

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV 2021-404-000528
[2021] NZHC 1594**

UNDER Section 95 of the Social Workers
Registration Act 2003

BETWEEN MATHEWKUTTY JOSE
MANGALASSERY
Appellant

AND THE SOCIAL WORKERS
REGISTRATION BOARD
Respondent

Hearing: 9 June 2021

Appearances: Appellant in person
S C Waalkens for the Respondent

Judgment: 30 June 2021

Reissued: 04 August 2021

JUDGMENT OF VAN BOHEMEN J

*This judgment was delivered by me on 30 June 2021 at 3.00 pm
and re-delivered by me on 04 August 2021 in accordance with High Court Rules 2016, r 11.10*

.....
Registrar/Deputy Registrar

Solicitors/Counsel:
Rice Speir, Auckland
Copy to:
Appellant

Introduction

[1] Mr Mangalassery, a self-represented appellant, appeals a decision of Judge R McIlraith in the District Court at Manukau. Judge McIlraith modified a decision of the Social Workers Registration Board (Board), which implemented a recommendation by a Professional Conduct Committee (PCC) established under the Social Workers Registration 2003 (Act) to consider a complaint against Mr Mangalassery. The PCC had recommended that Mr Mangalassery be directed to receive mentoring and/or counselling to develop his social work in specified areas.¹

[2] The PCC found that Mr Mangalassery had not breached his ethical duties or the Social Workers Registration Board Code of Conduct (Code of Conduct) in relation to the aspects of the complaint that had been referred to the PCC for consideration. Its recommendation was based on “two further, more general aspects of the case” that the PCC considered required discussion.

[3] Following an appeal by Mr Mangalassery against the Board’s decision, Judge McIlraith held that, in making its recommendation, the PCC had failed in its obligations under the Act to seek further input from Mr Mangalassery before making its recommendation and to apply the rules of natural justice.² The Judge accepted that the PCC had the jurisdiction to make its recommendation but modified the Board’s decision to require the Board to refer the matter back to the PCC so the PCC could have the discussion with Mr Mangalassery that it ought to have had before making its recommendation.³

[4] Despite Mr Mangalassery’s success in requiring the PCC and Board to reconsider their recommendation and decision, Mr Mangalassery appeals Judge McIlraith’s decision. Mr Mangalassery considers that Judge McIlraith erred in finding that the PCC had jurisdiction to make the recommendation it had made under s 71(1)(b)(v) of the Act. Mr Mangalassery says the only recommendation available to the PCC after it had found that he had not breached his ethical duties or the Code of Conduct was that no further action be taken.

¹ *Mangalassery v Social Workers Registration Board* [2021] NZDC 2809.

² At [40].

³ At [47] and [51].

Relevant background and timeline

[5] Mr Mangalassery has been a registered social worker under the Act since May 2012. At the time of the complaint and until earlier this year, Mr Mangalassery was employed as a social worker by Oranga Tamariki.

Complaint made

[6] In May 2018, a complaint was made about Mr Mangalassery's conduct as a social worker in relation to the mother of three children who were in the care of Oranga Tamariki and for whom Mr Mangalassery had been responsible.

[7] The complaint was considered by the Chairperson of the Board. In a decision dated 8 August 2018, the Board Chairperson recorded that the complaint alleged that:

- (a) Mr Mangalassery had:
 - (i) Breached his ethical duties in three specified respects;
 - (ii) Breached the Code of Conduct in five specified respects; and
- (b) In seven specified respects, most of which appear to relate to the alleged breaches of ethical duties and of the Code of Conduct, Mr Mangalassery had provided information that was unsupported by the evidence or incorrect or inappropriate.

[8] The Chairperson summarised the detailed response that Mr Mangalassery had made to the complaint and recorded that she had decided, pursuant to s 65(1) of the Act, that aspects of the complaint should be referred to a complaints assessment committee (CAC) for consideration and determination under s 71 of the Act.⁴

[9] In summary, the aspects referred to the CAC were:

⁴ Under amendments made to the Act in February 2019, CACs became PCCs. See discussion at [12] of this judgment.

- (a) The circumstances concerning a request by the children’s mother for a female social worker for her children;
- (b) The accuracy of, and the basis for, information communicated by Mr Mangalassery, including concerning the mother’s epilepsy and her ability to care for her children;
- (c) The alleged sharing by Mr Mangalassery of confidential information about the mother’s fourth pregnancy;
- (d) The allegation that Mr Mangalassery breached his ethical duties and the Code of Conduct in respect of any or all of the above.

[10] The Chairperson recorded that she was satisfied that no other aspects of the complaint needed to be pursued.

[11] The CAC was established shortly thereafter and commenced its investigation of the complaint. The CAC received submissions from and met with Mr Mangalassery as part of its investigation.

Amendments to Act come into force

[12] On 27 February 2019, while the complaint was still before the CAC, the Social Workers Registration Legislation Act 2019 (Amendment Act) received the Governor-General’s assent. The Amendment Act made a large number of amendments to the Act. Many of the amendments came into effect on 28 February 2019, although other amendments came into effect at later dates as set out in s 2 of the Amendment Act.

[13] The amendments that came into effect on 28 February 2019 included the following:

- (a) The term “complaints assessment committee” was replaced by the term “professional conduct committee;”

- (b) The range of measures that could be recommended by a PCC under s 71(1) in the case of a complaint were expanded and included, at s 71(1)(b)(v), the power to recommend that the Board direct a social worker to undertake training, mentoring and counselling; and
- (c) Transitional provisions included at Schedule 1AA of the Act provided that a complaint being considered by a CAC that had not been determined before the commencement date of the Amendment Act (i.e. 28 February 2019) must be determined under s 71 of the Act as it read on and after the commencement date of the Amendment Act.

