



**NEW ZEALAND  
HEALTH PRACTITIONERS  
DISCIPLINARY TRIBUNAL**

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**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HPDT No.** 886/HP16/377P

**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 X**

Applicant

**AND** **Mr S** of X, Health Practitioner

Practitioner

**HEARING held at Wellington on 23 March 2017**

**TRIBUNAL:** Mr D M Carden (Chair)

[xx] (Members)

Ms G Fraser (Executive Officer)

Ms K O'Brien (Stenographer)

**APPEARANCES:** Ms T Baker for the Professional Conduct Committee

Mr M McClelland QC for the practitioner

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## Introduction

1. Mr S (the Practitioner) is a health practitioner who had been working for the X (XDHB).
2. On x June 2016 Mr S was convicted in the X District Court on two charges of theft under sections 219 and 223 of the Crimes Act 1961 of quantities of a prescription medication named propofol to a total value of \$4,669.55.
3. Reparation was made by Mr S to the XDHB.
4. Mr S was sentenced in the District Court to come up if called upon and was granted permanent name suppression and identification of his profession.
5. This conviction was investigated by a Professional Conduct Committee (PCC) of the X that laid a Charge before the Tribunal under the Health Practitioners Competence Assurance Act 2003 (HPCA Act).
6. The Tribunal has inquired into the Charge laid and reached decisions on it recorded below.

## Charge and hearing

7. The Charge against Mr S read as follows:

*“The Committee charges that Mr S as has been convicted of offences, punishable by a term of imprisonment of, or in excess of, three months pursuant to section 219 and 223 of the Crimes Act 1961, and that the offences reflect adversely on his fitness to practise in accordance with section 100(1)(c) of the Act.*

### *Particulars*

- 1 *On x June 2016, Mr S was convicted in the District Court at X of charges of theft pursuant to section 219 and 223 of the Crimes Act 1961, in that:*
  - a. *During the period x April 2015 to x September 2015 (inclusive), Mr S stole the drug Propofol (prescription medication) from his employer, X District Health Board, to the value of or about \$4,669.00.*
- 2 *The convictions, either separately and/or cumulatively, reflect adversely on Mr S’ fitness to practise as a health practitioner pursuant to section 100(1)(c) of the Act.”*

8. The Charge was heard by the Tribunal for one day in Wellington and both parties were represented by counsel. Mr S was present and gave evidence. There was produced an Agreed Summary of Facts in which Mr S admitted the offences for which he had been convicted and that the offences reflected adversely on his fitness to practise as a health practitioner. There were produced two bundles of documents both of which were agreed to be on the basis that had earlier been canvassed at a conference, namely that each document in the bundle:
  - (a) is what it purports to be on its face;
  - (b) was signed by any purported signatory shown on its face;
  - (c) was sent by any purported author to, and was received by, any purported addressee on its face;
  - (d) was produced from the custody of the party indicated in the index;
  - (e) is admissible evidence; and
  - (f) is received into evidence as soon as referred to by a witness in evidence, or by counsel in submissions, but not otherwise.
9. Interim orders for suppression of name and identifying details and occupation of certain persons were made at the hearing and have been made permanent orders in this decision.

### **Background**

10. Mr S qualified overseas in 1998 and obtained a [ ] qualification overseas in 2004. In X 2009 he was provisionally registered by the X and in September 2011 he was given [ ].
11. Mr S has not practised his profession since September 2015 when he was stood down by his then employer, XDHB, following an initial investigation around inconsistencies with drug records and their possible cause.
12. That investigation was referred to the NZ Police who inquired into the matter and charges were laid against Mr S in the X District Court which led to the convictions to which this Charge refers.

