



**NEW ZEALAND
HEALTH PRACTITIONERS
DISCIPLINARY TRIBUNAL**
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BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HPDT NO: 1013/PHYS18/427P

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 PHYSIOTHERAPY BOARD OF
NEW ZEALAND

Applicant

AND MR DAVID FIAALII NONOA of Auckland,
registered physiotherapist

Practitioner

HEARING held at Auckland on 11 March 2019

TRIBUNAL Ms A Douglass (Chair)

Ms D McKinnon QSM, Ms K Davie, Ms S Stewart, Professor D
Reid (Members)

Ms K Davies (Executive Officer)

Ms H Hoffman (Stenographer)

APPEARANCES Ms B Johns for the Professional Conduct Committee (PCC)

Mr D McGill and Ms B Zagni for the Practitioner.

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Introduction

1. Mr David Nonoa (the Practitioner) has been a registered physiotherapist with the Physiotherapy Board (the Board) since July 2003. He practises in Auckland and owns and operates a physiotherapy practice.
2. Mr Nonoa faces one charge of professional misconduct under s 100(1)(a) and/or s 100(1)(b) of the Health Practitioners Competence Assurance Act 2003 (the Act) in that the alleged conduct either separately or cumulatively amounts to malpractice or negligence and/or has brought or was likely to bring discredit to the profession.

The Charge

3. The Notice of Charge was amended by consent at the beginning of the substantive hearing. The Particulars of the Amended Charge (the Charge) are set out in the Schedule to this decision.¹
4. In summary, the Charge relates to four matters of professional conduct over an 11 year period. Firstly, in 2012 and 2013, Mr Nonoa is alleged to have invoiced the Accident Compensation Corporation (ACC) for services under another physiotherapist's ACC provider number when this physiotherapist did not provide those services; secondly, from 2004 to 2015, he invoiced ACC for treatment provided to close family members when treatment was not provided in circumstances permitted by the Physiotherapy Board (the Board) or ACC's Treatment Provider Handbook; thirdly, he failed to obtain independent verification from a third party when claiming ACC payments for treating family members; and fourthly, when providing treatment to his family members, he failed to keep accurate and/or adequate patient records in respect of the family members he treated.
5. Mr Nonoa accepts the amended Notice of Charge in its entirety and that his conduct amounts to professional misconduct under s 100(1)(a) and s 100(1)(b) of the Act. He has also agreed to a summary of facts dated 20 February 2019 (Summary of Facts) and that the disciplinary charge (as amended) is deserving of a disciplinary sanction. The Tribunal must however, be satisfied that the Charge is established on the evidence.

Hearing

6. The Tribunal heard the Charge in Auckland on 11 March 2019 and both parties were represented by counsel.

¹ The original Notice of Charge dated 19 October 2018 was amended by consent by Notice of Charge dated 28 February 2019. The amended Charge was accepted by the Tribunal at the commencement of the hearing.

7. The parties produced to the Tribunal the Agreed Summary of Facts and an agreed bundle of documents (Agreed Bundle). The Agreed Bundle contained ACC's Investigation Findings Report in which Mr Nonoa accepted that he was liable to repay ACC for the treatment of family members, double invoicing for services and invoicing for services under another physiotherapist's ACC provider number. There were a number of documents provided in order to establish the expectations, responsibilities and obligations by Mr Nonoa to ACC. These included: the ACC Treatment Provider Handbook (2007 and 2011), the Board's Standards of Ethical Conduct (March 2006), Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct (October 2011, Code of Ethics) and the New Zealand/Physiotherapy Board Position Statement regarding Treatment of Whanau and Family Members and Self-Treatment (December 2012, Position Statement). There was also correspondence from ACC regarding its own investigation and complaint to the Board about the practitioner's conduct, an expert report from Mr Graeme White, a physiotherapist who was instructed by the PCC to give an independent expert opinion on the practitioner's conduct, and the accompanying clinical notes.
8. At the hearing, a statement in an email from Mr Nonoa dated 7 March 2019, was produced through his counsel. He also gave oral evidence as to his financial means for the purposes of the penalty decision.
9. No application was made for name suppression or identifying details of the practitioner prior to or during the hearing. At the conclusion of the hearing, Ms Zagni, counsel for the practitioner, made an application for suppression of the personal details of the practitioner's family provided in the written submissions and Mr Nonoa's statement before the Tribunal. There was no objection from the PCC to this application. Accordingly, the Tribunal makes an order for suppression of the personal details of the practitioner's family.²
10. Particular 1 of the amended Charge identifies another physiotherapist who Mr Nonoa has admitted claiming from ACC services under that practitioner's name. On the basis of a written statement made by that practitioner to ACC as part of its investigation,³ the Tribunal has redacted the practitioner's name in the Amended Charge shown in the Schedule and this practitioner will be referred to as Mr Y. The Tribunal makes an order suppressing the identifying details of the other practitioner, Mr Y.

² Specifically, the details relating to his family in paragraph 7.5 and 7.6 of the written submissions on behalf of David Nonoa on penalty, name suppression and costs [Document 8] and the details relating to his family in the annexed email from Mr Nonoa to those submissions dated 7 March 2019.

³ Document 5.

