

**IN THE DISTRICT COURT  
AT MANUKAU**

**I TE KŌTI-Ā-ROHE  
KI MANUKAU**

**CIV-2020-055-000043  
[2021] NZDC 2809**

BETWEEN

MATHEWKUTTY JOSE  
MANGALASSERY  
Appellant

AND

SOCIAL WORKERS REGISTRATION  
BOARD  
Respondent

Hearing: 16 February 2021

Appearances: Appellant appears In Person  
S Waalkens for the Respondent

Judgment: 22 February 2021

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**RESERVED DECISION OF JUDGE R McILRAITH**

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[1] Mr Mangalassery is a registered social worker employed by Oranga Tamariki. He has been a registered social worker since 10 May 2012.

[2] Mr Mangalassery appeals against a decision of the Social Workers Registration Board of 16 December 2019.

[3] A complaint was made by Ms Te Tau about Mr Mangalassery's conduct as a social worker in relation to three children of Ms P. Ms Te Tau is also a registered social worker and Ms P was her client at the time the complaint was made. Although Ms Te Tau filed the complaint, essentially she passed on the complaint which was that of Ms P.

[4] Upon receipt of the complaint, the chairperson of the Social Workers Complaints and Disciplinary Tribunal appointed a professional conduct committee (PCC) pursuant to s 66 of the Social Workers Registration Act 2003 (the Act) to investigate the complaint.

[5] The PCC identified four particular complaints with regard to the manner in which Mr Mangalassery dealt with Ms P's children. At the conclusion of its investigation, it determined that Mr Mangalassery did not breach his ethical obligations or the code of conduct. It nevertheless recommended that Mr Mangalassery undertake counselling and mentoring. This recommendation was considered by the Board and it agreed.

[6] Mr Mangalassery did not accept this outcome and has appealed.

[7] The appeal has been before the court for some time. A jurisdictional issue was raised by the Board at an early stage. This issue was determined by Judge Harrison in his decision of 10 November 2020. In that decision, Judge Harrison concluded that this court has jurisdiction to hear Mr Mangalassery's appeal. The substantive appeal then took place before me.

### **Legislative framework and approach to appeal**

[8] The purpose of the Act is set out in s 3. It relevantly provides:

#### **3 Purpose**

The purpose of this Act 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—
  - (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) to provide for the Board to promote the benefits of registration of social workers—
  - (i) to departments of State, other instruments of the Crown, other bodies and organisations that employ social workers, and the public; and
  - (ii) among people practising social work; and
- (d) to enhance the professionalism of social workers.

[9] With reference to the making of a complaint regarding a social worker, s 71 provides for determination by a PCC:

**71 Determination of complaint or notice of conviction by professional conduct committee**

- (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 social work (or both); 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; or
  - (d) no further steps should be taken under this Act in relation to the complaint or conviction.

- (2) In making its determination, the committee—
  - (a) may undertake or arrange for any investigations it thinks necessary; and
  - (b) in the case of a complaint, may have regard to—
    - (i) any investigations or considerations of the subject matter of the complaint already carried out...  
...
    - (ii) the consequences (if any) of any investigation or consideration carried out.
- (3) Before making its determination,—
  - (a) the committee—
    - (i) must give the social worker a reasonable opportunity to make a written explanation or statement in relation to the complaint or conviction; and
    - (ii) may, on the social worker’s application or of its own motion, give him or her a reasonable opportunity to appear before it to make an explanation or statement in relation to the complaint or conviction; and
  - (b) in the case of a complaint, the committee—
    - (i) must give the complainant a reasonable opportunity to make a written statement in relation to it; and
    - (ii) may, on the complainant’s application or of its own motion, give him or her a reasonable opportunity to appear before the committee to make a statement in relation to it.

[10] With respect to the Board’s consideration of a PCC recommendation for resolving a complaint, s 72A provides:

**72A Board’s consideration of committee recommendation for resolving complaint**

- (1) On receiving a notice under section 72(2A) of any recommendation made under section 71(1)(b)(ii) to (v), the Board must consider whether it agrees with the recommendation and, if it does agree, it must implement it.
- (2) If the Board does not agree with a recommendation made to it, it must refer the complaint back to the committee for further consideration.
- (3) The Board must give written notice of its decision, the reasons for its decision, and any action it takes...

