IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV 2023-085-073
[2023] NZDC 15997

UNDER	Section 106(1) of the Health Practitioners Competence Assurance Act 2003
IN THE MATTER	of an appeal against a decision suspending a practising certificate
BETWEEN	ALISON JANE GOODWIN Appellant
AND	THE MEDICAL COUNCIL OF NEW ZEALAND Respondent

Hearing: 28 June 2023

Appearances: A L Holloway and K M Wills for Appellant
S Mount KC and S Waalkens for Respondent

Judgment: 7 August 2023

RESERVED DECISION OF JUDGE K D KELLY

Introduction

[1] This is an appeal against a decision of the Medical Council of New Zealand (MCNZ) to suspend the practising certificate of Dr Alison Goodwin on an interim basis.

Background

[2] Dr Goodwin is a medical practitioner registered with the MCNZ, the regulatory authority for medical practitioners under the Health Practitioners Competence Assurance Act 2003 (the Act).

[3] During the COVID-19 pandemic, Dr Goodwin made a number of public statements in which she imparted information and opinions about COVID-19 which, by her own admission, were contrary to majority medical views. These resulted in notifications or complaints by members of the public to the MCNZ.

[4] There is no suggestion that these communications occurred in the context of a doctor patient relationship.

[5] On 20 October 2021 the MCNZ resolved to:[1]

(a) refer the information about Dr Goodwin's conduct to a professional conduct committee (PCC) appointed under the Act;

(b) request that Dr Goodwin sign a voluntary undertaking (VU) to the effect that she would not make COVID-19 related communications contrary to Ministry of Health guidance, or which might undermine the national pandemic response in New Zealand; and

(c) issue a notice pursuant to s 35 of the Act notifying certain agencies that the MCNZ considered Dr Goodwin's conduct may pose a risk of harm to the public.

[6] Dr Goodwin was not agreeable to signing the VU on the terms requested by the MCNZ.

[7] As a consequence, by letter dated 22 November 2021 the MCNZ advised Dr Goodwin that it had resolved to propose to suspend her practising certificate.[2]

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[1] Letter from MCNZ to Dr Goodwin's lawyers Wotton + Kearney, dated 29 October 2021
[2] Letter from MCNZ to Dr Goodwin's lawyers Wotton + Kearney, dated 22 November 2021; the MCNZ

[8] On 2 December 2021, through her lawyer Dr Goodwin made submissions in response.

[9] Amongst other things, Dr Goodwin submitted that while she had not personally published or uploaded material, she was agreeable to engaging productively with the MCNZ about its concerns. To this end, Dr Goodwin offered to sign the VU subject to a number of caveats. While not agreeing to refrain from making statements contrary to Ministry of Health guidance, the tenor of Dr Goodwin's caveats are that she said would ensure that patients and prospective patients knew that her views were a minority view and were contrary to Ministry of Health guidance and its position in support of the national pandemic response. Dr Goodwin also said that she would offer to refer patients to other doctors who could provide advice on COVID-19 in line with the Ministry of Health guidance. The amended VU included a clause that Dr Goodwin could withdraw the VU on 14 days written notice to the Council.

[10] Otherwise, Dr Goodwin submitted further that the MCNZ letter dated 22 November 2021 fell short of establishing that suspension was necessary to protect the health and safety of the public, or that suspension was the only means available to address the concerns of the MCNZ. Dr Goodwin also submitted that no specifics were provided to her as to what aspects of her communications were contrary to prevailing medical evidence. Dr Goodwin also submitted that she was entitled to an explanation about how the position taken by the MCNZ was demonstrably justified in terms of s 5 of the New Zealand Bill or Rights Act 1990 (NZBORA).

[11] Subsequently, on 8 December 2021,[3] the MCNZ suspended Dr Goodwin's practising certificate on an interim basis pending the PCC investigation, with effect from 10 January 2022.[4]

[12] The MCNZ reasoned that Dr Goodwin's comments cast doubt on the appropriateness of her conduct in her professional capacity and did not meet the standards of the profession. The MCNZ said that the comments were not factual,

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also proposed to delegate to the Registrar the ability to rescind its decision to propose suspension if Dr Goodwin agreed to the terms set out it the VU

[3] Communicated to Dr Goodwin on 23 December 2021

[4] Letter from MCNZ to Dr Goodwin's lawyers Wotton + Kearney, dated 23 December 2021

scientifically grounded or consensus driven for the betterment of public health. Being unbalanced, selective, or inaccurate, the MCNZ considered that they threatened to erode public trust in the medical profession, and put the health and safety of the public at risk.

