



**HPDT NO:** 998/Phys18/423P

**UNDER**

the Health Practitioners Competence

Assurance Act 2003 (the HPCA 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**

**Physiotherapy Board of New Zealand**

**Applicant**

**AND**

**Ms JANE MOORE** of Gisborne, registered  
physiotherapist

**Practitioner**

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HEARING held at Auckland on Monday 8 October 2018**

**TRIBUNAL:**

Ms M Dew (Chair)

Ms A Kinzett, Ms S Stewart, Mr A Schmidt, Mr J Salesa (Members)

Ms K Davies (Executive Officer)

Mr J Roberts (video link technician)

**APPEARANCES:**

Ms A Miller for Professional Conduct Committee (PCC), by video link.

Ms Jane Moore, Practitioner, by video link.

## **Introduction**

1. Ms Moore is a registered physiotherapist, practising in Gisborne. She has been registered in New Zealand since 2007. Ms Moore currently operates her own private practice in Gisborne. Prior to 2016, she was employed for approximately ten years as a physiotherapist (Hand Therapist) for Hauora Tairāwhiti, formerly known as the Tairāwhiti District Health Board.
2. In June 2018, a Professional Conduct Committee (PCC) appointed by the Physiotherapy Board of New Zealand (the Board) laid a disciplinary charge against Ms Moore under the Health Practitioners Competence Assurance Act 2003 (the HPCA Act).
3. The particulars of the charge allege that:
  - (a) Between 2012 and 2016 inclusive, Ms Moore conducted herself in an inappropriate and/or unprofessional manner in relation to her clinical record keeping and in February and March 2017, in her dealings with the Board; and
  - (b) Ms Moore practised her profession between on or about 1 and 18 April 2017, when she did not hold a current Annual Practising Certificate (APC).
4. The hearing proceeded on the basis of an Agreed Summary of Facts dated 15 August 2018 and an Agreed Bundle of Documents. The parties attended the hearing by way of video link, with the Tribunal present in the public hearing room.
5. The practitioner accepts the particulars of the Charge and that they are deserving of a disciplinary sanction. However, it remains for the Tribunal to determine whether the Charge is established and if so what, if any, penalty should apply.

## **The Charge**

6. The particulars of the Charge are set out below:
  - A. *“Between in or around 2012 to 2016 inclusive, when employed and practising as a physiotherapist at Hauora Tairāwhiti, Ms Moore conducted herself in an inappropriate and/or unprofessional manner by:*
    - (a) *Failing on approximately 200 occasions to maintain a complete contemporaneous record of patient treatment and progress, contrary to the*

*ethical and professional obligation to keep contemporaneous, accurate and legible records of patient treatment and progress (Principle 5.7 of the Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct, October 2011); and/or*

- (b) Removing from Hauora Tairāwhiti premises approximately 137 patient files containing personal and health information about patients, contrary to Hauora Tairāwhiti policy and contrary to the ethical and professional obligation to respect confidentiality, privacy and security of patient information (Principle 3 of the Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct, October 2011); and/or*
  - (c) Misplacing approximately 118 patient files containing personal and health information of patients, contrary to the ethical and professional obligation to respect confidentiality, privacy and security of patient information (Principle 3 of the Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct, October 2011); and/or*
- B. Between on or around 15 February 2017 and 9 March 2017, Ms Moore acted in an unprofessional manner by failing or refusing to respond to communications from the Physiotherapy Board in relation to a complaint about her professional conduct made by her former employer Hauora Tairāwhiti.*

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

**AND/OR**

- C. Between on or around 1 April 2017 and 18 April 2017, Ms Moore, a registered physiotherapist, practised the profession of physiotherapy when she did not hold a current practising certificate.”*

**Agreed Summary of Facts**

- 7. The factual background set out below is based on the Agreed Summary of Facts filed with the Tribunal.
- 8. Ms Moore graduated with a Bachelor of Science Physiotherapy (Hons) from Brunel University, London in 2004, and was registered with the Board in 2007.

