New Zealand Health Practitioners Disciplinary Tribunal

Level 6, 80 The Terrace, Wellington 6011
PO Box 10509, The Terrace, Wellington 6143, New Zealand
Telephone: 64 4 381 6816 Facsimile: 64 4 381 6770
Email: gfraser@hpdt.org.nz
Website: www.hpdt.org.nz

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DECISION NO	691/Chiro14/297P
IN THE MATTER	of the Health Practitioners Competence Assurance Act 2003
	-AND-
IN THE MATTER	of a charge laid by Professional Conduct Committee pursuant to Section 91 of the Act against **MYRON ROY BIERNAT**, of Dunedin, Registered Chiropractor

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING held in Dunedin on 30 March 2015

TRIBUNAL:	Mr K Johnston (Chair) Dr J Hawtin, Dr E Hurtgen, Dr J Loveday and Ms M Taylor-Cypers (Members)
IN ATTENDANCE:	Ms G Fraser (Executive Officer) Ms K O'Brien (Stenographer)
APPEARANCES:	Ms A Miller for the Professional Conduct Committee (the PCC) Practitioner in person

Introduction

1. Pursuant to s91 of the Health Practitioners Competence Assurance Act 2003, a Professional Conduct Committee of the Chiropractic Board established under s 71 charges the practitioner, Mr Myron Roy Biernat, pursuant to s81(2).

2. The Notice of Charge is dated 6 November 2014 and particularises the charge in the following terms:

> *"Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that:*
>
> *On 16 October 2013 Mr Biernat, a registered Chiropractor, was convicted in the District Court at Dunedin on a charge of doing an indecent act on a girl aged under 16 years pursuant to section 134(3) [of the] Crimes Act 1961. The offence is punishable by imprisonment for a term of three months or longer (namely a maximum of seven years imprisonment).*
>
> *This conviction reflects adversely on Mr Biernat's fitness to practise as a chiropractor. This is a ground on which a health practitioner may be disciplined under section 100(1)(c) of the Act."*

3. The Chair convened a pre-hearing telephone conference on 11 December 2014. Ms Miller participated in the conference, as did the practitioner. At the conclusion of the conference the matter was set down for hearing in Dunedin on 30 March 2015, and the Chair gave a series of directions relating to the filing and service of evidence and submissions. Amongst other things, those directions foreshadowed the possibility of the parties filing an agreed statement of facts.

4. Also addressed at the conference was the question of what if any interim or final orders were to be made pursuant to s95 - 99 which confer on the Tribunal jurisdiction to prohibit the publication of certain information. In a Minute issued on 17 December 2014, the Chair made a permanent order prohibiting the publication of any information identifying the young woman involved in the case (to whom the Tribunal will refer as the "victim"). He also made an interim order prohibiting the publication of the

practitioner's name on the basis that the Tribunal would revisit that order at the substantive hearing. Both of those orders were made by consent.

Evidence

5. As foreshadowed at the pre-hearing telephone conference, the parties filed an Agreed Statement of Facts which was in these terms:

> *"1. Myron Roy Biernat is a registered chiropractor. He was first registered with the Chiropractic Board on 8 October 1998. Mr Biernat does not currently hold a practising certificate.*
>
> *2. On 16 October 2013 Mr Biernat pleaded guilty to a charge of doing an indecent act on a girl under the age of 16 years. … .*
>
> *3. Mr Biernat was convicted of an offence under section 134(3) Crimes Act 1961. The offence carries a maximum penalty of 7 years imprisonment.*
>
> *4. On 27 November 2013 Mr Biernat appeared in the District Court at Dunedin for sentencing. The sentence imposed in respect of the conviction was a six month period of home detention, special conditions for six months, and 150 hours' community work.*
>
> *5. A copy of the Police Summary of Facts (…) on which Mr Biernat was sentenced is attached as Appendix A and forms part of this Summary of Facts placed before the Tribunal."*