[13] The MCNZ did not consider that the amendments to the VU mitigated the risk that Dr Goodwin's public comments would undermine New Zealand's public health response to the COVID-19 pandemic.

[14] On 1 March 2022, while suspended, Dr Goodwin's practising certificate expired in accordance with its term.

[15] In July 2022 Dr Goodwin reapplied for her practising certificate which was subsequently reissued on 7 November 2022, ten months after it was first suspended. It is acknowledged by the MCNZ that it did not adequately communicate to Dr Goodwin that she could reapply for a practising certificate when her certificate expired in March.

The conduct in question

[16] Dr Goodwin's conduct centred around four videos posted online, and an open letter to which Dr Goodwin was a signatory.[5] In these communications, Dr Goodwin variously:

(a) said that the mainstream media and the COVID-19 advertising campaign was presenting only one view point of view and that informed consent included a patient knowing that the vaccine was new or experimental;

(b) challenged the effectiveness of the vaccine in stopping a person from catching COVID-19;

(c) said that there is no long-term safety data about the vaccine;

[5] Letter from MCNZ to Dr Godwin through her solicitors Wotton Kearney, dated 29 October 2021

(d) said that the vaccine was "cooked up in a vat of bacteria";

(e) questioned the strategy of lockdown when people need to be outside getting exercise and vitamin D, and referred to research using vitamin C for COVID-19;

(f) suggested that the Government should be looking into the use of Ivermectin and hydroxychloroquine;

(g) questioned the use of mass vaccination clinics as people would not be properly informed about the vaccine as an experimental medication;

(h) challenged a range of so-called "myths about COVID-19" namely that:

(i) COVID-19 related hospitalisations or deaths from vaccinations were not being hushed up;

(ii) the vaccine does not affect fertility;

(iii) that vaccines cannot harm children;

(iv) the vaccine does not cause magnetism;

(v) natural remedies and immunity are not more effective against COVID-19;

(vi) COVID-19 vaccines do not alter cellular DNA;

(vii) the vaccine cannot cause cancer;

(viii) the vaccines are not still experimental;

(ix) vaccine companies are not exempt from all liability;

(x) vaccines do not just reduce symptoms; and

(i) equated the infection rate of COVID-19 with influenza, and stated that the mortality rate for COVID-19 is about the same as that from natural mortality.

[17] Dr Goodwin questioned who was counting the long term cost of the lockdown; what could have been done for the health of the population with the money GP practices were getting paid for testing; and how the right to decline medical treatment fits with mandatory testing, masks, and vaccinations.

[18] The open letter questioned whether the measures that were being undertaken caused more harm than good, and challenged the Government to review its policies and priorities, including abandoning the use of lockdowns, managed quarantine, border restrictions, mask-wearing, and measures that lead to social isolation.

[19] Dr Goodwin considered it inappropriate and unethical to rollout a medical procedure to all of New Zealand that she said was new and still in clinical trials, and that to be fully informed patients need to know, amongst other things, that the risks of the vaccine are likely to outweigh any benefits given that, amongst other things:

(a) the vaccine has not been studied in pregnancy or the elderly;

(b) the vaccine has not been the subject of adequate monitoring of adverse reactions; and

(c) individuals under 60 years of age and otherwise healthy are at minimal risk of catching COVID-19.

[20] Upon complaints about these videos and the open letter being brought to her attention by the MCNZ, Dr Goodwin responded[6] explaining that she was discussing issues that she thought a member of the public might think relevant when making an informed choice about whether or not to accept a medical procedure. Dr Goodwin referenced a MCNZ 'Statement on Informed Consent' which advises doctors to discuss the benefits, risks, uncertainties and alternatives with regards to medical procedures. Dr Goodwin also said that in the communications she was pondering questions about the ethics of mandatory medical procedures, and about New Zealand's COVID-19 response strategy saying it would be good to have a discussion and debate about other options.

