IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2017-419-369
[2019] NZHC 1516

UNDER	The Health Practitioners Competence Assurance Act 2003
IN THE MATTER	An appeal to the High Court pursuant to section 4 106(3) of the Health Practitioners Competence Assurance Act 2003
BETWEEN	PROFESSIONAL CONDUCT COMMITTEE OF THE PHYSIOTHERAPY BOARD Appellant
AND	JEREMY NATHAN SPENCE Respondent

Hearing:	4 February 2019
Appearances:	C Deans for the PCC D McGill and B Zagni for the Respondent
Further submissions and evidence completed:	27 March 2019
Date of Judgment:	2 July 2019

JUDGMENT OF POWELL J
[Penalty]

This judgment was delivered by me on 2 July 2019 at 10 a.m. pursuant to R 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] This judgment determines the penalty for a single charge of professional misconduct under the Health Practitioners Competence Assurance Act 2003 ("the HPCA Act") for which the respondent, Jeremy Spence, had been found guilty following an appeal to the High Court.[1] The parties agreed that a determination of penalty was necessary in this Court as no hearing on penalty proceeded in the Health Practitioners Disciplinary Tribunal ("the Tribunal") and the Tribunal that heard the charge can no longer be reconstituted.[2]

[2] At the time the appeal judgment was issued a second appeal, by Mr Spence against a decision of the Tribunal declining Mr Spence permanent name suppression, also stood to be determined. Prior to the hearing on penalty Mr Spence withdrew his appeal with regard to name suppression and as a result the hearing on 4 February 2019 proceeded on the issue of penalty alone.

[3] At the hearing on 4 February 2019 it became apparent that a range of further information was required before an appropriate penalty could be determined. As a result, the penalty hearing was adjourned part heard to enable further written submissions to be made and evidence to be provided.

Background

[4] The relevant background is set out in the appeal judgment.[3] For the sake of completeness, I summarise it briefly.

[5] Mr Spence, a physiotherapist, was found guilty of professional misconduct because of a relationship between Mr Spence and the complainant, a former patient, that began in December 2015 and ended in February 2016. After providing treatment to the complainant's daughter in November and December 2015, Mr Spence commenced treating the complainant for a haematoma on her calf. The first treatment was on 16 December, the same day as the complainant's daughter's final treatment,

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1 *Professional Conduct Committee of the Physiotherapy Board v R* [2018] NZHC 2531 ("Appeal judgment").
2 At [33].
3 At [12]-[15] and [29].

and was followed by two further treatments on 29 and 31 December 2015. Although the complainant had no further treatment following 31 December, they remained in contact for over a month.

[6] Their contact ended in mid-February and following a complaint made in July 2016, an investigation took place. Mr Spence was charged with professional misconduct for behaving inappropriately towards, and/or entering into an inappropriate relationship with the complainant, who was a former patient and/or patient and who was the mother of a former patient, by telephoning and inviting her for coffee; giving her a full body massage when she had attended treatment for a calf injury; having the complainant over to his house on two occasions; hugging the complainant; kissing the complainant; and engaging in inappropriate and/or sexual conversations by text with the complainant.

[7] At the hearing before the Tribunal Mr Spence accepted that he had breached his professional obligations but denied professional misconduct. The Tribunal accepted Mr Spence's submission and concluded that Mr Spence's misconduct was not sufficiently serious for a disciplinary sanction to be imposed and therefore found him not guilty of professional misconduct.[4] On appeal I concluded that the second part of the test for liability for professional misconduct, the threshold requirement, was indeed satisfied and allowed the appeal, resulting in the present hearing.[5]

Legal principles on penalty

[8] At the outset I note that, in terms of the general approach to be taken and principles to be applied, care must be taken not to analogise too far with the criminal sentencing process.[6]

[9] Section 101 of the HPCA Act sets out permissible penalties. The penalties may include:

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4 At [24].
5 At [31].
6 *Singh v Director of Proceedings* [2014] NZHC 2848 at [62]; and *Z v Complaints Assessment Committee* [2009] NZSC 55, [2009] 1 NZLR 1.

(a) cancellation of registration;

(b) suspension of registration for a period not exceeding three years;

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

(d) an order that the health practitioner is censured;

(e) a fine not exceeding $30,000; and

(f) an order that the practitioner pay for all of the costs of the Tribunal and the professional conduct committee or the Director of Proceedings.

[10] The Act, however, does not set out the factors the Tribunal, or a Judge on appeal, must consider when deciding which penalty to impose. But the power to discipline must be exercised in light of the principal purpose of the Act, namely:[7]

> … to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practice their professions.