13. There was some confusion at the hearing about the date of conviction because the record shows the hearing as having occurred on x May 2016 and that Mr S was convicted and sentenced then but the Certificate of Extract from the Criminal Records refers to a conviction on x June 2016. There was also some confusion about the dates of the offences in respect of which Mr S was convicted, the Certified Copy of the Permanent Court Record referring to dates between x April and x September 2015 (property value being \$4,658.00) and x September 2015 (property value of \$11.55). No point was made by either party before the Tribunal about those inconsistencies and the Tribunal has worked on the particulars of the Charge as set out above and which are admitted by Mr S.
14. The background to the offences for which Mr S was convicted are set out in the District Court judgment of X June 2016.
15. Mr S and his then partner, who is now his wife, were employed at the XDHB, [ ]. Since X 2015 Mr S's partner had been off work with an injured shoulder and other mental health issues and remained on leave without pay from that time until the offences were committed.
16. Over a four month period Mr S had been stealing the propofol from his employer, the XDHB. He had been passing them on to his partner for her use and on occasions used the drug himself.
17. Propofol is a sedative and short-acting anaesthetic agent that results in a decreased level of consciousness and lack of memory. It is used by the health profession in the commencement and maintenance of general anaesthesia, sedation for mechanically ventilated adults, and procedural sedation. It is given intravenously and the maximum effect takes about 2 minutes to occur and it typically lasts 5 - 10 minutes.
18. Common side effects include irregular heartbeat, low blood pressure, burning sensation at the site of injection, and the cessation of breathing. Other serious side effects may include seizures, infections with improper use, addiction and propofol infusion syndrome, a potentially lethal side-effect, with long term use.

19. When the XDHB realised there was an exponential increase in the use of propofol it commenced an auditing process that resulted in implication of Mr S and his partner. Police were called and Mr S was arrested.
20. Police went to the address occupied by Mr S and his partner and found the partner with a cannula in her arm administering the drug without any supervision. A search of the address revealed 9 x 100 ml., 10 x 50 ml. and 38 x 20 ml. empty vials of the anaesthetic in a wheelie bin that had previously been emptied 7 days earlier. Another 2 x 100 ml. empty bottles and 10 x 20 ml. empty vials were located inside the house. Both Mr S and his partner had only moved into the address 3 days before.
21. Mr S' partner told Police that Mr S had put the cannula in her arm so she could administer the drug herself. She used the drug, she said, because she was suffering from anxiety and was unable to sleep. She said that she was not sure how the other bottles and vials of propofol came to be in her house but they were always there so she used them.
22. In a statement which Mr S admitted to the Tribunal that he made to a health adviser he said that he inserted the cannula into his partner's arm and had her administer her own medication on the basis that if she lost consciousness she could not continue in administering the drug and would therefore avoid causing herself serious harm.
23. In answer to questions from the Tribunal Mr S acknowledged that his partner ran the risk of self-administering an excess of the drug and so losing consciousness before she could stop herself; and further that the risks of that occurring were possible cardiac and/or respiratory arrest for her.
24. The District Court judgment also records aggravating and mitigating factors both in relation to the offence itself and personally. Aggravating factors included:
  - 24.1. That Mr S was a trusted [ ] with unsupervised access to drugs stored by his employer.
  - 24.2. That he breached the trust considerably when he stole the drugs.
  - 24.3. That this was not just a one-off lapse in professional and personal judgment that was instantly regretted and never repeated; but that he

continued to steal the drugs over a four-month period which involved a not-insignificant amount given “*the tight resourcing of Health Boards*”.

- 24.4. That the items stolen were potentially dangerous drugs particularly in unsupervised hands.
  - 24.5. That this potential danger was more serious from what was observed at the residence as noted above.
  - 24.6. That the partner would administer the drugs to herself without immediate supervision of a doctor, which was a dangerous situation with a drug that had potential significant side effects (as acknowledged by Mr S in his evidence to the Tribunal noted above).
  - 24.7. That the drugs are capable of creating an addiction and that it seemed that that is exactly what had occurred in the case of his partner because of her description of a reliance on them (and this was described by the Court as “*a strong addiction*” given the circumstances of how they were obtained and that Mr S had to return “*just a matter of hours later to get some more*”).
  - 24.8. That on one occasion Mr S and his partner went into the hospital and medical area when they had no right to be there as they were not on duty.
25. The mitigating factors mentioned by the Court included:
- 25.1. That the drugs were not cynically stolen by Mr S for commercial gain but that he was motivated through a sense of hopelessness, along with massive misjudgement, and an altruistic desire, largely, to give relief to his young partner from the issues she was facing.
  - 25.2. That Mr S “*felt desperate to assist [his partner’s] dire predicament*”.
  - 25.3. The personal circumstances for Mr S in relation to his own personal relationships including with his children, his medical condition at the time, registration problems he was having as a result of failing a vocational assessment and resultant stress from that, and the issues

that his partner was then facing both physically, emotionally and psychologically.