[6] Letter dated 16 September 2021

Legislation and statutory context

Health Practitioners Competence Assurance Act 2003, s 69(2)

[21] Section 69 of the Act reads, relevantly:

> (1) This section applies if a practitioner is alleged to have engaged in conduct that—
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> (a) is relevant to—
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> (i) a criminal proceeding that is pending against the practitioner; or
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> (ii) an investigation about the practitioner that is pending under the Health and Disability Commissioner Act 1994 or under this Act; and
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> (b) in the opinion of the responsible authority held on reasonable grounds, casts doubt on the appropriateness of the practitioner's conduct in his or her professional capacity.
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> (2) If this section applies, the responsible authority may order that—
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> (a) the practising certificate of the health practitioner be suspended; or
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> (b) 1 or more conditions be included in the health practitioner's scope of practice.

[22] As noted by Judge Harrop in *Canaday v Medical Council of New Zealand*:[7]

> [9] Section 69 does not exist in a vacuum. The principal purpose of the Act is:
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> *... to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions.*[8]
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> [10] The Act endeavours to achieve that purpose by providing, among other things, for a "consistent accountability regime" for all health professions.[9]
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> [11] The Council is the statutory authority responsible for the registration and oversight of medical practitioners in New Zealand. Its functions include receiving "information from any person about the practice,

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[7] *Canaday v Medical Council of New Zealand* [2022] NZDC 4436 [31 March 2022] at [9] – [21]
[8] Section 3(1)
[9] Section 3(2)(a)

conduct or competence of health practitioners, and, if it is appropriate to do so, act on that information".[10]

[12] The requirements and process for registration are set out in ss 11 to 25 of the Act. Once a doctor is registered, that registration continues until it is cancelled, although a doctor's practising certificate may be suspended on various grounds.

[13 Part 4 of the Act deals with complaints about, and the discipline of, health practitioners, with particular reference to PCCs and the Health Practitioners Disciplinary Tribunal (the Tribunal).

[14] PCCs are the investigative bodies established to gather information and make recommendations and/or determinations under s 80. As has occurred here, under s 68(1) of the Act, if the Council considers that information in its possession "raises one or more questions about the appropriateness of the conduct or the safety of the health practitioner", it may refer the information and any or all of those questions to a PCC. The Tribunal determines charges brought against practitioners by either a PCC or by the Director of Proceedings under the Health and Disability Commissioner Act ("the HDC Act").

[15] Part 5 of the Act deals with appeals from specified adverse decisions of the relevant authority such as the Council's interim suspension decision in this case.

[16] Section 109 provides that an appeal is by way of rehearing with the court having the power to confirm, reverse, or modify the decision or order appealed against and the ability to make any other decision or order that the Council could have made. Under s 111, instead of determining an appeal, the court may direct reconsideration by the Council of the whole or any part of the decision or order under appeal.

[17] Section 108 of the Act provides that a "decision or order against which an appeal is lodged under this Part continues in force unless the District Court or the High Court orders otherwise.

[18] … the relevant factors in exercising the s 69 discretion whether or not to suspend a practising certificate on an interim basis include the need for public protection, maintaining public confidence in the medical system by the maintenance of professional standards and the need for proportionality.[11] Of course the decision to suspend must also be reached fairly and taking into account any submissions made by the health practitioner. Section 69(3) of the Act provides:

> (3) The authority may not make an order under subsection (2) unless it has first—
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> > (a) informed the health practitioner concerned why it may make an order under that subsection in respect of the health practitioner; and

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[10] Section 118(f)

[11] *Lim v Medical Council* [2016] NZHC 485 at [28] and [29]

(b) given the health practitioner a reasonable opportunity to make written submissions and be heard on the question, either personally or by his or her representative.

[19] … there is an inherent tension between the public safety purpose of the power to suspend or impose conditions while an investigation is on foot, and the private rights of a health practitioner who is otherwise qualified and entitled to practise and earn a living.