The Facts

11. This factual background is set out in the Agreed Summary of Facts, as produced by the parties.
12. At all material times relevant to the charge, Mr Nonoa was the director, shareholder and manager of Xcel Physio Limited which has clinics in Flatbush and Onehunga in Auckland. Mr Nonoa continues to practise as a physiotherapist at Xcel Physio in Auckland.
13. As part of Mr Nonoa's practice, he provided physiotherapy services as an ACC registered treatment provider under the Accident Compensation (Liability to Pay or Contribute to Costs of Treatment) Regulations 2003.
14. On 5 July 2016 ACC made a complaint to the Physiotherapy Board about the standard of Mr Nonoa's practice including his: treatment of family members; double invoicing for services; and invoicing for services under another physiotherapist ACC provider number.
15. ACC has completed its own investigation and it has produced a report in which Mr Nonoa conceded and accepted he was liable to repay ACC. An important issue was the treatment of whānau and family members. In his explanation to ACC for treating family members, Mr Nonoa claimed ignorance, stating "I was not aware that I was not allowed to treat family members."
16. In a subsequent letter dated 25 August 2016 ACC advised the outcome of its review in relation to Mr Nonoa's areas of billing confirming that he had been paid for services of which he was not entitled. No criminal liability was established and an educational approach was taken by ACC. After considering all the circumstances of the investigation, ACC considered that the raising of an overpayment and recovery of the cost of the treatments inappropriately claimed by the practitioner along with the issuing of a formal letter was appropriate. ACC then updated the Board in relation to its investigation.
17. ACC sought recovery of \$26,940.85 for payments made by ACC for treatment of family members inappropriately claimed by Mr Nonoa over a period of 11 years. In regard to double billing ACC sought recovery of \$683.71, an amount subsequently amended to \$341.85 and a debt of \$5,389.83 was also lodged against Mr Nonoa for incorrect claims for treatment purportedly provided by Mr Y when Mr Y was overseas. Mr Nonoa has repaid \$7,200 in respect of these amounts due.
18. On 19 October 2018 the PCC laid a Charge before the Tribunal. Mr Nonoa admitted the amended Charge as set out in the Schedule.

Relevant law under the HPCA Act – professional misconduct

19. Section 100 of the Act provides the grounds on which a health practitioner may be disciplined. The section provides that malpractice and/or negligence and/or conduct likely to bring discredit to the profession can constitute professional misconduct.⁴
20. The Tribunal and the Courts have considered the term “professional misconduct” under s 100(1)(a) on many occasions. In *Collie v Nursing Council of New Zealand*,⁵ Gendall J described negligence and malpractice as follows:

Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.⁶

21. “Malpractice” is defined as:

The immoral, illegal or unethical conduct or neglect of professional duties. Any instance of improper professional conduct”⁷ and, “Law Improper treatment or culpable neglect of a patient by a physician or of a client by a lawyer ... 2 *gen* criminal or illegal action: wrongdoing, misconduct.”⁸

22. Under s 101(b) of the Act, the Tribunal must also consider whether the alleged conduct has or is likely to bring discredit on the physiotherapy profession. In *Collie*,⁹ Gendall J stated:

To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard for the question to be asked by the Council being whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the nursing profession was lowered by the behaviour of the nurse concerned.

23. There is a well-established two-stage test for determining professional misconduct.¹⁰ These two steps are:
- (a) Firstly, did the proven conduct fall short of the conduct expected of a reasonably competent health practitioner operating in that vocational area? This requires an objective analysis of whether the practitioner’s acts or omissions can reasonably be

⁴ HPCA Act, ss 100(1)(a) and/or 100(1)(b).

⁵ [2001] NZAR 74.

⁶ [2001] NZAR 74 at [21].

⁷ Collins English Dictionary (2nd ed).

⁸ Shorter Oxford English Dictionary (1993 ed) as cited in *Dr E 136/Med07/76D* at [12] – [14].

⁹ Above, n 5, *Collie* at [28].

¹⁰ *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA), as applied for example, in *Johns v Director of Proceedings* [2017] NZHC 2843.

regarded by the Tribunal as constituting malpractice; negligence; or otherwise bringing or likely to bring, discredit to the profession; and

- (b) Secondly, if so, whether the departure from acceptable standards has been significant enough to warrant a disciplinary sanction for the purposes of protecting the public by maintaining professional standards and/or punishing the health practitioner.
24. The burden of proof in the present case is on the PCC. This means that it is for the PCC to establish that the practitioner is guilty of professional misconduct. The PCC must produce evidence that establishes the facts on which the Charge is based to the civil standard of proof; that is, proof which satisfies the Tribunal that on the balance of probabilities the Particulars of the charge are more likely than not. 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.¹¹

Tribunal consideration of the Charge

25. The Tribunal must be satisfied on the evidence provided by the PCC and the Agreed Summary of Facts that each of the four Particulars is established as alleged in the Charge.

Particular 1 – Invoicing ACC for services under another physiotherapist’s name

26. This particular relates to claims Mr Nonoa made to ACC for treatments performed during October 2012 and June 2013 under the ACC provider number of Mr Nonoa’s employee, Mr Y, at Xcel Physio, a total of \$6,530.55. It was supported by evidence from Mr Y and the New Zealand Custom’s record confirming Mr Y’s travel dates when Mr Y was overseas or travelling overseas and therefore not working. There was also ACC’s Schedule of Payments claimed under his provider number during this time and therefore they could not have been performed when that practitioner was overseas.¹²
27. In the Agreed Summary of Facts it was accepted that neither Mr Y, nor Mr Nonoa himself provided these services that had been claimed from ACC.¹³
28. At the hearing, Mr McGill submitted on Mr Nonoa’s behalf that the treatments were provided by Mr Y, but on other days.¹⁴ The system of recording involved the treating physiotherapist writing a handwritten note which was then later entered into the practice notes. The administrator had simply entered the wrong days for the treatments, such

¹¹ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR (SC) at [112].

¹² Agreed Bundle of Documents, Tab 13 and 14.

¹³ Agreed Summary of Facts, paragraphs 10 and 11.

¹⁴ Transcript of Evidence, p 48, line 8.

being a demonstration of the shambolic nature of Mr Nonoa's record-keeping and claims process.

