NEW ZEALAND
HEALTH PRACTITIONERS
DISCIPLINARY TRIBUNAL
TARAIPUINARA WHAKATIKA KAIMAHI HAUORA

Level 28, Plimmer Tower, 2-6 Gilmer Terrace, Wellington 6011
PO Box 10509, The Terrace, Wellington 6143, New Zealand
Telephone: 64 4 381 6816
Email: gfraser@hpdt.org.nz
Website: www.hpdt.org.nz

DECISION NO **975/Med18/413P**

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 MEDICAL COUNCIL OF NEW ZEALAND**
Applicant

AND **Dr VIJAY HARYPURSAT** of Whangarei, registered medical practitioner
Practitioner

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING held at Auckland on 17 April 2018

TRIBUNAL: Ms M Dew (Chair)
Ms D McKinnon QSM, Associate Professor J McKenzie, Dr T Turnbull and Dr S Ure (Members)
Ms G Fraser (Executive Officer)

APPEARANCES: Ms A Miller and Mr E Foxall for the Professional Conduct Committee
Ms A Kula for the Practitioner

Introduction

1. Dr Vijay Gaypers Harypursat ("the practitioner") has been a registered medical practitioner practicing in New Zealand since November 2003. For some 12 years, he worked as a General Practitioner in Whangarei, registered within a general scope of practice.

2. In July 2015, the practitioner was the subject of a previous charge heard before the Health Practitioner's Disciplinary Tribunal.[1] The practitioner was found guilty of professional misconduct by failing to maintain appropriate professional boundaries with a female patient in April and May 2013. The practitioner was suspended for nine months and had conditions placed on his return to practice. The practitioner has not held a practising certificate since September 2015.

3. Dr Harypursat now faces one charge of professional misconduct under s100 of the Health Practitioners Competence Assurance Act 2003 ("the Act"), that he has breached a voluntary undertaking to have a chaperone present when seeing female patients and failed to keep accurate records of those consultations. The practitioner also faces a second charge under s100(f) of the Act that he has failed to observe a condition placed on his scope of practice effective from 5 March 2015, that required him to have a chaperone present when seeing female patients.

The charge

4. The particulars of the charge are as follows:

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge against Dr Harypursat as follows:

1. On one or more occasion between 15 July 2014 and 5 March 2015, Dr Harypursat breached a voluntary undertaking between him and the Medical Council of New Zealand effective from 15 July 2014 that he have a chaperone present when seeing female patients, in that he consulted with a female patient without a chaperone being present, including in particular on:

a. 22 July 2014 with patient Ms H;

[1] Harypursat (729/Med15/316D)

b. 27 August 2014 with patient Ms N;

c. 23 September 2014 with patient Ms T;

d. 6 October 2014 with patient Ms S;

e. 24 November 2014 with patient Ms C;

f. 25 November 2014 with patient Ms D;

g. 25 November 2014 with patient Ms R;

h. 26 November 2014 with patient Ms I;

i. 26 November 2014 with patient Ms Y;

j. 26 November 2014 with patient Ms A;

k. 26 November 2014 with patient Ms O;

l. 26 November 2014 with patient Ms L;

m. 27 November 2014 with patient Ms E;

and/or

n. 27 November 2014 with patient Ms P.

2. On one or more occasion between 15 July 2014 and 9 September 2015, Dr Harypursat incorrectly and/or falsely recorded that there was a chaperone present during consultations, and in particular on:

a. 23 September 2014 with patient Ms T;

b. 24 November 2014 with patient Ms C;

c. 25 November 2014 with patient Ms D;

d. 26 November 2014 with patient Ms I;

e. 26 November 2014 with patient Ms Y;

f. 26 November 2014 with patient Ms A;

g. 26 November 2014 with patient Ms O;

h. 26 November 2014 with patient Ms L;

i. 27 November 2014 with patient Ms E;

and/or

j. 27 November 2014 with patient Ms P.

The conduct alleged above at particulars 1 and 2 either separately or cumulatively amounts to professional misconduct pursuant to section 100(1)(a) and/or section 100(1)(b) of the Act.

3. On one or more occasion between 5 March 2015 and 9 September 2015, Dr Harypursat failed to observe a condition imposed by the Medical Council of New Zealand on his scope of practice effective from 5 March 2015 that he have a chaperone present when seeing female patients, in that he consulted with a female patient without a chaperone being present, including in particular on:

a. 3 August 2015 with patient Ms K; and/or

b. 14 August 2015 with patient Ms G.