9. At all material times relevant to the charge, Ms Moore was employed as a physiotherapist (hand therapist) at Hauora Tairāwhiti, for approximately 10 years. She left the role on 26 October 2016 when she moved into private practice.
10. On 24 January 2017, the Director of Allied Health at Hauora Tairāwhiti, Mr Arish Naresh, made a complaint to the Board about Ms Moore's clinical records. The complaint followed an investigation by Hauora Tairāwhiti into a number of missing files from Ms Moore's referral list.

#### **Hauora Tairāwhiti's Investigation**

11. On 25 August 2016, the Community Health Administrator at Hauora Tairāwhiti emailed Ms Moore to advise that they had been working on archiving files and had noticed they were missing a number of patient files registered to her dating back to 2008. A request was made for return of the files.
12. Ms Moore did not respond to the email. On 26 September 2016, she resigned her position at Hauora Tairāwhiti.
13. On 7 October 2016, Ms Moore was notified by Hauora Tairāwhiti that an investigation was being undertaken into missing patient files. Ms Moore's last day at Hauora Tairāwhiti was on 26 October 2016, she did not take part in the investigation.
14. On 18 November 2016, Ms Moore was advised of the outcome of the investigation. Among other things, she was told that a total of 259 patient files were missing. The result of the investigation was reported to Ms Moore as follows:
  - 2015: 11 Missing files from 172 referrals – 6.3%
  - 2014: 17 Missing files from 152 referrals – 11%
  - 2013: 63 Missing files from 97 referrals – 65%
  - 2012: 168 Missing files from 217 referrals – 77%
15. Approximately 200 files remained in Ms Moore's former office unfiled and of unknown completion. Hauora Tairāwhiti noted that a control taken at the start of the investigation, (with 25 referrals being checked) from another therapist found 100% of files being accounted for. Due to concerning results from 2012 a further 50 referrals were taken from another therapist for 2012 to rule out any systemic administrative error, one file was unaccounted for.

16. Ms Moore was advised that there was a risk to patient confidentiality “*with a large number of files physically missing and in an unknown location*”, and that Hauora Tairāwhiti would need to inform the Board and ACC of the privacy breach. Ms Moore was invited to attend a meeting at Hauora Tairāwhiti to discuss these findings, and to assist with locating any other missing patient files.
17. On Monday 21 November 2016, Ms Moore informed the clinical leader of physiotherapy at Hauora Tairāwhiti “*I have been over the weekend doing notes and was coming in today only [my child] is off sick so will be able to make 9.30am Wednesday instead if this is okay*”. In reply, the Hauora Tairāwhiti clinical leader advised:
- Can I just stress, the big issue is the location of the missing files. All the ones in the room have been checked off against your referrals, and although incomplete, we still know where they are. If you have any idea where the remainder of the missing files could be, and could help in locating them, this would be most helpful for all involved.*
18. Ms Moore was unable to attend Hauora Tairāwhiti on Wednesday 23 November, or the rescheduled meeting on Monday 28 November.
19. On 30 November 2016, Ms Moore met with the clinical leader at Hauora Tairāwhiti. Ms Moore returned a box containing 137 patient files dating from 2012 to 2013. She had found these after searching her home. She also located a further four files after searching the physiotherapy department. This left a total of 118 patient files that were still missing.
20. Ms Moore accepts the results of the investigation into the missing files and she acknowledges and admits that between 2012 and 2016, when employed as a physiotherapist (hand therapist) at Hauora Tairāwhiti, she:
- (a) failed on approximately 200 occasions to maintain a complete contemporaneous record of patient treatment and progress; and
  - (b) removed approximately 137 patient files containing personal and health information about patients from Hauora Tairāwhiti premises, and that this was contrary to Hauora Tairāwhiti policy; and
  - (c) misplaced approximately 118 patient files containing personal and health information of patients.

21. As a result of Hauora Tairāwhiti's investigation findings it made a complaint to the Board on 24 January 2017.

22. On 25 January 2017, the Board referred the complaint to the Health and Disciplinary Commissioner (HDC) as required by section 64 of the HPCA Act. On that day the Board, through its representative, called and emailed Ms Moore:

*"I am writing further to my voice mail this morning. This email is to advise you that the Board has received the attached complaint from [Hauora Tairāwhiti] ...*

*In the event that the HDC refers the matter back to the Board, we will be in contact with you to seek any submissions you may wish to make on the matter. The Board would then consider whether to take any further action, if the complaint raises questions about your professional conduct or competence."*

23. Ms Moore confirms that she received this telephone message and email, and acknowledges that she did not reply to or acknowledge the email.

