



New Zealand
Health Practitioners
Disciplinary Tribunal

Level 13, Mid City Tower, 139 Willis Street, Wellington 6011
PO Box 11649, Manners Street, Wellington 6142, New Zealand
Telephone: 64 4 381 6816 Facsimile: 64 4 802 4831
Email: kdavies@hpd.org.nz
Website: www.hpd.org.nz

DECISION NO

405/Den11/184P

IN THE MATTER

of the Health Practitioners
Competence Assurance Act 2003

-AND-

IN THE MATTER

of disciplinary proceedings against
**DR ALAN GRAHAM
THOMAS PAYNE**, registered
dentist and prosthodontic
specialist, Whangarei

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING held in Auckland on 22 September 2011

TRIBUNAL:

Mr Bruce Corkill QC (Chair)

Ms Amanda Kinzett, Dr Robert East, Dr Cathrine Lloyd and Dr

Brent Stanley (Members)

Ms Kim Davies (Executive Officer)

Ms Katherine O'Brien (Stenographer)

APPEARANCES:

Dr Jonathan Coates and Ms Amy de Joux for the Professional
Conduct Committee

Mr Harry Waalkens QC for the practitioner.

Introduction

1. On 17 June 2011, a Professional Conduct Committee (PCC) appointed by the Dental Council of New Zealand (DCNZ) charged that Dr Payne had been convicted of two charges of using false documents to obtain a pecuniary advantage, such conduct reflecting adversely on his fitness to practise.

The Charge

2. The charge stated:

“TAKE NOTICE that pursuant to sections 91 and 100 of the Health Practitioners Competence Assurance Act 2003 (“the Act”), a Professional Conduct Committee, appointed by the Dental Council of New Zealand under section 71 of the Act, has reason to believe that grounds exist entitling the Health Practitioners Disciplinary Tribunal to exercise its powers under section 100 of the Act, and charges Dr Alan Graham Thomas Payne, registered Dentist and Prosthodontic Specialist, now of Whangarei, has been convicted of offences that separately, or cumulatively, reflect on his fitness to practise (section 100(1)(c)).

PARTICULARS OF CHARGE ONE

1. On 12 October 2010 Dr Payne was convicted in the Whangarei District Court of:
 - (a) Two charges of using false documents to obtain a pecuniary advantage pursuant to section 257(1)(a) of the Crimes Act 1961, each offence being punishable by a term of imprisonment not exceeding 10 years, namely:
 - (i) Between 22 August 2007 and 8 December 2008, Dr Payne committed an offence against section 257(1)(a) of the Crimes Act 1961, in that he knowing the documents, namely 16 IP Dental Ltd invoices and/or quotations, to be forged, used the documents to obtain a pecuniary advantage, namely \$4,601.25; and
 - (ii) Between 24 October 2007 and 11 November 2009, Dr Payne committed an offence against section 257(1)(a) of the Crimes Act 1961, in that he knowing the documents, namely 56 IP Dental Ltd invoices and/or quotations, to be forged, used the documents to obtain a pecuniary advantage, namely \$1,653.75.
 - (b) One charge of obtaining by deception and without claim of right a pecuniary advantage pursuant to section 240(1)(a) of the Crimes Act

1961, this offence being punishable by a term of imprisonment not exceeding 7 years, namely:

- (i) *Between 24 April 2007 and 11 November 2009, Dr Payne committed an offence against section 240(1)(a) of the Crimes Act 1961, in that he by deception and without claim of right obtained possession of a pecuniary advantage, namely \$3,515.61.*

The convictions set out in paragraph 1(a) and 1(b), either separately or cumulatively, reflect adversely on Dr Payne's fitness to practise under section 100(1)(c) of the Act."