The conduct alleged above at particular 3 amounts to a breach of section 100(1)(f) of the Act."

The agreed facts

5. The parties provided the Tribunal with an Agreed Summary of Facts dated 28 March 2018. The facts set out below are taken from the agreed summary and provide the background to the previous disciplinary matter and now the current charge.

6. From February 2007 until 17 May 2015, Dr Harypursat worked as a General Practitioner at Central Family Healthcare, Whangarei. From 18 May 2015 until 19 September 2015, Dr Harypursat worked as a General Practitioner at White Cross Healthcare, Whangarei.

7. In August 2013, the Medical Council was made aware of a complaint made to the Health and Disability Commissioner (HDC) alleging that Dr Harypursat had breached professional boundaries. The HDC investigated this complaint. The HDC referred the matter to the Director of Proceedings, who proceeded to lay a disciplinary charge with this Tribunal.

2014 Voluntary Undertaking

8. On 15 July 2014, following the HDC's notification to the Medical Council of the conclusion of its investigation, the Medical Council and Dr Harypursat entered into a voluntary undertaking, in which Dr Harypursat accepted and undertook to comply with the following conditions:

(a) *I will have a chaperone present when seeing female patients (the chaperone need not be a health practitioner, but must be independent of [Dr Harypursat]). For the avoidance of doubt, this includes any examination of, or consultation with, a female patient.*

(b) *I will maintain a list of any patients seen in the presence of a chaperone, identifying who the chaperone was (including their name, and position (if practice staff) or relationship to the patient).*

(c) *I will advise any employer that I must not undertake any examination of, or consultation with a female patient, without a chaperone being present.*

(d) *I will have in place, at all times, a notice that informs patients that 'Dr Harypursat requires a chaperone to be present when seeing a female patient' and that this notice must be an appropriate size and located in a place that can be reasonably read by all of my patients.*

(e) *I agree to meet with a clinical supervisor approved by Council's Registrar on advice of the Medical Adviser on a monthly basis to discuss all patients he has seen for psychological issues since his last monthly meeting. This means all patients where management of psychological issues forms part of the consultation or the overall management plan.*

(f) *I acknowledge that the supervisor may:*

- *Defer a scheduled meeting if I have no consultations with patients [with] psychological issues since the last monthly meeting*
- *At any time seek the consent of Council to extend the time period between meetings provided there is some justification for such a request.*

(g) *I accept that Council will take steps to monitor my compliance with this undertaking.*

(h) *I agree that I must abide by this voluntary undertaking until Council releases me from it.*

(i) *You understand and agree that, if you breach the above undertaking, Council's Registrar will impose the above requirements as conditions."*

December 2014 Performance Assessment Committee

9. On 10 December 2014, a Performance Assessment Committee (PAC), established by the Medical Council to assess Dr Harypursat's competence to practise, attended Central Family Healthcare where the practitioner worked.

10. As part of the assessment, the PAC members reviewed Dr Harypursat's handwritten log book used to record the chaperone present during his consultations with female patients. Dr Harypursat brought to the PAC's attention that there had been instances where he had consulted with female patients without a chaperone having been present.

11. On 11 December 2014, the convenor of the PAC alerted the Medical Council of concerns that Dr Harypursat had breached the terms of his voluntary undertaking, in that he had seen female patients without a chaperone being present. The Medical Council raised this concern with Dr Harypursat and he responded confirming that he had seen female patients without a chaperone on "four or five instances".

Imposition of conditions on scope of practice

12. On 23 December 2014, having received notification from the PAC that Dr Harypursat had breached his voluntary undertaking, the Medical Council proposed to impose conditions on Dr Harypursat's scope of practice.