PCC issues determination report and recommendation

[14] On 23 August 2019, the CAC, now the PCC, issued its determination report. The PCC considered the substantive issues raised in the complaint in terms of relevant principles and associated guidance in the Code of Conduct. It found that Mr Mangalassery had not breached his ethical duties or the Code of Conduct with respect to:

- (a) The mother's request for a female social worker;
- (b) Detailing information about the mother's epilepsy; or
- (c) Disclosing information about the fact of the mother's pregnancy to other professionals involved in her case.

[15] The PCC also found that Mr Mangalassery did not breach his ethical duties or the Code of Conduct in terms of his obligations to:

- (a) Respect the cultural needs and values of the mother;
- (b) Maintain accurate records and not mislead the Court in relation to the mother's epilepsy; and

- (c) Respect the mother's privacy and confidentiality about her fourth pregnancy.

[16] However, at paragraph 74 of its determination, the PCC stated:

Notwithstanding the PCC's findings on the above particulars, the PCC considers that information provided during the course of the PCC raises two further, more general aspects of the case that require discussion.

[17] The PCC report said that:

- (a) During its interactions with Mr Mangalassery, the PCC found that Mr Mangalassery had a heavy reliance on written interactions with the mother and other professionals; and
- (b) The PCC was concerned about Mr Mangalassery's reliance on his line manager or legal support to provide critical feedback on his intended actions.

[18] The PCC report also recorded that, in a meeting with the PCC, Mr Mangalassery appeared to have difficulty in assessing what he could have done differently in relation to the issues considered by the PCC.

[19] The PCC recommended that, pursuant to s 71(1)(b)(v) of the Act, Mr Mangalassery receive mentoring and/or counselling to develop his social work practice in:

- (a) Effective and appropriate communication concerning when emails are suitable and when opportunities should be sought for face to face meetings; and
- (b) Critical and reflective practice, including Mr Mangalassery's understanding of the role of line management and legal support and reflection on his own practice.

[20] The PCC considered that appropriate mentoring or counselling could be provided by regular supervision with a social worker approved by the Board.

[21] The PCC did not discuss its recommendation to Mr Mangalassery or seek his views on it before it issued its determination report and made its recommendation to the Board. However, the PCC provided Mr Mangalassery with a copy of its determination report, including the recommendation, on 23 August 2019, the date the report was issued.

Mr Mangalassery's response to the PCC recommendations

[22] By email dated 26 August 2019, Mr Mangalassery advised the Chief Executive of the Board of his concerns about the PCC's recommendation and said he believed that the recommendation may hinder his future professional growth and the possibility of procuring other positions in the field of social work. He also said he intended to make a detailed written submission on the PCC's recommendation to the Chairperson of the Board.

[23] In a submission dated 21 October 2019 addressed to the Chairperson of the Board, Mr Mangalassery set out his views on the PCC's recommendation in some detail. Among other things, Mr Mangalassery said that since the PCC had found he had not breached his ethical duties or the Code of Conduct on the four aspects referred to it for consideration, the PCC's recommendation should have been that no further steps should be taken, and that the PCC's recommendation did not relate to the four aspects it had been required to consider. The submission also contested the factual bases of the PCC's recommendation.

The Board's decision

[24] The Board conveyed its decision to Mr Mangalassery in a letter dated 16 December 2019 from the Registrar of the Board.

[25] The letter said that the Board had carefully considered the PCC's determination report and Mr Mangalassery's submissions and advised that the Board had decided that it agreed with the PCC recommendation. The letter stated:

While the PCC found that the conduct concerns that it was asked to investigate were not established, during the course of the PCC's investigation, the PCC has identified some general underlying competence concerns within your social work practice which it has recommended be addressed. Accordingly, the Board has decided to implement the PCC's recommendation.

[26] The letter discussed options for implementing the recommendation and sought Mr Mangalassery's views. The letter did not make any comment on the substance of Mr Mangalassery's submission.

Mr Mangalassery's first appeal

[27] Mr Mangalassery appealed the Board's decision to the District Court in accordance with s 88 of the Act.

[28] The Board raised, as a preliminary issue, whether the District Court had jurisdiction to hear the appeal because s 88(2) provides that:

A person may appeal to the District Court against the whole or any part of a decision or order made in relation to him or her under Part 4 (other than a determination of a professional conduct committee).

[29] Judge G M Harrison, by judgment dated 16 November 2020, decided the preliminary issue. He held that the exclusion of any appeal of a determination of a PCC did not exclude an appeal of the decision of the Board made in response to a PCC determination.⁵

[30] As discussed above, Mr Mangalassery's substantive appeal was heard and decided by Judge McIlraith.

[31] In his decision, Judge McIlraith summarised Mr Mangalassery's position as follows:⁶

[31] In a nutshell, Mr Mangalassery's complaint is that having determined that there was no basis to the complaint against him, it was quite wrong for the PCC to then raise "additional matters" as he called them ... and then determine whether a recommendation should be made to the Board that he undertake mentoring and/or counselling. Rather, he considered that the PCC

⁵ *Mangalassery v Social Workers Registration Board* [2020] NZDC 22624 at [19].

⁶ *Mangalassery v Social Workers Registration Board*, above n 1.

ought to have determined that no further steps should be taken in relation to the compliant.