25.4. That “*cognitive distortion occurred*” because of Mr S’ perception that his partner was not being adequately treated by her medical advisers creating human suffering for her.

25.5. That Mr S had completely co-operated with the XDHB and the Police and in the Court process; and that was accompanied by real remorse and full reparation.

26. The District Court ordered suppression of Mr S’ name and occupation, suppression of the name of his partner and that both come up if called upon.

### **The Charge – parties’ submissions**

27. The PCC:

27.1. Acknowledged that Mr S had co-operated with it throughout its investigation and during the Tribunal process.

27.2. Accepted that the burden of proof was on it.

27.3. Submitted that the primary purpose of the Tribunal’s disciplinary powers is the protection of the public by maintenance of professional standards.

27.4. Submitted that the role of punishment is not the primary purpose in the disciplinary process, particularly where there has been a conviction on the matter in a court in its criminal jurisdiction.

27.5. Submitted that a further purpose is to maintain the integrity of the profession.

27.6. Submitted, on the basis of cases cited, *Zauka*<sup>1</sup>, *Murdoch*<sup>2</sup>, *Martin*<sup>3</sup> and *Adams*<sup>4</sup> that the convictions of Mr S reflected adversely on his fitness to practise as a health practitioner with reference to other

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<sup>1</sup> MPDT Decision; 236/03/103C; 17 July 2003

<sup>2</sup> 76/Phys06/45P

<sup>3</sup> Wellington HC; CIV-2006-485-1461: Gendall J

<sup>4</sup> 632/Med13/270P



decisions of the Tribunal and with reference to statements from [x] and [x].

27.7. Submitted that the conviction related to serious dishonesty with offending against his employer and putting the health and safety of the public at risk; and that these are serious and fundamental breaches and a significant departure from standards reasonably expected.

28. There were effectively no submissions to the contrary from counsel for Mr S who accepted that the convictions had been entered and did reflect adversely on his fitness to practise.

### **The Charge – discussion**

29. The Tribunal has no difficulty in accepting that the Charge is made out as submitted. The evidence of the convictions is clear and is accepted by Mr S. These are convictions of a type that qualify for consideration under section 100(1)(c) of the HPCA Act. A conviction for theft of itself would, on normal authorities, reflect adversely on the fitness of a health practitioner to practise his profession.

30. Combined with that is the quantity and value of the product stolen. This is further aggravated by the circumstances of Mr S using the product as is outlined above.

31. The Tribunal finds the Charge is made out as being a conviction which does reflect adversely on The Mr S' fitness to practise as a health practitioner.

### **Penalty**

32. Before the parties made submissions Mr S gave evidence. He outlined his present personal position including that he had not worked as a health practitioner since the time of the events in question. He referred to his current employment and limited income and assets and his personal circumstances including reference to his dependent children. He said that he loved working as [ ] and would very much like to return to the practice of [ ], particularly [ ]. Mr S referred to counselling which he had had for a

period and the “*significant changes*” to his lifestyle that have occurred, including his stable relationship and recent marriage.

33. Mr S said that he deeply regretted his conduct that resulted in the convictions and that this had had a profound and everlasting effect on him and his ability to practise [ ]. He referred to his shame in having put his partner at the risks from the self-administering of the drug that are referred to above.
34. In its submissions the PCC submitted:
  - 34.1. That a period of suspension of not less than 24 months be imposed (although oral submissions also referred to concerns that the Tribunal may have discerned from Mr S having given evidence, including any concerns about his wellbeing or the safety and health of the public. Counsel for Mr S submitted that the Tribunal should not make any definitive conclusion from appearances at a hearing and in giving evidence. It is open to the Tribunal to draw some conclusions from demeanour and content of a practitioner’s evidence, although this must be carefully assessed in the context that this is a hearing environment which can be stressful).
  - 34.2. That there should be conditions imposed on Mr S’ scope of practice upon resumption of practice and these are discussed in detail below.
  - 34.3. That an order for censure and an order for contribution to costs should be made.
  - 34.4. With reference to certain decisions of the Tribunal, that, where the practitioner’s involvement in the proceedings has been minimal and there has been no expressed willingness to continue in the profession, the Tribunal has cancelled registration; but, where Mr S has been motivated to rehabilitate, the Tribunal has put in place other mechanisms to protect the public without the need for cancellation of registration.