13. At its meeting on 17 and 18 February 2015, Council resolved to impose the following conditions on Dr Harypursat's scope of practice:

(a) *Dr Harypursat will have a chaperone present when seeing female patients (the chaperone need not be a health practitioner, but must be independent of [Dr Harypursat]). For the avoidance of doubt, this includes any examination of, or consultation with, a female patient.*

(b) *Dr Harypursat will maintain a list of any patients seen in the presence of a chaperone, identifying who the chaperone was (including their name, and position (if practice staff) or relationship to the patient).*

(c) *Dr Harypursat will advise any employer that he must not undertake any examination of, or consultation with a female patient, without a chaperone being present.*

(d) *Dr Harypursat will have in place, at all times, a notice that informs patients that 'Dr Harypursat requires a chaperone to be present when seeing a female patient' and that this notice must be an appropriate size and located in a place that can be reasonably read by all of my patients.*

(e) *Dr Harypursat will meet with a clinical supervisor approved by Council's Registrar on advice of the Medical Adviser on a monthly basis to discuss all patients he has seen for psychological issues since his last monthly meeting. This means all patients where management of psychological issues forms part of the consultation or the overall management plan.*

14. The conditions came into effect on 5 March 2015.

2015 Tribunal hearing

15. On 7 July 2015, the Tribunal heard the Director of Proceeding's charge against Dr Harypursat. The Tribunal found the charge established and on 9 July 2015 the Tribunal issued a Minute to the parties recording its conclusion as to penalty.

16. On 19 August 2015, the Tribunal issued its written decision, with reasons. As to penalty, the Tribunal censured Dr Harypursat and ordered that he be suspended for a period of nine months (commencing one calendar month after the date of the Tribunal's written decision), and that conditions be imposed on his scope of practice upon recommencement of practice.

17. The conditions imposed by the Tribunal were that:

57.3.1 [Dr Harypursat] will practise only in accordance with the conditions imposed on him by the Medical Council at its meeting on 17 and 18 February 2015 and set out in the minutes of that meeting at paragraph 67. These conditions shall apply for a period of three

years, or until the Sexual Misconduct Assessment provided for in 57.3.2 below is completed, whichever occurs first;

57.3.2 Either before or immediately upon recommencement of practice following the period of suspension provided for in 57.2 above, [Dr Harypursat] shall arrange, at his expense to undergo a Sexual Misconduct Assessment as provided for in the Medical Council of New Zealand's October 2004 Guide relating to such assessments.

18. The Tribunal also ordered Dr Harypursat pay 40% of the costs of the PCC.

19. The Tribunal ordered the suspension to take effect from 19 September 2015. Dr Harypursat has not recommenced practice following the expiry of his term of suspension, and he has not held a practising certificate since 18 September 2015.

Breach of voluntary undertaking

20. Between 15 July 2014 and 5 March 2015, Dr Harypursat was subject to the voluntary undertaking set out above. In accordance with the voluntary undertaking, Dr Harypursat had expressly agreed to have a chaperone present when seeing female patients.

21. During the relevant period from 15 July 2014 to approximately the end of November 2014, Ms Carol Horne worked as Dr Harypursat's nurse at Central Family Healthcare. Ms Horne was also predominantly Dr Harypursat's chaperone during consultations he would have with female patients, as required by Dr Harypursat's voluntary undertaking. In or around November 2014, Ms Horne became concerned that Dr Harypursat was seeing female patients without a chaperone being present. Dr Harypursat accepts that Ms Horne's records of these incidents are accurate.

22. Dr Harypursat admits that he consulted with the following female patients without a chaperone being present:

(a) 22 July 2014 with Ms H

(b) 27 August 2014 with Ms N

(c) 6 October 2014 with Ms S

(d) 23 September 2014 with patient Ms T

(e) 24 November 2014 with patient Ms C

(f) 25 November 2014 with patient Ms D

(g) 25 November 2014 with Ms R

(h) 26 November 2014 with Ms I

(i) 26 November 2014 with Ms Y

(j) 26 November 2014 with Ms A

(k) 26 November 2014 with Ms O

(l) 26 November 2014 with Ms L

(m) 27 November 2014 with Ms E

(n) 27 November 2014 with Ms P

Incorrectly and/or falsely recording that there was a chaperone present during consultations

23. Dr Harypursat's voluntary undertaking required him to maintain a list of patients seen in the presence of a chaperone, including identifying who the chaperone was.

24. The practitioner's handwritten log book recorded that Ms Carol Horne had been present as a chaperone when Ms Horne was not in fact present:

(a) 23 September 2014 with patient Ms T

(b) 24 November 2014 with patient Ms C

(c) 25 November 2014 with patient Ms D

(d) 26 November 2014 with Ms Y

(e) 26 November 2014 with Ms A

(f) 26 November 2014 with Ms O

(g) 26 November 2014 with Ms L

(h) 27 November 2014 with Ms E

(i) 27 November 2014 with Ms P

25. Dr Harypursat accepts that his handwritten logbook suggested that he was complying with his voluntary undertaking that a chaperone be present during consultations with

female patients, when in fact there was no chaperone present. He admits that he incorrectly and/or falsely recorded that there was a chaperone present during the consultations with female patients on the occasions set out above.