Legal Principles:

3. The burden of proof was on the PCC.
4. As to standard of proof, the appropriate standard is the civil standard, that is proof to the satisfaction of the Tribunal on the balance of probabilities, rather than the criminal standard. The degree of satisfaction called for will vary according to the gravity of the allegations. The greater the gravity of the allegations the higher the standard of proof.
5. In the decision of *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1, a majority of the Supreme Court stated that in civil proceedings in New Zealand (including disciplinary proceedings) there is a civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them. The Court endorsed the classic passage of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362 to the effect that the affirmative of an allegation must be made out to the reasonable satisfaction of the fact finder. Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal.

6. Section 100(1)(c) of the Act provides that a registered health practitioner may be disciplined by the Tribunal where “... *the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise*”.
7. In *Pittwood* (84/Ost06/42P), there is a careful review of the second limb of the phraseology, “*reflects adversely*”, which this Tribunal adopts.
8. In *Zauka* (Decision 236/03/103C, 4 August 2003) the Medical Practitioners Disciplinary Tribunal was required to consider a similar provision – section 109(1)(e) of the Medical Practitioners Act 1995. That Tribunal, guided by observations of the District Court in *CAC v CM* [1999] DCR 492, stated:

“It is not necessary that the proven conduct should conclusively demonstrate that the practitioner is unfit to practise. The conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine. But not every divergence from recognised standards will reflect adversely on a practitioner’s fitness to practise. It is a matter of degree.”

9. In *Murdoch* (76/Phys06/45P), the Tribunal stated:

“Fitness to practise cannot, in the context of a conviction, relate only to the practitioner’s clinical ability. It must also involve a moral consideration and conduct which offends the law or is immoral or unethical, must affect adversely on the practitioner’s fitness to practise. Registration carries with it obligations to behave in a way which is ethical, honest and in accordance with the law. Failure to uphold the law or dishonesty must adversely affect a practitioner’s fitness to practise.”

10. In *Professional Conduct Committee v Martin* (Gendall J, 27 February 2007, CIV-2006-485-1461) the Court stated:

“‘Fitness’ often may be something different to competence. ... Aspects of general deterrence as well as specific deterrence remain relevant. So, too, is the broader consideration of the public or community’s confidence and the upholding of the standards of the nursing profession.” (paragraph [46])

11. The Tribunal accepts and applies the above principles, in this case.

The Hearing

12. The hearing was able to proceed on the basis of an Agreed Summary of Facts, which stated:

1. *Dr Alan Graham Thomas Payne has been registered with the Dental Council as a dentist and specialist prosthodontist since August 1998.*
2. *At all relevant times, Dr Payne was in part-time professional practice in Dunedin, and had a full time appointment as an Associate Professor, Head of the Department of Oral Rehabilitation and Associate Dean of Postgraduate Studies at the School of Dentistry, University of Otago.*

Dr Payne's prosthodontic practice

3. *Between 19 April 1999 and late 2009, Dr Payne was in a business relationship with Dr Raymond George, a general dentist, and Dr George's company Raymond J George Dental Surgeon Ltd.*
4. *Dr Payne provided specialist prosthodontic services to patients that had been referred by Dr George, or who had been referred by other general dentists in Otago, Southland, and Canterbury. The prosthodontic services that Dr Payne provided included treatment planning, fabrication of removable partial and complete dentures, advanced fixed crown and bridgework and implant-supported prostheses.*
5. *As part of providing prosthodontic services, Dr Payne engaged the services of a number of dental technicians and dental laboratories, and ordered sets of artificial denture teeth required from a number of different dental suppliers.*
6. *At all material times, the business relationship between Dr Payne and Dr George was governed by a contract dated 12 June 2003 between Dr Payne and Dr George's company. The contract provided that:*
 - (a) *Dr Payne would provide specialist prosthodontic services at the premises housing Dr George's dental practice, at 10 George Street, The Octagon, Dunedin. Patients would be charged for the service by Dr George's company;*
 - (b) *Dr Payne would be reimbursed by Dr George for any specialist laboratory costs, implant hardware costs, and bad debt recovery costs incurred. This included the costs of the artificial denture teeth used for each patient. Dr Payne would then receive, by way of remuneration, a commission equal to 50% of the remaining fees. Dr George would receive the remaining 50%;*