[11] As s 3 of the Act makes clear, part of the function of protecting the public involves setting penalties that will deter other health professionals from offending in a similar way. That object has primacy over any punitive purpose.[8] The need to punish the practitioner can be considered but is of secondary importance.[9]

[12] The leading case on the principles relating to the imposition of penalties under the Act is *Roberts v Professional Conduct Committee of the Nursing Council of New*

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7 Health Practitioners Assurance Act 2003, s 3(1).

8 *Professional Conduct Committee v Martin* HC Wellington CIV—2006-485-1461, 27 February 2007 at [23].

9 *Katamat v Professional Conduct Committee* [2012] NZHC 1633 at [53].

Zealand.[10] The High Court established that the Tribunal, or Judge on appeal, must take into account the following principles:[11]

> [44] The Tribunal's first consideration requires it to assess what penalty most appropriately protects the public…
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> [45] Secondly, when assessing what penalty to impose the Tribunal must be mindful of the fact that it plays an important role in setting professional standards…
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> [46] Thirdly, it is also important to recognise that penalties imposed by the Tribunal may have a punitive function…
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> [47] Fourthly, where it is appropriate, the Tribunal must give consideration to rehabilitating health professionals…
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> [48] Fifthly, the Tribunal should strive to ensure that any penalty it imposes is comparable to other penalties imposed upon health professionals in similar circumstances. In stating this objective… each case will require a careful assessment of its own facts and circumstances. Rarely will two cases be identical.
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> [49] Sixthly, it is important for the Tribunal to assess the health practitioner's behaviour against the spectrum of sentencing options that are available. In doing so the Tribunal must try to ensure that the maximum penalties are reserved for the worst offenders.
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> [50] Seventhly, the Tribunal should endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.
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> [51] Finally, it is important for the Tribunal to assess whether or not the penalty it is proposing to impose is fair, reasonable and proportionate in the circumstances presented to the Tribunal. Imposing a penalty involves issues of finely balanced judgement. It is not a formulaic exercise.
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> (Footnotes omitted.)

[13] Therefore, 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. The penalty must be fair, reasonable and proportionate in the circumstances of the case. The overall decision, however, is ultimately one involving an exercise of discretion.[12]

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10 *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

11 *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

12 *Katamat v Professional Conduct Committee* [2012] NZHC 1633.

The parties' submissions on penalty

[14] On behalf of the Professional Conduct Committee of the Physiotherapy Board ("PCC") Ms Deans submitted the following penalty should be imposed on Mr Spence:

(a) a censure order;

(b) the imposition of conditions that he:

(i) is subject to supervision for a period of two years upon terms approved by the Physiotherapy Board; and

(ii) completes a course approved by the Physiotherapy Board, at his own cost, on professional boundaries and ethical obligations; and

(c) a starting point of a 50 per cent contribution to the costs of the PCC.

[15] The PCC submitted that such a penalty has a rehabilitative and patient safety focus but also sends a clear and important message to the profession that Mr Spence's conduct falls short of accepted standards of practice.

[16] Mr McGill for Mr Spence accepted that a censure order is reasonable and is indeed a sufficient penalty in the circumstances, with it being inappropriate for the Court to impose a further penalty in the form of conditions on his practice. In support of this submission counsel noted that Mr Spence had already been subject to conditions on his practice between October 2016 and December 2017, and that these conditions have had a significant impact on Mr Spence personally, professionally and financially, and that they have also contributed to Mr Spence's rehabilitation. Counsel also submitted that, given Mr Spence's precarious financial position, an order of costs should not be imposed.

[17] In the course of submissions counsel referred to a number of cases involving health practitioners entering into inappropriate relationships with current and former

patients.[13] None of the cases appear to be directly comparable with the present as all involved significantly more serious conduct; whether because of the duration of the relationship, the seriousness of the particular conduct, the impact on the complainant or various combinations of all three. The cases really confirm that tailored penalties are necessary to the facts and merits of each case.[14]

The appropriate penalty

[18] As previously noted, both the PCC and Mr Spence agree that a censure is appropriate and, as a result, the issues to be determined are whether any further penalty is required and whether and to what extent Mr Spence should be liable for the costs of PCC (both in respect of the investigation and this appeal).

Further supervision or training required?

[19] The most serious aspects of Mr Spence's misconduct were set out in the appeal judgment in the following terms:[15]

(a) Mr Spence developed a personal/emotional connection with the complainant while he was treating her daughter over a period of several weeks while the complainant was present. The three treatments provided by Mr Spence to the complainant must be seen in this wider context; it was in the course of this broader professional relationship that a range of sensitive information was initially exchanged.

