



**NEW ZEALAND
HEALTH PRACTITIONERS
DISCIPLINARY TRIBUNAL**

TARAIPUINARA WHAKATIKA KAIMAHI HAUORA

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HPDT No. 963/Nur17/401P

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 NURSING COUNCIL OF
NEW ZEALAND

Applicant

AND **JOSE MIGUEL DY** registered nurse of Auckland
Practitioner

HEARING held at Auckland on 20 February 2018 and subsequently on the papers

TRIBUNAL: Mr D M Carden (Chair)
Mr N Davis, Dr C Taua, Associate Professor J Kilpatrick and Mr J
Lee (Members)
Miss D Gainey (Executive Officer)

APPEARANCES: Mr M McClelland QC (by videolink), Ms H de Montalk and Ms C
Billing for the Professional Conduct Committee
No appearance for the practitioner (who did provide a written
response to the Charge and written submissions later on penalty)

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Introduction

1. Mr Jose Miguel Dy is a 32 year old male nurse registered in New Zealand in 2012, having obtained his nursing qualification at the Universidad de Santa Isabella in the Philippines.
2. He was a temporary Clinical Manager at the Remuera Care Home and Village (“the care home”) before January 2014 and then appointed as the permanent Clinical Manager at the care home some months later. Various allegations of harassment [] were made against Mr Dy in respect of certain caregivers and nurses at the care home.
3. These resulted in a complaint to the Nursing Council of New Zealand (the NCNZ). These matters and the complaint were investigated by a Professional Conduct Committee (PCC) of the NCNZ which laid seven Charges before the Tribunal under the Health Practitioners Competence Assurance Act 2003 (the HPCA Act). The Charges have been heard and determined by the Tribunal which makes the orders set out below.

The Charges and hearing

4. The full text of the Charges against Mr Dy is set out in the Schedule to this decision. The first five Charges refer to individual registered nurses or caregivers at the care home where it is alleged that Mr Dy behaved in an inappropriate or unprofessional manner by harassing [] the individuals with full particulars given. Charges 6 and 7 referred to pressure on “*staff*” and misrepresentations to “*staff*” [] and resultant bullying and intimidation if they refused and to misrepresentations of Mr Dy’s ability to hire and terminate “*staff*” and to gain sponsorship or entry into Competence Assessment Programme (CAP) courses to intimidate or pressure those persons into complying with []. As the hearing developed, counsel for the PCC acknowledged that the reference to “*staff*” in those two Charges was a reference to the individual nurses or caregivers referred to in the previous five Charges. As the hearing progressed and evidence was given the PCC sought to amend Charge 1 as to particular 1.1 by deleting the words “*in Mission Bay*”. That is ordered accordingly.

5. The Charges alleged misconduct under section 100(1)(a) and/or (b) of the HPCA Act with the individual particulars being either separately or cumulatively particulars of the misconduct. The Charges were heard in Auckland on 20 February 2018. The PCC was represented by counsel. There was no appearance by or on behalf of Mr Dy but he had written to the Tribunal as referred to below. There was compelling evidence to the Tribunal that the Charge had been properly drawn to his attention as was the proposed hearing by the Tribunal. This was confirmed by the fact that by letter dated 1 October 2017 to the Tribunal Mr Dy said that he did not “*wish to be heard by the Tribunal*”; and made reference to the content of parts of the Charges. Furthermore, when the matter reached the penalty stage, as noted below, Mr Dy wrote again to the Tribunal by letter dated 2 March 2018.
6. In part the hearing was conducted by videoconference link, counsel being indisposed to attend in person. After the case for the PCC had been presented as to the Charges brought, consideration of this by the Tribunal was interrupted by indisposition of one of its members but when that was past the Tribunal considered the Charges and advised the parties the Charges were all found to be made out, inviting submissions as to penalty. The PCC has provided written submissions as to penalty as has Mr Dy. No oral hearing was sought and the Tribunal has considered the question of penalty on the papers.
7. At the hearing evidence for the PCC was given by:
 - 7.1. Ms Penelope Jane Dine, the Facility Manager of the care home.
 - 7.2. Ms Shahana Khan, a senior HR adviser to the company running the care home.
 - 7.3. The five individual nurses and caregivers to which the Charges refer.
 - 7.4. A registered nurse who knew Mr Dy [] who gave evidence about Mr Dy’s actions and conduct relating to matters which are relevant to the Charges but not directly concerning them.
 - 7.5. Another registered nurse from the Philippines who also knew Mr Dy and who was one of the registered nurses at the care home and spoke of their relationship and some acts and conduct on Mr Dy’s part of relevance to the matters in the Charges.