- (c) *Dr Payne's costs and commission would be paid by Dr George weekly, and would be calculated off the practice receipt book.*
7. *One of the laboratories that Dr Payne used was IP Dental Ltd, a sole trader company operated by Ian van Staden. Mr van Staden knew Dr Payne, as they were in the same Department of Oral Rehabilitation at the School of Dentistry, undertaking some research together.*
 8. *Mr van Staden provided laboratory services to Dr Payne through IP Dental Ltd, from October 2003 until 31 March 2009. On 31 March 2009, Mr van Staden ceased trading as IP Dental Ltd and filed cessation documents with the IRD. Mr van Staden continued to provide laboratory services to Dr Payne through his new company, Revitalise Ltd, from 1 April 2009 until sometime in May 2009.*
 9. *Payment for laboratory work and denture teeth was Dr Payne's responsibility. Dr Payne would then present the relevant laboratory invoices, and his own handwritten invoices for the supply of the denture teeth, to Raymond J George Dental Surgeon Ltd for reimbursement.*
 10. *The invoices were presented to Dr George by Dr Payne each week. Dr Payne would provide a schedule that outlined the breakdown of Dr Payne's charges, including the total laboratory fees that were to be reimbursed, and the 50% commission that was payable to Dr Payne.*
 11. *The staff of Raymond George Dental checked the invoice totals against the laboratory fees figure listed in the covering schedule. The detail on the laboratory invoices, and on the handwritten invoices for the supply of denture teeth, was accepted on trust as being genuine, and Dr Payne was reimbursed for the costs he claimed, and was paid his 50% commission.*

Issues with invoices

12. *In or around late November 2009, Mr van Staden and Dr George became aware that Dr Payne had been continuing to present invoices for work purported to have been performed by IP Dental Ltd to Raymond J George Dental Surgeon Ltd for reimbursement.*
13. *In or around late November or early December 2009, Dr George became aware that Dr Payne's handwritten invoices for sets of teeth appeared to suggest that Dr Payne was providing two sets of teeth for each patient. This attracted the attention of Dr George and Mr van Staden, who considered it to be outside the normal general dental practice of supplying just one set of artificial denture teeth to construct a denture.*
14. *On or about 5 December 2009, Mr van Staden laid a formal complaint with the Police.*
15. *On or about 6 December 2009, Dr George laid a formal complaint with the Police.*

Dr Payne's explanation

16. *Dr Payne provided a detailed explanation to the Police on 21 April 2010 as part of the Police investigation.*

Further explanations were provided by Dr Payne to the Dental Council by letters dated 3 May 2010 and 17 May 2010.

Criminal charges and convictions

17. *In or around late September or early October 2010, the Police charged Dr Payne with submitting false invoices to Raymond J George Dental Surgeon Ltd, overcharging the company and thereby obtaining a monetary gain.*

18. *Dr Payne pleaded guilty to three charges and, on 12 October 2010, Dr Payne was convicted of the following offences in the Whangarei District Court:*

- (a) *Two charges of using false documents to obtain a pecuniary advantage pursuant to section 257(1)(a) of the Crimes Act 1961, each offence being punishable by a term of imprisonment not exceeding 10 years, namely:*

- (i) *Between 22 August 2007 and 8 December 2008, Dr Payne committed an offence against section 257(1)(a) of the Crimes Act 1961, in that he knowing the documents, namely 16 IP Dental Ltd invoices and/or quotations, to be forged, used the documents to obtain a pecuniary advantage, namely \$4,601.25.*

As stated in the Police summary of facts, these 16 false IP Dental Ltd invoices included work that was actually completed by Dr Payne. Dr Payne had created the false invoices from genuine invoices sent to him electronically by IP Dental Ltd; and

- (ii) *Between 24 October 2007 and 11 November 2009, Dr Payne committed an offence against section 257(1)(a) of the Crimes Act 1961, in that he knowing the documents, namely 56 IP Dental Ltd invoices and/or quotations, to be forged, used the documents to obtain a pecuniary advantage, namely \$1,653.75.*

As stated in the Police summary of facts, these 56 false IP Dental Ltd invoices detail work solely completed by Dr Payne. Dr Payne created the false invoices from genuine invoices sent to him electronically by IP Dental Ltd. Eight of the invoices contained over-charged amounts to a total of \$3,307.50 with the loss to Raymond J George Dental Surgeon Ltd being 50% of this amount, namely \$1,653.75.

