



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 771/Nur15/330P

UNDER the Health Practitioners
Competence Assurance Act
2003

AND

IN THE MATTER of disciplinary proceedings
against **GARTH PHILIP
GOLDING** of Auckland,
Enrolled Nurse

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING held in Christchurch on 18 December 2015

TRIBUNAL: Mr K Johnston (Chair)
Mr Q Hix, Ms K Marshall, Mr M McIlhone and Dr C Taua
(Members)

Ms G Fraser, Executive Officer
Ms K O'Brien, Stenographer

APPEARANCES: Mr M McClelland QC and Ms H Stephen for Professional
Conduct Committee

Practitioner in person

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DECISION

Introduction

1. A Professional Conduct Committee appointed by the Nursing Council of New Zealand pursuant to s71 of the Health Practitioner’s Competence Assurance Act 2003, prefers a charge against the Practitioner, Garth Philip Golding.
2. The Notice of Charge is dated 21 August 2015, and particularises the charge in the following terms:

“1. On 31 March 2014, Mr Golding was convicted in the Auckland District Court for an offence punishable by a term of imprisonment not exceeding seven years, pursuant to section 135 of the Crimes Act 1961 (indecent assault) in that:

*1.1 On or about 5 November 2013 at Auckland, Mr Golding committed an offence of indecent assault against Ms R (as set out in the **attached Certified Copy of Entry of Criminal Record**).*

The conviction reflects adversely on Mr Golding’s fitness to practise pursuant to section 100(1)(c) of the Act.”

Charge

3. Section 100 of the Act, pursuant to which the charge is laid, materially provides:

“(1) The Tribunal may make any one 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 one or more findings that:

...

“(c) The Practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise; or

...

(2) The Tribunal may make a finding under sub-section 1(c) only if the conviction concerned:

(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.”*

4. Thus the elements of the charge are first, that the Practitioner has been convicted of a qualifying offence and, second, that the conviction reflects adversely on his or her fitness to practise.

Evidence

5. Prior to the hearing the parties lodged with the Tribunal an agreed statement of facts dated and signed by the Practitioner. The case proceeded primarily on the basis of the agreed factual position. The Tribunal sets out the agreed statement of facts in its entirety:

“MAY IT PLEASE THE TRIBUNAL:

- “1. *Garth Philip Golding registered as an enrolled nurse with the Nursing Council in 1989. Mr Golding has not held a current annual practising certificate since 30 June 2010.*
2. *In or around [] 2013, Mr Golding was employed as a massage therapist at a massage facility in Penrose, Auckland. As a result of an incident on or about [] 2013, Mr Golding was charged with an offence under section 135 of the Crimes Act 1971, namely indecent assault. Penalty for the offence is a term of imprisonment not exceeding 7 years.*
3. *Police’s Summary of Facts (attached as “A”) is set out in full as follows:*

INTRODUCTION

On the [] 2013 the defendant, Garth GOLDING, was working as a massage therapist at a massage facility in Penrose.

The victim in this matter, arrived at the facility to receive her massage from the defendant at 3.30pm.

CIRCUMSTANCES

The defendant asked her to fill in a new client card before asking her a number of questions about the areas of her body she would like massaged by him.

It was agreed that he would massage her neck, shoulder and entire back. He asked her to make herself comfortable and lie down on the massage table and to cover herself with a red blanket which he left on the bed.

After removing her clothing, including her underwear, she lay down as requested.

After a couple of minutes the defendant re-entered the room and lowered the blanket to her hip level and began palpating the victim's lower back before commencing a series of stretches. He stood to the side of the victim and bent her leg exposing her genitalia to view.

Next he applied massage oil on the victim's back and commenced massaging her lower back.

During the massage the defendant placed one hand in his trousers and touched himself while his other hand massaged the victim's back. The victim has heard the sound of the defendant touching himself and became very anxious and has not known how to deal with the situation.

As the defendant was touching himself the victim turned around and confronted him. The defendant quickly withdrew his hands from his trousers and apologised saying, "I'm really sorry, I don't usually do this".