Background

8. Mr Dy qualified and was first registered as a nurse in the Philippines, then becoming registered in New Zealand in May 2012. He had worked at the company which runs the care home since December 2010, having started as a caregiver and remaining on as a registered nurse. He completed a leadership course for that employer in 2014.
9. In 2014 Mr Dy was employed as a temporary Clinical Manager at the care home but when a new Clinical Manager was appointed Mr Dy stepped back into the role of registered nurse. Circumstances then demanded that he move to another rest home to work but when the position of Clinical Manager became available later in 2014 Mr Dy applied for, and was appointed to, that.
10. Evidence from the Facility Manager of the care home was that Mr Dy seemed to have numerous issues with the practice of some of the caregivers and registered nurses. She said he appeared to believe that she was weak in dealing with those issues and sometimes urged her to have staff dismissed or bring them for disciplinary meetings. During Mr Dy's time in the role the events to which the individual particulars of the Charge referred occurred as mentioned below. Staff members raised their concerns about Mr Dy's conduct which were referred to the Human Resources (HR) department for investigation. Mr Dy was invited to a formal disciplinary meeting on 4 April 2016 and was provided with details of the allegations against him and statements from the five individuals to which the Charges refer. Mr Dy attended the meeting and was represented by a lawyer, providing a written response to the statements and oral responses to the meeting. There was then further inquiry and on 13 May 2016 a further meeting held at which Mr Dy had the opportunity to provide his response to additional information. At the conclusion of the meeting Mr Dy was informed that he would be summarily dismissed from his employment.
11. The Tribunal must make its own independent assessment of the facts and the decision in the matter by his employer is not one which has influenced it.

The Charges– general

12. Although the Charge refers to "*Charge*" in the singular, it concludes with an allegation that the "*Charges*" amount to professional misconduct. The

submissions for the PCC referred to “*seven Charges*”. There is little practical significance because each Charge or particular must be considered separately and cumulatively, which would also occur in the case of seven separate Charges.

13. The onus is on the PCC to prove each Charge on the balance of probabilities. The more serious the allegation, the higher the standard of proof. In terms of section 100(1) of the HPCA Act there can be misconduct where:
 - 13.1. There is an act or omission that amounts to malpractice or negligence in the scope of practice in respect of which the practitioner was registered at the time the conduct occurred.
 - 13.2. There has been an act or omission that has brought or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred.
14. If negligence or malpractice is alleged that must be established as behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error or oversight or even carelessness.
15. Discredit to the profession involves a breach of an objective standard with the question to be asked being whether reasonable members of the public informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the profession in question was lowered by the behaviour of the practitioner.¹
16. In considering any charge of misconduct under the HPCA Act the Tribunal must, having found the acts or omissions in question were negligent or malpractice or were likely to bring discredit to the relevant professional, also consider whether the acts or omissions in question are of such severity as to warrant a disciplinary sanction for the purpose of maintaining standards, protecting the public, or punishing the practitioner.²
17. Where a practitioner does not attend, the Tribunal cannot draw adverse inferences from that; but it must give independent attention to all factors brought to its attention to ensure that the onus which is on the PCC to prove the Charges has been discharged to the relevant standard. In the bundle of

¹ *Collie v Nursing Council of New Zealand*; [2000] NZAR 74 at [28].

² *PCC v Nuttall*; 8/Med04/03P.

documents provided by the PCC there is extensive reference to the position taken on the facts behind the Charges by Mr Dy and submissions made on his behalf by his then representative lawyer. Although the primary focus for many of those documents was in the context of employment questions for Mr Dy, they are carefully noted by the Tribunal in the context of the Charges heard.