[11] With respect to appeals, s 91 provides:

**91 Procedure on appeal**

- (1) An appeal under this Part must be heard as soon as is reasonably practicable after it is lodged.
- (2) On hearing the appeal, the District Court—
  - (a) may confirm, reverse, or modify the decision or order appealed against; and
  - (b) may make any other decision or order that the person or body that made the decision or order appealed against could have made.
- (3) The District Court must not review—
  - (a) any part of a decision or order not appealed against; or
  - (b) any decision or order not appealed against at all.

[12] With respect to this Court's powers, s 93 is also relevant:

**93 Court may refer matter back for reconsideration**

- (1) Instead of determining an appeal under this Part, the District Court may direct the person or body whose decision or order is appealed against to reconsider, either generally or in respect of any specified aspect, the whole or any part of it.
- (2) The court—
  - (a) must state its reasons for its direction; and
  - (b) may give any other directions it thinks just as to the matter referred back for reconsideration.
- (3) The person or body—
  - (a) must reconsider the matter; and
  - (b) in doing so, must—
    - (i) take the court's reasons into account; and
    - (ii) give effect to the court's directions.

[13] This Court's approach to an appeal was considered by Judge Bergseng in *Craig*.<sup>1</sup> In that decision, Judge Bergseng noted that the Act is silent as to the nature of

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<sup>1</sup> *Craig v Social Workers Registration Board* [2016] NZDC 8283.

the appeal and that in such a case r 18.19 of the District Court Rules 2014 applies, requiring appeals to be by way of re-hearing. He set out the approach as follows:<sup>2</sup>

[16] The authoritative statement of law relating to such appeals is the Supreme Court's judgment in *Austin, Nichols & Co v Stichting Lodestar*.<sup>3</sup> In a general appeal on fact and law the court should come to its own view of the merits and the weight given to the decision under appeal is a matter of judgment. The court must act on its own view.<sup>4</sup>

[17] The Supreme Court observed that the appellant bears the onus of satisfying the appeal court it should differ from the decision under appeal. While the court has to arrive at its own assessment of the merits of the case it noted:

The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment.

[14] Judge Bergseng went on to observe that this approach required him to consider the criteria the appellant was required to meet in the circumstances of the appellant in *Craig*, and then consider the Board's approach to that matter before reaching his own decision.

[15] I agree with this assessment of the correct approach to this Court's role on appeal and shall adopt it.

### **Mr Mangalassery's grounds of appeal**

[16] Mr Mangalassery's notice of appeal of 9 January 2020 set out a number of grounds of appeal. He has since filed a number of sets of written submissions. The primary submissions filed in relation to this appeal were, however, those dated 15 December 2020.

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<sup>2</sup> At [16].

<sup>3</sup> *Austin, Nichols & Co, Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

<sup>4</sup> At [3].

[17] In his decision of 16 November 2020, Judge Harrison observed:<sup>5</sup>

[21] The essence of Mr Mangalassery's appeal was that once the PCC had determined that all four complaints against him should be dismissed, the PCC had no jurisdiction then to make its recommendation to the Board about his future supervision.

[18] Judge Harrison also noted a further issue that may require determination. That was:<sup>6</sup>

[22] ...The complaint was made on 31 May 2018. The Act was amended as of 28 February 2019. The amendments including s 71 and in particular the introduction of s 71(1)(b)(v) pursuant to which the PCC made its recommendations to the Board, then came into force but that section was not in force at the time of the complaint.

[19] In his submissions on behalf of the board, Mr Waalkens summarised Mr Mangalassery's grounds of appeal. He identified the key issues as being:

- (a) Whether the PCC had the power to make the recommendations it did under s 71(1) after deciding not to uphold the complaints against Mr Mangalassery; and
- (b) Whether the Board's decision was outside its powers under s 72A(1).

[20] Mr Waalkens noted that a range of other matters raised by Mr Mangalassery previously have not been pursued. I agree with Mr Waalkens' assessment with respect to the other grounds of appeal that have been raised at times by Mr Mangalassery and confirm that in my discussion with him during the hearing of this appeal, he confirmed such.