[32] Judge McIlraith went on to state:⁷

[36] I have a significant concern with the approach that the PCC took with respect to its final determination of the complaint against Mr Mangalassery. Having concluded that there was no breach of ethical duty or the code of conduct, with respect to the aspects of it identified by [the Board Chairperson], it is somewhat odd that having done so the PCC would then make formal recommendations in terms of s 71(1)(b).

...

[38] To articulate my concern precisely, I find it surprising that in reaching its conclusion at paragraph 74 of its determination of 23 August 2019, that “two further more general aspects of the case ... require discussion,” the PCC did not seek to discuss those matters with Mr Mangalassery. ...

[33] Judge McIlraith went on to find that, in making its recommendation, the PCC had failed to comply with its obligation with its obligation under s 71(3) of the Act to seek further input from Mr Mangalassery before it made its recommendation and with its obligation under s 67(2) to apply the rules of natural justice.⁸ Judge McIlraith also held that the Board had failed to provide full and meaningful reasons for its decision to implement the PCC’s recommendation,⁹ and had failed to explain why it had not accepted or commented upon the submissions Mr Mangalassery had made to the Board before it made its decision.¹⁰

[34] Judge McIlraith said that in his view, the decision the Board ought to have made was to not agree with the PCC’s recommendation and to refer the complaint back to the PCC for further consideration.¹¹ Accordingly, in exercise of his powers under s 91(2)(a) of the Act,¹² Judge McIlraith modified the Board’s decision and required the Board to refer the complaint back to the PCC for further consideration.¹³

⁷ *Mangalassery v Social Workers Registration Board*, above n 1.

⁸ At [40].

⁹ At [43].

¹⁰ At [44] – [45].

¹¹ At [45].

¹² Section 91(2)(a) of the Social Workers Registration 2003 provides that, on hearing an appeal, the District Court may confirm, reverse, or modify the decision or order appealed against.

¹³ *Mangalassery v Social Workers Registration Board*, above n 1, at [50].

[35] The Judge said:¹⁴

The PCC is to have the discussion it ought to have had with Mr Mangalassery. It should provide Mr Mangalassery with an opportunity to respond to the “further aspects” that formed the basis of its recommendation and is the required to consider afresh whether recommendations ought to have been made pursuant to s 71(1)(b)(v).

Mr Mangalassery’s second appeal

[36] Mr Mangalassery’s 35-page Notice of Appeal contained various criticisms of the legal and practical effect of Judge McIlraith’s decision to refer the complaint back to the PCC for further consideration.

[37] Following a case management conference, Venning J, by minute dated 20 April 2021, fixed the question of law for the appeal. Venning J also directed that the substantive hearing of the appeal should consider whether Mr Mangalassery requires leave to bring his appeal and, if so, whether Mr Mangalassery’s appeal was required to meet the threshold for leave for a second appeal set out in s 303(2) of the Criminal Procedure Act 2011 (CPA).

[38] I deal first with the procedural questions directed by Venning J: is leave required and, if so, what is the threshold for that leave?

Is leave to appeal required?

[39] The issue is whether pt 6 of the CPA applies to Mr Mangalassery’s appeal.

[40] Section 92 of the Act provides that, subject to s 96, the District Court’s decision on an appeal is final.

[41] Section 96 of the Act provides:

96 Appeal on question of law

- (1) If dissatisfied with a decision of the District Court as being erroneous in law, a party to an appeal under this Part may appeal to the High Court on a question of law only.

¹⁴ At [51].

- (2) The appeal must be heard and determined in accordance with rules of court.
- (3) Part 6 of the Criminal Procedure Act 2011 applies to the appeal—
 - (a) so far as it is applicable and with all necessary modifications; but
 - (b) only so far as it relates to appeals on questions of law.
- (4) Subsection (3) overrides subsection (2).

[42] It follows that Mr Mangalassery’s second appeal is limited to questions of law only and is subject to pt 6 of the CPA to the extent it is applicable.

Submissions of Mr Mangalassery

[43] Mr Mangalassery says that the CPA is not applicable because the subject matter of the complaint was not criminal and because, as confirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee*,¹⁵ it is well established that disciplinary proceedings are civil and not criminal in nature.

[44] Mr Mangalassery also refers to pt 20 of the High Court Rules 2016, which governs civil appeals. He notes that, although appeals under the CPA are excluded by from pt 20 by r 20.1(1)(a), r 20.1(2) provides that, for the purposes of r 20.1(1)(a), appeals under an enactment that incorporates provisions of the CPA are not appeals under the CPA. Mr Mangalassery invites the Court to conclude that pt 6 of the CPA is not applicable to his appeal under s 96 of the Act and that the appeal is governed only by pt 20 of the High Court Rules.

The Board’s submissions

[45] Mr Waalkens for the Board submits that s 96 if the Act is clear and that, while the CPA is focussed primarily on criminal proceedings, the Act has plainly imported pt 6 of the CPA. Mr Waalkens agrees that proceedings under pt 4 of the Act are civil proceedings but submits that the decisions in *Lim v Medical Council of New Zealand* and *Ministry of Business Innovation and Employment v Bell* support a finding that the CPA can and does apply to civil appeals, including disciplinary regimes such as that

¹⁵ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

under pt 4.¹⁶ Mr Waalkens agrees that pt 20 of the High Court Rules also applies to an appeal under s 96 of the Act but submits that pt 20 of the High Court Rules and pt 6 of the CPA can apply together.

Discussion

[46] I agree with Mr Waalkens that s 96 of the Act is clear and that pt 6 of the CPA applies to any appeal under s 96 to the extent applicable. I agree that proceedings under pt 4 of the Act are civil proceedings but that does not exclude the application of pt 6 of the CPA. The applicability of pt 6 of the CPA does not turn on the nature of the appeal under pt 4 of the Act but on the extent to which pt 6 of the CPA can sensibly apply to such an appeal.

