event during which he publicly confronted the (then) Prime Minister Jacinda Ardern about the efficacy and safety of the Covid-19 vaccine, and this was later reported by national news media (**particular 2**).

Disclosure of confidential information

(c) On 15 November 2021 the practitioner inappropriately and unprofessionally disclosed the name, workplace and phone number of someone who had laid a complaint against him, and indicated he intended to disclose details of other complainants (**particular 4**).

(d) On 22 November 2021 the practitioner failed or refused to confirm that he would not delete the disclosure or refrain from making further disclosures of information (**particular 5**).

(e) On 24 November 2021 the practitioner again failed or refused to confirm that he would not delete the disclosure or refrain from making further disclosures of information, and also posted a letter from the PCC's solicitors online (**particular 6**).

Other inappropriate and/or unprofessional behaviour

(f) On 28 January 2022, the practitioner made various inappropriate and/or unprofessional comments about the Pharmacy Council, including:

(i) that the Pharmacy Council is *"used as a Government whip to enslave those people in their practice. We will take away your ability to thrive and survive if you don't do what we say"* and/or

(ii) that *"to say [the Pharmacy Council] represents pharmacy is not true. Even though they use Pharmacy Council they should take that out of their name because its disingenuous and it fools the public into thinking that these people are actually pharmacists or healthcare providers or for them, those people, but they're actually not."*

(iii) alleging that the Pharmacy Council is "*extremely controlled and corrupt".*

False declaration to the Pharmacy Council

(g) On 22 June 2022, on his application to the Pharmacy Council to be removed from the Register, the practitioner declared that he was not aware of any disciplinary investigations when he knew or ought to have known he was under investigation by the PCC and that this declaration was false.

[7] It is charged that the alleged conduct either separately or cumulatively amounts to professional misconduct pursuant to s 100(1)(a) and/or s 100(a)(b) of the Act.

Background and relevant facts

[8] The practitioner is a registered pharmacist. He graduated with a Bachelor of Science (Pharmacy) from the University of Cincinnati, United States in 2001, and was registered in New Zealand in 2013. From around 2016 the practitioner lived and worked in Northland.

[9] Between September 2021 and January 2022, the practitioner appeared in a number of online videos and posts in which he discussed the New Zealand government's response to Covid-19 (particular 1). On 2 November 2021, the practitioner attended a press conference in Northland during which he made comments to the then Prime Minister Jacinda Ardern about the Pfizer Covid-19 vaccine. This was reported on by national news media (particular 2).

[10] Between 28 October and 10 November 2021, the Council received five complaints about the practitioner's online presence from registered nurse IE, journalist NY, retired GP Dr Lauren Roche, pharmacist YD and Māori health provider AS.

[11] On 15 November 2021, the Council wrote to the practitioner inviting his response to the complaints. The Council provided the practitioner with the complaints and the names of the complainants. On the same day, the practitioner posted details of Ms YD, including her name, workplace and telephone number. He also indicated that he intended to disclose information about the other complainants (particular 4).

[12] On 22 November 2021 the Council emailed the practitioner asking him to delete the information he had disclosed about Ms YD and not to make any further disclosures. The practitioner did not do so (particular 5).

[13] On 24 November 2021, solicitors for the Pharmacy Council wrote to the practitioner reiterating the request to delete the information he had disclosed and not

to make any further disclosures. The practitioner did not do so and posted the solicitors' letter on Telegram (particular 6).

[14] On 28 January 2022, the practitioner appeared on a podcast during which he made a number of negative comments about the Pharmacy Council (particular 8).

[15] On 22 June 2022, the practitioner applied to the Council to be removed from the Register. As part of this application, he declared that he was not aware of any criminal or disciplinary investigations or actions pending against him (particular 10).

[16] The PCC was originally appointed to investigate the five complaints, and its terms of reference were later amended to include the practitioner's response to the complaint and the declaration.

Relevant standards

[17] Counsel for the PCC referred to professional obligations that applied to registered pharmacists at the relevant times. As noted by Counsel, the Council's Code of Ethics 2018 (**the Code**) contains principles that "*express the responsibilities and professional values that are fundamental to the pharmacy profession*"[1] and the Code is intended as "*a framework against which breaches of professional conduct can be judged*".[2] Under the Code, pharmacists have an ethical obligation to:

(a) act to prevent harm to the patient and the public (Principle 1F);[3]

(b) promote and participate in public health initiatives (Principle 3E);[4]

(c) demonstrate accepted standards of professional and personal behaviour in any communication, including by social media (Principle 4A);[5]

[1] Pharmacy Council of New Zealand, *Code of Ethics*, 2018, at p 4.
[2] Pharmacy Council of New Zealand, *Code of Ethics*, 2018, at p 4.
[3] Pharmacy Council of New Zealand, *Code of Ethics*, 2018, at p 8.
[4] Pharmacy Council of New Zealand, *Code of Ethics*, 2018, at p 10.
[5] Pharmacy Council of New Zealand, *Code of Ethics*, 2018, at p 11.

(d) provide accurate, truthful, relevant and independent information in an appropriate form that is not misleading to patients and the public (Principle 4C);[6]

(e) not abuse their professional position or exploit the vulnerability or lack of knowledge of others (Principle 4D);[7] and

(f) respond honestly, openly, courteously and promptly to complaints and criticism (Principle 4E).[8]

[18] The Council's competence standards further set minimum expectations for competent practice as a pharmacist, which include:

(a) **professionalism:** personal and professional integrity and compliance with ethical requirements;[9]

(b) **public healthcare:** contribute to community health and health promotion;[10] and

(c) **leadership:** lead by example to serve as effective role model and mentor.[11]

Evidence

[19] The practitioner did not file any evidence. The PCC's evidence consisted of:

(a) the PCC's bundle of documents, which included:

(i) the practitioner's registration details;

[6] Pharmacy Council of New Zealand, *Code of Ethics*, 2018, at p 11.
[7] Pharmacy Council of New Zealand, *Code of Ethics*, 2018, at p 11.
[8] Pharmacy Council of New Zealand, *Code of Ethics*, 2018, at p 11.
[9] Pharmacy Council of New Zealand, *Competence Standards for the Pharmacy Profession*, 2015, at pp 10 - 11.
[10] Pharmacy Council of New Zealand, *Competence Standards for the Pharmacy Profession*, 2015, at p 26.
[11] Pharmacy Council of New Zealand, *Competence Standards for the Pharmacy Profession*, 2015, at p 32.

(ii) the links to the relevant videos and podcasts and some transcripts of these;

(iii) various relevant correspondence of the Council;

(iv) *Countering Vaccine Misinformation – Practice Guide for Healthcare Providers* by Associate Professor Helen Petousis-Harris and Dr Amy Chan; and

(v) relevant standards documents and scope of practice;

(b) the affirmed statement of Ms Barbara Moore, the convenor of the PCC that investigated the practitioner, who gave evidence about the investigation and the information received by the PCC;

(c) the written and oral expert evidence of Dr Collin Tukuitonga, an associate professor of public health and Associate Dean Pacific at the University of Auckland Faculty of Medical and Health Sciences. He holds a diploma from the Fiji School of Medicine, is a Member of the College of Community Medicine New Zealand and is a Fellow of the Australasian Faculty of Public Health Medicine of the Royal Australasian College of Physicians, the Royal New Zealand College of General Practitioners, and the Royal College of Public Health Medicine, New Zealand. Dr Tukuitonga led a government Pacific health advisory group for New Zealand's Covid-19 response. He provided expert evidence which addressed the impact of Covid-19 misinformation on Pacific and Māori communities; and

(d) the written and oral evidence of Dr Lauren Roche, a retired general practitioner who worked alongside the practitioner in Whangārei. She provided evidence of her interactions with the practitioner up until 2019, and the later complaint she made to the Council about the practitioner in 2021.