### **The complaint and process**

[21] The details of the complaint made about Mr Mangalassery are not relevant to my determination and given the privacy and confidentiality issues that arise, I will not go into any detail at all of the basis of the complaint. All that needs to be said is that a complaint was made by Ms Te Tau about aspects of Mr Mangalassery's work with

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<sup>5</sup> At [21].

<sup>6</sup> At [22].

respect to Ms P's three children and that, as noted earlier, this was referred by the Tribunal to a PCC.

[22] Ms Hughson, the chairperson of the Social Workers Complaints and Disciplinary Tribunal, wrote by letter of 6 August 2018 to Mr Mangalassery, recording that decision:

I have decided pursuant to s 65(1) that aspects of Ms Te Tau's complaint should be referred to a Complaints Assessment Committee (CAC) for consideration and determination under s 71 of the Act. Those aspects are as follows:

- (a) The circumstances surrounding Ms P's request for a female social worker for her children and Mr Mangalassery's response and/or conduct in relation to that request; and
- (b) The accuracy and basis for the information communicated by Mr Mangalassery in his social work reports and/or affidavits filed in the Family Court, including about Ms P's epilepsy and how that allegedly affected her ability to care for her three children at the relevant times; and
- (c) The alleged sharing of confidential information about Ms P and her fourth pregnancy with others in May 2018, including the content and timeliness of the information communicated; and
- (d) The allegation that Mr Mangalassery breached his ethical duties and the code of conduct in respect of any or all of the above aspects of the complaint.

[23] Ms Hughson concluded by noting: "I am satisfied that no other aspects of the complaint need to be pursued".

[24] I note at this point that what was referred to as a CAC at this point was subsequently known as a PCC, and the complaint was investigated by a PCC.

[25] Mr Mangalassery was given the opportunity (as is required under the Act) to object to the proposed membership of the PCC. He did so and changes were made to accommodate his views.

[26] The PCC followed a thorough process with respect to the complaint regarding Mr Mangalassery. I do not understand Mr Mangalassery to take any issue with its approach in terms of the manner of its investigation.



[27] The PCC's determination report was dated 23 August 2019. This report set out in detail the background to the complaint, the responses received from Mr Mangalassery, the information gathered by the PCC, details of its interviews, documentation received from Oranga Tamariki, the relevant professional standards and then set out its analysis regarding the complaint. It did so by commenting with respect to each of the four aspects identified in the complaint. The conclusion of the PCC is then set out:

[73] As set out above, the PCC has found that Mr Mangalassery did not breach his ethical duties and the code of conduct in terms of his obligations to:

- (a) Respect the cultural needs and values of Ms P and not engage in discriminatory behaviours;
- (b) Maintain accurate records and not mislead the Court in relation to her epilepsy; and
- (c) Respect Ms P's privacy and confidentiality in sending the 18 May 2018 email about her fourth pregnancy.

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

[75] During our interactions with Mr Mangalassery, the PCC have found that he had a heavy reliance on written interactions with Ms P and other professionals. Although this is to be commended on one hand for maintain ample written records of his work, social work remains a profession that relies on human interaction and dialogue. Although email exchanges can be used for conveying information, emails are a poor substitute for face to face conversation where empathy and compassion can be shared and witnessed when working to support clients and their parents.

[76] Secondly, the PCC were concerned about Mr Mangalassery's reliance upon his line manager or legal support to provide critical feedback on his intended actions. As a registered social worker, he is responsible for the actions that he takes in relation to his clients and that the absence of internal criticism is not a suitable check upon the appropriateness of his casework decisions.

[77] Finally, in the meeting with the PCC, Mr Mangalassery appeared to have difficulty in assessing what he could have done differently in relation to each of the three issues considered by the PCC. Principle 4.10 of the Code of Conduct states that registered social workers are expected to actively participate in supervision and critically reflect on practice. The PCC considers that Mr Mangalassery would benefit from professional development around self-reflective practice.

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

- (a) Effective and appropriate communication: when emails are suitable for dialogue/conversational exchanges, and when, instead, he should seek opportunities for face to face meetings;
- (b) Critical and reflective practice: including Mr Mangalassery's understanding of the role of line management and legal support within the work that he performs, and reflection on his own practice.