24. On 14 February 2017, the HDC referred the complaint back to the Board. On 14 and 15 February 2017, the Board attempted to contact Ms Moore by telephone and then email. Ms Moore confirms that she received the email from the Board.

25. On 6 March 2017, the Board called Ms Moore and left a voicemail message asking her to acknowledge receipt of its earlier communications. Ms Moore returned the Board's call and advised that she would call back later that day as she was taking her mother to a hospital appointment. Ms Moore did not call back.

26. On 8 March 2017, the Board left a further voicemail message for Ms Moore as she had not called back. The Board advised that the case would be considered at the Board's April meeting with or without her input.

27. On 9 March 2017, the Board again emailed Ms Moore, noting that they had not heard from her in relation to the complaint and advised the matter was to be considered at the Board's next meeting. She was asked to reply by 17 March 2017. Ms Moore confirms that she received this email, and acknowledges that she did not reply to or acknowledge the email.

28. On 27 April 2017, the Board sent a letter to Ms Moore (by email) confirming that the complaint from Hauora Tairāwhiti would be referred to a PCC, together with the Board's concerns about her failure to respond to its queries regarding the complaint.

29. On 6 June 2017, Hauora Tairāwhiti wrote to Ms Moore to advise that it had prepared letters to go to all patients affected by the missing files; that it had notified ACC of the investigation results (as 101 missing files were ACC files); and that it had prepared a media release.

30. The letter to patients affected by the missing patient files informed them that:

*“We are writing regarding the hand physiotherapy you received at Gisborne Hospital. Unfortunately your hand therapy clinical file cannot be located. The file includes treatment details and may include the referral from a doctor.*

*We understand this incident will be of concern to you and sincerely apologise”*

31. The media release, entitled “Hand therapy notes missing” was sent to the Gisborne Herald and TVNZ on 31 July 2017. Hauora Tairāwhiti also made a notification of a privacy breach to the Ministry of Health and the Privacy Commissioner.

32. In October 2017, ACC requested repayment of \$33,770.41 of funding from Hauora Tairāwhiti for treatment provided by Ms Moore.

#### **Practising without a practising certificate**

33. The Physiotherapy Board’s annual practising certificate (APC) year runs from 1 April to 31 March each year.

34. On 23 March 2017 and 29 March 2017, the Board sent Ms Moore emails reminding her to renew her APC. The email dated 23 March 2017, expressly advised Ms Moore:

*“You must not practise from 1 April 2017 without a current APC for the 2017/2018 practising year. Any practitioner who practises without an APC after 1 April 2017 may be referred to a Professional Conduct Committee by the Registrar.”*

35. Ms Moore confirms that she received these emails.

36. At 11.42 pm on Friday 31 March 2017, Ms Moore attempted to renew her APC using the Board’s online renewal process. She declared that she was currently under investigation and, as a result, the online renewal process was unable to be completed. At midnight on 31 March 2017, Ms Moore’s APC expired.

37. On Tuesday 4 April 2017, a Board staff member contacted Ms Moore by email to advise her that she would be required to complete a practising status form and to

remake her declaration, including a statement about what her declaration related to. A copy of the relevant practising status form was attached to the email.

38. Ms Moore confirms that she received this email, and acknowledges that she did not reply to the email.
39. On Thursday 6 April 2017, the Board attempted to contact Ms Moore on her mobile phone. There was no answer, and Ms Moore's listed work telephone number was not current. On Tuesday 11 April 2017, the Board again attempted to contact Ms Moore regarding her practising status. A voicemail message was left asking her to call back.
40. On Wednesday 12 April 2017, the Board located Ms Moore's practice details (Dynamic Rehab) and on enquiry it was advised that Ms Moore rented a room at Dynamic Rehab. The Board's file note recorded that:

*"CE [Chief Executive] phoned this clinic and asked for an appointment with Jane. Receptionist advised that Jane's next appointment was next Wednesday, as she was fully booked until then."*