The victim's phone rang and she quickly ended the call before telling the defendant to leave the room and that she intended to take legal action.

He told the victim that he would inform his boss what had happened and left the room so the victim could get dressed.

Once the victim was dressed she exited the room and asked to see his cell phone as she thought she heard sounds of buttons being pressed during her massage and she was concerned he had been taking photographs of her during the massage.

The defendant gave her his cell phone and the victim was unable to find any images of herself on the phone.

They entered into a discussion about giving the victim a refund resulting in the defendant stating "I'll give you \$85".

Thisd (sic) upset the victim even more and she briskly left the premises. The defendant followed her to the car telling her he would give her the money.

The victim drove away.

INJURIES TO THE VICTIM

The victim has sustained a significant amount of mental anguish as a result of the incident.

DEFENDANT COMMENTS

When spoken to by Police on the evening of 5 November 2013 he stated that he was not used to his clients taking off all their clothes for a massage and he found himself aroused.

The defendant has not previously appeared.

4. *Mr Golding pleaded guilty to the criminal charge. He was convicted and sentenced in the Auckland District Court on 31 March 2014 by Judge R Collins. A copy of the sentencing notes is attached as "B".*
5. *The Nursing Council was notified by the Auckland District Court of Mr Golding's conviction. A certified copy of the permanent court record sealed by the Deputy Registrar of the Auckland District Court on 19 February 2015 is attached as "C".*

*I, **GARTH PHILIP GOLDING**, enrolled nurse of Auckland, hereby admit the facts as set out in the agreed summary of facts, admit charge 1 that has been brought against me, and admit that the conduct as described in the agreed summary of facts*

and that the conviction reflects adversely on my fitness to practise pursuant to section 100(1)(c) of the Health Practitioners Competence Assurance Act 2003.

"G P Golding"

Garth Philip Golding

Dated the 10th day of Nov 2015"

4. Attached to the Notice of Charge was a certified copy of the relevant entry in the permanent criminal record verifying the Practitioner's conviction, following his plea of guilty, in the District Court at Auckland on 31 March 2014 and the sentence imposed being supervision for a year, an order that the Respondent pay reparation of \$800 and the issue of a first warning pursuant to s86B(1)(b) of the Sentencing Act.
5. Attached to the agreed statement of facts were copies of the Police summary of facts, the District Court Judge's sentencing notes and the Ministry of Justice's report to the Council.

Liability

6. The principles relating to the burden and standard of proof in professional disciplinary proceedings are too well established to require detailed exposition here.
7. It is sufficient to record that the burden of establishing the charge falls on the prosecutorial authority, and that it must do so to the civil standard or on the balance of probabilities, recognising that this is not a fixed standard in the sense that the more serious the allegation the more cogent the proof required.
8. As already stated, there are two elements of a charge under s100(1)(c). First, that the practitioner has been convicted of a qualifying offence, and, second, that the offence reflects adversely on the practitioner's fitness to practise.
9. Whilst there is no contest concerning liability in this case – the Practitioner has accepted from the outset that he is liable, and expressly confirmed that during the course of the hearing– nevertheless, it is appropriate to outline the basis upon which the Tribunal has concluded that the PCC has made out the charge.

10. The first element of the charge is made out simply because the Practitioner has been convicted of an offence pursuant to s135 of the Crimes Act 1961 which is punishable by imprisonment for a term not exceeding seven years, and, accordingly, the conviction is one which qualifies under s100(2)(b) of the Act.
11. For the PCC, Mr McClelland made helpful submissions as to the meaning of the phrase “*fitness to practise*”. It is not defined in the Act. It is well settled that it is a term which extends beyond issues of competence and includes conduct that, objectively considered, will have a negative impact on the trust and confidence which the public is entitled to have in the practitioner and the profession as a whole, including conduct which falls below the standards legitimately expected of a member of the relevant profession, whether of a clinical character or not.
12. Mr McClelland referred us to a number of relevant decisions in relation to this, but it is unnecessary to refer to them in detail here.
13. For his part, the Practitioner accepts that his conviction raises a question as to his fitness to practise – he has done so from the start.
14. The Tribunal has had no difficulty in concluding that the PCC has made out the charge in this case. For any nurse to commit an offence of this sort, involving as it does a gross breach of trust, whether in a clinical context or not, undoubtedly brings into question that nurse’s fitness to practise.