- (b) *One charge of obtaining by deception and without claim of right a pecuniary advantage pursuant to section 240(1)(a) of the Crimes Act 1961, this offence being punishable by a term of imprisonment not exceeding 7 years, namely:*

- (i) *Between 24 April 2007 and 11 November 2009, Dr Payne committed an offence against section 240(1)(a) of the Crimes Act 1961, in that he by deception and without claim of right obtained possession of a pecuniary advantage, namely \$3,515.61.*

As stated in the Police summary of facts, this charge related to 60 of Dr Payne's own invoices relating to the purchase of teeth that he submitted for reimbursement. The invoices include charges for multiple sets of the same teeth (albeit there were variances in colour). Although Raymond J George Dental Surgeon Ltd provided reimbursement for the cost of the extra sets of teeth to Dr Payne, the teeth themselves remained the property of Dr Payne. A small number of teeth were returned to suppliers but on these occasions Raymond J George Dental Surgeon Ltd did not receive its share of any credit provided to Dr Payne by the suppliers. The amount over-charged was \$7,031.23 with the loss to Raymond J George Dental Surgeon Ltd being 50% of this amount, namely \$3,515.61.

19. *The Court ordered that Dr Payne perform 200 hours of community work and pay a total of \$9820.61 in reparation. Dr Payne paid the reparation in full on 13 October 2010, and completed his community work on 10 December 2010.*
20. *Dr Payne now resides in Whangarei. He is employed jointly at Dent Street Dental and Gentle Dental Company practising general dental practice and specialist prosthodontics. He also continues to hold significant associate editorship and reviewer responsibilities to international dental journals, as well as contributing to academic textbooks on removable prosthodontics for students of dentistry.*
13. An issue arose at the hearing as to whether a set of further documents should be received by the Tribunal. Those documents consisted of the District Court Judge's sentencing notes, and several emails and documents which outlined aspects of the issues which gave rise to the charges brought against Dr Payne.
14. The PCC submitted that those documents ought to be received as evidence because:
- They would assist the Tribunal to understand exactly what it is that Dr Payne did that resulted in him being convicted of three criminal offences.
 - Because the Tribunal had received in the Agreed Bundle of Documents Dr Payne's explanations as to what had occurred, it was also appropriate to have evidence as to how the two principal victims described the events.

- The documents would assist the Tribunal when considering the impact of the offending on Dr Payne's professional colleagues.
15. For Dr Payne it was submitted that the various categories of document were either not relevant, or that any (minimal) probative value would be significantly outweighed by the prejudicial effect of the documents being introduced.
16. The Tribunal determined that:
- (a) The issue was to be dealt with under Clause 6 of Schedule 1 of the Act, which provides it may receive as evidence any statement, document, information or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not such evidence would be admissible in a Court of law.
 - (b) The District Court Judge's sentencing notes should be admitted. The Tribunal considered that the document would assist it to deal effectively with the issues before it, since the sentencing notes would indicate the various aggravating and mitigating factors which the Court had considered relevant, and explain the seriousness of the convictions which the Tribunal needed to have some understanding about in order to determine the extent to which these matters reflected on fitness to practise. Further, the remarks made by the District Court Judge were made in public, and the Tribunal should have knowledge of those in order to obtain an understanding as to the extent to which the public comments reflect adversely on Dr Payne and on the profession generally.
 - (c) As far as the background documents were concerned, however, the Tribunal was not persuaded on a provisional basis that those documents needed to be introduced. It was not the role of the Tribunal to relitigate the matters giving rise to the conviction; rather, the focus for the Tribunal would be on the fact of the convictions, and the respects in which those convictions reflect adversely on Dr

Payne's fitness to practise. If, however, at the penalty stage (assuming the Tribunal got to that stage) it became necessary to know more about the background factors, then the Tribunal would review its ruling.