18. The Charges include the involvement of application of provisions from the Code of Conduct for Nurses (June 2012) on which the PCC relied. These refer to the need and obligation to *“treat colleagues with respect...”* show *“behaviour towards colleagues [that must] always be respectful and not include dismissiveness, indifference, bullying, verbal abuse, harassment or discrimination”*, *“maintaining a high standard of professional and personal behaviour”* and *“upholding exemplary standards of conduct”*.
19. The evidence from all witnesses provided to the Tribunal was consistent concerning Mr Dy’s behaviour. The evidence of the individuals to whom the Charges refer is considered in detail below. There was also evidence from Ms Dine, the Facility Manager, Ms Khan, the senior HR Advisor at Bupa, Ms A a former [] of Mr Dy’s and later a [] with him at the care home, and Ms D who had worked as a [] at the care home. All the evidence so far as Mr Dy was concerned was very clearly consistent.
20. This painted a picture of Mr Dy first as a registered nurse, but then after 2014 as the Clinical Manager of the care home, using his authority and position to harass the five staff members to whom the Charges refer and []. Mr Dy [] the individuals. He spoke directly about the control that he had over their lives and particularly as to their on-going employment and on-going residency status in New Zealand. He unquestionably led them to believe that he was in a position of influence or power over them. He used that belief then to try to [].
21. The first five Charges allege inappropriate or unprofessional behaviour by harassment []. Charges 6 and 7 refer to pressure on staff, bullying and intimidating, and pressure to comply with requests for []. Because those two Charges refer to the five individuals in the other Charges, there is a significant measure of duplication.

22. The Tribunal has heard the evidence of all five persons and this is corroborated by the evidence of Ms A and Ms D on the one hand and that of Ms Dine and Ms Khan on the other.
23. Ms A referred to having met Mr Dy at [] school in New Zealand. They were [] between []. She referred to some personality aspects which are irrelevant to the Charges, but she did give graphic detail of a video which Mr Dy showed her on his telephone. Ms A contacted Mr Dy at the end of [] when he was by then the Clinical Manager of the care home and an interview for her employment there was arranged. She spoke of Mr Dy's having "*closed door meetings*" with her when Mr Dy would lock the door. She spoke of how Mr Dy had her report to him on other employees at the care home. Generally, the picture she painted of Mr Dy was one of his using his position as Clinical Manager to pressure the staff.
24. Ms D is a registered nurse, []. She referred to Mr Dy as having appeared to be angry with one of the nurses who is the subject of a Charge (No 4). When she was talking to the nurse about Mr Dy, the responses she received affirmed to her that []; and that evidence corroborates what was said by the nurse in her own evidence. During 2015, when there was a complaint concerning a resident, that nurse was the only staff member interviewed by Mr Dy which Ms D thought was unfair and Mr Dy told her that the nurse could lose her job and would be unable to find a fulltime job to support her []. The other evidence given by Ms D concerning Mr Dy and his attitude towards women staff members and things he said about them had a "*big impact*" on Ms D, she said, worrying that she could be the subject of complaint by Mr Dy.
25. Ms Dine, a registered nurse, has been the Facility Manager at the care home for three years and Mr Dy had already been employed as temporary Clinical Manager when she started there. Her evidence referred to four of the five persons the subject of Charges (not the caregiver referred to in Charge No 3). She referred to criticisms that Mr Dy made about the four individuals that she referred to. Mr Dy called for discipline of those persons. Ms Dine's evidence also referred to a change in attitude to some of those staff members by Mr Dy and in general terms the timing of the change is consistent with refusals that the staff members gave to Mr Dy concerning his [] towards them as mentioned below.