(b) Instead of Mr Spence discussing his growing feelings towards the complainant with a colleague or supervisor he obtained the complainant's contact details from the clinic records following her treatment on 29 December, and then rang her from his personal mobile. Whether or not this call was to provide information relating to her daughter's treatment, he went on to initiate social contact with the

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13 *Ms A* (917/Nur15/333P); *Mr N* (838/Phys16/338D); *Williams* (856/Phys16/345P); *Singleton* (398/Phys10/158P); *Harypursat* (729/Med 15/316D); *Ms L* (882/Nur15/324P); *Singh v Director of Proceedings* [2014] NZHC 2848; and *Allen* (27/OT05/14D).

14 *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [64].

15 Appeal judgment, above n 1, at [29].

complainant, and the provision of his mobile number facilitated the beginning of ongoing phone and text communications between the two, including between the treatment on 29 December and the complainant's third and final treatment on 31 December.

(c) At the 31 December appointment Mr Spence provided the complainant with "massage treatment" up to at least the level of the complainant's shoulder blades, treatment which required her to partially undress. While the Tribunal concluded the treatment itself was not inappropriate the complainant's medical records completed by Mr Spence recorded only that the complainant had received treatment to her calf/knee area. The massage treatment was not mentioned at all.

(d) Whether or not social contact between Mr Spence and the complainant took place at Mr Spence's house immediately after the 31 December treatment, Mr Spence and the complainant met the day after the second treatment on 1 January, after a further exchange of texts and phone calls on the evening of 31 December and the morning of 1 January.

(e) Until the relationship ended on 16 February, Mr Spence acknowledged he met the complainant on a total of four occasions, and that the relationship included hugging, romantic kissing on one occasion, and inappropriate texting.

(f) Mr Spence initially accepted the complainant's decision to end the relationship, but he subsequently texted the complainant to advise:

> Your [sic] a dick you should have just told me to back off. It's been a long time since I had a decent female to chat and spend time with. Now I feel like a knob and totally did not mean to ruin anything.

(g) Mr Spence sent Facebook friend requests on two occasions after the relationship had ended.

[20] Overall it is clear Mr Spence demonstrated a lack of awareness of his professional obligations in initiating the relationship, as well as shortcomings in his

record keeping of the treatment provided. Furthermore, the relationship included substantial use of inappropriate texting in a context where Mr Spence had obtained significant sensitive information from and about the complainant in the course of the professional relationship, and which gave him the opportunity to undertake the relationship.[16]

[21] There is no question that this behaviour raised serious issues given that any patient is inherently vulnerable within the practitioner/patient relationship. This is because in the context of a professional medical relationship, the starting point is that a professional boundary is required because the patient/professional relationship is not inherently one of equality. In cases of power imbalance, therefore, the inevitability of detriment justifies treating the imbalance as an aggravating factor in assessing the seriousness of the misconduct.

[22] On the other hand, Mr Spence's misconduct is, as noted, substantially less serious than behaviour considered in the range of cases referred to by counsel.

[23] It is, in particular, clear, both from the original Tribunal decision and my own impression of the evidence, that Mr Spence was motivated by nothing more than a genuine desire for friendship with the complainant and was at that time a relatively inexperienced practitioner. He was relatively new to the physiotherapy profession, having only been working for about three years at the time of the complaint, and therefore did not have the experience that may have allowed him to better recognise his breach of professional boundaries. Until that time Mr Spence had not demonstrated any causes for concern and was regarded as a competent practitioner.

[24] After the misconduct issues arose, and even while still disputing the charge, Mr Spence took proactive steps to improve his understanding of his professional obligations, including attending professional development and educational seminars. At the same time, Mr Spence was made subject to conditions on his practice between October 2016 and December 2017, preventing him from contacting female patients outside of the professional/patient relationship; nor assessing, treating or monitoring female patients; and providing that he only practised under supervision. Furthermore,

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16 Appeal judgment, above n 1, at [30].

even after the initial conditions lapsed Mr Spence has proactively sought ongoing mentoring, both professional and spiritual and is intending further study of physiotherapy, evidencing his commitment to his profession.

[25] While the PCC does not dispute either the initial conditions nor the steps taken by Mr Spence, it submitted that those steps do not remove the need for further supervision and training to be imposed as a penalty. Ms Deans submitted that the courses attended by Mr Spence were not entirely focused on ethics-type issues, nor was the professional mentor engaged by Mr Spence approved by the PCC.