[47] Part 6 of the CPA deals with all appeals that may be brought under the CPA and, in its various sub-parts, sets out the procedures applicable to first appeals and “further appeals” under those sub-parts.

[48] While s 96(3) provides that all of pt 6 of the CPA applies to the appeal under the Act, it was accepted in *Lim v Medical Council of New Zealand* that the effect of provisions similar to s 96(3) was to import only the requirements of sub-pt 8 of the CPA, which deals with appeals on questions of law.¹⁷ Indeed, some equivalent provisions in other disciplinary regimes refer only to sub-pt 8 of pt 6 of the CPA.¹⁸

[49] In *Ministry of Business Innovation and Employment v Bell*, Muir J considered whether the requirement to apply sub-pt 8 of pt 6 of the CPA to an appeal on a point of law under pt 4 of the Building Act 2004 required application of the procedures for first appeals under pt 6 of the CPA or the procedures for further appeals under that sub-part.¹⁹ Muir J concluded that categorising an appeal under pt 4 of the Building Act as a second appeal required fewer modifications and did less violence to s 296 of the CPA, the introductory provision of pt 6 of the CPA, than categorising it as a first

¹⁶ *Lim v Medical Council of New Zealand* [2016] NZHC 485; *Ministry of Business Innovation and Employment v Bell* [2018] NZHC 1662.

¹⁷ For example, *Lim v Medical Council of New Zealand*, above n 13, at [23].

¹⁸ For example, s 340 of Building Act 2004.

¹⁹ *Ministry of Business Innovation and Employment v Bell*, above n 13.

appeal.²⁰ Accordingly, Muir J considered that an appeal under pt 4 of the Building Act was governed by the “further appeal” provisions in pt 6 of the CPA, namely ss 303 to 308.²¹

[50] In *Lim v Medical Council of New Zealand*,²² Toogood J also accepted that the effect of a provision in the Health Practitioners Competence Assurance Act 2003, which confined second appeals to questions of law and imported pt 6 of the CPA to such appeals, meant that leave was required under s 303 of the CPA.

[51] I consider the analysis of Muir J in *Ministry of Business Innovation and Employment v Bell* is equally applicable to the circumstances of the present case. Muir J was dealing with the disciplinary regime under the Building Act which allowed a substantive appeal to the District Court from a decision of the Building Practitioners Board but then provided a further right of appeal on any determination of law arising in the appeal. In substance, the second appeal right under the Building Act was the much the same as the appeal right under s 96 of the Act.

[52] Accordingly, I find that the applicable provisions of pt 6 of the CPA to an appeal under the Act are ss 303 – 308 of the CPA. At this stage of the appeal process, the applicable provision is s 303, which establishes the requirement for leave and the threshold that must be satisfied before leave is granted.

[53] Section 303 provides:

- (1) A party to a first appeal under this subpart may, with the leave of the second appeal court, appeal under this subpart to that court against the determination of the first appeal.
- (2) The High Court or the Court of Appeal must not give leave for a second appeal under this subpart unless satisfied that—
 - (a) the appeal involves a matter of general or public importance;
or
 - (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

²⁰ At [25].

²¹ At [26].

²² *Lim v Medical Council of New Zealand*, above n 16, at [23].

[54] I also agree that s 303 of the CPA and pt 20 of the High Court Rules can be applied together. Rule 20.3 sets the requirements for seeking leave when an enactment provides that leave is required. It sets the timeframes within which leave must be sought but does not prescribe the tests that must be satisfied for leave to be granted. That is left for the enactment that requires leave to be obtained, in this case, s 303 of CPA.

[55] For these reasons, I conclude that:

- (a) In accordance with s 96 of the Act and s 303(1) of the CPA, Mr Mangalassery must obtain leave to appeal Judge McIlraith's decision; and
- (b) In accordance with s 303(2), leave must not be granted unless the Court is satisfied that the appeal involves a matter of general or public importance or that a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

Has Mr Mangalassery satisfied the threshold for leave?

[56] Mr Mangalassery says leave should be granted because an injustice may occur if leave it is not granted. Mr Mangalassery says that if the PCC were to confirm its original recommendation, after reconsideration as directed by Judge McIlraith, the recommendation has the potential to end Mr Mangalassery's fitness to practise as a social worker and to end his social work career.

[57] Mr Mangalassery also says that if leave is not granted a miscarriage of justice will have occurred because he will have been made subject to a decision based on a provision that was not in force at the time the complaint against him was made. Mr Mangalassery submits that that would be contrary to s 7 of the Interpretation Act 1999 which provides that an enactment does not have retrospective effect.

[58] Mr Waalkens for the Board submits that Mr Mangalassery's appeal does not raise any matter of general or public importance and that a miscarriage of justice has not occurred and would not occur if the appeal is not heard. Mr Waalkens notes that

Judge McIlraith considered matters of justice in his decision and that his decision to refer the complaint back to the PCC was based on natural justice considerations and would provide an opportunity for a prompt and sensible resolution of the matter.

[59] Mr Waalkens acknowledges Mr Mangalassery's concerns about the possible impacts of the complaint process on Mr Mangalassery's future employment but says that, even if the PCC were to confirm its recommendation, which is not a given, a direction that Mr Mangalassery undertake mentoring and counselling would not amount to a finding of culpability and ought not to have employment consequences.