[20] Parliament has, at least to an extent, addressed this tension by introducing some safeguards for practitioners within s 69. In addition to s 69(3), s 69(4) provides:

(4) The authority must order the revocation of an order under subsection (2) as soon as practicable after—

(a) the authority is satisfied that the appropriateness of the practitioner's conduct in his or her professional capacity is no longer in doubt; or

(b) the criminal proceeding on which the practitioner's suspension is based is disposed of otherwise than by his or her conviction; or

(c) if the criminal proceeding on which the practitioner's suspension is based results in his or her conviction, the authority is satisfied that no disciplinary action is to be taken or continued in respect of that conviction under the Health and Disability Commissioner Act 1994 or under this Act; or

(d) if the investigation on which the practitioner's suspension is based has been completed, the authority is satisfied that the practitioner will not be charged as a result of the investigation.

Issues on appeal

[23] The appeal is brought on twenty-nine grounds.[12] In essence, Dr Goodwin says that by suspending her in order to shut down her public speech, the MCNZ misinterpreted and misapplied s 69 of the Act in breach of the NZBORA.

[12] Notice of Appeal dated 9 February 2022, the appeal, however, does not engage the COVID-19 debate and the court is not invited to make any ruling about the effectiveness of the COVID-19 vaccine or response

[24] This raises two key issues for the Court:

(a) did Dr Goodwin's conduct justify any interim measures being taken under s 69 of the Act; and

(b) if the conduct did justify interim measures being taken, was the decision to suspend Dr Goodwin's practising certificate, a fair reasonable and proportionate response to the conduct?

[25] By way of relief, Dr Goodwin asks that the court reverse its decision suspending her practising certificate. Dr Goodwin submits, however, that there is no need to remake the decision as her practising certificate was re-issued on 7 November 2022.[13]

Preliminary Issue: Is the appeal moot?

[26] Given that Dr Goodwin asks that the court reverse but not to remake a fresh decision under s 69, a preliminary question arises as to whether the appeal is moot.

[27] Dr Goodwin submits that the appeal is not moot because she has, in effect, been censured without the benefit of a hearing before the Health Practitioners Disciplinary Tribunal and that the medical profession looks on suspension as evidence of serious wrongdoing. Dr Goodwin considers that a stigma persists as long as the decision of the MCNZ stands, and that a finding that the suspension was wrong will help undo what she considers to be serious damage to her reputation.

[28] The MCNZ adopts a neutral position but submits that Dr Goodwin is no longer suspended; there is no evidence of stigma; she can now practice and has been able to practice for months; and there is nothing on the public register to say that she has been suspended.

[13] Albeit with conditions that have since been removed

[29] The traditional position taken in New Zealand is that the courts will not hear an appeal "where the substratum of the … litigation between the parties has gone and there is no matter remaining in actual controversy and requiring decision".[14]

[30] In *R v Gordon*,[15] however, the Supreme Court citing *R v Secretary of State for the Home Department ex Salem*,[16] held that mootness is not a matter that deprives a court of jurisdiction to hear an appeal. The Supreme Court endorsed the position of the House of Lords in departing from the view that it would invariably be an improper exercise of appellate authority to hear appeals in relation to questions that have become moot. Nevertheless, the exercise of the authority to hear appeals in these circumstances should be exercised with caution[17] and appeals should not be heard where the decision will be abstract in nature; where the decision will have no practical effect on the rights of parties before the Court; or where they are purely advisory in nature.[18]

[31] In the present case, while there is no need to make a fresh determination, I do not consider the appeal falls within the scope of the general caution against hearing questions that have become moot.

[32] I accept that in the post COVID-19 climate Dr Goodwin's reputation is to some extent 'under a cloud' even if the worst of the storm is likely to have passed with the effluxion of time and the reissuing of her practising certificate. I also accept Dr Goodwin's evidence that she has been colloquially labelled as an 'anti-vaxxer' and that this label will have potentially adverse consequences for her reputation and future employment. While the decision being appealed is not one to which the notions of 'guilt' or 'innocence' readily apply, if Dr Goodwin is successful in obtaining relief, that may go some way to help remove any questions that remain about her reputation.

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[14] *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 at p 199 per Richardson J (CA)
[15] *R v Gordon* [2008] NZSC 56, [2009] 1 NZLR 721, at [14]- [15]
[16] *R v Secretary of State for the Home Department ex Salem* [1999] 1 AC 450
[17] at pp 456 and 457
[18] *R v Gordon* [2008] NZSC 56, [2009] 1 NZLR 721, at [18]

Approach on Appeal

[33] It is not disputed that the approach in *Austin Nichols & Co Inc v Stichting Lodestar* applies to an appeal under s 106:[19]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.