Breach of conditions imposed on scope of practice

26. From 5 March 2015, Dr Harypursat was subject to the conditions imposed by the Medical Council set out above.

27. On 10 September 2015, the Medical Council received a complaint regarding Dr Harypursat's consultation with two female patients at White Cross Healthcare Ltd in Whangarei, without a chaperone present.

    (a) 3 August 2015 with patient Ms K

    (b) 14 August 2015 with patient Ms G

28. Dr Harypursat admits that he saw the above female patients without a chaperone present, and in doing so failed to observe a Medical Council condition on his scope of practice that he have a chaperone present when consulting with female patients.

Admission of charge

29. Dr Harypursat admits that his conduct as set out at particulars 1 and 2 of the charge amounts to professional conduct in that, either separately or cumulatively, it:

    (a) Amounts to malpractice or negligence in relation to his scope of practice pursuant to section 100(1)(a) of the Health Practitioners Competence Assurance Act 2003 (Act): and/or

    (b) Has brought or is likely to bring discredit to the profession, pursuant to section 100(1)(b) of the Act.

30. The practitioner also admits that his conduct as set out at particular 3 of the charge, amounts to him having failed to observe a condition included on his scope of practice, pursuant to section 100(1)(f) of the Act. Finally, the practitioner also admits that his conduct, as set out in the charge, warrants a disciplinary finding against him.

31. The parties produced an Agreed Bundle of Documents, which includes the practitioner's registration details, the practitioner's voluntary undertaking dated 15 July

2014, the previous decision of this Tribunal relating to the practitioner dated 19 August 2015,[2] evidence of the practitioner's consultations with female patients during 2014 and 2015, letters of complaint from a patient and other health practitioners that initiated the Medical Council and PCC investigations and email correspondence between the Performance Assessment Committee and the Medical Council in December 2014.

The relevant law

32. The practitioner is charged under s100(1)(a) and/or (b) and s100(1)(f) of the Act, which provides as follows:

> ***"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 s91 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 the conduct occurred; or*
>
> *(b) the practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, has brought or is likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred.*
>
> …….
>
> *(f) the practitioner has failed to observe any conditions included in the practitioner's scope of practice. "*

33. The Tribunal and the Courts have considered the term "professional misconduct" under s100(1)(a) and (b) of the Act on numerous occasions. The Tribunal draws on the guidance now available in those cases.[3]

---

2 729/Med15/361D

3 *PPC v Nuttall*, (8Med04/03P), *Collie v Nursing Council of New Zealand*, [2000] NZAR 74, Aladdin (12/Den05/04 and 13/Den04/02D), *Dale* (20/Nur05/09D), *Dr T* (636/Med14/272P).

34. In *Collie v Nursing Council*, Gendall J considered negligence and malpractice in the context of professional misconduct at paragraph [21]:

> *"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."*

35. His Honour went on to discuss what it meant to discredit the profession in the professional disciplinary context at paragraph [28]:

> *"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."*

36. There is now a well-established two stage test for determining whether a practitioner's conduct constitutes professional misconduct.[4] The two key steps 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. In particular, does the conduct fall short of conduct expected of a reasonably competent health practitioner operating in that vocational area? and

(b) Secondly, the Tribunal must be satisfied that the practitioner's departure from accepted standards is significant enough to warrant a disciplinary sanction for the purposes of protection of the public or maintaining professional standards.

---

[4] *McKenzie v MPDT* [2004] NZAR 47 at [71], *PCC v Nuttall* (8Med04/03P), *Dr T* (636/Med14/272P), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 and *Johns v Director of Proceedings* [2017] NZHC 2843.

37. In relation to s100(1)(f) of the Act, this disciplinary ground is akin to a strict liability offence, if there has been a failure to observe a condition on practice, then the ground on which the practitioner may be disciplined is established. This does not require a two-step test as for professional misconduct offences. The PCC need only establish that a condition was in place and that the practitioner failed to observe it.