29. The Tribunal proceeds on the basis set out in the agreed facts, namely, that services were not provided by either Mr Y or Mr Nonoa on the days in question. There is no evidence before the Tribunal that Mr Y provided them on other days. As stated by Mr White in his expert report, (and regardless of whether either Mr Y or Mr Nonoa did in fact provide these services), it would never be acceptable to make a claim for treatment provided for by another staff member for a period of time in which that physiotherapist was overseas and did not provide the treatment.¹⁵
30. Such conduct is clearly in breach of Mr Nonoa's professional and ethical obligations including ACC's Policies and Procedures¹⁶ and the Physiotherapy Board's Standards¹⁷ and the Code of Ethics for Physiotherapists¹⁸ all of which emphasise that physiotherapists must act with honesty and integrity in all professional activities including interacting with their funders.
31. The Tribunal has determined that the conduct in Particular 1 amounts to malpractice and negligence, and conduct that is likely to bring discredit to the physiotherapy profession.

Particular 2 – Treatment of family members

32. Mr Nonoa admitted that between October 2004 and October 2015 he invoiced ACC for 775 treatments provided to four close family members, a total of \$26,940.85. Members of Mr Nonoa's family included his wife, his children and his son-in-law. These treatments were not provided in "exceptional circumstances," and therefore did not constitute good clinical practice. They could not be invoiced to ACC under ACC's policy. In support of this particular, there was ACC's schedule recording the services claimed by the practitioner for his family members for this period and the associated consultation notes for each family member.¹⁹
33. The "exceptional circumstances" policy is set out in the Position Statement of the Board²⁰ and ACC's policy, namely:

[ACC] will only consider paying for treatment provided to family members or yourself in 'exceptional circumstances'. Exceptional circumstances include:

¹⁵ Agreed Bundle of Documents, Expert report, Tab 15, p 10.

¹⁶ Agreed Bundle of Documents, ACC Treatment Provider Handbook, Tabs 2 and 3.

¹⁷ Agreed Bundle of Documents Physiotherapy Board's Standards of Ethical Conduct (March 2006), Tab 4.

¹⁸ Agreed Bundle of Documents, Aotearoa New Zealand Physiotherapy Code of Ethics and Professional Conduct (2011), Tab 5.

¹⁹ Agreed Bundle of Documents, Tab 11, and Tabs 16 - 23 (inclusive).

²⁰ Agreed Bundle of Documents, Tab 6, p 53.

- Acute treatment provided in an emergency situation where, in your reasonable judgement, the need for treatment is urgent giving the likely clinical effect on the person of any delay in treatment,
- Situations in rural areas where there is no other appropriately qualified treatment provider available to give the required treatment.

[ACC] will not fund

- Emergency treatment that is minor and would ordinarily be provided by a family member who is not a provider,
 - Treatment provided in a non-emergency situation.
34. As noted by Mr White in his expert report, there are justifiable situations where there may be an occasion that a physiotherapist uses his or her skills to treat a family member in the confines of their private residence and when the family member has given consent for such treatment. In deciding to treat family members and in claiming compensation from a third party by doing so, Mr Nonoa needs to have considered exceptional circumstances existed, including an emergency situation. He would need to be certain he could maintain appropriate professional boundaries when treating family members and avoid any conflict of interest; recognise the complex factors that may impact on the client/family member being treated and reflect on his behaviour in doing so.²¹ Mr Nonoa did not reflect on the provision of providing treatment to family members or clinically justify providing this treatment in accordance with the relevant professional Standards.
35. The Tribunal has determined that the conduct in Particular 2 amounts to both malpractice and negligence, and conduct that is likely to bring discredit to the physiotherapy profession.

Particular 3 – Failing to obtain independent verification

36. Linked to Particular 2, Mr Nonoa admitted that he failed to ensure that the claims he made to ACC for treatments provided to family members were independently verified by a third party.
37. The Board's Position Statement also confirms that if funding in these situations is to be sought from a third party, then care must be taken to meet particular criteria regarding verification, documentation and care plans.²² Thus, the emphasis is on avoiding treating

²¹ Agreed Bundle of Documents, Expert report, Tab 15, p101.

²² Agreed Bundle of Documents, Tab 6, p 52.

family members and certainly not invoicing ACC unless under what would usually be short-term exceptional circumstances with third party verification.

38. As identified by Mr White, the very purpose of such verification is a protective mechanism for health professionals to ensure appropriate professional boundaries are maintained and to avoid conflicts of interest, yet Mr Nonoa did not avail himself of such protection.
39. The Tribunal has determined that the conduct in Particular 3 amounts to both malpractice and negligence and conduct that is likely to bring discredit to the physiotherapy profession.

Particular 4 – Record keeping

40. Mr Nonoa acknowledged that over the same 11 year period he failed to keep accurate and/or adequate patient records in respect of the family members he treated, including failing to record informed consent, mechanism of injury, diagnosis, prognosis and discharge summary.
41. As set out above, there are a number of applicable professional guidelines for physiotherapists in respect of the standard of record-keeping required. Mr Nonoa acknowledged he failed to record progress with treatment using appropriate subjective and objective assessments in accordance with, for example, 1.1E of the Physiotherapy Practice Thresholds in Australia and Aotearoa New Zealand.²³ Some daily entry records did not show any record of change or treatment progression, with the treatment ceasing without the notes reflecting that the family member /patient had achieved his or her goals.
42. There were abundant examples of these failures within the patient records.²⁴ In some of the clinical notes Mr Nonoa recorded different injury mechanisms but under the same claim number. For example, the initial claim recorded “slipped on the edge hitting the wall”, however, the notes recorded the nature of injury as “overuse – repetitive strain mechanism”.²⁵
43. On some occasions Mr Nonoa made no notes for treatments provided or there were duplicated notes from previous treatments within the same claim and/or between different claim numbers and/or between different patients.
44. Of concern to the Tribunal was the potential to misuse a patient record system by duplicating notes from previous treatments or different patients by the use of “copy and

²³ Agreed Bundle of Documents, Tab 7, p 68.