[34] The Supreme Court also said:[20]

> The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. 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. An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

Was the MCNZ correct to find that Dr Goodwin's conduct reasonably cast doubt on whether she would conduct herself appropriately in a professional capacity (s 69(1)(b))?

[35] I accept Mr Holloway's submission that during 2020-2021 the Government's response to the COVID-19 pandemic was the most prominent and important political and social issue in the country with decisions being made by the Government about matters that had profound impacts on people's lives.

[36] It is submitted by Mr Holloway that it is in this context that Dr Goodwin imparted in public fora, information and opinions about matters connected with COVID-19.

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[19] *Austin Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [16]
[20] At [5]

[37] It is submitted that no person is excluded from public discourse and debate because of their profession. While Mr Holloway accepts that a health practitioner can be disciplined for speech in limited circumstances, it is submitted that it cannot be wrong merely to hold and express opinions that are in the minority or unpopular. To do so, it is submitted, renders the protections in the NZBORA meaningless.

[38] By using its power to suspend Dr Goodwin, Mr Holloway submits, it effectively censored public speech otherwise protected by the right to freedom of expression under the NZBORA, inconsistent with its statutory jurisdiction. Moreover, it is submitted that the MCNZ suspended Dr Goodwin in circumstances where:

(a) it refused or failed to tell Dr Goodwin what parts of her public speech it disagreed with;

(b) Dr Goodwin offered a comprehensive undertaking to address what she assumed to be the concerns of the MCNZ; and

(c) the PCC subsequently decided that the conduct complained about did not warrant a civil disciplinary charge under the Act.

[39] In considering whether the threshold in s 69(1)(a)(ii) is met, I accept Mr Holloway's submission that the MCNZ's opinion must be "held on reasonable grounds". This means that the opinion of the MCNZ must be based on information on which Dr Goodwin had the opportunity to make submissions and be heard, and that information must provide a reasonable and logical basis for the conclusions drawn by the MCNZ.

[40] I also accept Mr Holloway's submission that the expression: "casts doubt on the appropriateness of the practitioner's conduct," means that s 69 is concerned with assessing the risk posed by a practitioner. A risk assessment is by its nature forward looking and involves considerations of the likelihood of some harm occurring as a result of some behaviour (and the gravity of any consequences arising from that behaviour).

[41] I also agree with the submissions of Mr Holloway that the concept of "appropriateness" denotes an element of materiality and that 'appropriateness' is informed by the concept of professional misconduct, a finding that is reserved for only serious conduct.[21] The degree to which it can be so informed, however, only goes so far.

[42] The court in *Williams v Professional Conduct Committee of the Medical Council*[22] described professional misconduct as behaviour which falls seriously short of that which is considered acceptable by competent, ethical and responsible practitioners, and must not be mere inadvertent error, oversight or carelessness. As Judge Harrop recognised in *Canaday v Medical Council of New Zealand*,[23] however, s 100 includes conduct which brings discredit to the profession. This conduct is not restricted to conduct while the health practitioner is practising as would be the case with the disclosure to the media of confidential patient material.[24] Moreover, s 100 in its current form has moved away from an approach that differentiates between levels of seriousness in the charges brought. That differentiation is now likely to be reflected in the penalty instead.[25]

[43] Further, s 69 provides for interim measures to be taken pending an investigation where there is doubt over the appropriateness of the practitioner's conduct in his or her professional capacity. The threshold for an interim measure being warranted because of some concern or doubt about a practitioner's behaviour, must be lower than that which applies following a full investigation where a full risk analysis is able to be undertaken.

[44] Accordingly, I agree with Judge Harrop in *Canaday*, that it is not correct to say that the expression "casts doubt on the appropriateness of the practitioner's conduct," means that the conduct must be serious and present a material risk to the health and

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[21] *Williams v Professional Conduct Committee of the Medical Council* [2018] NZHC 2472 at [36]
[22] *Williams v Professional Conduct Committee of the Medical Council* [2018] NZHC 2472 at [36]
[23] *Canaday v Medical Council of New Zealand* [2022] NZDC 4436 at [66]
[24] *IRG v A Professional Conduct Committee of the Psychologists Board* [2009] NZCA 274; [2009] NZAR 563 at [49] – [50]
[25] *IRG v A Professional Conduct Committee of the Psychologists Board* [2009] NZCA 274; [2009] NZAR 563 at [50]

safety of members of the public such as substance abuse or inappropriate sexual contact with patients. The bar is lower.