38. It is evident from a search of previous cases that there have been very few cases in which the Tribunal has dealt with s100(1)(f).[5] The Tribunal in those cases has made some reference to the usual professional misconduct two step test, but in later cases the Tribunal has accepted that there does appear to be a question as to whether the same two step test is appropriate in relation to s100(1)(f). The Tribunal has declined to determine this matter squarely until it has been argued in full in a defended case. However, on a straightforward reading of s100, there does appear to be a clear distinction to be made between s100(1)(a) and (b) dealing with charges of professional misconduct and by contrast s100(1)(c) to s100(1)(g), which do not make any reference to the requirement that "professional misconduct" be established.

39. The provisions s100(1)(c) of the Act, does still require some element of judgment of the severity of the conduct at a liability phase, similar to s100(1)(a) and s100(1)(b), in that under s100(1)(c) the prosecution must establish a similar two step test in proving the charge:

    (a) That the practitioner has been convicted of an offence; and

    (b) That the offence reflects adversely on his or her fitness to practise.

40. However, s100(1)(d) to (g) of the Act, do not require any similar analysis of the severity of the conduct at the liability phase of the hearing. The Tribunal considers that these offences are more in the nature of strict liability offences that simply require the fact of the act or omission to be established, with some residual discretion to decline a finding of liability only where there is a total absence of fault. The severity of the conduct and whether it warrants any penalty is then a matter to be considered at the

[5] *Bhatia* 344/Med10/151P and *Ranchhod* 337/Med10/161P, *Moon* 536/Den12/231P and *Chum* 895/Phys17/379P.

penalty phase of the hearing. In adopting this approach, the Tribunal is acting in line with its previous decisions in respect of s100(1)(d).[6]

41. However, even if this was not the proper analysis, the Tribunal is satisfied in this case that the conduct in Dr Harypursat's case is sufficiently serious to warrant disciplinary sanction.

Onus and standard of proof

42. The burden of proof in the present case is on the PCC. It is for the PCC to establish that the practitioner is guilty of professional misconduct and for it to produce the evidence that establishes the facts upon which the charge is based to the appropriate standard of proof.

43. 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 charge are more likely than not. The Tribunal must apply a degree of flexibility to the balance of probabilities taking into account the seriousness of the allegation, and the gravity of the consequences flowing from a particular finding.[7]

44. The Tribunal is also required to consider each particular independently and then cumulatively, in the context of determining whether the overall charge is established.[8]

Is the charge established?

45. The practitioner has admitted the charge. Nevertheless, the Tribunal must still satisfy itself that the charge is established.

46. The Tribunal is satisfied that the charge is established on the following basis:

    (a) In relation to Particular 1, the Tribunal is satisfied on the evidence presented and admitted that the practitioner has breached his written voluntary undertaking to the Medical Council that he would have a chaperone present

---

6 *Heath*, Phar16/356, *Dr E* (503Den/12/219P) and *Ms R* (689/MSL14/294P), where the Tribunal confirmed that practising without a current practising certificate is a strict liability offence under s100(1)(d) of the Act, albeit there was some recognition that the charge may not be established if there was evidence of a complete absence of fault.

7 *Z v Complaints Assessment Committee* [2009] NZLR 1 and followed by this Tribunal in *PCC v Karagiannis* 181/Phar08/91P.

8 *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, CA 75/85.

when seeing female patients, in that he consulted with 14 female patients over the period from 22 July 2014 to 27 November 2014, without having any chaperone present. The female patients are those as set out in the charge;

(b) In relation to Particular 2, the Tribunal is satisfied that on 10 occasions between 23 September 2014 and 27 November 2014, the practitioner incorrectly and falsely recorded that there was a chaperone present during the consultations with female patients listed in Particular 2 of the charge;

(c) The Tribunal is satisfied that the established conduct in particulars 1 to 2 is conduct that amounts to negligence, malpractice and is likely to bring discredit to the profession. The Tribunal is also satisfied that this established conduct in particulars 1 to 2 both separately and cumulatively, amounts to professional misconduct as it is conduct that amounts to a significant and serious departure from accepted standards of conduct by a General Practitioner. Professional misconduct is therefore established under both s100(1)(a) and s100(1)(b) of the Act.

(d) In relation to Particular 3, the Tribunal is satisfied that the practitioner failed to observe a condition imposed by the Medical Council on his scope of practice effective from 5 March 2015, that he have a chaperone present when seeing two female patients, on 3 and 14 August 2015 respectively and that this conduct amounts to a breach of s100(1)(f) of the Act.