26. The evidence of the five individuals the subject of the Charges is referred to below.
27. Mr Dy did not himself give evidence to the Tribunal. He had, as noted above, been interviewed in the context of his employment at the care home. At that stage he was represented by a lawyer. The interviews arose from the complaints made by the five staff members in question. The complaints that they had made were produced to the Tribunal as was a record of interviews had with those staff members. Issues then raised by them were substantially the same as the Charges against Mr Dy before the Tribunal. Mr Dy largely denied much of what was said by the five staff members in their complaints and interviews and the Tribunal has taken his responses into account. Mr Dy did not, however, attend the hearing before the Tribunal or give any evidence to it nor was he available to be cross-examined by counsel for the PCC.
28. Questions of credibility are raised. The Tribunal accepts the submission of the PCC as to the criteria that can be taken into account in testing credibility, as articulated in *Rabih v Professional Conduct Committee*³ namely, the manner and demeanour of the witness when giving evidence; issues of potential bias, that is, to what extent was evidence given from a position of self-interest; internal consistency of the evidence of the witness throughout having regard to previous statements; external consistency between the evidence of the witness and that of other witnesses; and whether non-advantageous concessions were freely tendered.
29. Applying those tests and having heard the evidence that it has, the Tribunal has no difficulty in concluding that it accepts the evidence of the witnesses who attended and rejects any denial that Mr Dy may have given in the earlier employment inquiry process. The evidence of the witnesses was entirely consistent one with the other. The evidence of each witness before the Tribunal was consistent in its terms and tone. No witness had any position of self-interest to protect and therefore potential bias. Non-advantageous concessions were not called for, but any that were given were given freely. The manner and demeanour of the witnesses in each case was persuasive to the Tribunal. The Tribunal accepts the evidence tendered to it and finds the

³ [2015] NZHC 1110

facts are made out as alleged, and reference will be made to the individual particulars below.

Charge 1 – Registered Nurse N

- 30. [].
- 31. [].
- 32. [].
- 33. [].
- 34. [].
- 35. [].
- 36. [].

Discussion

- 37. On the basis of the evidence from the nurse the Tribunal finds that the factual allegations in the particulars are made out. This is in the context of the overall relationship of dominance and power imbalance between the two persons and the continued harassments of the nurse by Mr Dy. On the basis of the evidence the Tribunal finds that, at least, some of these harassments were []. This was inappropriate and unprofessional conduct according to the principles referred to above.
- 38. One particularly disquieting factor about these events, not directly related to the Charge as such, is that apparently the resident remained in the toilet area while the incident referred to above was taking place.
- 39. The Tribunal finds this particular of the Charge made out as misconduct being malpractice and conduct bringing discredit to the nursing profession.

Charge 2 – Registered Nurse Y

- 40. [].
- 41. [].
- 42. The nurse then continued in her evidence to corroborate the evidence of other witnesses as to a change in attitude from Mr Dy towards individuals once they had rejected his advances. [].
- 43. Having heard the evidence from Nurse Y and the way it was given and its consistency with the other evidence, the Tribunal finds that this Charge is misconduct as alleged, being malpractice and conduct bringing discredit to the

nursing profession. This nurse was in a situation of power imbalance which influenced her behaviour and responses to Mr Dy.

Charge 3 –Caregiver Z

44. [].
45. [].
46. [].
47. She finally made a written complaint when matters were coming to a head.
48. There are several aspects to this Charge which are completely unacceptable. First and foremost are the quite inappropriate [] advances that Mr Dy made to the caregiver.
49. Secondly, for Mr Dy to have suggested that competencies had to be tied into a game of basketball completely trivialises the process that competencies require. Completion of competencies is a significantly important process and needs to be done entirely professionally. There needs to be the objective assessment made in a context of complete professionalism. This was entirely lacking in the suggestion of tying the competencies into a basketball game or its outcome (even if this were in some context of jest – and there is no suggestion of this).
50. The Tribunal finds this Charge and each of its particulars made out as misconduct as malpractice and bringing discredit to the nursing profession both separately and cumulatively.

Charge 4 – Registered Nurse G

51. [].
52. Mr Dy told Nurse G that he would help her get sponsorship for a Competence Assessment Programme. Remarks made by Mr Dy led Nurse G to think that she owed her employment to him; and he also made references to reports that had led to employees having their employment terminated.
53. She described the incident referred to in particular 1 and said that she “*did not want to displease him because [she] thought it might cost [her her] job*”.
54. The nurse then described of the events surrounding the allegations in particular 4.2. The Tribunal is quite satisfied that the events as she described them did in fact occur. It is satisfied that there was coercion on Mr Dy’s part. It is

satisfied that Nurse G (then a caregiver) did not consent in any way to what occurred. It is satisfied that Mr Dy was aware that Nurse G was not consenting to the exchange. It is further satisfied that, even if there had been some suggestion of consent or agreement on Nurse G's part, this was brought about as a consequence of Nurse G's position as an employee and the power and control that Mr Dy had over her in her role as a caregiver.