- 34.5. That it accepted that in the circumstances the Tribunal might impose a penalty short of cancellation.
  - 34.6. That the aggravating factors were the risk to the public, including risks to Mr S' partner through self-administration of an un-prescribed medication; the breach of ethical and professional obligations; the quantity of drugs found at the address and the empty propofol vials found in the wheelie bin; the length of offending of approximately 4 months; and the fact that the conviction carried a maximum penalty of 7 years' imprisonment (but the Tribunal is of the view that it must focus on the penalty in fact imposed).
35. The mitigating factors acknowledged by the PCC included:
- 35.1. That Mr S did not steal the drugs for commercial gain but rather to provide relief to his partner.
  - 35.2. That Mr S had suffered from anxiety and depression at the time.
  - 35.3. That Mr S had other additional stressors, including a failure of a vocational assessment.
  - 35.4. That Mr S had co-operated with the PCC, the Police and throughout the Tribunal process.
  - 35.5. That Mr S had repaid his employer in full;
  - 35.6. That Mr S had engaged in drug counselling and sessions with a psychologist to ensure that he does not offend again.
  - 35.7. That the Tribunal could take into account Mr S' "*self-imposed suspension*" of 15 months since he last worked and that therefore, while the PCC might have pressed for a 36 month suspension, it was seeking only 24 months.
36. The submissions for Mr S included:
- 36.1. That within 24 hours of arrest on x September 2015 Mr S had notified (his registration authority) of his arrest and the reasons for it and "*self-referred*" to the Health Committee of the X very shortly thereafter.

- 36.2. That Mr S had not practised as a health practitioner since x September 2015 and had provided a voluntary undertaking confirming that he would cease practice and remain out of practice until the X released him from it.
- 36.3. That Mr S had not practised [ ] in any form for approximately 19 months.
37. Reference was made to legal principles and to Mr S' involvement with the X, with reference to his voluntary undertaking and acceptance of the Charge. There was reference also to many other cases and the outcome of them.
38. The aggravating factors acknowledged by Mr S included:
- 38.1. That as [ ], Mr S' breach of his employer's trust was "*very serious*" and occurred over a four month period.
- 38.2. That Mr S has not only seriously let himself down but he has let down his employer, his professional colleagues, and all those who trusted him, his family, his children and his wife and that Mr S deeply regretted that.
- 38.3. That the nature of the drugs stolen and the potential for addiction and misuse with risks associated were further aggravating factors for which Mr S had a deep sense of shame and remorse.
39. As to mitigating factors, it was submitted:
- 39.1. That Mr S' offending and breach of trust were motivated by a thorough sense of hopelessness and an altruistic desire to provide relief to his partner, with the acceptance by the Police as recorded in the District Court judgment that the circumstances "*were nothing short of tragic*".
- 39.2. That Mr S was himself depressed with reference to various causative issues creating an "*overwhelming sense of hopelessness together with a concern that his partner was not receiving appropriate medical care*".

- 39.3. That Mr S was found to be a high achieving man with excellent good character who had made significant contributions in his employment.
- 39.4. That Mr S had accepted responsibility for his actions and co-operated with all concerned.
- 39.5. That there was “*real remorse*” which continued and would hereafter.
- 39.6. That Mr S had taken every possible step to make good and to rehabilitate himself.
- 39.7. That Mr S had recently of his own volition undergone hair testing for traces of drugs.
- 39.8. That the Health Committee of the RA has determined that there is no active health condition that would prevent Mr S from returning to practice.
- 39.9. That Mr S had made full reparation.
- 39.10. That the likelihood of re-offending is minimal, if not nil.
40. Emphasis was placed on the consequences of Mr S’ offending in having lost his work and the financial impact and personal impact involved. It was said that Mr S had an absolute commitment to return to [ ] if at all possible and, although his prospects were now significantly compromised, there was every reason for the Tribunal to be confident that Mr S has rehabilitated himself to the extent that there is now no reason why he cannot return to practice subject to appropriate conditions. There is no public interest, it was submitted, in Mr S’ not being allowed to return to practice forthwith.
41. A period of suspension for 3 – 9 months was submitted to be appropriate but no further effective suspension should be imposed having regard to the period of voluntary removal from practice.

#### **Penalty – discussion**

42. The Tribunal accepts the submission that it can only impose a penalty and make orders on the Charge that has been brought before it, which is a

Charge of theft of product of a value of some \$4,669.00 which reflects adversely on Mr S' fitness to practise as a health practitioner.