Relevant law on liability

[20] The practitioner is charged with professional misconduct under s 100(1)(a) and/or s 100(1)(b) of the Act which provide:

> **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;
>
> (b) the practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, has brought or is likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred;

[21] The Tribunal and Courts have considered the term professional misconduct many times. In *Collie v Nursing Council,* Gendall J said:[12]

> 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.

[22] The Tribunal has also consistently adopted common usage definitions of "malpractice" as being:

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[12] *Collie v Nursing Council of New Zealand*, [2001] NZAR 74 at [21].

> the immoral, illegal or unethical conduct or neglect of professional duty. Any incidence of improper professional conduct[13]; and
>
> Improper treatment or culpable negligence of a patient by a physician or of a client by a lawyer… a criminal or illegal action: common misconduct."[14]

[23] It is for the Tribunal to determine whether the conduct has or is likely to bring discredit on the profession under s 100(1)(b) of the Act. In *Collie* at [28], Gendall J discussed the meaning of this provision, under the previous legislation, and stated:

> To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard for 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.

[24] There is a well-established two stage test for determining professional misconduct set out in previous decisions of both this Tribunal and its predecessor.[15] The two key steps involved in assessing what constitutes professional misconduct are:

(a) first, an objective analysis of whether the practitioner's acts or omissions can reasonably be regarded by the Tribunal as constituting malpractice, negligence or otherwise bringing or likely to bring discredit on the profession; and

(b) second, the Tribunal must be satisfied that the practitioner's acts or omissions require a disciplinary sanction for the purposes of protection of the public or maintaining professional standards or punishing the practitioner.

[13] Collins English Dictionary, 2nd Edition.
[14] The New Shorter Oxford Dictionary, 1993 Edition.
[15] *McKenzie v MPDT* [2004] NZAR 47 at [71] and *PCC v Nuttall* (8/Med04/03P).

[25] The burden of proof in the present case is on the PCC. This means that it is for the PCC to establish that the practitioner is guilty of professional misconduct. This remains so even where the practitioner does not participate.

[26] The standard of proof is the civil standard of proof, that is proof which satisfies the Tribunal that on the balance of probabilities the particulars of the charge are more likely than not.

[27] The Tribunal is also required to consider each particular independently and then cumulatively, in the context of determining whether the overall charge is established.[16]

Relevant cases

[28] Counsel for the PCC referred to a number of cases where the Tribunal has previously made findings of professional misconduct in relation to inappropriate or unprofessional comments or statements:

(a) Most relevantly, in *PCC v Tepou*[17] a nurse communicated inappropriate information about the Covid-19 vaccine for the purpose of discouraging vaccination, both on Facebook and on a Tokelauan radio station. In establishing professional misconduct under both ss 100(1)(a) and (b), the Tribunal stated:[18]

> …The practitioner would have known that as a trusted as a [*sic*] member of a community and a self-identified health professional, her opinion would carry significant weight. Knowing this, she deliberately used her speech to undermine the audience's confidence in the efficacy of the COVID-19 vaccine without providing any evidence. It is particularly egregious given the size and composition of the audience and some of the outlandish, unsubstantiated claims that were made in the course of the interview.

[16] *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513.
[17] *PCC v Tepou* 1331/Nur22/556P.
[18] At [89].

(b) In *Hugill*[19], professional misconduct was established where a nurse made racist comments on Facebook about Māori nurses and the Nursing Council.

(c) In *Tovaranonte*[20], a doctor made disparaging comments online about medical colleagues and submitted a misleading and inaccurate complaint to the Health and Disability Commissioner. In reaching the conclusion that malpractice was established under s 100(1)(a), the Tribunal stated:[21]

> It is an essential feature of the trust that is placed in the medical profession that doctors carry out their duties in a way that does not breach the ethical and professional standards set for the profession. The misuse of social media and misleading representatives to the HDC is undoubtedly conduct that brings discredit to the medical profession and is unethical behaviour so as to amount to malpractice.

[29] Counsel also referred to cases where the Tribunal has considered the obligation to give honest and correct answers when applying for an annual practising certificate (**APC**), submitting that these cases are relevant to the false declaration:

(a) in *Dr U*[22], a doctor made five false declarations that she was complying with her continuing professional development obligations when she had not completed them. The Tribunal found that while this conduct was low-level, it was likely to bring discredit to the medical profession and warranted disciplinary sanction. The Tribunal noted that responsible authorities are reliant on practitioners completing forms accurately, and that practitioners should be "*proactive in ensuring compliance and in ensuring accuracy of completed forms*"[23].

[19] *PCC v Hugill* 1114/Nur20.
[20] *PCC v Tovaranonte* 1232/Med21/531P.
[21] At [161].
[22] *PCC v Dr U* 699/Med14/298P.
[23] At [125].

(b) in *Harrison*[24]*,* the Tribunal considered a nurse making a false declaration in her APC application about previous convictions, along with the convictions themselves. The Tribunal considered that the false declaration warranted disciplinary sanction in and of itself; and

(c) in *Knight*[25]*,* a practitioner made a false declaration about her work history, alongside practising without a current practising certificate. The Tribunal was satisfied her actions were in breach of the Code of Ethics.

[30] Counsel further referred to *Tolland*[26] as an example of a case establishing misconduct where a practitioner failed to engage with the relevant health authority. In that case a midwife was charged with various acts of unprofessional conduct, including that she had failed to respond or engage with the Council when a response was required related to her registration and practising certificate:

> The evidence clearly shows that Ms Tolland was laconic (to say the least) about her communications with the Midwifery Council, only wrote to them when prompted to do so, gave deliberate half-truths or lies about the position and generally did not make it easy for herself or them to see that she was responding to their requirements. The Tribunal finds this particular proved to the balance of probabilities, warranting disciplinary sanction and in itself amounting to professional misconduct…

[31] Counsel was unaware of any cases in which a practitioner is alleged to have disclosed confidential information about a complainant.

Consideration of particulars 1 – 2: videos and/or communications in which the practitioner made various comments and/or statements about Covid-19

Scope of practice

[32] The Tribunal first considers its jurisdiction in relation to particulars 1 and 2. Section 100(1)(a) of the Act concerns conduct in relation to the scope of practice in

[24] *PCC v Harrison* Nur16/364P.
[25] 1085/Phar20/481P
[26] Mid10/146P.

respect of which the practitioner was registered at the time that the conduct occurred. The practitioner is registered in the pharmacist scope of practice, which describes the practice of pharmacy as follows:[27]

> The practice of pharmacy is necessarily broad and is wider than pharmacists working directly with patients, given that such roles influence clinical practice and public safety. In a clinical role, the pharmacist acts as a medicines manager, providing patient-centered medication therapy management, health improvement and disease prevention services, usually in a collaborative environment. Pharmacists ensure safe and quality use of medicines and optimise health outcomes by contributing to patient assessment and to the selection, prescribing, monitoring and evaluation of medicine therapy.
>
> The practice of pharmacy may include, but is not limited to:
>
> (a) the custody, preparation and dispensing of medicines and pharmaceutical products;
>
> (b) the selection and provision of non-prescription medicine therapies and therapeutic aids;
>
> (c) health promotion, including health screening;
>
> (d) administration of medicines, including injectable medicines;
>
> (e) researching and evaluating information and providing evidence-based advice and recommendations on medicines and medicine-related health issues;
>
> (f) teaching and advising;
>
> (g) policy development;
>
> (h) management;
>
> (i) manufacturing; and
>
> (j) auditing.