41. On Thursday 13 April 2017, the Board telephoned the practice and asked to speak with Ms Moore. Ms Moore was advised to cease practice immediately as she did not hold an APC. Ms Moore was advised the matter may be referred to the PCC.
42. On 13 April 2017, Ms Moore emailed the Board:

*"Please find my APC application/renew attached which I have rescanned can you forward this immediately to Susan as I have ceased practising immediately and will continue to do so until I have formal notice from the Physioboard. I have not been able to find the previously scanned application this may have sat in my drafts box and not been sent as I had thought."*

*Please accept my apology for this large error."*

43. In reply, the Board asked Ms Moore to complete an entirely new form as "you have not stated what your fitness to practise declaration is regarding and the date of your APC declaration is from 31/03/2017."
44. On 18 April 2017, Ms Moore emailed the Board an updated and completed application form. Ms Moore was issued with an APC on the same date.
45. On 19 May 2017 the Board sent a letter to Ms Moore (by email) to advise that it had



decided to refer the matter of her practising without a current practising certificate` to the same PCC which had been established to investigate the complaint made by Hauora Tairāwhiti.

46. As part of this investigation, the PCC sought information from ACC, which advised that between 3 April 2017 and 18 April 2017, Ms Moore invoiced 30 patient consultations to ACC, as follows:

- (a) Monday 3 April 2017: 8 consultations
- (b) Tuesday 4 April 2017: 9 consultations
- (c) Wednesday 5 April 2017: 6 consultations
- (d) Friday 7 April 2017: 6 consultations
- (e) Tuesday 18 April 2017: 1 consultation

#### **Legal principles**

47. The Charge must be established on the balance of probabilities and the onus of proof rests on the PCC to establish the Charge.
48. The relevant provision of section 100 of the HPCA Act provides:

#### ***“100 Grounds on which health practitioner may be disciplined***

- (1) *The Tribunal may make any 1 or more of the orders authorised by section 101 if, after conducting a hearing on a charge laid under section 91 against the health practitioner, it makes 1 or more findings that -*
- (a) *the practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time that the conduct occurred; or;*
  - (b) *the practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred; or;*

.....

- (d) *the practitioner has practised his or her profession while not holding a current practising certificate;*” ...

*Professional misconduct*

49. The elements of a professional misconduct charge laid under section 100(1)(a) and section 100(1)(b) of the HPCA Act have been long established by this Tribunal and affirmed by the Courts. There is now a well-established two stage test for determining whether a practitioner’s conduct constitutes professional misconduct.<sup>1</sup> 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) Second, 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.

*Practising without an APC*

50. There are three elements of a charge under section 100(1)(d) of the HPCA Act namely that:
- (a) the practitioner was a registered physiotherapist during the dates set out in the charge;
  - (b) the practitioner practised as a physiotherapist during the same dates; and
  - (c) the practitioner did not hold a current practising certificate during the same dates.
51. A charge under section 100(1)(d) of the Act, does not require any element of

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<sup>1</sup> *McKenzie v MPDT* [2004] NZAR 47 at [71]; *Nuttall HPDT* (8Med04/03P); *Dr T HPDT* (636/Med14/272P); *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774; and *Johns v Director of Proceedings* [2017] NZHC 2843.

knowledge or intention on the part of the practitioner. The offence of practising without a current APC is an absolute offence in this sense. It does not require any deliberate intention to flout professional obligations or even that the practitioner knew or ought to have known that they did not have a current APC.<sup>2</sup>