Discussion

[60] Mr Mangalassery's first asserted ground of injustice is based on his view that a direction by the Board that he undergo mentoring and counselling amounts to a penalty and will have serious adverse employment consequences for him. While I accept that Mr Mangalassery's view is genuinely held, I consider it is based on a misunderstanding of the nature and purpose of any such direction and of its employment consequences. As I explain more fully in the next section of my judgment, such a direction is not a penalty and should not be regarded as such. I am satisfied that any such direction would be intended to assist Mr Mangalassery in his development as a social worker and, if appropriately explained, ought not to have employment consequences. Accordingly, I do not accept that an injustice of the kind asserted by Mr Mangalassery will result if his appeal is not heard.

[61] Mr Mangalassery's other asserted ground of injustice, based on s 7 of the Interpretation Act, does not take account of s 4(1) of that Act which provides that the Interpretation Act applies to any enactment that is part of the law of New Zealand unless the enactment provides otherwise. Schedule 1AA of the Act required the PCC to apply s 71 as amended by the Amendment Act to the complaint against Mr Mangalassery, even though the complaint was made before the Amendment Act was in force. It follows that the prohibition on retrospective application of legislation in s 7 of the Interpretation Act does not apply. No injustice can be said to have resulted to Mr Mangalassery from the PCC complying with Parliament's direction.

[62] Mr Mangalassery does not contend that his appeal involves a matter of general or public importance and Mr Waalkens submits that it does not. Mr Waalkens says the matters raised on appeal are highly fact specific and are unlikely to be repeated.

[63] While I was initially inclined to accept Mr Waalkens' submission, I have since come to a different conclusion because of the general nature of the question fixed by Venning J. That question asks whether the PCC can make recommendations on how the Board should deal with a social worker about whom a complaint has been made, even if the PCC has determined that there is no basis to the complaint. While, as I discuss below, I consider that question does not embrace what happened in Mr Mangalassery's case, the question is undoubtedly of general application to all social workers. I also consider it to be a question of general importance because it is relevant to the application of the Act's disciplinary regime to all social workers.

[64] Accordingly, I grant leave to Mr Mangalassery to bring his appeal.

Question of law fixed by Venning J

[65] The question of law fixed by Venning J in his minute of 20 April 2021 is:

Whether Judge McIlraith erred in finding that the PCC had jurisdiction to make a recommendation under s 71(1)(b)(v) of the Act in circumstances where the PCC had determined that there was no basis to the complaint against the appellant.

Preliminary issue as to question of law

[66] The question of law as fixed is based on the premise that the PCC had determined that there was no basis to the complaint against Mr Mangalassery. Judge McIlraith's decision also appears to have proceeded on the basis of that premise.

[67] Having reviewed the PCC's determination and the decision of the Board Chairperson referring the complaint to the PCC, however, I consider that that characterisation of the PCC's determination does not adequately take into account what the PCC was directed to consider or the scope of its determination.

[68] In her decision of 8 August 2018, the Board Chairperson referred four “aspects” of the complaint to the CAC, later the PCC: the three substantive aspects of the complaint *and* whether Mr Mangalassery breached his ethical duties and the Code of Conduct in relation to those aspects. That is, the PCC’s mandate was not limited to considering only whether Mr Mangalassery had breached his ethical duties and the Code of Conduct in relation to the three substantive aspects identified in the Board Chairperson’s decision. Given the terms of the Chairperson’s decision, the PCC could also consider and make recommendations on those substantive aspects in and of themselves, even if found that Mr Mangalassery had not breached his ethical duties or the Code of Conduct in relation to those aspects.

[69] I consider that this is what, in fact happened. The PCC did not state in its determination that there was no basis to the complaint. Rather, the PCC stated that it was satisfied that Mr Mangalassery had not breached his ethical duties or the Code of Conduct on the substantive aspects referred to it. It then went on to consider the “two further, more general aspects of the case that require discussion.”

[70] I consider that, when referring to these “further aspects”, the PCC was not referring to aspects of the complaint not covered by the four aspects referred to it by the Chairperson’s decision of 8 August 2018, as Mr Mangalassery alleges. Rather, the PCC was referring to the evidence given by Mr Mangalassery in relation to those four aspects.

[71] While the PCC was satisfied that Mr Mangalassery had not breached his ethical duties or the Code of Conduct in relation to the substantive aspects of the complaint, it was concerned about what it had observed of Mr Mangalassery when he had been giving evidence before the PCC on those aspects – namely his heavy reliance on written instructions and his reliance on his line manager and legal support to provide critical feedback on his intended actions. The PCC was also concerned that Mr Mangalassery appeared to have difficulty in reflecting upon his own actions.

[72] I consider that these were not matters external or in addition to the substantive aspects of the complaint that were referred to the PCC but arose directly in relation to the PCC’s consideration of those substantive aspects.

[73] For these reasons, I do not consider that the premise of the question fixed by Venning J is strictly correct. The PCC had not determined that there was no basis to the complaint. A more accurate framing of the question would have been:

Whether Judge McIlraith erred in finding that the PCC had jurisdiction to make a recommendation under s 71(1)(b)(v) of the Act in circumstances where the PCC had determined that Mr Mangalassery had not breached his ethical duties or the Code of Conduct.

[74] Nonetheless, because the question was fixed in the terms set by Venning J and argument proceeded on that basis, the rest of this judgment addresses the question fixed by Venning J.

Relevant provisions of the Act

[75] The purpose of the Act, as set out in s 3, is:

- (a) to protect the safety of members of the public, by prescribing or providing for mechanisms to ensure that social workers are—
 - (i) competent to practise; and
 - (ii) accountable for the way in which they practise; and
- (b) for the purposes of paragraph (a), to create a framework for the registration of social workers in New Zealand and determine their scopes of practice, and—
 - (i) establish a board to register social workers, and provide for its powers; and
 - (ii) establish a tribunal to consider complaints about social workers; and
- (c) ...
- (d) to enhance the professionalism of social workers.