²⁴ Mr White’s report.

²⁵ Agreed Bundle of Documents, Volume 2, Tab 16, pp 31-32.

paste” or the use of an “auto-populate” tool without individualising the record to the appointment for the specific patient.²⁶

45. In *Dr E*,²⁷ the Tribunal found Dr E guilty of professional misconduct for providing treatment to his de facto partner and that he failed to keep records of consultations and treatment. The “essential dilemma” that arises in treating family members was described as follows:

On the one hand, there is the natural impulse to assist the family member due to close emotional ties. On the other, there is the need to make objective independent professional decisions, uninfluenced by emotional factors.²⁸

46. The Tribunal has acknowledged in other cases that the failure to keep appropriate and accurate records is contrary to accepted standards.²⁹ The pattern of Mr Nonoa’s failures to document fundamental and expected requirements of his practice and treatment provided as set out in Particular 4 amounts to both malpractice and negligence and conduct that is likely to bring discredit to the physiotherapy profession.
47. The Tribunal finds that the established conduct, separately and cumulatively, in respect of all Particulars in relation to the Charge is sufficiently serious to warrant a disciplinary sanction for the purposes of maintaining professional standards.

Penalty

Penalty principles

48. The Tribunal is satisfied that the Charge is established and now turns to consider the appropriate penalty under s 101 of the Act. The Tribunal adopts the penalty principles as set out in a number of authorities notably, *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*,³⁰ as follows:
- 48.1. What penalty most appropriately protects the public;
- 48.2. The important role of setting professional standards;
- 48.3. A punitive function (although this is not the principle purpose behind an order but may be a secondary consequence);

²⁶ Agreed Bundle of Documents Expert report, Tab 15, for example, p 133.

²⁷ 136/Med07/76D.

²⁸ Ibid at [54].

²⁹ For example, *Dr N* (543/Med12/224P) at [37]; *Dr E* (136/Med07/76D).

³⁰ [2012] NZHC 3354, Collins J at [44] – [51].

- 48.4. Rehabilitation of the health professional;
- 48.5. That any penalty imposed is comparable to other penalties imposed upon health professionals in similar circumstances;
- 48.6. Assessing the health practitioner’s behaviour against the spectrum of sentencing options that are available and trying to ensure that the maximum penalties are reserved for the worst offenders;
- 48.7. Endeavouring to impose a penalty that is the least restrictive; and
- 48.8. Whether the penalty proposed is fair, reasonable and proportionate in the circumstances presented.
49. In *A v Professional Conduct Committee*, the High Court observed that four points could be expressly, and a fifth impliedly, derived from the authorities:³¹

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

50. In *Katamat v Professional Conduct Committee*,³² the High Court noted the primary factor to consider:

“... of all the factors discussed, the primary factor will be what penalty is required to protect the public and deters similar conduct. The need to punish the practitioner can be considered, but it is of secondary importance. The objective seriousness of the misconduct, the need for consistency with past cases, the likelihood of rehabilitation and the need to impose the least restrictive penalty that is appropriate will all be relevant to the inquiry. It bears repeating, however, that the overall decision is ultimately one involving an exercise of discretion.”

51. In *A v Professional Conduct Committee*, the Court went on to state:³³

Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: *B v B* (HC, Auckland, HC 4/92, 6 April 1993) Blanchard J. Moreover, as was said in *Giele v The General Medical Council* [2005] EWHC 2143, though ... the maintenance of public confidence ... must outweigh the

³¹ [2008] Akld HC CIV-2008-404-2927, 5 September 2008, Keane J at [81].

³² [2012] NZHC 1633 at [53].

³³ *Ibid*, at [82].

interests of the individual doctor’, that is not absolute – ‘the existence of the public interest in not ending the career of a competent doctor will play a part’.

PCC’s penalty submissions

52. The PCC submitted that the appropriate penalty in this case should be censure of the practitioner, suspension from practice for a period of six to nine months, conditions to be imposed on his scope of practice on his return, and a fine of \$10,000.
53. The PCC referred to the following aggravating and mitigating features which it submitted warranted a significant penalty on the practitioner to ensure that both the public is protected and that the integrity of not only his profession but also the ACC Scheme is maintained.
54. In summary, the aggravating features were:
 - (a) Mr Nonoa had abused his position of trust as a treatment provider registered with ACC by claiming for treatments to which he was not entitled;
 - (b) Making multiple claims using another physiotherapist’s provider number while he was overseas could only be viewed as dishonest to the detriment of the State funded system;
 - (c) In relation to treating family members the conduct was deliberate and repetitive taking place over a period of almost 11 years;
 - (d) The quantum involved (over \$33,000) while in the “mid-range” when compared with other cases, needed to be contextualised in the practice of physiotherapy itself and in doing so constitutes a significant amount of money;
 - (e) The related and extensive inadequacies in Mr Nonoa’s clinical record demonstrate a broad failure to uphold the expected standards of a physiotherapist. These failures included in some instances not only inadequate but no notes and treatments which he claimed from ACC. These failings were not minor but suggested a deeper inadequacy in comprehension in not only Mr Nonoa’s practice of physiotherapy, but in the way he runs his practice; and
 - (f) Mr Nonoa’s role as director and manager of his practice means he was responsible for other staff during the period of offending and was obliged to model good professional standards for his employees.
55. The PCC also submitted that there were mitigating factors. These were:

- (a) Mr Nonoa has co-operated with the ACC from the outset;
 - (b) He has agreed to pay the full amount to ACC and is repaying at a rate of \$500 per month. Since 2016 Mr Nonoa has repaid approximately \$7,200; and
 - (c) Mr Nonoa has cooperated with the PCC throughout its investigation, admitted the Charge and Agreed Summary of Facts.
56. The PCC submitted that suspension of six to nine months was appropriate in view of the admitted serious misconduct from which Mr Nonoa had benefited financially from public monies. Moreover, it was neither sufficient nor tenable to suggest that Mr Nonoa was unaware or ignorant of his professional obligations in respect of *all* the admitted Particulars of the Charge. The PCC emphasised that, even if it was accepted that Mr Nonoa was just trying to help his family, he claimed money from ACC and that was not what he was entitled to do. Suspension can, and has, been imposed in circumstances where there is no intent to defraud or to gain financial advantage.
57. In the PCC's submission Mr Nonoa was in clear breach of the Code of Ethics and in that he failed to act with honesty and integrity in all professional activities. The cumulative failings required a clear message to be sent to the profession. Mr Nonoa knew or must have known what he was doing or, at the very least, was reckless in not complying with his professional obligations. In respect of putting patients and their safety at risk, the PCC argued that Mr Nonoa's poor administration flowed over into his clinical record keeping, directly putting patients and their safety at risk as their records were incomplete.
58. In *Tunnickliff*,³⁴ it was held it was an integral part of the proper discharge of health professional's responsibilities to a patient for each individual involved in treatment of the patient to keep adequate notes. This of itself was described as being of significant concern where a practitioner is unaware of the responsibilities in this regard and puts the patients in question at risk.³⁵
59. In respect of conditions on Mr Nonoa's annual practising certificate the PCC submitted that conditions were necessary to ensure that there are sufficient safeguards in place to ensure that he is able to make the required professional standards, that there is no reoccurrence of his misconduct and the community is protected during his necessary rehabilitation. These conditions were agreed to at the hearing by Mr Nonoa.
60. The PCC proposed a fine of \$10,000 and that this was a fair, reasonable and proportionate response having regard to the nature and extent of Mr Nonoa's misconduct and the discredit that will inevitably bring to the profession.

³⁴ HPDT 570/Nur13/248P.

³⁵ *Tunnickliff* at [71] and [72].

Practitioner's penalty submissions

61. Mr McGill, for the practitioner, submitted that in all the circumstances, the appropriate penalty is censure together with conditions on Mr Nonoa's practice and a very modest fine (if any) as an appropriate penalty. There was an "upfront" acknowledgement that Mr Nonoa's conduct fell short of best practice. Indeed, Mr McGill conceded at the outset of the hearing that Mr Nonoa accepted that "his record-keeping in the vernacular was a shambles."³⁶
62. Any period of suspension was opposed on Mr Nonoa's behalf as while his conduct fell short of best practice it could not be said to be at the upper end of the disciplinary spectrum. It was submitted for Mr Nonoa that he did not act dishonestly, or with intent to defraud, or obtain financial advantage. He was naive and inexperienced and did not know what he was doing.
63. In summary, the mitigating factors, some of which were appropriately conceded by Ms Johns for the PCC as set out above, included:
- (a) Mr Nonoa accepted responsibility for his actions at the earliest possible opportunity;
 - (b) Mr Nonoa did not act dishonestly or with intent to defraud, to the extent that there was insufficient evidence for ACC to establish criminal liability.³⁷ It was explained to the Tribunal that Mr Nonoa had poor administrative practices that led him to wrongly invoicing ACC for treatments provided. At that time Mr Nonoa used a paper-based system and the practice was for the physiotherapists in the practice to write down the names of the people treated and a brief description of the treatment provided. Mr Nonoa's wife, who was responsible for the administrative side of the business would then enter the information into the online system. This could result in treatment dates being arbitrarily assigned if there were no dates recorded on the paper copy. At the time Mr Nonoa had a significant workload and he was seeing around 20 patients per day five days a week and around 8 patients per day over the weekend.
 - (c) Mr Nonoa maintained that he was generally not aware that he was not allowed to provide treatment to family members. His sole motivation for treating his family members was to help them. It was submitted that Mr Nonoa's cultural beliefs within his Samoan family influenced his view that it was appropriate to provide treatment to family members. Mr Nonoa was not motivated by a desire to defraud the system and/or obtain a financial advantage.

³⁶ Transcript of Evidence, p 47, line12.

³⁷ ACC Letter to Physiotherapy Board, Agreed Bundle of Documents, Vol 1, Tab 8.

- (d) Mr Nonoa is remorseful and regretful and has learnt significantly from his actions. In the past three years he has reflected on this and taken steps, including changing his administrative practices to ensure that these breaches would not occur again.
64. The Tribunal was told that Mr Nonoa had been attending informal supervision sessions with a senior physiotherapist to discuss his practice. He has sold his practice to focus on the successful running of a smaller practice whereby he works two days a week for another physiotherapist and three days a week for himself. Mr Nonoa has also engaged twice with the ACC contract manager as part of ACC's monitoring process.
65. And finally, the context in which Mr Nonoa was acting reflects that he was inexperienced, having only just established his first private practice. There were significant family issues which had a significant and stressful impact on him and his family. The details of these have been suppressed.³⁸ The net result was that he has become solely responsible for providing for his family. Despite all of these circumstances, he has managed to continue to make his payments to ACC to repay the debt he owes and to continue in practice.