### **Finding on the charge**

52. The Tribunal is satisfied that each of the particulars of the Charge have been established. The evidence submitted in the Agreed Summary of Facts and the Agreed Bundle of Documents establish the Charge as laid.
53. In respect of particular A, the Tribunal is satisfied that Ms Moore's failure to maintain approximately 200 contemporaneous patient records, removal of approximately 137 patient files from Hauora Tairāwhiti and misplacing approximately 118 patient files, during 2012 and 2016, amounts to negligence and brings discredit to the profession under section 100(1)(a) and (b) of the HPCA Act. This conduct falls seriously short of conduct expected of a reasonably competent health practitioner practising as a physiotherapist.
54. In respect of particular B, the Tribunal is also satisfied that Ms Moore acted in an unprofessional manner by failing to respond to the several communications from the Board in relation to the complaint about her professional conduct raised by Hauora Tairāwhiti. During the period from 15 February 2017 through to 9 March 2017, the Board made contact with Ms Moore at least five times and yet she failed to respond to any of these communications. It is a serious matter not to respond to a professional complaint in this way.
55. Ms Moore did not engage with the Board until much later when her APC expired in mid-April 2017. This conduct falls short of conduct expected of a reasonably competent health practitioner practising as a physiotherapist. A registered health professional is expected to engage and co-operate with their regulatory authority and it is unprofessional not to do so. The Tribunal is satisfied this conduct that is likely to bring discredit to the profession under section 100(1) (b) of the HPCA Act.
56. Overall, the Tribunal is satisfied the practitioner's departure from accepted standards in

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<sup>2</sup> Kewene HPDT (503/Den/12/219P) at [76]; *White* HPDT (366/Opt10/168P) at [9]; *Henderson* HPDT (477/Phar12/210P and Phar12/213P) at [36]; and *Ms H* HPDT (256/Psy09/128P) at [6] and [7]; and *Bhatia* HPDT (344/Med10/151P) at [74].

relation to particulars A and B, are both separately and cumulatively significant enough to warrant a disciplinary sanction for the purposes of protection of the public and maintaining professional standards.

57. In respect of particular C, the Tribunal is satisfied that the three elements of the charge laid under section 100(1)(d) of the HPCA Act are established. In particular:

- (a) The practitioner was at all relevant times a registered physiotherapist;
- (b) During the period of the charge, 1 April 2017 and 18 April 2017 she practised as such; and
- (c) That during the same period of the charge she did not hold a current practising certificate.

### **Penalty**

58. Given that the Tribunal is satisfied the charge is established, it must go on to consider the appropriate penalty under section 101 of the HPCA Act. The penalties may include:

- (a) Cancellation of registration;
- (b) Suspension of registration for a period not exceeding 3 years;
- (c) An order that the practitioner may only practise with conditions imposed on employment or supervision or otherwise;
- (d) Censure;
- (e) A fine of up to \$30,000; and
- (f) An order as to costs of the Tribunal and/or the PCC to be met in part or in whole by the practitioner.

59. The Tribunal accepts as the appropriate sentencing principles those contained in *Roberts v Professional Conduct Committee*<sup>3</sup> where 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:

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<sup>3</sup> [2012] NZHC 3354 at [44]-[51].

- (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 "*fair, reasonable and proportionate in the circumstances.*"

60. Counsel for the PCC submitted that the appropriate penalty in this case is a censure, a fine of \$5,000, conditions on practice to ensure monitoring of Ms Moore's patient records for a period of 18 months and a contribution to the costs of the PCC and the Tribunal.
61. The practitioner did not oppose the penalty of censure or conditions. Ms Moore in her submissions referred to her remorse at her conduct. She also explained that the period 2012 to 2016 had been a very busy time in her life personally and professionally and she had failed to cope with the administration required in her role. Ms Moore also noted her financial position, disclosing that she earned a moderate part time income and did not have any significant debts.
62. The PCC referred the Tribunal to a range of cases dealing with professional misconduct for failure to maintain patient records. The cases referred to a range of penalties from censure and conditions to suspension from practise.<sup>4</sup>
63. A review of the cases indicates that for offending under section 100(1)(d) of the HPCA Act that is at the lower end of the scale, the range of penalties imposed is predominantly censure and a fine of between \$500 to \$1,500 and costs.<sup>5</sup>

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<sup>4</sup> *Gouse*, HPDT (30/Med05/11D); *Parker* HPDT (310/Chi09/121D); and *Tunnickliff* HPDT (570/Nur13/248P).