43. There are matters of significant disquiet to the Tribunal. These are that he administered these drugs to his then partner (now wife) and that raises questions of the propriety of giving assistance to a person with whom he had a relationship.
44. There is the concern that his partner was placed at significant risk because of the unsupervised, self-administering process that he allowed her to undertake and the risk that she may have exceeded safe doses which could have had fatal consequences. Those are background matters and contextual matters which the Tribunal cannot ignore.
45. It must not, however, impose penalties on the basis that they are found to have been made out in their own right as misconduct because that has not been charged.
46. The Tribunal is faced with the primary facts of the conviction reflecting adversely on fitness to practise and the secondary facts of the background behind that offending. Those background facts reveal that Mr S had some significant drug issues of his own as there is reference to his having used them himself. They reflect a significant breach of the trust that was placed in Mr S by his employer. They reflect a significant lack of judgment on Mr S' part in administering these drugs to a person with whom he had a personal relationship and the manner in which he did so and the risks that he placed her under.
47. There are the stressor factors to which submission has been made and the District Court judgment refers and the Tribunal has taken those into account. It has taken into account the aggravating factors outlined by the PCC in its submissions and referred to above and those conceded by submissions on Mr S' behalf also referred to above.
48. The Tribunal has taken into account the mitigating factors conceded by the PCC and advanced by Mr S. It has taken careful note of the medical information provided especially a report prepared apparently for the court proceeding and dated x January 2016 following a psychological assessment.

49. The admitted facts remain, however, that Mr S and his partner were involved in stealing the drug propofol over a period of some 4 months. The theft was from their, and in Mr S' case his, employer. The total amount stolen had a value of some \$4,669.00. Those thefts occurred in a deceitful manner and outside of office hours. The product stolen, propofol, was used partly by Mr S himself but predominantly by his partner in what they thought was a way that would assist her mental and physical health issues. But the way in which the drug was used by Mr S' partner put her at significant risk of harm.
50. A health practitioner with the experience and training that Mr S has had, should have been acutely aware of his responsibilities to all concerned and acutely aware of the risk and danger that he was placing his partner in. This was a significant lack of judgment on Mr S' part in his involvement throughout the whole matter.
51. The Tribunal takes account of the significant outcomes there have been for Mr S. These are professional outcomes in the loss of his employment and significant reduction in prospects of re-employment. There are personal outcomes in relation to his wife, his former wife, his x children, and his own self-esteem and psychological wellbeing.
52. The Tribunal has concluded that it accepts that, in the circumstances this is a case where an order for cancellation of Mr S' registration as a health practitioner is not required.

### **Suspension**

53. Mr S attended the hearing and gave a full and comprehensive explanation of the circumstances for him. He has been frank and honest in his answers to the Tribunal and in his acceptance of the Charge. The Tribunal has been much more readily able to assess his remorse on the one hand and his prospects of rehabilitation given proper conditions on the other from his having attended.

54. It should be an important message to any health practitioner that, if there are enquiries made or charges laid against the practitioner, the Tribunal is much better able to make a more fully informed decision if there is full and frank discussion and disclosure. That is not to say that a health practitioner cannot defend a charge, and certainly that should be done where appropriate. That is different from an occasion where a lack of involvement by a practitioner leaves an inquiring authority and this Tribunal in a position that it cannot give any credit to mitigating factors or meaningful help to a health practitioner in the absence of engagement.
55. Each case before the Tribunal must be decided on its own facts but it is important that there be consistency in Tribunal decisions. The Tribunal has considered all of the cases mentioned by the PCC and on Mr S' behalf but particularly notes the following:
- 55.1. *Yang*,<sup>5</sup> where a pharmacist had been convicted of stealing products and medication from the pharmacy he worked at of a total value of some \$1,200.00. He was sentenced by the court to be called up for sentencing. At the time of the hearing Mr Yang had already been suspended for a period of 14 months by the Pharmacy Council. It had been noted by the Tribunal that Mr Yang wanted to be rehabilitated and that the opportunity for that should be recognised and given. He was ordered to be suspended from practice for a period of 6 months from the date of the Tribunal's oral decision with conditions imposed including completion of an intern pharmacist programme, an examination, undertaking an ethics course, and not to be in sole charge of a pharmacy for a period of 12 months. He was censured and ordered to pay costs.
- 55.2. *S*,<sup>6</sup> where a pharmacist was convicted of 8 charges of theft of prescription medicine to a total value of \$840.00 from his employer for his own use. He was not suspended but conditions were ordered for therapy, an assessment by the Health Committee and a

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<sup>5</sup> 285/Phar09/135P

<sup>6</sup> 260/Phar09/126P



mentoring arrangement. He too was censured and ordered to pay costs.