55. Nurse G then described the events referred to in particular 4.3. The Tribunal is quite satisfied that this did occur, particularly because Nurse G described that Mr Dy had a "*mischievous look*" on his face and said a word in their local dialect which, in the context of their friendship, had a [] meaning. Again Nurse G said she tried to ignore it and did not want to displease him but "*believed that he had all the power*".

56. [].

57. [].

58. The evidence given by Nurse G was internally consistent and was meaningfully given. It was consistent with the evidence from other witnesses as to the approach taken by Mr Dy; including his use of his position of authority and power to try to achieve [].

59. Charge 4 is found with all its particulars both separately and cumulatively to amount to malpractice and conduct bringing discredit to the nursing profession.

Charge 5 - Caregiver D

60. [].

61. [].

62. The totality of the evidence from this caregiver confirms the allegations in Charge 5 and its individual four particulars. The evidence paints the same picture for this caregiver as was the case with the other individuals mentioned earlier, namely that Mr Dy used his position of influence and power [] as mentioned in the particulars. This amounts to harassment [] and the Tribunal has no difficulty in finding this Charge and its particulars made out separately and cumulatively as malpractice and conduct bringing discredit to the nursing profession.

Charges 6 and 7

63. Because of the concession by the PCC that the reference to “*staff*” in these two Charges is in fact a reference to the five individuals referred to in Charges 1 – 5, there is no need for the Tribunal to look further into these. The pressure to [] with the result that refusal caused him to become bullying and intimidating as alleged in Charge 6 is made out on the evidence from the five witnesses.
64. Likewise, the misrepresentations of Mr Dy’s ability to hire and terminate staff and aspects of the CAP courses to intimidate and pressure those staff into complying with his requests for [] as alleged is also made out.
65. These Charges in themselves are separately and cumulatively malpractice and conduct bringing discredit to the nursing profession; but, because they are effectively repeated allegations to those made in Charges 1 – 5, the Tribunal need not consider them further.

Disciplinary sanction

66. As with all allegations of misconduct, in addition to finding the facts as alleged and that this did not meet required standards, the Tribunal must also then decide whether the acts and conduct in question are such as to warrant disciplinary sanction either to maintain standards in the profession or to protect the public.
67. The Tribunal has no hesitation in finding that to be the case here. The standards of the nursing profession have been significantly compromised by the discredit brought to them by Mr Dy’s acts and conduct. He needs to be disciplined to express the Tribunal’s disquiet about this. Sanctions on him are required to maintain standards in the profession by sending the appropriate message to its members.
68. The public needs protection from harassments and [] of this kind. This applies not only to any patients and clients with whom the nurse is dealing, but also her or his colleagues and workmates. They cannot be expected to discharge their responsibilities, professionally, competently or properly if they are being harassed in this way. That impacts on the public and it impacts on the colleagues and their professional performance.
69. The public, both the patients of nurses and caregivers and the nurses and caregivers themselves need the protection of disciplinary sanction against Mr

Dy and the harassments behaviour found by the Tribunal to be have been involved here.

70. In summary, the Tribunal finds Charges 1 – 5 (and to the extent that Charges 6 and 7 are separately relevant) to be made out as misconduct warranting disciplinary sanction. That decision having been reached by the Tribunal and conveyed to the parties, written submissions on penalty was sought.

Penalty

71. Written submissions were received from the PCC and from Mr Dy. The PCC, having made submissions based on general principles and relevant cases, submitted that this was a case of sufficient severity that an order should be made cancelling Mr Dy’s registration as a nurse. It referred to the position of power and influence that Mr Dy had in respect of the nurses and caregivers and of their vulnerability to his claim to authority over them. The conduct occurred over a two-year period and was described by the submissions as relentless harassment which caused the nurses and caregivers to be scared, frightened, ashamed, embarrassed and humiliated. It was said that the conduct was consistent with that [] and referred to Mr Dy’s manipulation of staff to isolate them, seemingly as punishment. The conduct was described as premeditated, calculated and repeated and not a “*one-off*”. Reference was made to the open criticism of management which undermined its authority.
72. The PCC sought an order for censure and it sought costs, referred to below.
73. Mr Dy, who would have had those submissions and the opportunity to reply, only wrote in the context of his financial ability to meet an order for costs. He acknowledged his mistake. As to discredit, he referred to having discredited his name and brought shame to his wife and family and to have put the nursing profession in disrepute. He said he would “*embrace*” whatever penalty was deemed necessary and again expressed his significant regret. He gave details of his work and financial position, mentioned below in the context of costs.