[45] Mr Holloway also submits that the phrase "professional capacity" must be sufficiently connected with aspects of a practitioners professional role which is regulated under the Act, namely where that practitioner is acting in a clinical role in the context of an individual doctor patient relationship.

[46] In this regard, Mr Holloway submits that the open letter does not oppose vaccination but rather engages on matters of public policy. In turn, it is submitted that in the videos Dr Goodwin acknowledges that her views differ from those of health officials and encourages people to listen to the Director-General of Health. The overall theme of Dr Goodwins' speech, it is submitted, is that the Government policy response to COVID-19 involved choices and trade-offs and that she did not agree with how the choices had been valued against each other, or the ultimate decisions made. It is submitted that Dr Goodwin considered that public debate about this issues was being shut down and that public messaging was inconsistent with best practice informed consent. It is further submitted that Dr Goodwin provided balance by noting that her views differed from others and that she might not be right.

[47] I do not agree with this submission. As the Court of Appeal said in *IRG v A Professional Conduct Committee of the Psychologists Board* the conduct is not restricted to conduct whilst the health practitioner is practising.[26] I consider, for example, that a doctor presenting on medical matters, whether that be to colleagues in a seminar context, or to members of the public as is the case here, assumes the mantle of the profession regardless of whether that doctor is in a clinical setting in a doctor patient capacity.

[48] In any event, I accept the submission made by Mr Mount that Dr Goodwin presented as a doctor in her communications and spoke on medical matters. At the time Dr Godwin was also seeing patients as a general practitioner. In her

[26] *IRG v A Professional Conduct Committee of the Psychologists Board* [2009] NZCA 274; [2009] NZAR 563 at [49] – [50]

introductions, Dr Goodwin outlined her history as a doctor and her training in lifestyle medicine. To an objective listener, Dr Goodwin was presenting as a practitioner.

[49] Nor do I accept the submission that Dr Goodwin engaged in a measured and responsible way in what is a significant public policy issue. Dr Goodwin's comments were such that they instilled doubt in the risks of COVID-19, the efficacy and safety of the COVID-19 vaccination programme, and suggested that vaccination posed a risk to the public. Whether this was by design or not is of little import.

[50] I accept that the risk arising from Dr Goodwin's comments is, as was spelled out by Dr Curtis Walker, the Chair of the MCNZ, that:[27]

> Individuals who contract COVID-19 are at the risk of serious illness and ongoing effects, as well as death. The highly infectious nature of the disease means the potential for a rapid spread of COVID-19 and resulting significant strain on healthcare systems is high.
>
> The overwhelming scientific evidence is that vaccinations assist in reducing the risk of serious illness in the event of infection and the risk of transmitting the virus to others. While scientific knowledge of COVID-19 and vaccine efficacy has developed over time, the evidence is and remains that vaccinations are vital in managing COVID-19 in the population.

[51] Further,[28]

> The potential for harm in distributing COVID-19 information that does not meet [the requirements of the joint statement with the Dental Council titled "COVID-19 and your professional responsibility"] is substantial. Within the community, there is a group of people who have been genuinely unsure about whether or not to get vaccinated, for a range of reasons. A significant number of people who have listened to information shared online could be influenced in their decisions about whether or not to get vaccinated.
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> To the extent that one or more people have decided not to get vaccinated when they otherwise would or may have done, then the potential effects go well beyond the effects on those people. Each such person will present a greater risk not only to themselves but to members of the community with whom they may interact. Those who are not vaccinated are more likely to spread the disease and more likely to suffer serious consequences themselves. Directly and indirectly, any individual decision not to get vaccinated is likely to place additional and unnecessary strain on New Zealand's healthcare system.