- 55.3. *Campbell*,<sup>7</sup> another pharmacist case where there was a conviction on charges of theft of medication to a value of \$130.00 and his registration was ordered cancelled. It was submitted to this Tribunal that the Tribunal in that case considered the offences were very serious with a breach of trust of employers and that the drugs had been stolen primarily for Mr Campbell's own use. The Tribunal made the observation in that case that a suspension could be viewed as more severe than cancellation of registration as it was open to the pharmacist to apply for re-registration at any time and the Tribunal could envisage circumstances where an application for re-registration could be considered sympathetically.
- 55.4. *Powell*,<sup>8</sup> a case of a nurse charged with misconduct who had misappropriated significant numbers of codeine phosphate tablets from her employer and other medications for her own or some other use. Although in court she was discharged without conviction on charges relating to part of the product only, she did not appear before the Tribunal and her registration was cancelled. Aggravating features included frequency of offending, a serious breach of the employer's trust, that the hospital had been required to undertake a detailed investigation of all staff, and that all staff were impacted as they came under suspicion.
- 55.5. *Hathaway*,<sup>9</sup> the case of another nurse where a charge of misconduct was found against her, she having on 5 occasions misappropriated Tramadol and then entered the name of a patient who was either not prescribed the drug or alternatively she did not administer the drug to the patient. She was suspended for 6 months unless she met competence conditions within 90 days and there were conditions

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<sup>7</sup> 648/Phar14/296P

<sup>8</sup> 731/Nur15/306P

<sup>9</sup> 561/Nur13/238P

imposed on her practice. She was censured and ordered to pay costs.

- 55.6. *Schlee*,<sup>10</sup> was another case of a nurse where misconduct charges were found against her, she having misappropriated oxycodone or falsified entries. Her registration was cancelled and she was censured and ordered to pay costs.
- 55.7. *Rich*,<sup>11</sup> a case of a nurse convicted of 1 charge of theft of cigarettes and 1 charge of theft of drugs (codeine phosphate tablets) where her registration was cancelled, she having offered no explanation and no indication of insight or remorse.
- 55.8. *Hodgson*,<sup>12</sup> a case of a medical practitioner convicted on 5 charges of dishonesty relating to prescription medicines and other conduct amounting to professional misconduct. He was suspended from practice for 3 months with conditions imposed on resumption of practice. The aggravating features included that the misconduct had occurred over a 7 year period, was premeditated and determined, and with a significant and fundamental breach of trust of various persons. It was the doctor's first appearance before the Tribunal but he was found to have taken significant steps to address his addiction and this was a mitigating factor.
- 55.9. *Dr Y*,<sup>13</sup> was a case of a medical practitioner where a professional misconduct charge found against her from having written prescriptions for the supply of medicines and controlled drugs for her own dependency use. She would have qualified for a suspension of 12 months but, having regard to the fact that she had not been practising from her own choice and was receiving therapy, a net period of suspension of 3 months was ordered with conditions imposed on resumption of practice.

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<sup>10</sup> 843/Nur15/328P