Discussion

74. The available penalties for the Tribunal are:⁴
- 74.1. That registration be cancelled.

⁴ Section 101 of the HPCA Act

- 74.2. That registration be suspended for a period not exceeding 3 years.
- 74.3. That the health practitioner be required, after commencing practice following the date of the order, for a period not exceeding 3 years, to practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise specified.
- 74.4. Censure.
- 74.5. A fine of up to \$30,000.00 (but not if he or she has been convicted of a relevant offence or damages have been awarded against him or her – which is not the case here).
- 74.6. Costs.
75. The principles behind penalty orders of the Tribunal as clearly set out on the basis of authorities⁵ are:
- 75.1. What penalty most appropriately protects the public.
- 75.2. The important role of setting professional standards.
- 75.3. A punitive function (although this is not the principal purpose behind the order but may be a secondary consequence).
- 75.4. Rehabilitation of the health professional.
- 75.5. That any penalty imposed is comparable to other penalties imposed upon health professionals in similar circumstances.
- 75.6. 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.
- 75.7. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.
- 75.8. Whether the penalty proposed is fair, reasonable and proportionate in the circumstances presented.
76. In *A v Professional Conduct Committee*⁶ the High Court said that four points could be expressly and a fifth by implication from the authorities namely:

“First, the primary purpose of cancelling or suspending registration is to protect the public, but that ‘inevitably imports

⁵ *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Katamat v PCC* [2012] NZHC 1633 at paragraph 49 and *Joseph v PCC*; [2013] NZHC 1131 at [65] – [66]; *Singh v Director of Proceedings*, [2014] NZHC 2848 (esp. paragraphs [56] – [60] and [66])

⁶ *A v Professional Conduct Committee* [2008] NZHC 1387 at [81]

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 amenable to cure.’ Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.”

77. The Court went on:⁷

“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 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.”

78. The Tribunal has taken into account and accepts the significantly aggravating factors in this case mentioned in the PCC submissions. The facts as outlined above speak for themselves of the severity of the offending by Mr Dy.

79. No mitigating factors were advanced by him as such but the Tribunal has noted that Mr Dy has now acknowledged that he has brought discredit to the profession (and, to the extent relevant, his wife and family). Against that, however, must be weighed the fact that Mr Dy denied any wrongdoing towards the various nurses and caregivers in question (apart from having taken [] – which would have been relatively easily proven by external evidence, unlike the other facts of the case).

80. This means that Mr Dy is in denial about what has occurred and is in denial about how wrong it was for him to have acted in this way. For him belatedly to acknowledge discredit to the profession in light of the findings that the Tribunal had conveyed to him in the decision on the Charges is too little and too late. He has not acknowledged in any way the significant impact that his acts and offending have had on the nurses and caregivers in question. He has not acknowledged the significantly compromising position that arose when he [] as is mentioned in particular 1.3 of Charge 1 above. He has not acknowledged that he used his position of power and influence over these

⁷ At [82]

young and vulnerable women to seek to [] nor abuse of that position of power, because of refusal from them, to compromise their working environment and their future prospects. Mr Dy has given the Tribunal the distinct impression that he is looking only after himself and that he has no real remorse for his acts. He continues to be a real risk to his profession and the public that it serves.

81. The first question for the Tribunal to consider is whether any penalty short of cancelling Mr Dy's registration as a nurse will suffice. The Tribunal considered carefully the options of suspension and imposition of conditions and both. It has concluded, however, that the offending by Mr Dy in this case is sufficiently serious to cancel his registration as a nurse; and that no other penalty would suffice. Cancellation of his registration would not be disproportionate. To suspend and impose conditions would not adequately express the Tribunal's dissatisfaction with the acts and conduct of Mr Dy as a nurse.
82. The Tribunal must consider carefully other decisions for a comparison with like cases. Each case must be decided on its own facts and merits but some guidance can be obtained from other decisions and there must be some consistency in result.
83. Had Mr Dy been prosecuted in the courts for alleged crimes arising from these events and been convicted there, questions would have arisen as to whether those convictions reflected adversely on his fitness to practise. Examples are: *Rae*,⁸ a case of a nurse convicted of indecent assault on a female aged 14 years. The incident occurred when the complainant was coming out of the shower and walking to her bedroom. Rae had a previous history of conviction for indecent assault which had in turn resulted in a charge before this Tribunal. He was censured and his registration cancelled by the Tribunal. *Ruhe*,⁹ a case of a nurse convicted on two counts of indecent assault on a boy aged under 16 years and one count of an indecent act on a boy under 16 years and sentenced in a court to 2 years 3 months imprisonment. His registration as a nurse was cancelled and he was censured.