[33] *Vohara* states that s 100(1)(a):

> …is not exclusively concerned with misconduct within the scope of practice. Rather, it is concerned with a slightly broader concept of misconduct relating or directly connected to that scope of practice. This does not include conduct

[27] "Pharmacy Council Scopes of Practice and Prescribed Qualifications Amendment Notice 2014" (16 October 2015) *New Zealand Gazette* No. 127, p 3569.

> extraneous to performance of specialist clinic functions. But it literally and logically includes any conduct directly incidental to the performance of those functions.

[34] Counsel for the PCC submits that the practitioner's communications come within the pharmacist scope of practice and therefore within s 100(1)(a). Counsel cited *Tepou* as a recent example where the Tribunal has found malpractice in relation to a practitioner making problematic comments publicly or online concerning matters relevant to her profession. In this instance, the PCC submits:

(a) the practitioner has made it clear that he is a pharmacist in order to give his views added weight, and he has relied on his knowledge and training as a pharmacist to provide support for his statements;

(b) the practitioner makes statements that are concerned with issues of public health and safety, namely the public health response to Covid-19; and

(c) the practitioner purports to provide advice about the use of medicines.

[35] The Tribunal agrees with Counsel for the PCC that the practitioner was clearly relying on his knowledge and training as a pharmacist to give weight to his views about Covid-19. In the course of his communications, the practitioner was purporting to give health advice relating to Covid-19, the vaccine and other related matters. The Tribunal is satisfied this conduct falls within the pharmacy scope of practice.

PCC evidence relevant to particulars 1 – 2

[36] During the hearing the Tribunal watched the 13 videos and communications in relation to particular 1, and the PCC also provided transcripts for some of the videos. Counsel for the PCC referred the Tribunal to the following specific statements of the practitioner in relation to the Covid-19 vaccine:

"…Bloomfield, turn in your damn registration. Turn in your medical licence…you know people are dying, you know the [VAERS] recording system in the United States and how there's over 8,000 deaths just reported in that" and "You are a liar and you know you're a liar"[28]

"Ashley Bloomfield, why don't you come out and talk about it? Because if this happening both of you are murderers. How are you not a murderer if you know something kills people and you do nothing but promote whatever it is…Because you have blood on your hands;[29]

"You're culturally appropriating for a vaccine that you know is going to lose efficacy really fast and you know was designed for a very narrow spectrum as we say in our industry which means as soon as something changes it fails. And that's what we're seeing now. And you're promoting it for the Delta variant, which is absurd…"[30]

"…the children just don't need this vaccine. I've said this from the beginning. Anyone under 30, probably, doesn't need this unless you're immune compromised in some manner. There's no reason to get this. You're not going to --- you're not going to get sick, very sick. You're not going to pass on…"[31]

"Now if they believe the Government propaganda, if they – if they trust that, and they believe they need to get their kids vaccinated because of what…Michael Baker, you know, rolled out there, which is just criminal as far as healthcare goes…". And "…the poor outcomes on that, and a damaged child or a dead child is not going to be something that a parent's going to…come out and speak about."[32]

"…This is [malfeasance] on a level that has never been – never been seen since Nazi Germany and Mengele…"[33]

[28] Bundle of documents at p 6.
[29] Bundle of documents at p 6.
[30] Bundle of documents at p 8.
[31] Bundle of documents at p 41.
[32] Bundle of documents at p 45 – 46.
[33] Bundle of documents at p 47.

[37] Counsel also identified the following statements relating to New Zealand's public health response:

> "Is this the Spanish flu? No. Is this the black plague – no it's not. So these responses seem to be out of order with what is happening. It's an overkill."[34]
>
> "…like this whole covid mess with the "crisis" declared and emergency management from you know basically the Prime Minister's seat, it's sort of extra judicial if you will because, as I've enquired to the Ministry of Justice, about specific parts of the covid orders and what they've said to me is "that's outside of our jurisdiction"…"So they just washed their hands because they have no jurisdiction here and yet they're supposed to be then going back and forcing these draconian measures upon a population without a democratic process".[35]
>
> "So, what I hear about children being subjected to this vaccine, and. – and mask wearing which is absolutely absurd…So now New Zealand has – has seen that even though there's been mass studies for decades out of England that stated that there was no effect on pathogen transmission, that sometimes it actually makes it worse by wearing masks…and now we look at New Zealand at its all about PPE seemingly."[36]

[38] In addition, Counsel highlighted other comments in support of the submission that the practitioner's comments were in the realm of conspiracy theories and which reasonably amounts to misinformation:

> As an example, the practitioner asserts that there is information from the previous US administration "what we're going to call the Covid Pentagon Papers" and "they believe it's a bio weapon and that's from a previous Secretary of State as well as, I think, the Director of National Intelligence, who said that". The practitioner also appears to promote (or at least legitimise) both Ivermectin and Hydroxychloroquine as treatments for COVID-19.

[34] Video 24 September 2021, Counterspin Ep 30: Covid-19 – the Other Side at 34.20.
[35] Bundle of documents at p 25.
[36] Bundle of documents at p 41.

[39] In relation to particular 2, the Tribunal viewed the video footage of the practitioner confronting the then Prime Minister about the efficacy and safety of the Covid-19 vaccine. The transcript of the video is set out in full below:[37]

> Ardern: And what I'd say is that we're all actually completely on the same page when it comes to driving vaccinations and making [*sic*] that we're doing everything that we can to reach people that we need to. This is an issue of –
> Chafin: Why is the vaccine not working in Israel?
> Arden: - this is an issue –
> Chafin: Why is the vaccine not working in Israel?
> Arden: Sir, I'm gonna ask – I'm gonna answer the questions of the accredited media.
> Chafin (speaking over Ardern): [indistinguishable] the vaccine has a 39% efficacy rate [indistinguishable] and you are still pushing it here in New Zealand [indistinguishable] the virus also in the UK [indistinguishable] 63% its rude to lie to [indistinguishable]
> Ardern: Sorry to our accredited members of the, ah gallery here, we might move to an inside venue, unfortunately we've got someone who's disrupting your press conference today, so we might reconvene. Thank you. Could we use the facility here?
> Woman: Yeah yeah yeah, I'm sure we can.
> …
> Chafin: If you want to go to Counterspinmedia dot com, you'll get the truth! Not tame media like is here [indistinguishable]. Bye, Prime Sinister!