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

[28] Once this determination report was provided to Mr Mangalassery it was clear that he had difficulties with these recommendations. It was, of course, also provided to the Board. Mr Mangalassery emailed the Board regarding the PCC determination and set out extensive submissions, including with respect to the "further aspects" identified by the PCC and which were the basis for its recommendations.

[29] The Board considered the PCC determination and Mr Mangalassery's submissions at its meeting on 5 December 2019. The Board agreed with the PCC's determination and delegated implementation of the determination to Mr Paul Kirby, registrar of the Social Workers Registration Board. That was, I understand, the normal approach.

[30] In Mr Kirby's affidavit which was provided in support of the Board's position, he commented upon the Board's process:

[38] In considering Mr Mangalassery's submission, reliance was placed on the professional experts' recommendations into the practice of Mr Mangalassery in the PCC report. In the Board's view, and from my standpoint as registrar, it would be very difficult to ignore the PCC recommendation without going through another investigation.

[39] The Board tried to implement the PCC's recommendation in a way that was agreeable to Mr Mangalassery and tried to work with him to address the issues identified in the PCC's determination report.

## **Analysis**

[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 (I note the PCC referred to "further aspects") 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 ought to have determined that no further steps should be taken in relation to the complaint.

[32] He submitted that in deciding to recommend further steps, the PCC was not acting in accordance with its obligation to regulate its procedure in accordance with the rules of natural justice and, most importantly, was not acting in accordance with its obligation to give him a reasonable opportunity to comment upon the "additional issues" which the PCC saw fit to note in its decision.<sup>7</sup> Taking that position logically further, of course, Mr Mangalassery's complaint regarding the Board is that it simply agreed with the PCC's determination and advised accordingly without any apparent consideration of his submissions.

[33] While Mr Mangalassery accepted that he did have the opportunity to make submissions to the Board when it was making its decision in terms of s 72A, he submitted that this was all too late. He had been given no such opportunity to address the "further aspects" raised by the PCC and which it appeared had given rise to its recommendation.

[34] Mr Waalkens filed extensive written submissions and spoke to them orally during the hearing of this appeal. In those submissions, he sought to persuade me that the PCC had the power to make the recommendations that it did as the "additional matters" were not outside the scope of the terms of reference for the PCC. He referred to particular aspects of the complaint made and the findings of the PCC.

[35] Mr Waalkens also referred extensively to the purpose of the Act and, in particular, that its primary objectives are to ensure that social workers are competent and professional, that the interests of the public are safeguarded, and to enhance the professionalism of social workers. As he observed, plainly the PCC took the view that there was room for improvement in Mr Mangalassery's practice and it was in this

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<sup>7</sup> Section 67(2).

context that its recommendations for mentoring and/or counselling were made under s 71(1)(b) and, in his submission, these were not unreasonable and not unfairly or unduly arduous.

[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 Ms Hughson, it is somewhat odd that having done so the PCC would then make formal recommendations in terms of s 71(1)(b).

[37] While I respect entirely Mr Waalkens' submissions as to the purpose of the Act, and the objective of the PCC in making the recommendations that it did, in my view this overlooks the seriousness of the recommendations from a social worker's perspective. These recommendations are made in the context of a disciplinary matter (Part 4 of the Act is so described). While I appreciate the approach that the Board subsequently took to the recommendations and, in particular, that it wished to implement them in as "low key" a way as was practicable for Mr Mangalassery, once again this overlooks the potential seriousness of the recommendation made in terms of Mr Mangalassery's career.

[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. I am unclear as to exactly with whom it intended any discussion was to occur. If the PCC meant that it was an internal matter for it, then this should have been made clear. It was not. I can therefore understand Mr Mangalassery's frustration upon receipt of the decision that he was not given the opportunity for discussion and the opportunity to make submissions and provide further comments before recommendations were made.

[39] While Mr Waalkens sought to persuade me that the use of these words did not give rise to an obligation to consult or seek further input from Mr Mangalassery, and in this context he resisted my suggestion to him that s 71(3) was applicable, I do not accept Mr Waalkens' submission.