Convictions reflect adversely on fitness to practise:

17. Counsel for Dr Payne accepted that both limbs of the section 100(1)(c) were established. That said, the Tribunal nonetheless had the obligation to satisfy itself as to the components of the charge.
18. Evidence of the convictions obtained in the District Court were placed before the Tribunal. There are three convictions, in respect of offences punishable by imprisonment for a term of three months or longer.
19. Having regard to the legal principles set out above as to the term "*reflects adversely on ... fitness to practise*", the Tribunal considers this requirement is made out for the following reasons:
 - The convictions related to the dishonest use of 132 invoices, for Dr Payne's own financial gain. The offending was premeditated.
 - The offending covered a period of more than two and half years (April 2007 – November 2009)
 - The offending occurred in a professional environment and was linked to Dr Payne's professional practice. It included forging a professional colleague's invoices (Mr van Staten and IP Dental) to the financial detriment of Dr Payne's professional partner (Dr George). It involved as the sentencing Judge stated a breach of trust.

- During the period of offending Dr George was terminally ill, and for at least part of the period Dr Payne was aware of this.
 - Because the charges involved an assertion of forgery, and in each instance, deliberate intent, the events which unfolded cannot be put down to oversight or inadvertence. They were deliberate acts.
20. Dr Payne's actions were immoral, unethical and involved significant breaches. Given the very serious breaches of professional standards, discipline is undoubtedly warranted.
21. Consequently these events reflect adversely on his fitness to practise.
22. The charge is accordingly made out.

Penalty

23. The PCC in its submissions on penalty:
- (a) Referred to legal principles with regard to the objects of sentencing, which are set out more fully below.
 - (b) Referred to a number of cases which it submitted were relevant, where orders of cancellation of registration had been made, following convictions in a criminal court. These were the cases of *Bain*¹, *Condon*², *Dassanayake*³, *Philipiah*⁴, *Healey*⁵, *Pollock*⁶, *Pellowe*⁷, *Sellwood*⁸, *Singleton*⁹.

¹ 387/Nur11/176P

² 23/Nur05/13P

³ 554/98/31C

⁴ 264/03/114C

⁵ 123/Nur07/70P

⁶ 95/Nur06/38P

⁷ 137/Phar07/74P

⁸ 391/Mrt11/178P

⁹ 398/Phys10/158P

- (c) Referred to a number of suspension cases following convictions, namely *Satya*¹⁰, *Winefield*¹¹, *Palmer*¹², *Burton*¹³, *Marchand*¹⁴, *Chiew*¹⁵. All cases referred to by the PCC are commented on below.
- (d) It was submitted that a starting point for the imposition of penalties must be the cancellation of Dr Payne's registration having regard to the seriousness of the matter. Multiple aggravating factors were referred to, and these are commented on below.
- (e) Alternatively, the PCC submitted that a lengthy period (9 -12 months) of suspension would be appropriate.
- (f) Finally, it was submitted that other orders, including conditions regulating any return to practice should be made. An order for costs was also sought.

24. For Dr Payne it was submitted:

- (a) As the District Court Judge had stated in her sentencing notes, Dr Payne's actions were stupid; it was accepted that there had been significant errors of judgment and it was completely inappropriate for Dr Payne to have documented the charges as being from a third party.
- (b) Dr Payne had been under enormous stress. That stress, following the laying of complaint and Police interviews, had resulted in him resigning from his position at the School of Dentistry at the University of Otago.
- (c) He had fully co-operated with all matters from the commencement of the Police investigation, to payment of reparation, to the undertaking of the PCC

¹⁰ 365/Phar10/169P

¹¹ 60/Phar/06/30P

¹² 96/Phys06/43P

¹³ 142/Phar/07/78P

¹⁴ 280/Med09/133P

¹⁵ 180/Phar08/96P

investigation. He had not sought suppression of name or details, and the principle of proportionality meant that factor had to be taken into account.