6. The Police Summary of Facts, which was appended to the Agreed Statement of Facts, and upon the basis of which the practitioner pleaded guilty to the charge against him, was in the following terms:

> ***"SUMMARY OF FACTS***
>
> ***INTRODUCTION***
>
> *The victim is … .*
>
> *The defendant and his wife sleep in separate bedrooms.*
>
> *At the time of the offending the victim was approximately 10 years old.*
>
> ***CIRCUMSTANCES***
> *On one occasion between the 26th day of October 2007 and the 26th day of October 2008 the defendant was in his bedroom at his address situated at …, Dunedin.*
>
> *He was wearing a T-shirt and underpants.*
>
> *The defendant called the victim in to his bedroom and asked her to scratch his*

head.

After a short while he told her to get in to his single bed and give [him] a cuddle.

The defendant then pulled the blankets over the victim's head and told her to go down.

When she reached his genital area he told her to stop and rest her head there.

After a short time she got out of the bed and left the room.

On another occasion between the same dates the defendant was again in his bedroom.

He was wearing similar clothing to the first occasion.

He called the victim in to his room and asked her to get in to bed with him.

The defendant then pulled the blankets over the victim's head and told her to go down.

When she reached his genital area he told her to stop and rest her head there.

The defendant declined to comment.

The defendant has not previously appeared before the Court."

7. In addition to the Agreed Statement of Facts, the parties filed a Common Bundle of Documents. This was done pursuant to the directions given by the Chair at the pre-hearing telephone conference, and on the basis that the documentation:

> *"(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 too, 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."*

8. The Common Bundle of Documents contains some 22 documents, some of which were referred to by Ms Miller, the practitioner or witnesses during the course of the hearing.

9. Before the Tribunal, the practitioner gave evidence and called three other witnesses, all of whom were members of his extended family. It is convenient to refer to that evidence now, because the Tribunal will not need to refer to it extensively in this decision.

10. The practitioner's additional evidence, that is to say his own evidence and that of the other witnesses called by him, fell into two broad categories:

10.1 For the most part it was directed at establishing that the practitioner did not commit the offence with which he was charged, to which he pleaded guilty, and of which he was convicted. This evidence ranged over such matters as the veracity and reliability of the victim's evidence, the propriety of the investigations in the criminal process and by the PCC, and the professional advice the practitioner received during the course of the criminal proceedings;

10.2 Otherwise it covered the practitioner's personal circumstances.

11. During the course of the hearing, the Chair made it clear to the practitioner that the Tribunal had no jurisdiction to look beyond the conviction, or to review the actions of the Police or the PCC. By the conclusion of the hearing the Tribunal was beginning to have some confidence that the Practitioner understood this, and that the opportunity to contest the criminal charges had passed.

Charge

12. As already stated, the charge is brought pursuant to s100 (1)(c) which materially provides:

(1) The Tribunal may make any one or more of the orders authorised by s 101 if, after conducting a hearing on a charge made under s 91 against a health practitioner, it makes one or more findings that:

(a) ...
(b) ...
(c) the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise ...
(d) ...
(e) ...

(f) ...

(2) The tribunal may make a finding under subsection (1)(c) only if the conviction concerned:

(a) ...
(b) Has been entered by any court in New Zealand or elsewhere for an offence punishable by imprisonment for a term of three months or longer.

(3) ...

(4) ..."

13. There are then, as Ms Miller submitted, and the practitioner accepted, two elements to the charge:

13.1 First, that the practitioner has been convicted by a New Zealand Court of a criminal offence which carries a penalty of three months' imprisonment or more; and

13.2 Second, that the practitioner's offending reflects adversely on his or her fitness to practise.

14. It is well settled that in professional disciplinary proceedings the complainant – here, the PCC – bears the burden of proving all elements of the charge, that the standard of proof is the civil standard of the balance of probabilities, and that the proof required will vary in relation to the gravity of the charge.