[40] During evidence-in-chief, Dr Tukuitonga commented on the accuracy of some the practitioner's comments. The Tribunal exercises a degree of caution in relation to this evidence, as Dr Tukuitonga had not watched the videos. However Counsel for the PCC summarised a number of the practitioner's propositions and put these to Dr Tukuitonga for his views:

(a) In response to the practitioner's comments that many people were dying from the Covid-19 vaccine, Dr Tukuitonga explained that New Zealand has

[37] Bundle of documents at p 9.

a “world class” system of reporting adverse events to vaccines, including the Pfizer vaccine. Further, due to the early approval given to the Pfizer vaccine, one of the conditions was that the manufacturer reported routinely to New Zealand authorities on adverse effects, including deaths. He did not consider the practitioner’s comments were credible.

(b) In response to the practitioner’s comments that in relation to the Covid-19 vaccination Dr Ashley Bloomfield, and impliedly the then Prime Minister, Jacinda Ardern, were murderers, he said these comments were unprofessional, unacceptable and clearly behaviour unbecoming of a registered health professional.

(c) In response to the practitioner’s comment that children do not need the Covid-19 vaccine, Dr Tukuitonga said the practitioner was unqualified to make those kinds of statements. He acknowledged he had his own reservations about nations relying on studies conducted by Pfizer, but explained there were sufficient independent studies conducted, particularly in the United States, that demonstrated the risks to children and the benefits of vaccination.

(d) In response to the practitioner’s comment that the public health response to Covid-19 was an “overkill”, Dr Tukuitonga said that he disagreed and said that, for the most part, New Zealand’s responses were appropriate to the level of risk the country was facing. He was particularly aware of the increased risk to Māori and Pacific people. The only instances where Dr Tukuitonga did not agree with the government’s response was where public health measures were lifted and he considered this was premature.

(e) In response to the practitioner’s comments that mask wearing is “absolutely absurd”, Dr Tukuitonga said that masks were a useful addition to New Zealand’s public health response. He acknowledged that the World Health Organisation had played a role in encouraging doubt around mask wearing, but as the pandemic progressed it became clear that mask wearing was effective.

(f) In response to the practitioner's comments about using ivermectin and hydroxychloroquine as a treatment for Covid-19, Dr Tukuitonga said there is no evidence that these were effective treatments for Covid-19 and this was an absurd statement for a pharmacist to make.

(g) In response to the practitioner's comments that Covid-19 was a bioweapon, Dr Tukuitonga said this was the type of comment that would excite conspiracy theories that were present at the time.

[41] To provide an understanding of the expectations of the practitioner at the time, Counsel for the PCC provided a statement by the Council dated May 2021, that stated:[38]

> Pharmacists have an ethical and professional obligation to protect and promote the health of their tangata whaiora and the public, and to participate in government led public health interventions. Vaccination will play a critical role in protecting the health of the New Zealand public by reducing the community risk of acquiring and transmitting COVID-19.

[42] Council also provided a publication by Associate Professor Helen Petousis-Harris and Dr Amy Chan, *Countering Vaccine Misinformation: A Practical Guide for Healthcare Providers,* that discusses vaccine misinformation and provides strategies for combating vaccine hesitancy and misinformation.[39] The document states:[40]

> Widespread prevalence and persistence of vaccine-related misinformation poses a threat to the public health response to a pandemic. Misinformation contributes to underutilisation of diagnostic testing, vaccine campaigns failing to meet targets, and also polarisation of public debate related to COVID-19.
>
> …

[38] Pharmacy Council, *Covid-19 – Anti-Vaccination Statement,* Pharmacy Council Newsletter May 2021, at pp 5 – 6.
[39] Bundle of documents at p 155.
[40] Bundle of documents at p 155.

> Misinformation being spread about COVID-19 has been shown to evoke confusion and mistrust during the pandemic, which are factors related to a reduced tendancy towards COVID-19 vaccine uptake.

[43] On the impacts of the practitioner's comments, Dr Collin Tukuitonga said that, for Māori and Pacific communities, "*the views of pharmacists, doctors and nurses will have a big influence on whether people get vaccinated and whether they'll vaccinate their families*". In his opinion, the impact of misinformation on these communities will negatively impact on whether or not they accept the vaccine or test for Covid-19, and would undermine the trust that people have in health professionals more broadly.

[44] Similarly, the evidence from Dr Lauren Roche was that:

> …From what I had seen, the majority of vaccine misinformation is spread on social media. I think that Counterspin, Telegram and social media have led to fewer Māori people getting vaccinated. That concerns me because the Northland community is very vulnerable.
>
> In my opinion, Shane was using his credentials as a pharmacist to try to add authority to his anti-health ideas on Counterspin and social media. I do believe that more people would have been vaccinated if it wasn't for the disinformation Shane was spreading.

[45] The Tribunal was also provided emails from three GPs who were practising in Northland during the pandemic, each of whom described the difficulties faced by GPs whose patients were often influenced by conspiracy theories and vaccine misinformation.

PCC submissions on particulars 1 – 2

[46] Counsel for the PCC submits it is clear that the practitioner appeared in the recordings and is identified as a pharmacist. The evidence also clearly shows that the practitioner made numerous comments or statements which questioned the public health response to Covid-19, and that he used language which objectively had the potential to undermine vaccination against Covid-19 – a core part of that public health

response. Where the practitioner referred to unspecified research or data (e.g. “less than 1% fatal”; “Zero point percent fatality rate”), it is submitted that his comments were misleading to the public about a significant public health issue and that those statements were inappropriate.

[47] Counsel submits that it is not necessary for the Tribunal to determine whether the practitioner was well-intentioned or believed what he said, as his conduct was contrary to clear and mandatory ethical standards and professional responsibilities. Of particular concern is that the comments were made at a time when members of the public were seeking authoritative guidance on the public health response. It is submitted the comments had the very real potential to endanger public safety by undermining the public health response to Covid-19, including discouraging vaccination. Further, by making statements with reference to his qualifications and experience as a pharmacist, the practitioner can be said to have abused his professional position and exploited the vulnerability and lack of knowledge of members of the public.

[48] In relation to the practitioner’s right to freedom of expression, Counsel submits that this is subject to the conduct expected of a registered health practitioner, particularly where he referred to and relied on his qualifications, experience and role as a pharmacist when discussing matters relevant to Covid-19.

[49] Regarding particular 2, Counsel submits it is evident that the practitioner intended to disrupt the Prime Minister during a media event and to create fear about, or to discourage, vaccination against Covid-19.

Tribunal consideration of particulars 1 – 2

[50] The Tribunal finds that particulars 1 and 2 are sufficiently supported by the evidence heard and are established. It is clear the practitioner strongly questioned the Government’s response to Covid-19, including public health advice on the seriousness of the virus and the safety and appropriateness of the vaccine. In doing so, he made personal attacks on individuals leading the public health response. It appears clear that the practitioner’s intention was to undermine the public health response, including by

discouraging vaccination. The Tribunal considers the practitioner ought to have known this had the potential to place the health and safety of individuals and the public at risk.

[51] In relation to particular 2, the Tribunal is satisfied that the practitioner's comments during the press-conference questioned the efficacy or safety of the Pfizer Covid-19 vaccine.

[52] Having established the charges, the Tribunal must consider whether each charge amounts to professional misconduct. As an initial step, the Tribunal has considered whether the practitioner's comments are protected by his right to freedom of expression under s 14 of the New Zealand Bill of Rights 1990. Section 14 of the NZBORA states that "*[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form*". Section 5 of the NZBORA provides that the right to freedom of expression "*may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*".