Penalty

47. The Tribunal, once satisfied the charge is established, must go on to consider whether it is appropriate to order any penalty under s101 of the Act. The penalties may include:

(a) Cancellation of registration;

(b) Suspension of registration for a period not exceeding 3 years;

(c) A fine not exceeding $30,000;

(d) 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;

(e) An order that the health practitioner is censured;

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

48. The Tribunal adopts the sentencing principles as contained in *Roberts v Professional Conduct Committee*[9] in which Collins J identified the following eight factors as relevant whenever the 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;

(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."*

PCC submissions on penalty

49. The PCC submits the penalties imposed by the Tribunal should serve three purposes. Firstly, maintaining professional standards and deterring others; second, protecting the public; and thirdly, assisting with the practitioner's rehabilitation. The PCC invites the Tribunal to impose penalties on the practitioner as follows:

(a) Cancellation (or in the alternative a two-year suspension);

(b) Censure; and

(c) In the event that cancellation is not ordered then the suspension should be accompanied by a number of conditions on the practitioner's return to practice including training, supervision, his not consulting with any female patients for a period of two years, proper record keeping and disclosure to employers of the conditions in place.

[9] [2012] NZHC 3354 at [44]-[51]

50. The PCC submit that it is now open to the Tribunal to consider cancellation in this case because of the practitioner's dishonesty in this case and his failure to abide by both his voluntary and imposed conditions on practice. The PCC maintain that there are now material public safety and professional standards issues at play that warrant serious consideration of cancellation.

51. The PCC made the following submissions in support of cancellation:

(a) The breach of voluntary undertaking raises serious concerns about the practitioner's respect for professional boundaries and public safety;

(b) His actions demonstrate a significant lack of insight in his dealings with female patients after the voluntary undertaking and adverse finding in the previous Tribunal decision;

(c) His actions were dishonest in failing to ensure that female patients were made aware of the chaperone condition, which is a clear breach of his ethical obligations as a health practitioner;

(d) The lengthy period of the offending between July 2014 and August 2015 demonstrates a persistent disregard for his professional obligations;

(e) His dishonesty in seeking to avoid detection of his breaches by creating false and incorrect entries in the chaperone logbook.

(f) The fact that the previous Tribunal had given the practitioner a very clear warning that "by a very fine margin" it would not cancel his registration in that case and despite this the doctor has misconducted himself;

(g) The prospect of rehabilitation in this case now seems slim given the repeated failure to comply with regulatory restrictions.

52. The PCC acknowledged the following mitigating factor, being the practitioner's early admission of wrongdoing and co-operation with the PCC and Tribunal.

53. **Penalty submissions for the practitioner**

54. On behalf of the practitioner, Ms Kula accepts that a period of up to two years suspension, and conditions on return to practice, will be warranted in this case. However, it is submitted that the practitioner remains capable of rehabilitation.

55. In relation to mitigating factors, Ms Kula made the following points:

(a) Dr Harypursat was part of a very busy practice routinely seeing 30-40 patients per day, with more than half being female. Therefore, the vast majority of his female patients were seen with a chaperone. However, the busy practice made this difficult on every occasion and at times he states patients declined the chaperone;

(b) At times he did not want to decline to see a female patient as he felt they would not receive much needed care;

(c) At the White Cross practice, he tried to compensate for not having a chaperone by seeing the patients directly opposite the nurses' station where conversations could be heard and the consultation was not in a fully enclosed private room;

(d) There is no evidence that any of the patients seen without a chaperone have complained about any inappropriate conduct. Therefore, there is no further suggestion of any further act of sexual impropriety but rather a breach of condition;

(e) Dr Harypursat denies that he attempted to hide his unchaperoned consultations. He believes the incorrect entries came about when he lost track of which nurse had chaperoned which patient.

(f) The practitioner has shown insight and remorse by accepting the charge at an early stage;

(g) He has also had a long career in medicine graduating in 1991 in South Africa and practising until 2015. The practitioner also submitted a number of character and professional references from colleagues, patients and others. The references confirmed there were no concerns about the practitioner's professional capabilities and that with adequate treatment, colleagues would be comfortable working with the practitioner;

(h) The practitioner does acknowledge that his good character will of course be impacted by the previous adverse finding of professional misconduct towards a female patient in April and May 2013;

(i) However, there is an element of public interest in maintaining in the profession a professional who has acquired three decades of training, skills and experience;

(j) The practitioner was suffering from severe depression and anxiety at the time of the offending in 2014 and 2015. This diagnosis together with a recognition of an obsessive-compulsive personality disorder, caused the practitioner to act as he did in wanting to provide care to his patients despite the constraints on the availability of a chaperone at times. It is submitted that this points to the lack of any deliberate conduct on his part and should be taken into account in respect of the prospect for rehabilitation.