Liability

15. The first element of the charge is made out. As alleged in the Notice of Charge, the practitioner has been convicted of an offence under s134(3) of the Crimes Act 1961 which carries a maximum penalty of seven years imprisonment. The Common Bundle of Documents included a certified copy of the relevant entry in the Criminal record. Nothing more needs to be said about this.

16. The second element requires the Tribunal to be satisfied that the practitioner's offending reflects adversely on his or her fitness to practise.

17. How far is the Tribunal entitled to go in looking into the circumstances of the offending in considering this issue?

18. The Tribunal is bound by the fact of the conviction – it would be singularly inappropriate for the Tribunal to embark on any sort of re-examination of the practitioner's guilt. The Tribunal must regard itself as bound by, and obliged to consider the case on the basis of, the core facts established in the criminal proceeding. In a case such as this, in which the practitioner pleaded guilty to the charge, that plea will have been entered on the basis of the Police Summary of Facts, and the Tribunal takes the view that in all but the most extraordinary circumstances it is both entitled and obliged to treat the Summary of Facts as a definitive statement of the factual circumstances.

19. Those things said, it is no doubt open to a practitioner to call evidence for the purposes of adding to or explaining the core factual circumstances.

20. In this case, the practitioner did not call any evidence which materially added to the information contained in the Police Summary of Facts, with the sole exception that he gave evidence, which the Tribunal accepts, that the victim was born in 1995, so that the Police Summary of Facts was inaccurate to the extent that it identified her age at the time of the offending as being 10 when in fact it was 13. The Tribunal does not regard that as being material to the determination of liability.

21. It should be acknowledged that the practitioner's offending did not take place in the context of his practice as a chiropractor. However, that is not a necessary element of the charge, and there is ample authority in the decisions of this Tribunal and other comparable tribunals that the activities of a professional person outside the course of his or her practice can nevertheless bring into question his or her fitness to practise.

22. Thus, in the end, the Tribunal is dealing with a practitioner who has been convicted of a very serious offence in the circumstances set out in the Police Summary of Facts.

23. The Tribunal has had little difficulty in concluding that the PCC has discharged the burden of establishing the charge it brings to the necessary standard.

24. In the Tribunal's view for any chiropractor to be convicted of such an offence calls into question his or her fitness to practise. Putting everything else to one side, this type of offending where the victim is a child under 16 involves the most serious breach of trust, and chiropractic practice, like that of other occupational groups in the health sector, depends on there being a level of trust between practitioners and their patients.

25. Indeed, in the course of his opening remarks in this case, the practitioner himself acknowledged that a conviction of this type would call into question the fitness to practise of any health professional.

26. During the course of the hearing, after the evidence had been heard, and both parties had been given an opportunity to make submissions in relation to the issue of liability, the Tribunal conferred briefly, and then announced that it had reached the conclusion that the PCC had made out its case on liability, and would give reasons in its written decision.

Penalty

27. It does not follow from the fact that the Tribunal has concluded that the complainant has made out its case on liability that a penalty will necessarily be imposed on the practitioner. Both s100 and s101 are clear in saying that having conducted a hearing and concluded that one or more of the circumstances set out in s100 exist, the Tribunal may impose one or more of the penalties referred to in s101.

28. Having said that, the Tribunal's view is that the practitioner's misconduct in this case is so serious that the imposition of a penalty is inevitable, and the real issue is what that penalty should be.

29. Ms Miller referred the Tribunal to s101(1) which sets out the penalties which are available. These range from the imposition of a censure through to an order for the cancellation of the practitioner's registration.

30. She reminded the Tribunal that the principal purposes of professional disciplinary proceedings are the protection of the public, the maintenance of professional standards

and punishment, bearing in mind that, where punishment is a relevant consideration, so too is the possibility of the practitioner's rehabilitation.

31. Given that this case involves the referral of a conviction and that the practitioner has already faced criminal proceedings, the Tribunal has focused its consideration on the issues of the protection of the public and the maintenance of professional standards.