[53] The Tribunal considers that the practitioner's right to freedom of expression is engaged in these proceedings. However, the Tribunal also agrees that this is subject to the conduct expected of a registered health practitioner, particularly where he referred to and relied on his qualifications, experience and role as a pharmacist, and where the comments were made within the context of a public health response where the potential for harm is greater. In this context, the practitioner's professional obligations not to spread misinformation about Covid-19 and undermine the public health response to Covid-19 and vaccination, is a justified limitation on his rights to freedom of expression.

[54] Regarding misconduct, in relation to particular 1, the Tribunal agrees that the practitioner's conduct was contrary to pharmacists' ethical standards, including those outlined in particular 3. The Tribunal encourages health practitioners to engage in legitimate scientific debate. Within the context of Covid-19, where there were novel or new public health initiatives that had a significant impact on people's lives, it was particularly important that health professionals could appropriately question the safety and efficacy of the measures employed through avenues such as peer-reviewed studies and research.

[55] However, the Tribunal is clear that where practitioners engage in such debate, it is incumbent on practitioners to do so professionally, responsibly and ethically, for example by publishing peer-reviewed studies and research. It is clear that the practitioner's comments did not fall into this form of discussion. While an earlier video of the practitioner provided a degree of balance, the choice of where he made his comments was poor. The practitioner's comments in subsequent videos escalated to the point where they became largely unfounded, inflammatory, inaccurate, and intentionally sought to create distrust and division. The Tribunal is satisfied that the practitioner's conduct under charge 1 amounts to malpractice and negligence. It also falls far short of what would be expected of a pharmacist and therefore brought or was likely to bring discredit to the pharmacy profession.

[56] Similarly, in relation to particular 2, the Tribunal is clear that the practitioner's conduct was unprofessional, inappropriate and in clear breach of his ethical standards, including those outlined in particular 3. In attending a press-conference held by the Prime Minister, it presumably was the practitioner's intention to convey his message to a wide audience. To address the Prime Minister, in a manner that can only be described as heckling, during a public health address, is far from the standard expected of a pharmacist. Although the practitioner did not explicitly identify himself as a pharmacist during the conference, he was clearly identified as such subsequently. The Tribunal considers this conduct also amounts to malpractice, negligence and has brought discredit to the pharmacy profession.

[57] The Tribunal considers that particulars 1 and 2 each warrant discipline on a separate and cumulative basis due to the significant breach of ethical standards and potential for individual and public harm his comments had.

Consideration of particulars 4 – 6: disclosure of confidential information relating to the complaints

PCC evidence relevant to particulars 4 - 6

[58] Counsel for the PCC provided a copy of the letter from the Pharmacy Council to the practitioner dated 15 November 2021, which outlined the complaints that had been

received against the practitioner and also attached copies. The letter was marked private and confidential.

[59] The PCC also provided a copy of the Telegram post made by the practitioner. The post stated:

> I have been contacted by The Pharmacy Council of NZ who have received 19 pages of complaints from 5 complainants.
> I will begin by releasing their information for your discretion.
> Here is the first one.
> Her name is YD and she owns a Pharmacy in [ ].
> Her direct number is [ ]
> [ ] Pharmacy
> Their number is [ ]
> I am sure she could use some [love heart symbol].
> The Nature Of Her Complaint [fingers pointing down symbol]
> "I saw his conduct at the Northland Press Conference Today" (when I asked Jacinda the hard questions)
> "He is spreading vaccine information"
> "Saying we should not be wearing masks"
> "Covid death rate"
> Remember ANZACs, this individual is attempting to take away the livelyhood [*sic*] of a Patriot, who is spreading covid truth. Cancelling is what this is known as and it has now come to the shores of NZ…

[60] The Tribunal was also provided with email correspondence from the Pharmacy Council to the practitioner dated 22 November 2021, asking the practitioner to "immediately cease any further disclosure…and delete any disclosures that have already been made". In response by email the same day, the practitioner stated:

> You wage a political hit and you pay the consequences. If they are bold enough to make rubbish claims then they will bear the consequences.
> You were already on the 68 and 69 of the Health Practitioners Competence Assurance Act 2003 course.

I have nothing to lose.

Welcome to my game and my control.

You cease your current actions and I am happy to cease mine.

[61] Dr Roche gave evidence that on or around 22 November 2021 she was advised that the practitioner had released her details online.

[62] On 24 November 2021, solicitors for the Pharmacy Council wrote to the practitioner reiterating the request to cease any further disclosures and to delete any disclosures that had already been made. The practitioner responded to the solicitor's letter indicating that he had received it, and then posted the letter on Telegram.

[63] The Tribunal does not have the benefit of evidence from the practitioner. However, in a screenshot of the solicitor's letter that was posted on Telegram, there is a comment from the practitioner that states: "*I just cannot find in the email where it says that I cannot disclose info they sent me"* and then "*"Confidential" placed in this letter. That does zero legally. This is nothing but legal thuggery".*

PCC submissions on particulars 4 – 6

[64] Counsel for the PCC referred to the responsibility of registered pharmacists to act at all times with honesty and integrity. They refer the Tribunal to the Code of Ethics which also requires that a pharmacist:

(a) attains and maintains the highest possible degree of ethical conduct and accepts responsibility and accountability for membership in the profession; and

(b) avoids any conduct that might bring the profession into disrepute or impair the public's confidence in the pharmacy profession.

[65] In addition, it is submitted there is a clear obligation to demonstrate accepted standards of professional and personal behaviour in any communication, and that this obligation must be coloured by the requirement to maintain a high degree of ethical

conduct. Likewise, it is submitted the responsibility to respond courteously to complaints also demands a response which is consistent with the obligation to accept accountability as a member of the pharmacy profession.

[66] Counsel for the PCC submits that the evidence shows that the practitioner did not act consistently or have any regard to these professional obligations. It is submitted the conduct was deliberate and was intended to cause harm to the complainant. Further, the practitioner has not demonstrated insight into his conduct, and his engagement with the Council in relation to the complaints was completely unprofessional.

Tribunal consideration of particulars 4 – 6

[67] The Tribunal finds that particulars 4 – 6 are sufficiently supported by the evidence before the Tribunal and are established.

[68] Turning to misconduct, the Tribunal agrees with Counsel for the PCC that registered pharmacists, and health professionals generally, have professional responsibilities to act ethically and responsibly in all matters. In particular, principles 4A (demonstrate acceptable standards of professional and personal behaviour in any communication, including by social media) and 4E (respond honestly, openly, courteously and promptly to complaints and criticism) of the Code are relevant to the practitioner's conduct in this instance.

[69] Regarding particular 4, it was inappropriate and unprofessional for the practitioner to post the complainant's details online. While the practitioner did not consider he had been explicitly told not to do this, it was evident from the context that the communication was confidential and was being shared with him for the purposes of obtaining his response. The Tribunal was particularly concerned by the practitioner's message encouraging viewers to contact the complainant themselves, potentially exposing her to harassment at her place of work. The Tribunal considers this was a clear breach of the practitioner's professional standards.

[70] The Tribunal considers that particular 4 amounts to malpractice and negligence and was likely to bring or brought discredit to the profession due to the significant failure

of the practitioner to meet his ethical obligations. Further, the Tribunal considers this particular warrants discipline on a separate and cumulative basis, due to the potential risk that he exposed the complainant to.