56. The practitioner was open with the Tribunal about his current health and that he is now under the care of specialist mental health professionals.

57. The Tribunal was informed that Dr Harypursat has been employed in a minimum wage role outside of the profession since 2016 and that they have had to rely on family support. The Tribunal was advised that the practitioner owes approximately $100,000 to his family and they have had to remortgage their home in February 2018 to pay off other debts.

Comparative cases on penalty

58. The Tribunal was referred to a number of cases in which health practitioners have been disciplined for professional misconduct and breaches of conditions. The PCC acknowledged that it was not able to direct the Tribunal to any case in which a practitioner's registration has been cancelled for practising contrary to a voluntary undertaking or breach in conditions.

59. The Tribunal considers the cases of most assistance in determining the appropriate examples included:

(a) *Bhatia*[10] - a doctor was found guilty of failure to comply with conditions on his practice imposed by the Tribunal. The practitioner had failed to attend a peer review group and undergo a clinical audit every three months. Dr Bhatia also faced charges of practising without a practising certificate and misconduct in respect of a patient. He did not defend the charges or attend the hearing. His registration was cancelled.

[10] 344/Med10/151P

(b) *Chum*[11] - A physiotherapist had acted in breach of a condition imposed by the Physiotherapy Board not to assess or treat female patients, when he treated 14 separate female patients on 20 occasions. Mr Chum did not attend the hearing to defend the charge. He was found guilty under s100(1)(f) of the Act, censured, fined $2,000 and conditions were placed on his practice and ordered to pay costs of $25,000. No suspension was ordered, as the Tribunal had considered the previous actions of the Physiotherapy Board in imposing further conditions was sufficient in that case.

(c) *Ranchhod*[12] - A doctor had a condition on his practice that he only work in a group general practice setting approved by the Medical Council. However, the doctor had breached the condition by carrying out a medical examination and blood test outside that setting. The Tribunal ordered a suspension of 7 months.

(d) *Moon*[13] – A dentist had been suspended for failing to comply with dental emergency safety obligations under a relevant Code of Practice. The charge related to the practitioner's failure to have certain safety equipment on site, for which he had been suspended by the Dental Council and he had resumed practice prior to the end of the suspension. The charge had been brought under s100(1)(a) and (b) of the Act. The order of suspended suspension made by the Tribunal was appealed to the High Court by the PCC and a cross appeal by Mr Moon. The High Court ordered that the appropriate penalty was censure, a fine of $5,000 together with conditions. The Tribunal order for suspended suspension was overturned

Tribunal consideration of penalty

60. The Tribunal has taken into account all of the aggravating and mitigating factors referred to by both counsel. It has also assessed the sentencing principles and previous cases referred to by both counsel.

61. The Tribunal has determined that it is necessary to impose the following penalties which together are the proportionate penalty overall, while still allowing for the rehabilitation of the practitioner. The Tribunal orders:

---

11 Phys17/379P
12 273/Med09/129P
13 536/Den12/231P and *PCC v Moon* [2014] NZHC 189

(a) A censure; and

(b) A suspension for a period of two years;

(c) Conditions to be imposed on the doctor's return to work which will be aimed primarily at the protection of the public and the rehabilitation of the doctor. These conditions are set out in full below on the final pages of this decision under "Orders of the Tribunal".

62. We have given very serious consideration as to whether cancellation of registration is the appropriate penalty in this case, given the serial breaches of professional obligations by Dr Harypursat that now span from 2013 and his first misconduct with a female patient, followed by the several breaches of voluntary undertaking and conditions.

63. However, on balance we have determined that the practitioner is entitled to one final opportunity to be rehabilitated. The principal reason for this is that there is no evidence of any further patient harm caused since 2013 and his first offending. The remaining misconduct relates to the practitioner's failure to comply with conditions on his practice.