<sup>11</sup> 94/Nur07/51P

<sup>12</sup> 740/Med15/315P

<sup>13</sup> 716/Med15/310P

56. Having weighed up the various factors and by comparison, to the extent possible, with other cases, the Tribunal is of the view that this conviction reflecting adversely on fitness to practise warrants suspension of Mr S for a period of **12 months**.
57. Some allowance should be made for the fact that Mr S has been out of professional work for a period, but any consideration given to any such allowance must take careful note of the reason why Mr S is out of work and what has been done constructively towards rehabilitation in the meantime. A practitioner may lose employment as a consequence of misconduct or a conviction reflecting adversely on fitness to practise and then be unable to get work for those reasons. That does not of itself qualify for any reduction in a period of suspension. If during a period of absence from professional activity a practitioner has undertaken some therapy or treatment or study or has in some other way addressed the issues which gave cause to the offending in question, then some allowance may be made for that.
58. Part of the purpose of an order for suspension is to enable Mr S to use the time for rehabilitation and if some time has been applied to that purpose in the meantime, some allowance can be made for it.
59. Since his arrest and convictions Mr S has sought employment in both retail and general healthcare such as in retirement homes and the like but has been unable to gain employment in those areas due either to the criminal charges which he was facing or subsequently his convictions. He is currently employed through a recruitment agency and works as casual staff at a bread-making factory in X.
60. Mr S spoke of his love of work as [ ] and that he would “*very much like to return to the practice of [ ], particularly [ ]*”. He acknowledged significant difficulty in gaining employment as a [ ] or [ ], given his convictions.
61. Certainly, within 24 hours of his arrest Mr S had notified the X and shortly thereafter referred himself to the Health Committee of the X. He provided by voluntary undertakings dated x September 2015 to agree to cease practice until the X had had an opportunity to consider the concerns about

him and his response to those; and that that agreement remains in place until the X releases him from it.

62. Although Mr S has not practised [ ] in any form for some 19 months, the Tribunal cannot take the whole of this period in the same category as a suspension. His non-practice has been imposed on him by the circumstances of his own behaviour.
63. Accordingly, the Tribunal is of the view that the allowance that should be made from the appropriate period of suspension is 3 months, leaving a balance for appropriate suspension from the date of this decision of **9 months**.

### **Conditions**

64. Conditions should be imposed on Mr S' resumption of practice when this occurs. The Tribunal has power to do this for a period of up to 3 years running from that time of resumption of practice.
65. The PCC sought conditions for:
- 65.1. Supervision for a period of 12 months by a supervisor approved and appointed by the X with the supervisor reporting to the X at monthly intervals, with the cost to be met by Mr S. The submission referred to the X, at the end of the period, determining "*Mr S' competency to practise without supervision*". That implies to the Tribunal some unilateral extension of the period of supervision. That is not something which the HPCA Act allows for; and the period of any condition must be fixed by the Tribunal.
- 65.2. Monitoring by the X Health Committee for a period determined by it or until it is satisfied that Mr S did not require further monitoring, this to include drug testing if required. The PCC additionally sought some condition requiring a further health assessment. It relied on Mr S' demeanour at the hearing, particularly when giving evidence and the content of that evidence. Counsel for Mr S resisted any such assessment by the Tribunal from appearance at a hearing where a practitioner is in a position of stress and the Tribunal is not

adequately equipped to make any formal or structured assessment of him or her. The Tribunal considers that it is able to make some assessment and judgment based on a practitioner's appearance at a Tribunal hearing and take this into account within the limitations of the hearing conditions.

- 65.3. Completion of an ethics course approved or structured by the X, at Mr S' cost.
- 65.4. For disclosure of convictions and the decision of this Tribunal to current and future employers.
66. For Mr S, conditions were accepted as being appropriate, although these were not addressed in detail. It was, however, submitted that conditions outlined in two letters, both dated X May 2016, written by the Health Committee Case Manager to Mr S (and apparently one was written for his eyes only and the other appropriately to be shown to others, particularly any prospective employer) were appropriate.
67. The Tribunal, taking into account the submissions for Mr S, accepts that the conditions proposed by the PCC, and appropriate conditions are made accordingly below.
68. The Tribunal can only order conditions for the maximum period of 3 years. The supervision is to run for a period of 12 months. The monitoring by the Health Committee should last for the 3 year period unless the Health Committee is earlier satisfied that monitoring is no longer required.
69. The PCC sought an order for censure and this was acknowledged by Mr S as appropriate.

## **Costs**

70. The PCC sought an order for costs against Mr S and referred to its costs, including counsel's costs as being approximately \$10,000.00. The costs for the Tribunal is estimated at approximately \$16,258.00. That means total costs in excess of \$27,200.00.