[71] Regarding particulars 5 and 6, the Tribunal also considers these fail to meet the practitioner's ethical obligations and thus amount to malpractice, negligence and were likely to bring or brought discredit to the pharmacy profession. The practitioner clearly did not courteously engage with the Council in response to the complaint that had been made. However, the Tribunal considers these particulars are most egregious when viewed in light of particular 4, and therefore considers they only warrant discipline on a cumulative basis.

Consideration of particular 8: podcast in which the practitioner made various inappropriate and/or unprofessional behaviour

PCC evidence relating to particular 8

[72] The transcript of the 28 January 2022 podcast was provided to the Tribunal. In addition to the statements referred to in sub-particulars 8(a) – (c), Counsel for the PCC also highlighted that the practitioner commented that the Council is a "*Government entity";* that *"these people…are all political appointees"* and that his "true goal here is just to highlight the corruption that exists within the New Zealand Government and its specific entities…". The practitioner also described himself as a "*politically persecuted pharmacist"* and described the Tribunal process as "*literally a polit bureau [sic] political hit*".

PCC submissions relating to particular 8

[73] Counsel for the PCC suggests that the practitioner's comments about the Council appear to have been in response to his receiving notification of complaints against him. In the podcast he states:

> So, I'm one of the – the top experts in the area of medicines and when I go out and ask Jacinda Ardern a question in this regard, because, you know, she – she painted herself as the single source of truth, her podium…what I get back from

> that is an email, from the Pharmacy Council, stating because I've asked her those questions, they're very concerned about my ability to practice pharmacy in a safe manner.

[74] Counsel submits that the Council was simply acting in accordance with its core statutory function in seeking the practitioner's response to the complaints. Instead of engaging in this process, the practitioner disclosed the name of the complainant and made disparaging comments about the Council.

[75] Counsel submits that the comments about the 'enslavement' of pharmacists by the Council and that the Council is "not actually pharmacists" is wholly inappropriate, as the majority of the Council are pharmacists, and its principle purpose is to protect the health and safety of the public. Further, the language used demonstrates the practitioner's complete failure to take accountability for his own actions, and it is clearly not the standard expected of a pharmacist. The nature of some of his comments, were outrageous: to suggest corruption or Government interference in the operations of the Council was wrong, inappropriate and unprofessional.

Tribunal consideration of particular 8

[76] The Tribunal finds that particular 8 is sufficiently supported by the evidence and is established.

[77] The Tribunal also finds that the conduct amounts to malpractice and negligence as the practitioner's conduct fell far short of that expected by a pharmacist and was in breach of his professional obligations identified in particular 9. It is of course open to health practitioners to engage with their regulatory bodies. However, in a similar way as particulars 1 and 2, it is incumbent upon practitioners to do so professionally and responsibly. The practitioner's comments about the Council were unfounded and had significant potential to undermine public trust in the Council and health regulatory bodies more broadly. The comments quite clearly brought discredit to the pharmacy profession as they directly criticised its regulatory body.

[78] The Tribunal finds that particular 8 warrants discipline on a separate and cumulative basis, due to the potential harm caused to the reputation of the Council and the profession as a whole. This seriousness is amplified within the context of a public health response.

Consideration of particular 10: false declaration to the Pharmacy Council

PCC evidence relating to particular 10

[79] The PCC provided a copy of the declaration to the Tribunal that was made on 22 June 2022. Counsel also provided correspondence from the practitioner to the Pharmacy Council, dated 20 April 2022, in respect of the investigation:

> Not a registered Pharmacist with the Pharmacy Council so under what grounds/jurisdiction are you investigating?

[80] In an email dated 26 April 2022 the PCC clarified that it was able to investigate registered pharmacists regardless of whether or not they had a practising certificate to which the practitioner responded, "*Easy to correct".*

[81] When asked for an explanation as to why he made this declaration within the context of the PCC's investigation on 22 June 2022, the practitioner responded the same day stating that "*[t]here was not a category for political persecution. I am also not in NZ".*

[82] During questions to Counsel from the Tribunal about how the application for removal from the Register operates in practice, Counsel clarified that it was not possible to apply for removal without making the declaration.

PCC submissions relating to particular 10

[83] PCC refers to the Code of Ethics which establishes a general ethical obligation to act with honesty and integrity. Counsel submits that the declaration was clearly false, and that the only reasonable conclusion on the evidence was that it was made in full knowledge of the PCC investigation, and therefore it was knowingly false. Counsel submits this shows little if any respect for the Council's regulatory requirements.

[84] Counsel submits that knowingly making a false declaration is conduct which can be regarded as neglect of the professional expectation to act with honesty and integrity. That expectation must properly extend to a pharmacist's dealings with the Council, which is entitled to expect truthful responses to declarations which are made for a regulatory purpose.

Tribunal consideration of particular 10

[85] The Tribunal finds that particular 10 is sufficiently supported by the evidence and is established.

[86] The Tribunal also finds that the conduct amounts malpractice and negligence as there is an unequivocal expectation that health practitioners complete such declarations accurately and honestly. Regulatory bodies are reliant on this being done, so appropriate notice is given of any matters which may require further investigation. Regardless of the context in which this particular false declaration arose, the fact that the practitioner made a declaration he knew to be untrue is a departure from the expected standard. Similarly, it is conduct which is likely to bring or brought discredit to the profession.

[87] When considering whether the conduct warrants disciplinary sanction, the Tribunal finds that the particulars of charge 10 warrant discipline on a cumulative basis. While the practitioner did make a false declaration, his intention was not to mislead the Council but to remove his name from the Register.

Penalty

[88] Having been satisfied particulars 1, 2, 4 – 6, 8 and 10 amount to professional misconduct, the Tribunal must go on to consider whether it is appropriate to order any penalty under s 101 of the Act.

Relevant law

[89] Under s 101(1) of the Act, penalties may include:

(a) cancellation of the practitioner's registration as a health practitioner;

(b) suspension of the practitioner's registration for a period of up to 3 years;

(c) an order that the practitioner may only practise in accordance with any conditions as to employment, supervision or otherwise, such conditions not to be imposed for more than 3 years;

(d) an order that the practitioner is censured;

(e) subject to subsections (2) and (3), order that the health practitioner pay a fine not exceeding $30,000; and

(f) an order that the practitioner pay part or all of the costs of the Tribunal and/or the PCC.

[90] The appropriate sentencing principles are those contained in *Roberts v Professional Conduct Committee*[41], where Collins J identified the following eight factors as relevant whenever this Tribunal is determining an appropriate penalty. In particular, the Tribunal is bound to consider what penalty:

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

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

(c) punishes the practitioner;

(d) allows for the rehabilitation of the health practitioner;

(e) promotes consistency with penalties in similar cases;

[41] *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 2254 at [44] – [51].

(f) reflects the seriousness of the misconduct;

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

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

[91] The objective when determining penalty is described in *Young v Professional Conduct Committee*:[42]

> The protection and maintenance of professional standards is an important part of the protection of the public. It is through the maintenance of high professional standards that the public is protected. Deterrence is in the same category. This is intended to discourage others from acting the same way reflected in the severity of the punishment imposed.