[76] Part 2 of the Act sets out the requirements for registration as a social worker, for authorisation to practise within prescribed scopes of practice and for practising certificates. The Amendment Act inserted new ss 6AA and 6AAB, which require social workers to be registered under the Act if they are to hold themselves out as social workers. That was not the case before the Amendment Act.

[77] Part 3 provides for competence assessments of social workers to ensure they have the skill and knowledge required to practise as social workers in accordance with their registration, and to meet the professional standards reasonably to be expected of social workers. The Amendment Act imposed a new requirement on the Board to recognise ways for social workers to undertake professional development (s 38A). It also imposed obligations on employers to report to the Board if they consider a social worker may not be competent to practise (s 38B) or if they believe a social worker has engaged in serious misconduct (s 47A).

[78] Part 4 of the Act is headed “Discipline” and provides the procedures for complaints to be made, the referral of complaints to PCCs and the procedures to be followed by PCCs, and procedures for the determination of complaints.

[79] Section 59 provides that any person may make a complaint, orally or in writing, against a social worker to the Registrar of the Register of Social Workers (Registrar) or, if the complaint relates to provision of health or disability services, to Health and Disability Commissioner (Commissioner) appointed under the Health and Disability Commissioner Act 1994.

[80] Section 65 requires complaints to be referred to a PCC unless the Board or, in appropriate cases, the Commissioner consider the complaint does not need to be pursued.

[81] Section 66 provides that the Board may appoint two social workers and a person who is not a social worker to be a PCC in relation to a particular case or class of cases.

[82] Section 67(1) provides that a PCC may regulate its own procedure as it sees fit. The PCC must apply the rules of natural justice, the Act and any regulations made under the Act.

[83] Sections 68 and 68A empower a PCC to appoint a legal adviser to advise it on matters of law, procedure and evidence and to issue notices requiring the production

of documents and other information. Section 68B requires compliance with any such notice.

[84] Section 69 requires that the social worker is provided with the particulars of the complaint and of the intended membership of the PCC that is to consider the complaint.

[85] Section 71(1) provides for the determination of complaints and sets out the decisions and recommendations a PCC may take when determining a complaint. As noted above, the Amendment Act considerably expanded the range of actions and recommendations available to a PCC when determining a complaint.

[86] Prior to the Amendment Act, s 71(1) used to provide:

- (1) As soon as is reasonably practicable after a complaint or notice of conviction is referred to a complaints assessment committee, it must determine whether—
 - (a) the Board should review the competence or fitness of the registered social worker concerned to practise social work (or both); or
 - (b) in the case of a complaint, the committee should submit it to conciliation; or
 - (c) the committee should submit the complaint or conviction to the Tribunal; or
 - (d) no further steps should be taken under this Act in relation to the complaint or conviction.

[87] As a consequence of the Amendment Act, s 71(1) now provides:

- (1) As soon as is reasonably practicable after a complaint or notice of conviction is referred to a professional conduct committee, it must determine whether—
 - (a) the Board should review the competence or fitness of the social worker concerned to practise as a social worker (or both); or
 - (ab) the Board should review the social worker's individual scope of practice; or
 - (b) in the case of a complaint, the committee should—

- (i) submit it to conciliation or mediation; or
- (ii) recommend that the Board direct the social worker to apologise to the complainant; or
- (iii) recommend that the Board censure the social worker; or
- (iv) recommend that the Board refer the allegations to the Police for investigation; or
- (v) recommend that the Board direct the social worker to undertake 1 or more of the following:
 - (A) training;
 - (B) mentoring;
 - (C) counselling; or
- (c) the committee should submit the complaint or conviction to the Tribunal;²³ or
- (d) no further steps should be taken under this Act in relation to the complaint or conviction.

[88] Section 71(3) provides that before making its determination the PCC must give the social worker a reasonable opportunity to make a written explanation or statement in relation to the complaint and may give the social worker a reasonable opportunity to appear before it to make an explanation or statement.

[89] Sections 72 and 72A set out the procedures to be followed after a PCC has made its determination other than a determination that no further action is required. These include providing notice of the determination to the Registrar and the social worker. If the PCC has submitted a complaint to the Tribunal, the PCC must frame an appropriate charge and lay it before the Tribunal.

[90] The Amendment Act expanded the range of procedures to be followed to reflect the expanded range of options set out in s 71(1). The Amendment Act also inserted s 72A, which provides that, where the Board receives any recommendation made under s 71(1)(b)(ii) to (v), the Board must consider whether it agrees with the recommendation and, if it does agree, it must implement that recommendation. If the

²³ The Social Workers Complaints and Disciplinary Tribunal (Tribunal).

Board does not agree with the recommendation, it must refer the complaint back to the PCC for further consideration.

[91] Sections 75 and 76 set out the procedures to be followed when a charge is laid against a social worker. Sections 79 to 81 deal with the hearing by the Tribunal of the charge against a social worker.

[92] Section 82(1) sets out circumstances in which orders may be made under s 83. Such orders can only be made if the Tribunal is satisfied that the social worker:

- (a) Has been guilty of professional misconduct; or
- (b) Has been guilty of conduct unbecoming of a social worker and reflects adversely on the social worker's fitness to practise; or
- (c) Has been convicted of an offence punishable by imprisonment of a term of three months or more and in circumstances that reflect adversely on the social worker's fitness to practise; or
- (d) Has failed to comply with the social workers individual scope of practice in various specified ways.