[26] There is some force in Ms Deans' submissions. However, Mr Spence could only attend courses that were available and his mentor, while not approved by the PCC, was one of a number of mentors listed on the Physiotherapy New Zealand website str being a person who has "expressed an interest in providing professional supervision to members". While Physiotherapy New Zealand made it clear that it takes no responsibility for the quality of supervision, the supervisors listed on the website is nonetheless the starting point for any professional supervision within the profession. It was therefore not unreasonable for Mr Spence to set up a professional supervision arrangement utilising one of the names on the list.

[27] Taking these matters together, I am satisfied that to ignore the nature and duration of the steps taken by or required to be taken by Mr Spence would be wrong. This is particularly so when, since the appeal hearing, Mr Spence has, through the withdrawal of the name suppression appeal, definitively acknowledged fault and conceded that his behaviour was unwise and inappropriate. I am in no doubt that the necessarily protracted resolution of the charge against Mr Spence, the obvious stress and humiliation that that has entailed, and the steps he has been required to take has provided a more than salutary lesson on his professional obligations. When these circumstances are properly considered against the nature of the misconduct for which Mr Spence was found guilty, I am clear that no further period of supervision or training should be imposed as a penalty, nor is such required in order to protect the public.

Costs

[28] Turning now to costs, following the hearing the PCC confirmed that its total costs incurred as a result of its investigation and prosecution of Mr Spence was $57,266.63 (excluding GST). In addition, the PCC seeks scale costs of $12,599.50 for the High Court appeal. No issue is taken with either of these figures on behalf of Mr Spence.

[29] Counsel agree the leading authority on costs is *Cooray v Preliminary Proceedings Committee.*[17] In that case Doogue J held that the starting point for a reasonable order of costs is 50 per cent, and that in some circumstances downwards or upwards adjustment will be appropriate.[18] When considering whether to depart from the starting point of a 50 per cent contribution to costs the courts will take into consideration the co-operation of the practitioner, attempts made to reduce costs, and the financial circumstances of the practitioner.[19]

[30] With regard to the financial circumstances of the practitioner, in *Williams* the practitioner was ordered to pay 12 per cent of costs where she had particularly limited financial means and where her financial position would be further impacted by a period of suspension.[20] Likewise, in *Pearson* the Tribunal did not impose any order for costs due to the practitioner's "dire" financial circumstances, which made any award for costs impossible to be enforced.[21] Mr McGill submits, given Mr Spence's precarious financial position, that it is unlikely that an award of costs could be enforced such that an order for costs should not be imposed.

[31] In the present case, I am satisfied that a discount is appropriate to reflect the fact that Mr Spence has co-operated throughout the PCC, Tribunal and High Court processes. He did not unreasonably defend his charge in the Tribunal and accepted the decision of the Court on appeal.

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17 *Cooray v Preliminary Proceedings Committee* HC Wellington, AP 23/94 14 September 1995.

18 See also *Kenny* (990/Chiro18/421P); *Hart-Murray* (986/Mid18/419P); and *Macdonald v PCC* HC Auckland CIV-2009-404-1516 [10 July 2009] at [102].

19 *Harypursat* (Med18/413P); *Farr* (Med17/408P); and *Winefield v PCC* HC Wellington, CIV-2006-485-2225.

20 *Williams* (856/Phys16/345P).

21 *Pearson* (39/Nur05/23P).

[32] More fundamentally, it is clear that Mr Spence is in an exceedingly difficult financial situation. He is a single father with joint custody of his 15-year-old daughter. Based on the figures provided at the penalty hearing Mr Spence has little income and significant outgoings, which include the support of his daughter. Furthermore, as a result of the conditions on his practice from October 2016 to December 2017, his workload has significantly decreased to 10-15 hours a week and, therefore, his earning capacity significantly reduced.

[33] While therefore a moderate award of costs would have been entirely appropriate so as to not require the physiotherapy profession as a whole to bear the full cost of professional disciplinary proceedings,[22] in this case I am satisfied that the imposition of more than a token amount of costs will place an intolerable burden upon Mr Spence and not give him a realistic chance to move on from this issue, to learn from his mistakes and become a valued member of the profession. In those circumstances I am therefore satisfied that a total award of costs in the sum of $2,500.00 is appropriate and the most that Mr Spence could be realistically expected to pay.

Decision

[34] After taking into account the seriousness of the charge, the aggravating and mitigating features and relevant cases, the appropriate and proportionate penalty overall is:

(a) An order censuring Mr Spence for his professional misconduct; and

(b) costs in the sum of $2,500.00 in respect of both the costs incurred by the PCC for the investigation and prosecution of Mr Spence and in respect of the present appeal and penalty hearing.

Powell J

[22] *Vasan v The Medical Council of New Zealand* HC Wellington, AP43/91.