⁸ 471/Nur12/208P

⁹ 367/Nur10/164 P

Golding,¹⁰ a case of a nurse employed as a massage therapist who, in the course of massage treatment of a female placed one hand inside his trousers while simultaneously massaging his victim's back. When confronted by the victim Mr Golding withdrew his hand from his trousers and apologised. He was censured and suspended for 6 months subject to conditions, the Tribunal saying that this case was less serious than the *Rae* and *Ruhe* cases which involved sexual assault.

84. In cases where there has been behaviour of this kind but no criminal outcome, there has been a varied response from the Tribunal. In brief, the cases referred to the Tribunal by counsel for the PCC are:

Chand,¹¹ where a nurse faced several charges, including those involving inappropriate sexual contact with colleagues and with patients. His registration as a nurse was cancelled.

Milo,¹² This was a case of a nurse found guilty of misconduct when he pushed a colleague into a locker room and embraced her, despite resistance; and faced other charges. He was placed on supervision for two years, censured and fined \$3,000.00. The circumstances and factual background to that case indicate to the Tribunal that it was not as serious as is the present case.

Wilson,¹³ where a nurse was charged with behaving in any inappropriate or unprofessional manner towards nursing students on placement in the Unit, with allegations including touching and stroking, attempting to kiss and making inappropriate comments. He was suspended from practice for three months with conditions imposed, censured and fined \$2,000.00. Again that case is not as serious as the present one.

85. The clear message must be sent to Mr Dy himself personally, to the nursing profession in general, and to the public that the Tribunal views behaviour of this kind as completely unacceptable. Harassment [] in the workplace will have their own employment ramifications for a nurse, but also, in the context of health practitioners' discipline, they impact significantly on the maintenance of standards in the profession and protection of the public.

¹⁰ 771/Nur15/330P

¹¹ 106/Nur06/49P

¹² 453/Nur11/196P

¹³ 458/Nur12/203P

86. To suspend Mr Dy for a significant period, even the maximum allowed by the HPCA Act would not adequately send that message.
87. This case also calls for an order for censure to express the Tribunal significant disquiet as to the acts and conduct of Mr Dy in this matter. Orders accordingly are made below.

Costs

88. The PCC sought an order for costs against Mr Dy, stating that its estimated costs were approximately \$25,891.00. In addition, there are the costs for the Tribunal estimated to be approximately \$38,172.00. This is a total of some \$64,000.00. Some deduction from this can be made for the fact that only one day of the estimated hearing was required (partly because of indisposition of a Tribunal member). The Tribunal has taken a starting point of approximately \$60,000.00.
89. The normal contribution ordered starts at 50% with addition or deduction based on relevant factors. Mr Dy should be given some credit for his co-operation in dealing with the matter of penalty, he having provided written submissions and given some detail of his financial means. Taking those various factors into account and Mr Dy's means as conveyed by him to the Tribunal, the conclusion is that he should be ordered to pay approximately 15% of those estimated costs, namely the sum of \$9,000.00.

Names suppression

90. It is quite appropriate that the five nurses and caregivers to whom the Charges relate should have the benefit of an order preventing publication of their names and identifying details. The same applies to the two further witnesses, Ms A and Ms D. Detail of the evidence that they gave is significantly personal to them and they should not in any way be identified in connection with that.
91. Furthermore, because the Tribunal is not making an order prohibiting publication of the name or particulars of the affairs of Mr Dy or of the care home or Bupa, it is likely that there may be identification of one or more of the nurses or caregivers or other witnesses in question. Some of those witnesses sought hearing in private while giving evidence pursuant to the provisions of section 97 of the HPCA Act and that was ordered by the Tribunal.