Penalty

15. The real issue in this case concerns the appropriate penalty.
16. At the outset, the Tribunal makes it clear that this case is simply too serious for there to be any question as to whether a penalty should be imposed. Plainly it must. The issue is the appropriate penalty.

The PCC’s submissions

17. For the PCC, Mr McClelland began his submissions concerning penalty by focusing on the purpose of professional disciplinary proceedings.

18. He referred us to *Dentice v The Valuers Registration Board*¹ where Eichelbaum CJ spoke of professional disciplinary proceedings existing

“...to enforce a high standard of proprietary and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and profession itself, against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of its members conform to the standards generally expected of them...”.

19. He then referred us also to Williams J’s decision in *Katamat v Professional Conduct Committee*² where, referring in turn to Collins J’s decision in *Roberts v Professional Conduct Committee*³ he identified a series of factors which the Tribunal should consider in determining the appropriate penalty in any case.
20. Mr McClelland also referred us to *Patel v Dentists Disciplinary Tribunal*⁴ in which Randerson J provided some helpful guidance as to the Tribunal’s role in balancing the nature and gravity of offences and their bearing on a professional person’s fitness to practise.
21. Finally, Mr McClelland referred us to *A v Professional Conduct Committee*.⁵
22. The principles which emerge from these cases can be summarised as follows. The primary purposes of professional disciplinary proceedings are the protection of the public and the maintenance of professional standards. Punishment is not a primary purpose, though it is an inevitable outcome of the imposition of any penalty. Consideration should be given to the prospects of the rehabilitation of the Practitioner. The Tribunal’s responsibility is to consider all available options in order to identify the least punitive penalty which reflects the seriousness of the misconduct and discharges its responsibilities to the public and the profession. It is important that penalties imposed from case to case are consistent – like misconduct should attract

¹ *Dentice v The Valuers Registration Board* [2012] NZHC 3354

² *Katamat v Professional Conduct Committee* [2012] NZHC 1633

³ *Roberts v Professional Conduct Committee* [2012] NZHC 3354

⁴ *Patel v Dentists Disciplinary Tribunal* AP77/02

⁵ *A v Professional Conduct committee* CIV-2008-404-2927

like penalties. In the end, the Tribunal must identify a penalty which is fair, reasonable and proportionate in the circumstances.

23. Mr McClelland then turned to the penalties available in this case, noting that, because it involves a referral of conviction, the range of available penalties is narrower than in other types of cases.
24. He referred us to *Rae*⁶ in which the Tribunal spoke of the need to send a clear message to practitioners:

“... that it is a privilege for them in their professions to deal with other people in a close and intimate way. There are high standards required in every physical contact that a health practitioner has with another person. That person is placing their trust and the privacy in the health practitioner and that every person expects their privacy will be respected and their trust will be honoured.”

and, later in the same case, said that if a health practitioner:

“...is found by the Court to have offended against the law relating to physical contact with another person, particularly when the conviction is for a sexual offence, there is a serious breach of professional standards and a strong call for the protection of the public.”

25. *Rae* involved a nurse who was convicted of a sustained sexual assault on a 14 year old.
26. The outcome of the professional disciplinary proceeding was that *Rae* was censured, his registration was cancelled and a series of conditions were imposed under s102.
27. Mr McClelland also referred us to *Ruhe*.⁷ That case involved professional disciplinary proceedings following a practitioner’s conviction on two counts of indecent assault of a victim under 16 and one count of committing an indecent act on a victim under 16.
28. Mr McClelland submitted that it was relevant for the Tribunal in considering the appropriate penalty in this case that the victim suffered significant mental anguish.