32. The Tribunal is also conscious that its obligation is to consider all available options before deciding on the appropriate penalty, and that it is incumbent on it to identify the lest punitive outcome consistent with meeting the objectives of protecting the public and maintaining professional standards. That principle derives from the High Court's decision in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*.[1] That that obligation is particularly acute in the case of a referral of a conviction, where punishment is not a key consideration.

33. Ms Miller referred the Tribunal to a number of previous decisions which she submitted were, to one extent or another, comparable with this. The Tribunal has of course considered all of the decisions to which she referred. The most obviously comparable decisions are *Henderson,*[2] *Vautier*[3]*, Curry*[4]*, Te Maha Ruhe*[5] *and "G"*[6]. All of those cases involved convictions of health practitioners comparable with those involved in this case and in each of those cases the practitioner's registration was cancelled.

34. Turning to the present case Ms Miller identified a number of what she submitted were aggravating features of the case:

- The age and vulnerability of the victim;
- The breach of trust involved;
- The fact that the case involves two events within a year;

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1 [2012] NZHC 3354, applied in *Katamat v PCC* [2012] NZHC 1633 at [49] and *Joseph v PCC* [2013] NZHC 1131 at [65] – [66]
2 Henderson 406/Nur11/186P
3 Vautier 291/Med09/140P
4 Curry 386/Nur11/174P
5 Te Maha Ruhe 367/Nur10/164P
6 "G" 659/Den14/278P

- The fact that the psychologist engaged to assist in the sentencing process in the criminal proceedings, whilst giving it as his opinion that the likelihood of the practitioner reoffending was low, qualified that view by adding that the nature of his offending was such that he continued to present a risk to young females in his care;

- The practitioner's ongoing insistence, despite his conviction, that the victim's accusations were being made out of spite or malice, and his attempt to blame her;

- The practitioner's ongoing denial that his offending was *"problematic"*.

35. Ms Miller also identified what she submitted were the mitigating features of the case, namely that the practitioner was 69 at the time of the offending, that this was his first offence, that he had pleaded guilty and that he had cooperated with the PCC.

36. To those mitigating factors, the Tribunal would add that the practitioner's unchallenged evidence is that this event has effectively brought his career to an end and been ruinous from a financial perspective to the extent that he no longer owns his home or any other substantial assets and that the matter has taken a severe psychological toll on him.

37. Ms Miller then made a series of submissions in relation to penalty.

38. Her starting point was to submit that the practise of chiropractic involves physical contact with patients at a time when those patients are potentially vulnerable, thus giving rise to a power imbalance between the practitioner and the patient. She submitted that patients are entitled to expect to be able to place absolute trust and confidence in their chiropractor, and to expect behaviour that is above reproach.

39. Ms Miller then submitted that in circumstances where a chiropractor has been convicted of an offence relating to indecent physical contact with another person – particularly a young vulnerable person in that practitioner's care – the protection of the public and the maintenance of professional standards effectively demand the cancellation of that practitioner's registration.

40. Finally in relation to the question of penalty, she submitted that if an order for cancellation was to be made it was appropriate to impose conditions pursuant to s102

which the practitioner would need to satisfy before applying for re-registration, and she articulated the conditions being sought by the PCC.

41. The practitioner did not make submissions in relation to penalty, but relied on his opening submissions, which, it will be recalled, focused largely on the question of whether or not he had committed the offence.

42. A feature of this case is that the practitioner, who was self-represented, obviously, and quite wrongly, perceived that the issue before the Tribunal was whether or not he had committed the offence with which he was charged and convicted. As the Tribunal has already said, by the time the hearing was concluded it seemed that the practitioner had come to the realisation that that was not the issue, or not the issue before this Tribunal. He did not, however, refocus his attention on the appropriate penalty. Had he been able to do so he might have contended that, bearing in mind the mitigating aspects of the case to which the Tribunal has already referred, it would be a sufficient penalty in this case to censure him and possibly impose a series of conditions focused on his rehabilitation.