92. It is appropriate that the Tribunal now make an order prohibiting the publication of those parts of the Charges, the hearing, the evidence and this decision which refer to the [] Mr Dy had with each and every one of those witnesses.
93. No order prohibiting the publication of the name or particulars of Ms Dine or Ms Khan was sought nor is that appropriate. They gave their evidence openly in their respective capacities at the care home and for their roles at Bupa. The interim orders for name suppression that had been made in relation to them are discharged.
94. Likewise, no order was sought nor is made prohibiting identification of Bupa or the care home. The public are entitled to know the identity of the facility and the operator at which this offending occurred and, to the extent relevant, the identity of the Facility Manager at the time. Any private interest that those persons may have is outweighed by the public interest in knowing those identities. Again the interim orders are discharged.
95. There was evidence given to the Tribunal concerning Mr Dy's own medical matters and physiology. It is appropriate that there be an order prohibiting the publication of any detail concerning that.

Result and orders

96. The Charges against Mr Dy and the particulars of each of them are found to be made out as misconduct both separately and cumulatively.
97. Mr Dy is censured for the acts and conduct to which the Charges refer.
98. An order is made cancelling Mr Dy's registration as a nurse from the time that this decision takes effect.
99. Mr Dy is ordered to contribute the sum of \$9,000.00 towards the costs of the PCC and the Tribunal to be divided equally between them.
100. An order is made permanently prohibiting the publication of the name or any particulars of the affairs of any of the five nurses and caregivers referred to in the Charges and the two witnesses, Ms D and Ms A.
101. An order is made prohibiting the publication of those parts of the Charges, the hearing, the evidence and this decision which refer to the [] that Mr Dy had with each and every one of the witnesses; and concerning Mr Dy's own personal medical matters and physiology. No other order for name

suppression is made and interim name suppression orders earlier otherwise made are discharged.

102. Pursuant to section 157 of the HPCA Act the Tribunal directs the Executive Officer:

102.1. To publish this decision, and a summary, on the Tribunal's website;

102.2. To request the NCNZ 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 Auckland this 7th day of May 2018

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David M Carden
Chairperson
Health Practitioners Disciplinary Tribunal

SCHEDULE

- 1.0 In 2015 while Mr Dy was employed as a registered nurse in the role of Clinical Manager at the Remuera Care Home in Auckland he behaved in an inappropriate or unprofessional manner []. In particular:
 - 1.1 [];
 - 1.2 [];
 - 1.3 [].
- 2.0 In 2015 while Mr Dy was employed as a registered nurse in the role of Clinical Manager at the Remuera Care Home in Auckland he behaved in an inappropriate or unprofessional manner by []. In particular:
 - 2.1 [].
- 3.0 During the period 2015 to 2016 while Mr Dy was employed as a registered nurse in the role of Clinical Manager at the Remuera Care Home in Auckland he behaved in an inappropriate or unprofessional manner by []. In particular:
 - 3.1 [];
 - 3.2 [];
 - 3.3 [].
- 4.0 During the period 2015 to 2016 while Mr Dy was employed as a registered nurse in the role of Clinical Manager at the Remuera Care Home in Auckland he behaved in an inappropriate or unprofessional manner by []. In particular:
 - 4.1 [];
 - 4.2 [];
 - 4.3 [];
 - 4.4 [].
- 5.0 During the period 2015 to 2016 while Mr Dy was employed as a registered nurse in the role of Clinical Manager at the Remuera Care Home in Auckland he behaved in an inappropriate or unprofessional manner by []. In particular:
 - 5.1 [];
 - 5.2 [];
 - 5.3 [];
 - 5.4 [].
- 6.0 During the period 2014-2016 Mr Dy used his position as Clinical Manger at Remuera Rest Home [].
- 7.0 During the period 2014-2016 Mr Dy misrepresented his ability to hire or terminate staff and to gain sponsorship and/or entry to Competence Assessment Programme courses [].

The conduct alleged in Charges 1.0 to 7.0 amounts to professional misconduct pursuant to section 100(1)(a) or (b) of the Act and particulars 1.1 to 5.3 either separately or cumulatively, are particulars of that professional misconduct.