⁶ *Rae* 471/Nur12/208P

⁷ *Ruhe* 367/Nur10/164P

29. He noted also that in the criminal proceeding the sentencing Judge had said that the Practitioner was entitled to credit for the fact that this was a first offence, that he had accepted responsibility for his actions and pleaded guilty and had offered to make amends in the form of a payment of a sum of money, and that the conviction itself was a significant penalty.
30. Mr McClelland concluded his submissions as to penalty in these terms:

“... it is the PCC’s submission that given how seriously indecent assault is considered and the impact on the complainant, the only penalty that the Tribunal can impose is cancellation of registration, censure, and the imposition of conditions the same or similar as those imposed by the Tribunal on [in] Rae.”

The Practitioner’s submissions

31. The Practitioner at first said that he had nothing to say about penalty, but then referred us to a letter he had written to the Executive Officer on 19 November 2015. In the circumstances, it seems appropriate to set out the relevant part of this letter. In it, the Practitioner said:

“On July 24th of 2015, I was given the opportunity to meet with the Professional Conduct Committee (PCC) of the Nursing Council; while providing the PCC with the necessary documents, prior to the meeting.

During the Meeting I had to explain in my own words the summary of events that occurred on the [] 2015; while I was working as a Massage Therapist employed in a private studio in Auckland.

In my account of events that lead to my conviction I attempted to explain to the Committee, that during a routine massage procedure; after entering the Massage room I unveiled a blanket, over the client upon seeing the client was fully unclothed, while laying face down. (As stated in the summary of the facts); later I took advantage of a fragile situation, by in which I afterwards, realised I had made a very grave error of judgement, and caused potential harm upon the client, during the massage session, which later lead to a conviction; that I deeply regret to this day.

I was also asked by the Committee, during the meeting; in what steps have I taken to assure the Nursing Council that an act of this nature would not occur again?

I explained to the Committee, due to the conviction; A sentence of one year of supervision, having to report weekly to Probation Officers, (as specified by the Courts); from the March of 2014 to March of 2015, was imposed upon me by

the Courts along with reparation payments to the victim. I explained I had discussed with my probation officer, the option of counselling programmes, in which I was agreeable towards. However on further enquiry to counselling agencies by probations; due to the predisposition of my conviction, counselling would not be offered (freely), by agencies, because of their threshold of only offering free counselling to clients to whom have had drug and/or alcohol related issues relevant to their conviction. Adding to that; The opinion of my Probation Officers, was that of, after several weeks of reporting for probation, they considered myself of to be a low risk category for re-offending.

The Committee had also asked me about my present employment status. In which I explained; Apart from casual- part-time work; I have not been able to obtain any full-time employment, during this time; due to having to be declare a (one conviction) on job applications forms, and/or employees unwilling to take candidates with convictions; while I have applied for over one hundred jobs and attended countless interviews in the process of attempting to obtain meaningful employment in the past 18 months.

Over that period and up until present; This has caused a considerable amount of financial hardship and mental anguish and for me and also on my family. I had made previous enquiries to the Nursing Council into the various Educational Providers offering CAP courses; in which I was issued with a list, by Council. On speaking with the Providers; a very limited number of Institutes throughout New Zealand were offering CAP courses; I also discovered CAP courses, were only being offered, dependent upon participant numbers that would only warrant running the CAP course. I had re-inquired about available courses over a two year period, (prior to my conviction) but without success.

However in the last six months I have regained some confidence in returning to further Education taking an NZQA Computing Courses Level 3 Courses in Christchurch where I am presently residing, while still applying for customer service and sales consultants roles relating to healthcare. While enquiring into the CAP Courses in 2016 for Enrolled Nurses throughout various locations in NZ. Once the judicial process, after my hearing date of December 18th in Christchurch with New Zealand Health Practitioners Disciplinary Tribunal is to be completed.”

32. The Tribunal asked the Practitioner a number of questions and he was very happy to provide additional information, but nothing emerged which contradicted the agreed factual position or is sufficiently relevant to record in connection with the issue of penalty.