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[27] Report dated 3 May 2022 provided under District Court Rule 18.16 at para [33] – [34]
[28] Report dated 3 May 2022 provided under District Court Rule 18.16 at para [37] – [38]

[52] The joint statement with the Dental Council referred to, is dated April 2021. It states that while the MCNZ and the Dental Council respect an individual's right to have their own opinions: "there is no place for anti-vaccination messages in professional health practice, nor any promotion of anti-vaccination claims including on social media and advertising by health practitioners." The reasons for this are evident from Dr Walker's evidence.

[53] I do not need to determine whether this risk will eventuate. It is sufficient for the purposes of s 69 that the opinion held by the MCNZ about the nature of the risk was held on reasonable grounds.

[54] I do not accept the submission that Dr Goodwin's comments were balanced. It is disingenuous for a professional to make statements to the effect that 'others may disagree' or that they 'do not know whether everything presented is true' when the overall tenor of the communications is contrary to majority professional opinion which Dr Goodwin accepts her comments are.

[55] Standing back, and looking objectively at these communications, I am satisfied that they were intended to do exactly what the MCNZ said in its letter of 29 October 2022, namely to contradict the public health advice and directions issued by the Ministry of Health. I am also satisfied that the number of communications in public fora were likely to increase the likelihood that the public's trust and confidence in the public health response to the COVID-19 pandemic.

[56] I am also satisfied that there was no doubt that Dr Goodwin knew the nature of the harm with which the MCNZ was concerned. What is required is not a forensic examination of everything that was said, but there must be some evidence that the measure sought to be imposed will achieve the objective sought to be achieved. The Council gave Dr Goodwin an opportunity to put forward her position and she did so. I am satisfied that the reasons provided to Dr Goodwin were adequately summarised in the MCNZ's letters of 2 and 5 September, 8 October, and 22 November 2021. I accept the submission of Mr Mount that MCNZ was not required to provide a lengthy, judicial-style analysis of all of her statements and am satisfied that Dr Goodwin was not left in the dark as to the basis for the concerns and decision of the MCNZ. The

communications create the very risk that Dr Walker speaks about in his report and I am satisfied that Dr Goodwin would have been aware of this.

[57] The question, however, is whether the interim suspension ─ given that it limits Dr Goodwin's fundamental right to freedom of expression ─ is reasonable, and demonstrably justified in a free and democratic society. The burden to establish this is on the MCNZ.[29]

[58] The test is that set in *Hansen v R.*[30] Citing the supreme Court of Canada in *Multani v Commission scolaire Marguerite-Bourgeoys,*[31], Tipping J said the appropriate methodology to be applied to s 5 of the NZBORA is that two requirements must be met under the 'justification head'.[32] There must be a sufficiently important objective, and proportionality of the means chosen to achieve that objective. As Tipping J put it:[33]

> Whether a limit on a right or freedom is justified under s 5 is essentially an inquiry into whether a justified end is achieved by proportionate means. The end must be justified and the means adopted to achieve that end must be proportionate to it. Several sub-issues inform that ultimate head issue. They include whether the practical benefits to society of the limit under consideration outweigh the harm done to the individual right or freedom.

[59] While not a rigid test, but rather a framework for the court to ultimately address the question of justification,[34] in the present circumstances the application of this test involves consideration of the following questions:

(a) what is the importance of the objective sought to be achieved by the MCNZ;

(b) is the measure imposed by the MCNZ rationally connected to the objective;

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[29] *Yardley v Minister for Workplace Relations and Strategy* [2022] NZHC 291, at [65]
[30] *Hansen v R* [2007] 3 NZSC 7
[31] *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] SCR 256
[32] *Hansen v R* [2007] 3 NZSC 7, at [120] and following
[33] *Hansen v R* [2007] 3 NZSC 7, at [123]
[34] *Yardley v Minister for Workplace Relations and Strategy* [2022] NZHC 291, at [65]

(c) is the impairment caused by the measure greater than is reasonably necessary; and

(d) is the measure in due proportion to the importance of the objective?

[60] Broadly speaking, this equates to the requirement that the measure be fair, reasonable and proportionate.[35]

[61] In this regard, I do not agree with the submission of Mr Holloway that in *Canaday* Judge Harrop was wrong to find that NZBORA considerations 'fold into' the proportionality assessment that is required to be made. As Judge Harrop put it, even if s 14 of the NZBORA did not exist, the interim suspension cannot be upheld unless it is a fair, reasonable and proportionate response to the conduct and the risk identified as emanating from it.[36]

Was suspension a fair, reasonable and proportionate response to the conduct complained about?