Comparable case law

66. The task of the Tribunal is to strive to ensure a comparability of penalties in comparable circumstances.³⁹ The following cases have dealt with the issue of whether suspension of a practitioner's practice should be imposed. They demonstrate the range of penalties which have been imposed on a practitioner in similar circumstances in making this assessment.
67. In *Tovaranote*,⁴⁰ the Tribunal suspended Dr Tovaranote for three months, censured him, imposed conditions on his return to practice for three years, fined him \$5,000 and ordered him to pay costs of \$50,000. In that case, specific allegations of dishonesty were established although the amount at issue was significantly less (\$3,553.44).
68. In *Fairgray*,⁴¹ the Tribunal suspended the pharmacist for three months, imposed a fine of \$10,000 and censured him for claiming dispensing fees for close to expiry prescriptions in the knowledge that the Pharmacy was not entitled to do so, a total of at least \$104,633.19. The Tribunal noted that the fine was "at the high end of the scale in order to reflect the reduction of the suspension.". Mr Fairgray was ordered to pay 30% of costs.

³⁸ As set out in paragraph 9 above.

³⁹ *Roberts* at [48] applied in *Liston v Director of Proceedings* [2018] NZHC 2981 Clark J at [75].

⁴⁰ 870/Med16/344P

⁴¹ 138/Phar07/75P.

69. In *Howells*,⁴² the GP altered the records of 12 patients, which had the effect of maintaining their involvement at his practice in circumstances where they not eligible or entitled to remain involved and received financial benefits, a total of \$3,929.00. No suspension was imposed. The Tribunal placed conditions on his practice which included preventing him from having a management role in a practice and censured him. Dr Howells was ordered (and agreed) to pay 50% of the PCC's costs, and 50% of the Tribunal costs.
70. At the lower end of the scale in *Henderson*,⁴³ the Tribunal found obstetrician Dr Henderson guilty of professional misconduct, censured him and imposed a fine of \$5,000 for claiming fees of \$62,825 as Lead Maternity Carer (LMC) when he knew he was not the LMC for that patient (which he subsequently repaid). He was also ordered to pay 25% of costs. The Tribunal noted its disquiet that the practitioner may have been deliberately manipulating a system by exploiting a "loophole" or he may have been significantly naïve.
71. The above cases were in respect of findings by the Tribunal in breach of s 100(1)(a) (negligence and/or malpractice) and s 100(1)(b) (holding the profession into disrepute). They may be distinguished from cases – referred to as "conviction reflecting adversely", where the PCC has laid a charge under s 100(1)(c) of the Act as the practitioner has been convicted of an offence.⁴⁴
72. The high tidemark of the "conviction reflecting adversely" cases in this context is the recent decision *Kenny*,⁴⁵ where the practitioner had his registration as a chiropractor cancelled after being convicted (for the second time) for submitting to ACC false treatment injury claim forms and claiming for treatments he did not provide, a total of \$2,282.72. In that case, the Tribunal found that Dr Kenny's conduct was deliberate and premeditated. The Tribunal also imposed conditions that he must satisfy before he applies for registration as a chiropractor again, censured him and ordered that he pay \$10,000.00 costs.
73. There are two prior cases involving physiotherapists falsely claiming from ACC under this category of "conviction reflecting adversely." *Re Murdoch*,⁴⁶ a decision of the Tribunal in 2006, involved a physiotherapist charged with using a document for intent to defraud, forgery and using a forged document and related charges where the physiotherapist encouraged patients to write false injury details or had himself complete false accident particulars on forms which the patients had signed and then billed ACC for such treatments that had not in fact been given. The Tribunal imposed cancellation of

⁴² 980/Med18/416P.

⁴³ 451/Med11/200P.

⁴⁴ In dealing with a matter that constitutes an offence for which the practitioner has been convicted by a Court under s 101(1)(c) the Tribunal must not impose a fine, s 101(2).

⁴⁵ 990/Chiro18/421P.

⁴⁶ 76/Phys0645P.

the physiotherapist's registration, a censure and an order that the physiotherapist pay 50% of the costs.

74. *Palmer*⁴⁷ a decision of the Tribunal issued in 2007, involved a physiotherapist who was convicted and sentenced in respect of 20 charges of dishonesty contrary to the ACC legislation. In that case the amount fraudulently claimed was \$4,432.09. Upon conviction in the District Court the Tribunal ordered that the physiotherapist be suspended for a period of six months with conditions on supervision, censure and 30% contribution towards the PCC's and the Tribunal's costs.
75. Mr McGill invited the Tribunal to distinguish *Palmer* on the grounds it involved more serious conduct than the present case. Counsel submitted, even though the conduct was more serious, the Tribunal imposed a penalty lighter than that sought by the PCC in this case. Mr Palmer was charged by ACC and convicted in the District Court. Conversely, in this case, Mr Nonoa had no intention to defraud and was not charged by ACC. While the duration of Mr Nonoa's offending was longer, and the debt was larger, it was submitted that this was immaterial and that Mr Nonoa did not intend to obtain any financial advantage, and is currently repaying the full debt he owes to ACC.

Tribunal's penalty discussion

76. The Tribunal has found the Charge established under both s 100(1)(a) and s 100(1)(b) of the Act based on the Agreed Summary of Facts and that the conduct is sufficiently serious to warrant a penalty. The Tribunal turns to consider the penalties it will impose and whether a period of suspension on Mr Nonoa's practice should be imposed.
77. Every case must be considered on its own facts and the circumstances of the practitioner. ACC gave Mr Nonoa a formal warning and declined to prosecute him for falsely billing and incorrectly invoicing treatments provided to close family members under the relevant legislation.⁴⁸ Whilst there may be situations where there has not been a prior criminal conviction under s 100(1)(c) of the Act and a penalty of suspension is warranted, it is not for the Tribunal to make a finding on whether there was intentional or fraudulent conduct by the practitioner in misleading the ACC in this case. That said, Mr Nonoa was clearly in breach of ethical and professional standards which question his honesty and integrity in his dealings with ACC. Mr Nonoa is in a position of trust as a treatment provider with ACC. As the Tribunal noted in *Kenny*:⁴⁹

The ACC scheme operates on a trust-based system and could not function effectively unless health practitioners who are entitled to claim monies did so in a way and on occasions when they are entitled

⁴⁷ 96/Phys06/43P.