- (d) He had suffered immeasurably as a consequence of the convictions, and financial information in that regard was provided.
- (e) As a result of his actions, he had had to withdraw from an academic appointment that had been offered to him. In short, there had been a very significant fall from grace.
- (f) Excellent references were provided from a wide variety of academic and professional colleagues.
- (g) The offending was completely out of character, and there was no material or real risk of re-offending.
- (h) DCNZ had been aware of the matter from the start and appropriate voluntary undertakings had been given.
- (i) He was currently working as an employee, with 60% of his time in dentistry being devoted to removable and fixed prosthodontic work, the remaining 40% being general dental practice.
- (j) Counsel then referred to the appropriate legal principles, discussed below.
- (k) It was submitted that the evidence before the Tribunal indicated Dr Payne had insight, and was fit to continue practising as a dentist.
- (l) Dealing with the options open to the Tribunal, cancellation was a penalty of last resort; such was inappropriate here.
- (m) Suspension has the primary purpose of protecting the public; but it was submitted that such an outcome was not needed in the present case and that the imposition of conditions would provide adequate and effective protection against the extremely minimal risk of any repeat. Suspension would also cause irreparable harm to both the practitioner and his wife.

- (n) Suspension would result in patients, and professional colleagues with whom he was currently working, being disadvantaged and inconvenienced.
 - (o) Submissions were made regarding the other cases to which reference had been made by the PCC, and it was submitted that they were all very different on their facts, and of limited assistance to the Tribunal. However, if the Tribunal determined that an order of suspension must be made, then as in previous cases suspension itself should be suspended for a period of time during which Dr Payne could be recalled to the Tribunal to revisit the matter.
 - (p) Finally, submissions were made as to costs, which are considered below.
25. Dr Payne then addressed the Tribunal. He apologised for what had happened, acknowledging that he had let family, colleagues and profession down. He said he would never be able to recover from that, noting that not only members of the local dental community in New Zealand were aware of his downfall, but also members of the international community. He stated that he would accept the ruling from the Tribunal. He characterised the events as being out of character and said they had arisen through excessive workload, and resulted in him making “*stupid mistakes*”, the events were inappropriate and unbecoming of someone within his profession.

Penalty - Legal Principles:

26. In determining the appropriate penalties, the Tribunal recognised the following functions of disciplinary proceedings:
- (a) To protect the public – this object is reinforced by section 3 of the HPCA Act;
 - (b) To maintain professional standards – this object is emphasised in *Taylor v General Medical Council* [1990] 2 All ER 263; *Ziderman v General Dental Council* [1976] 2 All ER 344 and *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720;

- (c) To punish the practitioner in question, as referred to in *Dentice v The Valuers Registration Board* (Supra) and *Patel v Complaints Assessment Committee* (CIV-2007-404-1818, 13 August 2007 Lang J);
- (d) Where appropriate, to rehabilitate the practitioner, as referred to in *J v Director of Proceedings* (CIV-2006-404-2188, 17 October 2006, Baragwanath J), and *Patel* (supra).
27. In *A v PCC* (5 September 2008, Keane J, CIV-2008-404-2927), the Court discussed carefully the range of sanctions available to the Tribunal, particularly cancellation and suspension.¹⁶ The Court stated that four points could expressly be derived from the authorities, and implicitly a fifth:
- “[81] *First, the primary purpose of cancelling or suspending registration is to protect the public, but that “inevitably imports some punitive element”. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is ‘some condition affecting the practitioner’s fitness to practise which may or may not be amenable to cure’. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.*
- [82] *Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v B (HC Auckland, HC4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele the General Medical Council [2005] EWHC 2143, though ... the maintenance of public confidence ... must outweigh the interest of the individual doctor, that is not absolute – ‘the existence of the public interest in not ending the career of a competent doctor will play a part’”*
28. In numerous cases, the need to consider and explain why lesser options have not been adopted is emphasised. But the Tribunal has to proceed on the basis of what is appropriate, having regard to the public interest, and the need to maintain public confidence in the profession.¹⁷ Randerson J put the matter in this way:

¹⁶ Paras 77-82.