[62] I am satisfied that the MCNZ was well placed to determine that the overwhelming scientific evidence is that vaccinations assists in reducing the risk of serious illness in the event of infection, and in transmitting the virus to others.

[63] The objective sought to be achieved by the MCNZ, however, was not directly that people be vaccinated. While that was a downstream goal, the objective sought to be achieved by Dr Goodwin's suspension was subtly different, namely that to ensure that Dr Goodwin's was not able to speak as a medical practitioner in a professional capacity.

[64] In this regard, I agree with Judge Harrop in *Canaday* that there is force in the distinction between statements made by a doctor who is able to say they are a practising doctor and those made by a doctor whose practising certificate has been

[35] *Lim v Medical Council of New Zealand* [2016] NZDC 2149 and [2016] NZHC 485, [2016] NZAR 447
[36] *Canaday* at [80]

suspended.[37] Accordingly, I am satisfied that the measure of suspension has a rational connection to the objective.

[65] I am also satisfied that the MCNZ was seized of the need to consider Dr Goodwin's freedom of expression. In its letter advising Dr Goodwin of its decision, the MCNZ noted Dr Goodwin's counsels' submission that Dr Goodwin's right to expression and the content of that expression is protected by the NZBORA.[38] Nevertheless, the MCNZ remained of the view that Dr Goodwin's conduct could cause harm to the New Zealand public and that it must exercise its authority to take steps in fulfilment of the purpose of the Act. The minutes of the meeting of the MCNZ held on 7 and 8 December 2021 also say that the MCNZ acknowledges an individual's right to express their opinions and views, but considered that considered that medical practitioners must do so consistently with the standards of professionalism and ethical conduct set by the MCNZ and reasonably to be expected within the medical profession.

[66] As per *Hansen v R,* however, I accept the submission from Mr Holloway that s 69 must be interpreted in a way that is the least restrictive of the rights in the NZBORA, in this case Dr Goodwin's right to freedom of expression. What the MCNZ was required to do was assess the impact of that right in the circumstances as well as the interests of those it considered would be affected by her communications, and consider what measures short of suspension, might otherwise have addressed the conflict,[39] given the impact on Dr Goodwin's NZBORA rights and the impact on her livelihood.

[67] In this respect, I am satisfied that the impairment caused by the sanction was greater than was reasonably necessary to achieve the objective that Dr Goodwin not challenge the COVID-19 response with the imprimatur that comes with being registered. In other words, suspension was disproportionate to the importance of the objective sought to be achieved.

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[37] *Canaday* at [93]
[38] dated 23 December 2021
[39] *Morse v Police* [2011] NZSC 45 at [17], and [105] – 106]

[68] While I accept that the MCNZ considered whether the VU as amended by Dr Goodwin was unlikely to sufficiently mitigate the risk associated with Dr Goodwin's comments,[40] I do not accept that suspension was the only practical way in which it could sufficiently addressed its concerns when faced with that VU.

[69] It may also have been possible for the MCNZ to have further negotiated a VU that was mutually acceptable, given that Dr Goodwin indicated that she was willing to engage productively with the MCNZ about its concerns. In rejecting the amended VU, the MCNZ could have made a further approach to Dr Goodwin to discuss its concerns with her amendments. If Dr Goodwin rebuffed that approach, then the MCNZ could have sought to impose conditions on Dr Goodwin's practising certificate along the lines of the VU. This would have allowed Dr Goodwin to continuing practising while still addressing the envisioned risk.

[70] By failing to do so the MCNZ did not properly consider whether other potentially available, and less draconian, options were available to it.

[71] On balance, I accept the submission of Mr Holloway that the MCNZ's decision to suspend Dr Goodwin was an inappropriate response to the risk with which the MCNZ was concerned.

Result

[72] The appeal is allowed.

[73] Pursuant to s 106 of the Act, the decision of the MCNZ is reversed.

[40] refer minutes of the MCNZ meeting of 7 and 8 December 2021

Costs

[74] The parties are invited to agree costs. Failing that, memoranda are to be filed and a decision will be made on the papers.

K D Kelly
District Court Judge