[40] Section 73(3) expressly requires that before making its determination, a PCC “must give the social worker a reasonable opportunity to make a written explanation or statement in relation to the complaint”. I appreciate that a full opportunity was given to Mr Mangalassery to comment and give an explanation with respect to the “complaint” but, in my view, once the PCC decided that there were “further aspects” that required discussion, this gave rise to an obligation to seek further input from Mr Mangalassery under s 71(3). Frankly, even if s 71(3) did not require that approach, in my view natural justice principles did so and, of course, s 67(2) requires a PCC to regulate its procedure as it thinks fit subject, of course, to the rules of natural justice.

[41] This appeal does, of course, not concern the decision of the PCC. I am very mindful of the observations of Judge Bergseng in *Craig* with respect to the deference that this Court on appeal may have to the technical knowledge and expertise of the Board. However, the difficulty for me on this appeal is that the Board in discharging its obligations under s 72A has acted, in my view, in a very perfunctory manner.

[42] As I noted, in his affidavit Mr Kirby explained the approach of the Board. While the Board considered Mr Mangalassery’s submission, which I note replied to a large extent to the “further aspects” which had been raised by the PCC decision and which gave rise to its recommendation, he nevertheless noted that while this information had been considered the Board it agreed with the PCC determination and “in the Board’s view, and from my standpoint of registrar, it would be very difficult to ignore the PCC recommendation without going through another investigation”.

[43] I do not consider that the approach described by Mr Kirby met the Board’s obligations. The Board must be required to give full and meaningful reasons for its decision. It cannot simply be a “rubber stamp”. While Mr Mangalassery was given a basic explanation of why the Board agreed with the PCC recommendation, no comment at all was made on his extensive submissions. Its decision was communicated to him in its letter of 16 December 2019.

[44] In the letter the Board noted:

The Board has now carefully considered the PCC’s determination report and your submissions dated 21 October. The Board has decided that it agrees with

the PCC's recommendations. 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 was 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 recommendations.

[45] Nowhere in this letter does the Board explain why it has not accepted Mr Mangalassery's submissions or even comment upon them. He had gone to considerable trouble to set out (over many pages) his responses. In terms of my approach to this appeal, this is problematic. I am not really in a position to assess the basis for the Board's decision as I have no information in front of me with respect to its views regarding Mr Mangalassery's explanation. I have only the very basic description from Mr Kirby and the decision letter. Had, of course, Mr Mangalassery been given the opportunity by the PCC to provide his explanation in relation to the "further aspects" when they arose, such that his responses could have been considered by the PCC before it made its recommendations, then, of course, it would not have been left to the Board to have to deal with Mr Mangalassery's submissions with respect to those matters. That is, regrettably, what occurred.

### **Did the PCC have jurisdiction under s 71(1)?**

[46] As a final matter I address the jurisdictional issue noted earlier.

[47] In my view the PCC did have jurisdiction to make the recommendations it did (had it followed the proper process). This investigation commenced on 31 May 2018 and the specific provision of the Act came in to force on 28 February 2019.

[48] As Mr Waalkens submitted, the complaint had not been determined prior to this date and it was therefore a complaint still in consideration. By virtue of Schedule 1AA of the Act, the complaint was required to be determined by the PCC based on s 71 of the Act as it read on 28 February 2019.

### **Result**

[49] Section 91 provides that on hearing the appeal an option available to me is to make any other decision or order that the Board could have made.

[50] An option available to the Board under s 72A was not to agree with the recommendation made to it and to refer the complaint back to the PCC for further consideration. In my view, that is the decision that the Board ought to have made. It ought to have noted that Mr Mangalassery had not been given the opportunity to comment upon the “further aspects” that were identified by the PCC in its determination. It ought not to have agreed with the recommendation made by the PCC without that step being taken.

[51] Accordingly, the outcome of this appeal is that the decision of the Board is modified in that the Board must now refer the complaint back to the PCC for further consideration. 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 then required to consider afresh whether recommendations ought to be made pursuant to s 71(1)(b)(v).

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Judge R McIlraith  
District Court Judge

Date of authentication: 22/02/2021

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.