71. The PCC sought a costs order of approximately 30% to reflect other cases and take into consideration the dishonesty element present in this case. A costs order is not to penalise any health practitioner and no account should be taken of any dishonesty element.
72. For Mr S it was submitted that a contribution of 30% was too high and, by reference to Y, the submission was that something more of the order of 15% should be ordered.
73. Mr S gave evidence of his financial position including legal costs that he had to make, cancellation of his insurance, of his overseas pension which was inaccessible to him, and the financial commitments he had. It is helpful for the Tribunal to have that type of information. The means of a practitioner must be taken into account when an order for costs is made.
74. The Tribunal must also take into account the fact that this matter has been able to be dealt with expeditiously because of Mr S' acceptance of the facts and assistance in the expeditious hearing of the charge. The normal starting point for an order for contribution to costs is 50% but allowance can be made for mitigating factors.
75. Taking into account Mr S' means and his assistance in bringing the matter to conclusion, the Tribunal is of the view that the appropriate contribution would be 30% which yields approximately \$7,800.00, and this is ordered below.

### **Name suppression**

76. Mr S sought an order for permanent suppression of his name and occupation. He relied on the order that had been made in the District Court for such name and occupation suppression. He drew attention to the Court's reference to the evidence of extreme hardship that he and his family suffered that was required before such a Court order. Primarily reference and reliance was placed on matters pertaining to Mr S' former wife who has the same name and profession and risks of confusion with her. The Court also ordered suppression of occupation to protect Mr S' colleagues and further ordered the suppression of Mr S' then partner's (now wife's) name.

It was submitted that those orders should be honoured by further orders of the Tribunal likewise.

77. The PCC's position was that it respected the Court orders that had been made and was of the view that orders from the Tribunal were therefore inevitable.
78. The Tribunal has its own jurisdiction so far as orders for suppression of names are concerned and there are different criteria which apply before the Tribunal to those which apply before a court. However, significance must be placed on any order that is made by a court for suppression of identifying details and any order of the Tribunal refusing suppression would negate any such court order.
79. Accordingly, the Tribunal is of the view that orders should be made for suppression of the name and identifying details of Mr S and of his occupation as a health practitioner and the name and identifying details of his former wife, his present wife, and his children.

### **Result and orders**

80. The Charge is found to be made out.
81. The Tribunal orders censure of Mr S.
82. Mr S' registration as a health practitioner is suspended for a period of 9 months from the date of this decision.
83. Mr S may, after commencing practice following the date of this order, practise his profession only in accordance with the following conditions:
  - 83.1. That he be supervised for a period of 12 months from the date of commencement of such practice by a supervisor approved or appointed by the X, with the supervisor reporting back to the X at monthly intervals or at such other frequency as is determined by the X.
  - 83.2. That Mr S is to continue to be monitored by the Health Committee of the X for a period of up to 36 months (or such lesser period as the Health Committee may determine) on the same conditions as are set

out in the letters (2) dated X May 2016 from the Health Case Manager to Mr S, namely:

- Ongoing monitoring in the form of:
  - 3-monthly hair testing for benzodiazepines, opiates, barbiturates, amphetamines, and Fentanyl.
  - Random urine testing for benzodiazepines and opiates.
  - Random blood testing to monitor alcohol use (full blood count, liver function tests, ethanol, and CDT).
  - Monthly reports from Mr S' counsellor.
  - Further reports from Mr S' general practitioner or an independent assessor appointed by the Health Committee as is required by it.
- An acceptable proposal from any potential employer on the safeguards and protocols that it will implement in the workplace, using the second of the two letters dated X May 2016 to show to a prospective employer so that such a proposal may be submitted.

83.3. That Mr S undergo at his expense within 12 months of such commencement of practice such ethics course as is approved by or structured by the RA.

83.4. That for the period of 3 years from the date of resumption of practice Mr S disclose the convictions to which this decision refers and the decision itself to his current and future employers; and produce evidence from his employer from time to time to the satisfaction of the X that Mr S has complied with this condition; the intention being that Mr S' employers will be better able to monitor his access to drugs.

83.5. That for that period of 3 years from the date of resumption of practice Mr S advise the X the name or names of his employers from time to time during that period.



84. Mr S is ordered to pay the sum of \$7,800.00 towards the cost of prosecution and hearing, to be divided equally between the PCC and the Tribunal.
85. An order is made prohibiting the publication of the name or any particulars of the affairs, including the occupation as a health practitioner, of Mr S, his former wife, his current wife, and his children.
86. The Tribunal directs the Executive Officer to publish this decision and a summary of it on the Tribunal's website.

**DATED** at Auckland this 27<sup>th</sup> day of April 2017



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David M Carden  
Chairperson  
Health Practitioners Disciplinary Tribunal