[93] Section 82(2) provides that a social worker is guilty of professional misconduct if they breach the Code of Conduct, hold themselves out to be a registered social worker while not holding a current practising certificate, fail to report to the Board as required by s 51(1A) or commit an act or omission that, in the opinion of the Tribunal has brought or is likely to bring discredit to the social work profession.

[94] Section 83 sets out the orders the Tribunal may make if satisfied of any of the matters in s 82(1). Available orders include any or all of: cancellation or suspension of registration of the social worker, censure, a fine, requiring an apology and a direction that the social worker undertake additional training or professional development, or both.

[95] Clause 4(4) of Schedule 1AA provides:

A complaint or notice of conviction that is being considered by a complaints assessment committee and is yet to be determined immediately before the commencement date must be determined under section 71 as it reads on and after the commencement date.

Comment on purpose of Act and regulatory regime

[96] The purpose of the Act has two primary aspects:

- (a) Protection of the safety of the public by ensuring the competence and accountability of social workers; and
- (b) Enhancement of the professionalism of social workers.

[97] Those purposes are to be achieved by the registration requirements in pt 2, the competence assessment procedures in pt 3 and the disciplinary procedures in pt 4. Each of those parts has been strengthened by the changes made under the Amendment Act. Those changes go to both aspects of the purpose of the Act.

Submissions of the parties on questions of law

[98] Mr Mangalassery challenges the jurisdiction of the PCC to make its recommendation on a number of grounds set out at some detail in his notice of appeal and the two sets of written submissions filed prior to the hearing. Principally, Mr Mangalassery submits that:

- (a) In basing its recommendations on the “further aspects” beyond its findings that he had not breached his ethical duties or the Code of Conduct, the PCC acted outside the scope of its authority as established by the Chairperson of the Board and had no basis for making a recommendation that he receive mentoring and counselling;
- (b) Under the Act, the PCC is limited to deciding matters disclosed in the particulars of the complaint that are provided to the social worker under s 69;

- (c) Because the PCC found that he had not breached his ethical duties or the Code of Conduct, the PCC had found there was no basis for the complaint and had no jurisdiction to make recommendations based on “other matters” outside the scope of the complaint; and
- (d) The recommendation by the PCC that Mr Mangalassery receive training and counselling constitutes a recommendation that Mr Mangalassery should be punished or penalised even though the PCC held he had not breached his ethical duties or the Code of Conduct.

[99] For all these reasons, Mr Mangalassery says that the only action open to the PCC after it had found that he had not breached his ethical duties or the Code of Conduct was a determination that no further steps be taken.

[100] Mr Waalkens submits that the PCC’s recommendation was within the scope of its powers under the Act and that the PCC had good grounds for the recommendation given the matters it had identified in its interactions with Mr Mangalassery. Mr Waalkens says the recommendation was consistent with the purpose of the Act, was reasonable and not unfair or arduous, and within the broad discretion conferred on PCCs by s 71 of the Act.

[101] Mr Waalkens says that the effect of Mr Mangalassery’s position would be to read into s 71(1) of the Act a requirement that it make a finding of fault taking any action or making any recommendation other than a determination that no further steps should be taken.

Discussion

[102] Of the various challenges that Mr Mangalassery makes to the PCC’s recommendation, only that set out at [96](c) falls squarely within the question of law fixed by Venning J. However, given the effort and energy that Mr Mangalassery has put into preparing his case, I also address the other principal challenges he has raised.

Did the PCC act outside the scope of its authority?

[103] Mr Mangalassery submits that the PCC's recommendation was based on matters outside those referred to the PCC by the Board Chairperson and was outside the PCC's determination of those matters.

[104] I consider that submission misinterprets the Board Chairperson's direction for the reasons set out at [68] above. Accordingly, I do not accept that submission.

Was the PCC limited to deciding matters disclosed in the particulars of the complaint provided to Mr Mangalassery under s 69?

[105] Because I consider that the PCC's recommendation was based on the matters that had been referred to the PCC by the Board Chairperson, I do not accept that the PCC considered matters not disclosed in the particulars of the complaint provided to Mr Mangalassery. However, even if the PCC had based its recommendations on matters outside those disclosed in the particulars of the complaint, I do not consider the PCC exceeded its jurisdiction under s 71 of the Act for the reasons set out in the next section.

Does the PCC have jurisdiction to make a recommendation under s 71(1)(b)(v) of the Act in circumstances where it has determined that there was no basis to the complaint?

[106] This is the question fixed by Venning J. To answer it, it is necessary to consider the nature of the PCC's role and the scope of its powers under pt 4 of the Act.

[107] Under s 59, a complaint can be made by anyone and can be made orally or in writing. It cannot be assumed, therefore, that a complaint as referred to the PCC will necessarily encompass all of the issues to which a complaint may give rise once it has been investigated. It is quite possible that a PCC will find that a complaint is incomplete or misdirected and that other aspects of the performance of a social worker's performance should be addressed. For that reason, I do not accept that, when determining a complaint, a PCC is limited to dealing only with matters disclosed in the particulars of complaint.

[108] I am reinforced in that conclusion when regard is had to the nature of the actions that a PCC may take under s 71, as well as the purpose of the Act and the changes made by the Amendment Act.

[109] The scope of the PCC's role is not specified. It can be inferred from ss 65 to 71 that the role of the PCC in relation to complaints is to investigate a complaint and, in the light of that investigation, to refer the complaint to other bodies for final resolution or to make appropriate recommendations to the Board.