[92] The Tribunal was also referred to *A v Professional Conduct Committee* where Keane J discussed the penalties of cancellation and suspension:[43]

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

[93] In addition, Counsel for the PCC referred to *Katamat v Professional Conduct Committe*e, where Williams J gave guidance on the process by which the Tribunal should determine an appropriate penalty:

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[42] *Young v Professional Conduct Committee* HC Wellington CIV 2006-485-1002 1 June 2007.
[43] *A v Professional Conduct Committee* CIV 2008-404-2927, Auckland 5 September 2008.

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

[94] Overall, the Tribunal's role is to determine the appropriate penalty considering the nature and seriousness of the conduct and the purposes of the Act to protect the public interest and the integrity of the profession.

Comparable cases

[95] Counsel for the PCC referred the Tribunal to a number of comparable cases. In the cases discussed above, where the Tribunal has previously made findings of professional misconduct, Counsel noted that:

(a) in *Tepou,* a nurse was suspended for 12 months, censured, had conditions imposed and was required to contribute to 40% of costs;

(b) in *Hugill,* a nurse had her registration cancelled;

(c) in *Tovaranonte,* the Tribunal considered suspension but considered a fine and conditions as to supervision the least restrictive penalty in the circumstances.

[96] Counsel also notes that cancellation had been ordered in two recent decisions of the Tribunal regarding the publication and dissemination of Covid-19 misinformation, but the written decisions were not yet available.[44]

[97] In relation to other disparaging conduct:

(a) In *Amarsee,* a pharmacist made derogatory comments to patients about a medical practice, along with other serious charges relating to dispensing. In that case the practitioner's registration was cancelled.

(b) In *Tolland,* the Tribunal imposed a condition of supervision for 3 years, and fined and censured the practitioner, noting that while it was a serious matter, "its seriousness lies more in the inadequacy of Ms Tolland's response than any significant fears about her clinical practice as a midwife or the health and safety of the public".

[98] Counsel for the PCC also referred to the following cases in which health practitioners failed to participate in the disciplinary process:

(a) In *Kleszcz*,[45] a doctor wrote prescriptions for medicines she obtained for her own use. She did not attend the hearing, and in considering penalty, the Tribunal noted it was unable to consider whether a penalty less than cancellation was appropriate where it did not have information about the practitioner's current circumstances;

(b) In *Savage,* a nurse was charged in relation to a conviction for indecent assault against a colleague, and similarly did not participate in the disciplinary process. Again, the Tribunal was unable to consider whether a penalty less than cancellation might be appropriate:

[44] Med22/574P and Med22/571P
[45] Med16/353P.

> Had there been more information before the Tribunal about Mr Savage's personal position or the other matters mentioned, there may have been room to consider a result other than cancellation of his registration. That information is not to hand.
>
> To suspend Mr Savage for any period up to 3 years may achieve little if he is not intending to practise as a nurse at least in New Zealand during that time.
>
> Accordingly, the better course is for his registration to be cancelled now and, if he ever wishes to return to the profession, the then circumstances can be considered in full in any application that he makes; and this would include the censure that the Tribunal is ordering in this case and the content of this decision.

(c) Other cases in which the practitioner's failure to participate was a factor considered by the Tribunal include *Fernando*[46]*, Kurt*[47] and *Kora*[48]*.*

PCC submissions on penalty

[99] Counsel for the PCC referred to *Katamat* to support the submission that public protection is the primary consideration under the Act. Acknowledging that the penalty imposed needs to be the least restrictive relevant penalty, it is submitted that the following aggravating factors justify cancellation in this case:

(a) the practitioner relied on his qualifications, experience and registration as a pharmacist to add weight to his statements;

[46] Med16/325P.
[47] Nur14/285D.
[48] Nur11/192P.

(b) the practitioner made public statements during a global pandemic, which vaccine hesitant or concerned members of the public may have been seeking authoritative information and would have been influenced by the practitioner's status as a pharmacist;

(c) the practitioner was a respected senior pharmacist within the Northland community, and his views would likely have had an impact on that community;

(d) the practitioner appears to have sought out wide public attention for his views;

(e) the practitioner's conduct involved repeated lapses of fundamental aspects of professional practice over a number of months, rather than it being a one-off error of judgement;

(f) the practitioner showed serious disregard for the standing of the pharmacy profession as a whole and the role of pharmacists in the public health response to Covid-19;

(g) the media reports of the practitioner's conduct, which include the fact that he is a pharmacist; has damaged the reputation of the profession;

(h) the practitioner has displayed no insight into his conduct; and

(i) the practitioner's failure to participate in the professional disciplinary process indicates a lack of regard for the regulatory regime under which he is registered.

[100] The PCC could not identify any mitigating factors and noted that the practitioner has not provided the Tribunal with any explanation for his conduct.

[101] Counsel also submits that there is no evidence before the Tribunal to suggest that the practitioner is capable of rehabilitation.

[102] Regarding possible lesser penalties, the PCC submits that in the absence of any input from the practitioner, there can be no assurance that a period of suspension would result in reflection or improvement in understanding of or compliance with basic professional obligations. The practitioner is understood not to be in New Zealand and there are indications he does not wish to practise as a pharmacist in New Zealand. Cancellation would ensure that if the practitioner did return to practise in New Zealand again the Council would be on notice to assess his fitness to practise. Similarly, it is submitted that conditions would have no practical utility in terms of penalty.

[103] Overall, cancellation of registration will advance responsible standards of practice in the pharmacy profession by clearly identifying the significant consequences of such failures.

[104] The PCC also submits this is an appropriate case in which to make an order under s 102(1)(a) that the practitioner cannot apply for re-registration for a minimum period of 3 years.

[105] The PCC also submits that it is appropriate for the practitioner to be censured, to mark the Tribunal's disapproval of the conduct in question.

Non-publication orders

[106] The PCC seeks permanent name suppression for four of the people who laid complaints about the practitioner:

(a) IE, registered nurse of [ ];

(b) NY, a journalist [ ];

(c) YD, a pharmacist of [ ]; and

(d) AS, Māori Health Provider, [ ].

[107] The PCC submits that it was appropriate for the complainants to raise their concerns with the Pharmacy Council, and that there is no public interest in knowing their identities. Further, given the nature of the concerns the publication of their names could reasonably have a chilling effect on future complainants. Counsel also referred to the practitioner's previous disclosure of one of the complainants' names which strengthens the need for protection against further inappropriate disclosure of the complainant's names and details.

[108] In addition, Counsel sought a permanent order for suppression of the name and identifying details of Dr NE, whose name may have been referred to in submissions and included in the evidence before the Tribunal. Dr N has raised concerns with the PCC and said that as a busy GP he does not want to be targeted by "anti-vaxx' people.

[109] The Tribunal considers the reasons in support of the PCC application is persuasive and thus considers it is desirable to make the non-publication orders on the basis set out above.

Costs

[110] In relation to costs, the Tribunal records that it has used a starting point that a health practitioner will generally be expected to contribute 50% of the actual and reasonable costs of the Tribunal and PCC.

[111] In relation to costs, Counsel for the PCC notes the practitioner's failure to co-operate with the disciplinary process has meant it was necessary to call witnesses. It is submitted there is a clear element of unfairness for responsible pharmacists to subsidise the costs of the practitioner's conduct and there is no justification for a costs award of less than 50% in respect of the costs incurred, and that a percentage of 60% may be justified in the circumstances.