Discussion

33. This is a serious case. It involves a practitioner who unquestionably breached the trust of the person with whom he was dealing in an environment which, although not clinical, was very similar in its nature. As was said in *Rae*, the message which the Tribunal is obliged to impart to all health practitioners is that such behaviour is unacceptable.
34. Having said that, there are features of this case which in the Tribunal's view need to be reflected in the penalty.
35. First, as already stated, the Practitioner's misconduct did not take place in a professional environment. This Tribunal's jurisdiction is not limited to behaviour which takes place in such an environment. But it is a relevant consideration whether or not it did in any given case. The powerful counterpoint in this particular case is that the environment in which the misconduct took place was very closely akin to a professional situation in the sense that the victim was in a vulnerable position and was entitled to expect the Practitioner not to abuse her trust.
36. Second, there was no element of physical assault in this case, as there has been in others of a similar nature.
37. Third, precisely because this case involves the referral of a conviction, punishment is even less of a relevant consideration in relation to penalty than it may be in other categories of case. This is because the Practitioner has already been through criminal proceedings and been punished.
38. Having regard to those considerations, the Tribunal takes the view that this case is somewhat less serious than cases such as *Rae* and *Ruhe* which involved sexual assaults. Considering all of the various factors involved in arriving at an appropriate penalty, particularly those relating to the protection of the public and the maintenance of professional standards, and having considered all of the available options with a view to identifying the least punitive option which will reflect the seriousness of the case whilst at the same time discharging our responsibilities to the public and the profession, we have concluded that the appropriate penalty in this case involves a censure, the suspension of the Practitioner's practising certificate for a period of six months commencing from the date of the hearing (18 December 2015) and the imposition of

conditions on the Practitioner intended to ensure that if and when he returns to practice he has a proper understanding of professional boundaries and professional ethics and receives an appropriate level of supervision.

Costs

39. That leaves only the question of costs.
40. The PCC seeks costs on the usual basis.
41. For his part, the Practitioner explained to the Tribunal in some detail that his financial position is parlous. The Tribunal is satisfied that he is simply not in a position to pay a substantial costs award. Nevertheless, it is appropriate to make a nominal award of costs so as to ensure that the profession does not shoulder the entire burden.
42. In the circumstances, we propose to order the Practitioner to contribute \$1,500 in respect of the Tribunal's costs and \$750 in respect of the PCC's costs.

Conclusion

43. For all of the above reasons, the Tribunal imposes the following sanctions:
 - 43.1 Pursuant to s 101(1)(d) of the Act, the Practitioner is censured;
 - 43.2 Pursuant to s 101(1)(b), the Practitioner's registration is suspended for a period of six months from 18 December 2015;
 - 43.3 Pursuant to s 101(1)(c), the Tribunal orders that, following the period of suspension provided for in 43.2 above, the Practitioner shall only practice in accordance with the following conditions:
 - 43.3.1 Within three months of the conclusion of the period of suspension he is to attend and complete a course approved by the Nursing Council of New Zealand concerning the recognition of and compliance with professional boundaries for health practitioners;
 - 43.3.2 For a period of six months following the expiry of the suspension and his resumption of practice, the Practitioner is to arrange not to be employed in any position in which he will have unsupervised

responsibility for patient care, to arrange appropriate supervision and report whatever arrangements he enters into to the Nursing Council;

- 43.4 Pursuant to s 101(1)(f), the Practitioner is to pay the sums of \$1,500 on account of the Tribunal's costs and \$750 on account of the PCC's costs in this matter.
- 43.5 Pursuant to s95(1)(d) the Tribunal orders the permanent suppression of the name and all identifying details of the victim referred to in the agreed summary of facts.
- 43.6 Subject to the suppression order above, the Tribunal directs that the Executive Officer publish a copy of this decision and a summary on the Tribunal's website. The Tribunal further directs the Executive Officer to publish a notice stating the effect of the Tribunal's decision in *Kai Tiaki Nursing New Zealand and the Nursing Council Newsletter*. (Section 157 HPCA Act 2003)

DATED AT Wellington this 23rd day of March 2016.

Kenneth Johnston
Chairman
Health Practitioners Disciplinary Tribunal