64. We accept that the practitioner has suffered from a very significant period of depression and that he has worked in busy work environments where he has felt pressured to see patients at times without a chaperone. While this does not excuse the misconduct or breaches it does allow the Tribunal to see that there may be an opportunity for rehabilitation of the practitioner. He has not been the subject of any patient complaint since 2013 and it is apparent that he has otherwise been well regarded by peers and the community in which he works, as evidenced by the character references provided.

65. The practitioner also deserves credit for the insight and co-operation he has shown towards the Medical Council and Tribunal by his early admission of the charge.

66. However, we do consider it is necessary to impose a substantial period of suspension to reflect the seriousness of the breaches and uphold professional standards. The Tribunal also considers it is necessary to ensure that there is a significant period of reflection and rehabilitation for the practitioner in which he can prepare himself for resuming practice. This period of suspension will also allow him to complete the training and medical assessments the Tribunal has imposed as conditions, prior to recommencing

practice as this will provide him with a better platform for resuming practice than if he has to undertake this work at the same time as re-commencing practice.

Costs

67. The PCC filed a memorandum of cost dated 13 April 2018 which detailed the costs of the PCC investigation and legal costs as at 1 April 2018, being $34,716. At the conclusion of the hearing the PCC also detailed its further costs in relation to the hearing being $2,267, making a total of $36,983.

68. The Tribunal's costs and disbursements incurred up to and including the date of hearing were $11,534.

69. The Tribunal records that it has used as 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.[14] However, in the present case the Tribunal has determined that a further discount is appropriate to reflect the practitioner's co-operation and financial circumstances. The practitioner should nevertheless properly contribute to the costs arising from his misconduct.

70. The Tribunal considers it is proper for the practitioner to contribute 20% of the total costs of both the Tribunal and the PCC. The costs ordered to be paid are set out in the Orders at the conclusion of this decision.

Orders of the Tribunal

71. The Orders of the Tribunal are as follows:

    (a) The charge laid against the practitioner under s100(1)(a), (b) and (d) of the Health Practitioners Competence Assurance Act is established;

    (b) The practitioner's registration is suspended under s101(1)(b) of the Act, for a period of two years as from the date of this decision;

    (c) The practitioner is censured under s101(1)(d) of the Act to mark the Tribunal's disapproval of his conduct the subject of the charge;

    (d) That after re-commencing practice following the conclusion of the suspension,

[14] *Coorey v PCC*, AP 23/94, 14 September 1995, Doogue J

the practitioner will only practise his profession in accordance with the following conditions:

i. Before recommencing clinical practice, the practitioner must successfully complete appropriate training and/or courses in professional obligations as set or approved by the Medical Council of New Zealand, within 6 months. This may include a one-on-one course specifically designed by a course provider having taken into consideration the Tribunal's written decision and further input from the Medical Council. All costs associated with such training or course to be met by the practitioner;

ii. Before recommencing clinical practice, the practitioner must undergo a Sexual Misconduct Assessment as provided for in the Medical Council October 2004, Guide relating to such assessments. This is to be at the practitioner's expense and reported and disclosed to the Medical Council;

iii. Before recommencing clinical practice, the practitioner must undertake a psychiatric assessment to ensure that he is fit to return to practice, to be paid for by the practitioner;

iv. On recommencing clinical practice, the practitioner is to be placed under monitoring by the Health Committee of the Medical Council and required to provide regular reports (not less than quarterly per annum) of his health via his own General Practitioner to the Health Committee, for a period of two years. This is to be paid for by the practitioner;

v. The practitioner must practise under the supervision of a Medical Council approved supervisor for a period of 2 years and

- Must not see female patients at all during that time;
- Must make his records available to his supervisor in order to monitor his compliance with this condition;
- Must make any employer/organisation for whom he works in his capacity as a medical practitioner aware of these conditions;

(e) An order that Dr Harypursat pay 20% of the Tribunal and PCC costs and expenses, being $2,307 to the Tribunal and $7,396 towards the PCC costs. All sums to be paid are GST exclusive.

(f) There will be an order for permanent suppression of the names and any identifying features of the patients named in the charge or in the evidence. This order is made under s95 of the Act;

(g) Subject to the suppression order above, the Tribunal directs the Executive Officer to publish a copy of this decision on the Tribunal's website, together with a summary. It further directs that the Executive Officer seek to publish a notice stating the effect of the Tribunal's decision in the New Zealand Medical Journal.

DATED at Auckland this 22nd day of June 2018

.....

MJ Dew
Chairperson
Health Practitioners Disciplinary Tribunal