[112] Following the conclusion of the hearing, the practitioner was given an opportunity to make submissions on costs before the Tribunal finalised its indicative costs award. The practitioner did not avail themselves of this opportunity.

[113] Given the lack of submissions, the Tribunal has no evidence before it as to the practitioner's financial situation. Given this, and the practitioner's overall failure to engage with the disciplinary process, the Tribunal's considers that a 50% costs contribution is appropriate.

Orders

[114] Accordingly, the Tribunal makes the following orders:

(a) the practitioner's registration is cancelled pursuant to s 101(1)(a) of the Act;

(b) the practitioner may not apply for re-registration before three years have elapsed from the date of the judgement pursuant to s 102(1)(a);

(c) the practitioner is censured pursuant to s 101(1)(d) of the Act;

(d) the practitioner is to pay a 50% contribution of costs to both the PCC and the Tribunal pursuant to s 101(f) of the Act. The practitioner is therefore ordered to pay $34,067.14 as a contribution to the PCC costs and $21,297.55 as a contribution to the Tribunal costs; and

(e) that the name and identifying details of IE, NY, YD, AS and NE be permanently suppressed pursuant to s 95(2) of the Act.

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

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

(b) request the Pharmacy Council of New Zealand to publish either a summary of, or a reference to, the Tribunal's decision in its professional publications to members, in either case including a reference to the Tribunal's website so as to enable interested parties to access the decision.

DATED at HASTINGS this 18th day of June 2024

Winston McCarthy
Deputy Chairperson
Health Practitioners Disciplinary Tribunal

DISCIPLINARY CHARGE

TAKE NOTICE that a Professional Conduct Committee appointed by the Pharmacy Council pursuant to section 71 of the Health Practitioners Competence Assurance Act 2003 (**the Act**) has determined in accordance with section 80(3)(b) of the Act that a disciplinary charge be brought against registered pharmacist Mr Shane Chafin before the Health Practitioners Disciplinary Tribunal (**the Tribunal**).

The Professional Conduct Committee has reason to believe that grounds exist entitling the Tribunal to exercise its powers under section 100 of the Act.

PARTICULARS OF CHARGE

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that registered pharmacist Shane Chafin has acted in an unprofessional and/or inappropriate manner in the following ways:

Videos and/or communication about COVID-19

1. Between on or around September 2021 and January 2022 Mr Chafin appeared in approximately 13 videos and/or online posts, as listed in **Appendix 1**, in which he made various comments and/or statements which (including but not limited to): questioned the accuracy of COVID-19 information provided by the Government and/or public health officials; used negative and/or emotive language about the public health response to COVID-19 (including the Pfizer COVID-19 vaccine); made claims which minimised the potential impact of COVID-19, when he knew or ought to have known that his comments and/or statements had the potential to:

    (a) undermine the public health response to COVID-19; and/or

    (b) place the health and wellbeing of individual members of the public at risk and/or to endanger public safety during

a pandemic, including by promoting and/or encouraging distrust of the public health response to COVID-19; and/or

(c) discourage members of the public from receiving the COVID-19 vaccine and/or to create distrust or fear about the COVID-19 vaccine; and/or

2. On 2 November 2021 Mr Chafin attended an event in Northland during which he confronted the (then) Prime Minister Jacinda Ardern and made comments which questioned the efficacy or safety of the Pfizer COVID-19 vaccine in the presence of members of the public and/or which were reported on or by national news media; and/or

3. By making the various comments and/or statements in the videos and/or online posts referred to in paragraph 1 above, and/or by acting in the manner alleged at paragraph 2 above, Mr Chafin failed and/or refused to have regard to his professional responsibility to, among other things:

(a) promote and participate in public health initiatives; and/or

(b) not to abuse his professional position and/or to exploit the vulnerability or lack of knowledge of others; and/or

(c) provide accurate and truthful information in an appropriate form that is not misleading to the public; and/or

(d) act to prevent harm to the public; and/or

(e) demonstrate acceptable standards of professional and personal behaviour in any communication, including by social media; and/or

Disclosure of confidential information

4. On or around 15 November 2021 the Pharmacy Council wrote to Mr Chafin to advise that it had received complaints from five individuals about his online presence. The letter, which was marked “Private and Confidential”, provided Mr Chafin with copies of the complaints and the names of the complainants to allow him to respond. In response, Mr Chafin inappropriately and/or unprofessionally used a Telegram chat:

    (a) to disclose the name, workplace, and telephone number of one the complainants, and details of their complaint, to third parties; and/or

    (b) to indicate to third parties that he intended to disclose information about the other complainants; and/or

5. On or around 22 November 2021 the Pharmacy Council emailed Mr Chafin to advise that the complaint information had been provided to him confidentially and requested that he immediately delete the disclosure already made and not to disclose any other information relating to the complainants. In response, Mr Chafin failed or refused to confirm that he would not make further disclosure of information about the complainants and/or that he would delete the existing disclosure; and/or

6. On or around 24 November 2021 the Pharmacy Council’s solicitors wrote to Mr Chafin to reiterate the request to delete the existing disclosure about the complainant and not to disclose information about other complainants. In response, Mr Chafin posted the solicitor’s letter on Telegram and/or failed or refused to confirm that he would not make further disclosure of information about the complainants and/or that he would delete the existing disclosure; and/or

7. By acting in the manner alleged at paragraphs 4 - 6 above, and/or by failing or refusing to delete the disclosure alleged at

paragraph 5 and 6 above, Mr Chafin failed and/or refused to have regard to his professional responsibility to, among other things:

(a) demonstrate accepted standards of professional and personal behaviour in person and in any communication; and/or

(b) respond courteously to complaints and criticism; and/or

Other inappropriate and/or unprofessional behaviour

8. In a podcast released and/or made available to the public on or about 28 January 2022, Mr Chafin made various inappropriate and/or unprofessional comments about the Pharmacy Council including:

(a) that the Pharmacy Council is "*used as a Government whip to enslave those people in their practice. We will take away your ability to thrive and survive if you don't do what we say*" and/or

(b) that "*to say* [the Pharmacy Council] *represents pharmacy is not true. Even though they use Pharmacy Council they should take that out of their name because its disingenuous and it fools the public into thinking that these people are actually pharmacists or healthcare providers or for them, those people, but they're actually not*."

(c) alleging that the Pharmacy Council is "*extremely controlled and corrupt*"; and/or

9. By acting in the manner alleged in paragraph 8 above, Mr Chafin failed and/or refused to have regard to his professional responsibility to, among other things:

(a) be mindful about comments made about colleagues (pharmacists or otherwise), employers or work environments; and/or

(b) demonstrate accepted standards of professional and personal behaviour in person and in any communication; and/or

False declaration to the Pharmacy Council

10. On or around 22 June 2022 Mr Chafin applied to the Pharmacy Council to be removed from the Register. As part of the application, Mr Chafin confirmed the following declaration: "*I wish to be removed from the Register and declare that I am not aware of any criminal or disciplinary investigations or actions pending against me*" when he knew or ought to have known that he was under investigation by a Professional Conduct Committee and/or that his declaration was false.

The conduct alleged above either separately or cumulatively amounts to professional misconduct pursuant to section 100(1)(a) and/or section 100(1)(b) of the Act.