⁴⁸ Accident Compensation Act 2001, s 308. Offence to mislead Corporation. See Agreed Bundle of Documents, Tab 12, p 86.

⁴⁹ 1990/Chiro 18/421P at [20].

to do so. The system would likely grind to a halt unless the ACC could trust practitioners to act in the correct manner and claim monies only where entitled.

78. An aggravating feature in this case is the large amount of ACC claims (775 invoices) over a period of 11 years. During this time Mr Nonoa was apparently not aware of his professional obligations where the treatment of family members is involved. Whilst Mr Nonoa may have been trying to help his family, he went on to claim money from ACC for that treatment and he breached professional obligations for independent verification.
79. The practitioner's clinical record keeping and administration of his practice, including, the inadequate and incomplete records of the treatment of his family, clearly falls well below accepted professional standards. The Tribunal also recognises the public safety implications of poor record keeping for Mr Nonoa's entire practice. If the clinical records before the Tribunal are indicative of Mr Nonoa's administrative approach to his practice, there is the possibility of placing all of the patients that attend his practice at risk.
80. The mitigating features include: Mr Nonoa's immediate (ongoing) cooperation with the ACC and the PCC throughout the respective investigations. He has admitted the Charge and the Agreed Summary of Facts. Importantly, very early on in the investigation, Mr Nonoa agreed to pay the full amount to ACC and he is repaying it. The Tribunal accepts that Mr Nonoa has been under considerable personal and family stress, as well as financial pressure to continue to maintain his professional practice. He is now well-motivated to improve his professional practice and to continue to provide physiotherapy services in his community.

Penalty decision

81. The Tribunal considers that maintenance of professional and ethical standards is an important aspect of the disciplinary sanctions that may be imposed. Moreover, Mr Nonoa's conduct with ACC is likely to bring discredit and reflect poorly on the physiotherapy profession. The case law reviewed above shows however, that a penalty ordering cancellation or suspension of a practitioner's registration is generally reserved for those cases in which there has been a deliberate intention to defraud and to gain financial advantage.⁵⁰ Accordingly, the Tribunal declines to make an order for suspension as sought by the PCC.
82. The Tribunal orders censure for the practitioner to mark its disapproval of this conduct. It also considers that a monetary penalty should be imposed as a deterrence to the practitioner and to other members of the profession. There will be a fine of \$5,000.00.

⁵⁰ In addition to the above cases cited, other examples were given to the Tribunal. *Osborne* 827/Phar16/346P; *Chum* 895/Phys17/379P; and *Pittwood* 84/Ost06/42P.

83. Mr Nonoa breached professional boundaries by treating his family in circumstances that were not properly accountable. An area of concern in this case is that he was unaware of these professional standards, including the Code of Ethics, and the need for compliance with them. At the commencement of this period of time, Mr Nonoa was newly qualified and had only been registered for one year. If, as submitted by Mr McGill, there were cultural expectations from the Samoan community placed on him to treat family members – either self-imposed or from his family – then the Tribunal considers that Mr Nonoa would benefit from professional education in this regard.
84. The Tribunal orders that there will be culturally appropriate supervision of Mr Nonoa's practice over a two year period by a qualified physiotherapist. Mr Nonoa, through his counsel, has agreed to a culturally appropriate supervisor. Conditions will be imposed on Mr Nonoa's practice to address firstly, the ethical issues that arise when a practitioner is treating family members and, secondly, how to manage the cultural expectations from his family and the wider community that he practices in. Supervision will also include addressing the very important aspects of Mr Nonoa's clinical note-taking and the record-keeping systems he has in place.
85. In reaching this decision, the Tribunal has balanced the need to maintain public confidence in the profession with the rehabilitation of the practitioner and his ability to continue to practice under appropriate professional supervision. Any sanction of a punitive nature should be the least restrictive and a secondary consequence to the rehabilitative aspects of the penalty that will be imposed.⁵¹ Taken together, these include censure, comprehensive conditions for supervision of his practice and conditions on his annual practising certificate, and a fine.

Costs

86. The Tribunal has the power to award costs and expenses incurred by the PCC and the Tribunal arising out of the investigation and hearing of this Charge.⁵²
87. The starting point for any award of costs by the Tribunal is 50% of the total costs incurred by the PCC and the Tribunal.⁵³ This recognises that the profession should not have to bear all of the costs of the professional disciplinary proceedings but equally that the costs of professional regulation will, in part, be met by, and for the benefit, of the profession as a whole.

⁵¹ *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand, Katamat v Professional Conduct Committee*

⁵² HPCA Act, s 101(1)(f).

⁵³ *Cooray v Preliminary Proceedings Committee*, Doogue J, HC Wellington, AP23/94, 14 September 1994.

88. The PCC costs relating to the investigation and hearing of this charge are \$66,998.04 (GST exclusive).⁵⁴
89. The Tribunal estimate of costs and disbursements, produced at the hearing by way of a schedule of costs, are \$21,409.78 (GST exclusive).⁵⁵ The combined total therefore is approximately \$88,400.00.
90. The PCC seeks an order for at least 50% of the total costs against the practitioner on the basis that it would be unfair to require the profession as a whole to bear the full cost of professional disciplinary proceedings.
91. Mr McGill submitted that no costs should be awarded given Mr Nonoa's financial circumstances. No financial statement of Mr Nonoa's means were provided to the Tribunal. At the hearing Mr Nonoa gave oral evidence of his poor financial position including, a substantial mortgage over his home, loans and other debts. This included the \$500 a month that he is paying towards his debt with ACC. His wife's poor health has impacted on the family and he is now the sole income earner for his family.
92. An order to pay 15% of the total cost is appropriate in this case. This fairly recognises the cooperation by the practitioner by a material reduction on the starting point of 50% to 30%. It is the Tribunal's view that this case is also one where it is likely that there would be additional financial hardship. The contribution to costs is therefore reduced further to 15% as a just, fair and proportionate approach to both the costs of the hearing and the mitigating factors in Mr Nonoa's favour. The Tribunal also considers that to impose a large award of costs would detract from the appropriate priority of Mr Nonoa repaying his ACC debt in a timely manner.
93. The costs order to be paid is therefore \$13,260.00.