¹⁷ *Patel*, supra, para 30 per Lang J; *L v The Director of Proceedings*, Woodhouse J, 25 March 2009, CIV-2008-404-2268 [47-48].

“[30] *The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist’s fitness to practise against the need for removal and its consequences to the individual: Dad v General Dental Council [2002] 1 WLR 1538. As the Privy Council further observed at 1543:*

Such consequences can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.

[31] *I respectfully adopt the observations of the Privy Counsel and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case. As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.”¹⁸*

Penalty – Discussion:

29. The Tribunal considers that there are the following aggravating factors:

- (a) The seriousness of the offending, and the period over which that offending occurred.
- (b) The Tribunal notes that two of the convictions were for forgery, and one for obtaining by deception. These were deliberate and dishonest acts. Dr Payne must have known that what he was doing was wrong.
- (c) There were significant breaches of trust, as already stated, which occurred in a professional environment.
- (d) For part of the period of the offending, Dr Payne knew that Dr George was terminally ill.

¹⁸ *Patel v The Dentists Disciplinary Tribunal* HC AK AP77/02, 8 October 2002.

- (e) Dr Payne was in a position of authority, responsibility and trust at University, holding teaching responsibilities for undergraduate and post graduate students. Put shortly, he should have known better.

45. There are the following mitigating factors:

- (a) Dr Payne pleaded guilty to the criminal charges, and acknowledged his culpability in respect of the professional charge. There has been a high degree of co-operation in resolving this matter, and in that respect Dr Payne has acted responsibly. Included in this is the fact that he informed DCNZ of the circumstances (although initially maintaining an explanation which was not consistent with the facts contained in the Summary of Facts placed before the Court for the purposes of the conviction).
- (b) In all other respects, it appears Dr Payne has been a highly competent and well regarded practitioner and academic with a strong professional reputation.
- (c) He has taken appropriate advice in relation to his circumstances. Although it was submitted to the Tribunal that he had considerable insight into his circumstances, the Tribunal considered that he was reluctant to accept outright, at least in his statement to the Tribunal, that the offending was dishonest and deliberate. That said, however, the totality of the evidence before the Tribunal satisfies it that there is a low risk of any comparable reoffending.
- (d) Dr Payne, and his wife, have already suffered significant financial detriment as a result of these matters.

46. The Tribunal has considered the previous cases that were placed before it very carefully; the cancellation cases to which reference was made are cases where the offending on which the conviction was based were so serious as to have resulted in the imposition of custodial sentences; and they involved a wide range of differing circumstances. Most of

the remaining cases resulted in orders of suspension, but in two instances the order of suspension had itself been suspended¹⁹.

47. Whilst, as is clear from the case law, consistency is desirable and full regard must be given to other cases, in the end each case is dependent on its own facts. None of the cases referred to are directly similar to this case although the supervision cases are more similar having regard to the penalties imposed by the Courts. However that is only one factor. The main issue for the Tribunal is to consider what disciplinary penalties are appropriate having regard to the Tribunal's evaluation of fitness to practise.
48. Taking all factors into account, the Tribunal considered that the public interest and the maintenance of standards required a combination of suspension orders and conditions. The suspension order would take the form of a period of suspension for 9 months, suspended for 24 months with the matter being able to come back to the Tribunal for reconsideration if need be. The conditions are of a rehabilitative nature, to ensure that after the traumatic events Dr Payne has undergone, there are safeguards to ensure competence and fitness to practise. The Tribunal also considers this is a case where there is a public interest in not ending the career of a competent health professional.
49. The final issue related to costs. The Tribunal was advised that:
 - (a) The costs of the PCC were \$25,000, not inclusive of GST.
 - (b) The costs of the Tribunal were \$17,607, not inclusive of GST.
50. The authorities require the Tribunal to take 50% of reasonable costs as a starting point, and then increase or decrease that amount having regard to the circumstances of the case.
51. An aspect of the PCC's costs which required consideration was that the charge had initially been laid not only under section 100(1)(c) but under section 100(1)(b), that is, a charge of professional misconduct based on the assertion that the conduct brought discredit to the profession. It is apparent that the PCC incurred costs investigating this