<sup>5</sup> *Kewene* HPDT (503Den12/219P); *Heath* HPDT (854/Phar16/356P); *White* HPDT

### **Aggravating and Mitigating Factors**

64. In considering what is the appropriate penalty, the Tribunal is required to consider the aggravating and mitigating factors in this case.
65. The Tribunal notes the following aggravating factors:
- (a) The length of time that Ms Moore failed to comply with her patient record keeping obligations was over four years;
  - (b) The scale of the offending was not minor in relation to the patient records given the number of patient files involved;
  - (c) The risks to patient privacy created by removing and losing patient files;
  - (d) The evidence of previous cautions she had received to maintain patient records while employed at Hauora Tairāwhiti; and
  - (e) That Ms Moore failed to appreciate her professional obligation to respond to the professional complaint to the Board despite the numerous opportunities given to her.
66. However, there are also material mitigating factors in this case which we take into account, including:
- (a) Ms Moore's co-operation with the PCC and Tribunal since this charge has been laid, although the PCC states this had been sporadic during its investigation phase which added to the costs of the investigation;
  - (b) The fact that Ms Moore has admitted the Charge at an early stage;
  - (c) Ms Moore does not have any previous disciplinary matters before this Tribunal and there is no suggestion in the evidence that her clinical competence has been in issue; and
  - (d) Finally, Ms Moore has helpfully expressed insight into her failures at this hearing.

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(366/Opt10/168P); *Henderson* HPDT (477/Phar12/210P and Phar12/213P); *Dr S* HPDT (445/Den/11/198P); and *Wilson* HPDT (823/Phar16/357P).

### **Finding on Penalty**

67. The Tribunal has taken into account the relevant sentencing principles, aggravating and mitigating factors and the comparative cases.
68. We are satisfied that the appropriate penalty in this case is a censure, conditions to be imposed to ensure that Ms Moore remains diligent in her patient file maintenance and a contribution to costs. In view of the on-going costs of the conditions imposed by the Tribunal and the level of costs ordered, we do not consider a fine is warranted.
69. The Tribunal wishes to note that we considered the practitioner was at material risk of a suspension penalty given the extent of the failures to maintain patient files. However, Ms Moore's co-operation with the Tribunal and that there is no evidence of any incompetent physiotherapy practise have both assisted her to avoid such a penalty.
70. The APC is also an important part of the regulatory regime. The importance of this obligation is underscored by the ground of discipline provided by section 100(1)(d) of the Act. However, the Tribunal notes Ms Moore's offending in relation to the APC is at the lower end of the scale of this offending.

### **Costs**

71. In considering the appropriate quantum of costs, the Tribunal must take into account the need to make a proper contribution towards the costs. In doing so it takes 50% of the total reasonable costs as a starting point, in accordance with the dicta in *Cooray v Preliminary Proceedings Committee*.<sup>6</sup> The Tribunal recognises the cooperation received from Ms Moore, particularly the indication of an early plea and the fact that the Charge was able to be dealt with on the basis of an Agreed Summary of Facts. However, the Tribunal has also been mindful that the PCC and the Tribunal have been put to considerable costs as a result of the practitioner's failures including the additional investigation of the failure to respond to the Board and to complete the APC.

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<sup>6</sup> HC Wellington, AP 23/94, Doogue J, 14 September 1995.

72. The PCC costs were \$38,813 and the Tribunal costs were \$13,891 in total. The PCC submitted that the practitioner should contribute 50% of the total PCC and Tribunal costs combined.
73. Taking all factors into account, the Tribunal orders that Ms Moore pay the sum of \$26,000 in costs to be paid half each to the PCC and Tribunal. This is equivalent to approximately 50% of the total costs.

**Tribunal decision on name suppression**

74. The practitioner did make an application for permanent suppression of her name and any identifying details. The grounds of the application include that Ms Moore has three school aged children and that they live in a small community. She is concerned about the impact of publicity on her children, when this decision is published.
75. Ms Moore is also concerned that publication will impact her professional reputation in the community and therefore her income.
76. The PCC opposes the application on the basis that the events that lead to the principal Charge of failure to maintain patient files, are already well known in the local community given the publicity this matter received when the loss of patient files was notified to the community and her former patients.
77. Ms Moore accepts that the community knew of the events as published in 2017, and that she had had to explain the matter to her children at the time. The practitioner also accepted that the local medical and health community was aware of the events as published by her former employer in 2017 and that it related to her.
78. In considering any application for name suppression, the Tribunal must be mindful that the principle of open justice is key in any effective disciplinary regime. It has been Parliament's clear intention, expressed in section 95 of the HPCA Act, that professional disciplinary hearings should generally be held in public.
79. When the Tribunal is considering an application to suppress the name of any person appearing before it, it must consider whether it "*is satisfied that it is desirable*" to make such an order taking into account the following:



- (a) the interests of any person; and
  - (b) the public interest.
80. The interests of any person will include the complainant if any, the applicant and any third parties.
81. The public interest will include an evaluation of the relative strength of the public interest factors namely:
- (a) there is a public interest in knowing the name of the health practitioner accused of or found guilty of a disciplinary offence;
  - (b) the accountability and transparency of the disciplinary process; and
  - (c) the importance of freedom of speech and the right enshrined in section 14 New Zealand Bill of Rights Act 1990.
82. A useful summary of these interests has been provided by the Court in *Anderson v PCC*,<sup>7</sup> in which Gendall J. states:

*“[36] Private interests will include the health interests of a practitioner, matters that may affect a family and their wellbeing, and rehabilitation. Correspondingly, interests such as protection of the public, maintenance of professional standards, both openness and ‘transparency’ and accountability of the disciplinary process, the basic value of freedom to receive and impart information, the public interest [in] knowing the identity of a practitioner found guilty of professional misconduct, the risk of other doctors’ reputations being affected by suspicion, are all factors to be weighed on the scales.*

*[37] Those factors were also referred to at some length in the Tribunal. Of course publication of a practitioner’s name is often seen by the practitioner to be punitive but its purpose is to protect and advance the public interest by ensuring that it is informed of the disciplinary process and of practitioners who may be guilty of*

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<sup>7</sup> HC Wellington, CIV 2008-485-1646, 14 November 2008.

*malpractice or professional misconduct. It reflects also the principles of openness of such proceedings, and freedom to receive and impart information.”*

83. The Tribunal also recognises that once the practitioner has been found guilty of a Charge, it becomes more difficult to satisfy the Tribunal that the presumption of open justice should be departed from.<sup>8</sup> However that onus is not to the higher criminal standard but only that suppression orders are “desirable” as set out in section 95(2) of the HPCA Act.
84. Ultimately, it is a balancing exercise of the public interest in knowing the name of a practitioner once found guilty of professional misconduct as against any private interest factors for the practitioner and others. In the present case, the Tribunal is not satisfied that it is desirable to grant name suppression to the practitioner. The private interest factors raised of concern for her family and income are understandable and unfortunate. However, they do not appear to be anything out of the ordinary for any practitioner found guilty of professional misconduct. The Tribunal has also been mindful that to a large extent the events that are the subject of the principal Charge A have already been disclosed in the community where Ms Moore lives. This decision simply confirms the professional disciplinary outcome.
85. The Tribunal considers that the public interest in an open and transparent disciplinary process outweighs the private interest factors raised in this case. The application for permanent name suppression is declined.

### **Conclusion**

86. The charge is established under section 100(1)(a) and (b) and (d) of the Act;
87. The penalty orders made against the practitioner by this Tribunal are as follows:
- (a) Censure;
  - (b) Conditions on the practitioner’s practice to apply for a period of two years from the date of this decision, as follows:
    - i. The practitioner to be independently supervised by a clinical

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<sup>8</sup> *Director of Proceedings v I* [2004] NZAR 635.

supervisor approved by the Board, to have a particular focus on clinical record keeping and file management and to be paid for by the practitioner. The supervisor to report to the Board on terms to be settled by the Board.

ii. The practitioner to undertake training as directed by the Board in patient record keeping and/or professional obligations, as directed by the Board at the practitioner's cost; and

iii. Two audits of Ms Moore's clinical record keeping practice to occur at 12 and 24 months, to be carried out by the Board at Ms Moore's own cost.

(c) Costs of \$26,000 to be paid by the practitioner, being \$13,000 to the PCC and \$13,000 to the Tribunal.

(d) The Tribunal directs the Executive Officer to publish this decision and a summary on the Tribunal's website. The Tribunal also directs the Executive Officer to request the Physiotherapy Board of New Zealand to publish either a summary of, or a reference to, the Tribunal's decision in its principal 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 Auckland this 13th day of December 2018



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MJ Dew, Chairperson  
Health Practitioners Disciplinary Tribunal