43. The Tribunal has considered that possibility, and indeed all available options short of deregistration.

44. However, in the end, the Tribunal has reached the conclusion that it cannot discharge its responsibilities to the public and the profession in this case without ordering the practitioner's deregistration.

45. The principal considerations which have driven the Tribunal to that conclusion are the seriousness of the practitioner's offending, the breach of trust involved and the uncertainty surrounding the degree of risk he would present were he to resume practice. Another factor to which the Tribunal has had regard is the practitioner's stated permanent retirement from practice and preparedness to relinquish his registration as a chiropractor. [suppressed by direction of the Tribunal] Nevertheless, the Tribunal regards it as significant that the practitioner himself has been ready to relinquish his practising certificate.

46. Bearing all of those considerations in mind, having considered all available options in terms of penalty, and conscious of its responsibility to identify the least punitive outcome which meets the requirements of the case, the Tribunal is simply unable to identify any outcome which would enable it to discharge its responsibilities to the public and the profession other than to censure the practitioner and make an order for his deregistration.

Publication

47. An order is sought pursuant to s95 for the permanent suppression of the practitioner's name. This is resisted by the PCC.

48. Section 95 is very clear in its terms. The default position is that the Tribunal's decisions are published in full and include the names of practitioners, unless the Tribunal is satisfied that an order suppressing the practitioner's name is necessary in the public interest or in the interests of any person.

49. No compelling argument was put to us to the effect that it was in the public interest or in the interests of any person to supress the practitioner's name. No suppression order was made in the criminal proceedings in the District Court and the practitioner's appeal to the High Court seeking suppression of his name was dismissed by Pankhurst J in a judgment dated 18 December 2013. As a result, the practitioner's name is already in the public arena. The Common Bundle of Documents includes an example of an article in the Otago Daily Times of 21 December 2013. An order for the suppression of the practitioner's name in this case would serve no useful purpose, and is not one which the Tribunal is prepared to make.

50. The application for such an order is declined.

Costs

51. The PCC seeks costs. The Tribunal's costs are $18,253.66, and the PCC's costs of prosecuting this matter total $14,067.41.

52. The practitioner indicated to the Tribunal that he resisted any order for costs, but made no detailed submission in that regard.

53. As already recorded, the practitioner's unchallenged evidence is that he is impecunious and the Tribunal accepts that that is the position. It seems that he enjoys the support of his immediate and extended family. However, it is the practitioner's own circumstances that are relevant in connection with a costs application.

54. As a rule, if a costs application in circumstances such as the present is to be resisted on the grounds of impecuniosity, the Tribunal would expect to see detailed financial information. However, in this case, the self-represented practitioner has simply given evidence that he has no funds available and that is unchallenged.

55. Costs are a particularly difficult issue in professional disciplinary proceedings because the costs burden is either borne by the profession as a whole or by the practitioner who by definition is responsible for those costs being incurred in the first place.

56. The starting point in this Tribunal – as in other comparable tribunals – is generally to order that a practitioner who has been found liable should pay half of the costs involved (provided of course they are reasonably incurred), and to spread the costs burden in that way. Orders for more or less than half of those costs are regularly made, depending on the particular circumstances of the case.

57. The criminal proceedings – including the appeal – and these professional disciplinary proceedings have imposed a heavy financial toll on the practitioner and his family. In the particular circumstances of this case, the Tribunal has concluded that the most appropriate outcome is to make no order as to costs.

Conclusion

58. The Tribunal orders that:

    58.1. The practitioner's registration is cancelled.

    58.2. The practitioner's application for permanent name suppression is declined and the interim order for non-publication of the practitioner's name is discharged.

59. The Tribunal directs the Executive Officer to publish a copy of this decision and a summary on the tribunal's website. The Tribunal further directs the Executive Officer to publish a notice stating the effect of the Tribunal's decision on the Chiropractic Board's website and in the Chiropractic Board of New Zealand's newsletter.

DATED at Wellington this 17th day of April 2015

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K Johnston
Chair
Health Practitioners Disciplinary Tribunal