¹⁹ E 345/Med10/155P and *Marchand* 250/Med09/133P

aspect of the matter which was ultimately not pursued. The Tribunal was advised that the full extent of the PCC costs was in the order of \$5,000 - \$6,000. The Tribunal concluded that the correct starting point for the PCC costs should be to work from a starting point of \$22,500.

52. The case was able to proceed on the basis of an Agreed Summary of Facts, and in an efficient way, as a result of the co-operation of Dr Payne. That is a matter that can be reflected in the costs order.
53. The Tribunal must also consider Dr Payne's limited financial circumstances.
54. Taking all those factors into account, the Tribunal concluded that a correct percentage of the costs is 30%. Accordingly, Dr Payne should contribute to the costs of the PCC in the sum of \$6,750, and to the costs of the Tribunal in the sum of \$5,250.
55. Censure is an important order; such an order makes clear to the practitioner and to the profession that the conduct it has been required to consider is inappropriate. Accordingly such an order is made in the present case.

Conclusion

56. The charge is established.
57. The following penalties are imposed:
 - 56.1 Dr Payne is suspended for a period of 9 months; however, the order of suspension is suspended for a period of up to 24 months from the date of hearing of 22 September 2011. Leave is reserved to the PCC to apply to the Tribunal in respect of any matters which arise during the 24 month period such as non-compliance with the conditions imposed below, or for any other disciplinary reason. If such an application is made, the suspension order (that is of 9 months) will come forward for reconsideration by the Tribunal and possible immediate application. If there is no matter raised which is raised

before the Tribunal in the 24 month period, or beyond it in respect of events during that period, the order of suspension (that is for 9 months) will lapse.

56.2 The following conditions on practice are imposed for a period of 3 years:

56.2.1 There shall be professional supervision of Dr Payne on the following terms:

- The supervision shall be to the satisfaction of DCNZ, the focus of supervision being to ensure that these conditions are being met.
- The supervisor is to be appointed by DCNZ.
- The supervisor is to meet with Dr Payne quarterly and report to the DCNZ quarterly.
- Dr Payne will meet the cost of professional supervision.

56.2.2 Dr Payne may not practise on his own account and may not own or manage a practice except as may be otherwise authorised by DCNZ and subject to conditions as it may impose.

56.2.3 Dr Payne shall establish and maintain a therapeutic relationship with his medical practitioner, the identity of whom is to be advised to DCNZ by Dr Payne. He is to authorise his medical practitioner to inform DCNZ if at any time his fitness to practise is likely to detrimentally affect public safety. He has confirmed to DCNZ that he has done so.

56.2.4 Dr Payne is not to undertake any financial transactions directly with patients, or with any external dental service provider. This does not preclude quoting or estimating costs of treatment with patients. Nor

is he to undertake any financial commitments on behalf of an employer.

56.2.5 Any employer is to be made aware of these penalties and is to be provided with a copy of this decision.

56.3 Censure: an order of censure is made. The Tribunal must express its strong disapproval for the conduct which has given rise to the serious convictions it was required to consider.

56.4 Dr Payne is directed to pay costs as follows; on such terms as DCNZ may require:

56.4.1 In respect of the costs of the PCC, the sum of \$6,750, with no GST being payable.

56.5.2 In respect of the costs of the Tribunal, the sum of \$5,250, with no GST being payable.

56.5 The Tribunal directs that a copy of this decision and a summary be placed on its website. It further directs that a notice stating the effect of the Tribunal's decision be placed on the DCNZ's website and in the Newsletter of the Dental Council of New Zealand.

DATED at Wellington this 11th day of October 2011

B A Corkill QC
Chair
Health Practitioners Disciplinary Tribunal