Result and orders of the Tribunal

94. The Charge and the Particulars 1-4, separately and cumulatively, are made out in respect of both malpractice and negligence as well as conduct likely to bring discredit to the profession. The seriousness of the conduct warrants a disciplinary sanction.
95. The Tribunal makes the following orders.
- 95.1. The practitioner is censured.⁵⁶

⁵⁴ Document 6.

⁵⁵ Document 7.

⁵⁶ HPCA Act, s 101(1)(d).

- 95.2. The practitioner is ordered to pay a fine of \$5,000.⁵⁷
- 95.3. There will be conditions imposed on the practitioner's annual practising certificate for a period of two years:⁵⁸
- (a) Mr Nonoa is to complete a course on ethics and professional responsibility at his own expense and as approved by the Physiotherapy Board;
 - (b) Mr Nonoa is to engage in monthly professional and culturally appropriate supervision by a qualified physiotherapist approved by the Board, for 12 months at his own cost. The supervision should involve onsite visits to check compliance, monitoring of professional development, adherence to practice professional standards and measurement of progress on professional and personal goals, as well as checks to see that he is meeting ACC required standards including repayment.
 - (c) The supervisor is to provide reports every three months to the Board, with a direct focus on:
 - (i) The above matters listed;
 - (ii) Mr Nonoa's clinical note taking, including (but not limited to) diagnosis, treatment, progress with treatment, evaluation, reassessment and discharge; and
 - (iii) Mr Nonoa's claims to ACC and record keeping in that regard.
 - (d) After one year's supervision, the Board will undertake a full audit of Mr Nonoa's practice standards, with particular reference to demonstrating competence in law and ethics as they relate to those standards and his clinical notetaking; and a second audit at the end of the two years.
 - (e) Mr Nonoa is not to be involved in undergraduate student placement for clinical practice until all of the above has been satisfied to the satisfaction of the Board.
96. There will be an order for costs that the practitioner contribute 15% (\$13,260.00) of the Tribunal and the PCC's costs.⁵⁹

⁵⁷ HPCA Act, s 101(1)(e).

⁵⁸ HPCA Act, s 101(1)(c).

⁵⁹ HPCA Act, s 101(1)(f).

97. The Tribunal orders the Executive Officer:⁶⁰

98.1 to publish this decision, and a summary, on the Tribunal's website; and

98.2. to request the Board to publish either a summary of, or a reference to, the Tribunal's decision in its next available publication to members, in either case including a reference to the Tribunal's website so as to enable interested parties to access the decision.

DATED at Dunedin this 18th day of April 2019



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Alison Douglass

Chair
Health Practitioners Disciplinary Tribunal

⁶⁰ HPCA Act, s 157(2).

SCHEDULE***Particulars of Charge***

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a Charge against David Nonoa that:

1. Between on or around 28 October 2012 to 29 October 2012 and 15 June 2013 to 30 June 2013 Mr Nonoa invoiced the Accident Compensation Corporation (ACC) for physiotherapy services totalling \$6,530.55 purportedly provided by Mr Y a physiotherapist employed by a company controlled by Mr Nonoa, when Mr Y was overseas at all relevant times during that period and did not provide those services.

AND/OR

2. Between on or about 14 October 2004 and 4 October 2015 Mr Nonoa invoiced ACC for 775 treatments provided to close family members totalling \$26,940.85 where most treatments:
 - (a) did not constitute good clinical practice as they were neither provided in emergency situations where the patient/client would have suffered further harm if care was not provided nor in rural settings where no other suitably qualified provider was available; and/or
 - (b) were not provided in 'exceptional circumstances' and therefore could not be invoiced to ACC under ACC's policy regarding treatment of family members; and/or
3. Between on or about 14 October 2004 and 4 October 2015 Mr Nonoa failed to ensure that the claims for payment he made to ACC for treatments provided to family members were independently verified by a third party.

AND/OR

4. Between on or about 14 October 2004 and 4 October 2015, Mr Nonoa failed to keep accurate and/or adequate patient records in respect of the family members he treated. In particular, Mr Nonoa:
 - (a) Failed to record the informed consent of the family members he treated to provide treatment to them; and/or the basis on which they granted informed consent.
 - (b) Failed to record an accurate mechanism of the injury and/or diagnosis of it; and/or was ambiguous as to the same.

- (c) Failed to ensure the diagnosis recorded in the notes was consistent with the injury and/or treatment of it and/or with the claim registered with ACC.
- (d) Failed to record the patient's progress with treatment, via appropriate subjective and objective assessments.
- (e) Failed to record an appropriate evaluation and reassessment of his patients from one treatment to the next and/or failed to set or record patient goals.
- (f) Failed to provide a discharge summary when the patient reached the end of the treatment.
- (g) Duplicated notes from previous treatments within the same claim and/or between different claim numbers and/or between different patients by the use of 'copy and paste' and/or the auto-populate tool, without individualising the record to the specific patient and/or checking if the record was accurate and appropriate.

The conduct alleged above either separately or cumulatively amounts to professional misconduct pursuant to section 100(1)(a) and/or section 100(1)(b) of the Act in that it amounts to malpractice or negligence and/or has brought or was likely to bring discredit to the profession.