[110] In undertaking its investigatory role, a PCC must comply with requirements to ensure procedural fairness and the rules of natural justice, but it sets its own procedure. It is not, however, a prosecutor or a court. Nor is it, itself, a disciplinary body. Under ss 75 to 83 of the Act, it is the Tribunal that conducts formal disciplinary proceedings and may impose penalties, including penalties for breaches of the Code of Conduct.

[111] Except in a case where the PCC has concluded, under s 71(1)(d), that no further step should be taken, a PCC's possible actions under s 71(1) with respect to a complaint are limited to:

- (a) Submitting the complaint to conciliation or mediation (s 71(1)(b)(i));
or
- (b) Making recommendations to the Board (s 71(1)(b)(ii) – (v)); or
- (c) Submitting the complaint to the Tribunal (s 71(1)(c)).

[112] Broadly speaking, these three possible actions deal with consensual solutions (conciliation or mediation), administrative solutions (Board decision) and penal solutions (imposed through the Tribunal process).

[113] While the actions that may be recommended to the Board under s 71(1)(b) include measures that entail an element of coercion (e.g. requiring an apology or censure), the range of actions that may be recommended covers a broad scope and none is contingent upon any finding that the social worker has breached their ethical duties or the code of conduct.

[114] This latter aspect contrasts with the powers of the Tribunal under s 82 of the Act, which provides that the Tribunal may impose a penalty under s 83 only if it is satisfied that the social worker has been guilty of professional misconduct (which includes but is not limited to breaching the Code of Conduct) or that one of the other grounds set out in s 82(1) has been made out. Section 71(1), however, does not require any finding of guilt or failure by the PCC before it can take any of the actions set out in the section.

[115] I conclude, therefore, that a PCC is not required to find that a complaint has been made out, alone let find that there has been a breach of the Code of Conduct or a breach of ethical duties, before it can make a recommendation under s 71(1)(b).

[116] Of course, before making such a recommendation to the Board, the PCC must comply with its obligations to observe the rules of natural justice and give the social worker the opportunity to comment on the recommendation, as Judge McIlraith has held. But provided those procedural requirements are met, a PCC has the power to recommend any of the actions set out in s 71(1)(b).

[117] It is also inherent in the nature of some of the actions that a PCC may recommend that the PCC will have found the complaint to have had some basis when making those recommendations. A PCC could not reasonably recommend that a social worker be censured or required to apologise, or that the allegations in the complaint be referred to the Police, if the PCC was not satisfied there was some basis to the complaint. However, a recommendation under s 71(1)(b)(v) that a social worker undertake training, mentoring or counselling is of a different character. Training, mentoring and counselling are in the nature of assistance. Such actions are relevant particularly to the second aspect of the purpose of the Act: enhancing the professionalism of social workers. They are not penalties or punishments and do not imply or require any guilt or fault on the part of the social worker.

[118] It may be that a PCC will recommend that a social worker undertake training, mentoring or counselling if it considers a complaint to have been made out, but that is not a precondition to making such a recommendation.

[119] I am satisfied therefore, that if, when considering a complaint, a PCC comes to the view that a social worker needs or would benefit from training, mentoring or counselling, it has the jurisdiction to make that recommendation, even if it considers there is no foundation to the complaint.

[120] This conclusion is consistent with the changes made by the Amendment Act, which bolster both aspects of the purpose of the Act and broaden the range of actions that can be taken under s 71(1)(b), including with respect to complaints made but not decided when those provisions of the Amendment Act came into effect.

[121] For these reasons, I am satisfied that a PCC does not have to uphold a complaint before it can make a recommendation under s 71(1)(b)(v) of the Act. It follows that a PCC has jurisdiction to make a recommendation under s 71(1)(b)(v) in circumstances where it has determined that there was no basis to the complaint.

Does the PCC's recommendation that Mr Mangalassery receive training and counselling constitute a recommendation that Mr Mangalassery should be punished or penalised?

[122] The answer to this question is “No” for the reasons set out above. It is not a punishment or a penalty to require a social worker to undertake training, mentoring or counselling. I consider such measures are intended to help a social worker to improve their skills and professional development, not to penalise or punish them.

[123] One of the sad aspects of this case is that Mr Mangalassery has chosen to see the measures recommended by the PCC in this punitive light. He is quite mistaken in that regard and appears to have brought considerable distress upon himself and his family as a consequence of that misapprehension.

Conclusions and result

[124] For all these reasons, I find that:

- (a) In accordance with s 96 of the Act and s 303 of the CPA, Mr Mangalassery requires the leave of this Court before he can appeal Judge McIlraith's decision on Mr Mangalassery first appeal;

- (b) The question of law fixed by Venning J as the question on appeal raises a question of general importance and I grant Mr Mangalassery leave to appeal in accordance with s 303(2) of the CPA; and
- (c) Mr Mangalassery has not made out the substantive grounds of his appeal because I am satisfied that a PCC has jurisdiction to make a recommendation under s 71(1)(b)(v) even in circumstances where it has determined that there is no basis to the complaint.

[125] Mr Mangalassery's appeal is dismissed.

Concluding observation

[126] This decision has been based on the question of law fixed by Venning J. For the reasons I have explained, I do not consider that the question as fixed embraced what happened in Mr Mangalassery's case. However, had the question been fixed more narrowly as set out in [73] above, leave would not have been granted to bring the appeal and the appeal would have been dismissed. An appeal on that more limited basis would not have raised a question of general importance and the substantive merits of the appeal would have weighed decisively against Mr Mangalassery.

G J van Bohemen J