



New Zealand  
Health Practitioners  
Disciplinary Tribunal

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**DECISION NO:** 445/Den11/198P

**IN THE MATTER** of the Health Practitioners  
Competence Assurance Act 2003

**AND**

**IN THE MATTER** of a charge laid by a Professional  
Conduct Committee against **DR S**,  
registered dentist

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HEARING** in Wellington on 14 March 2012

**TRIBUNAL:** Mr B A Corkill QC (Chairperson)

Ms A Hauk-Willis, Dr C Lloyd, Dr W Ross and Dr S Salis  
(Members)

Ms G Fraser (Executive Officer)

Ms T Murray (Stenographer)

**APPEARANCES:** Ms A Miller and Ms A De Joux, for the Professional Conduct  
Committee

No appearance for Dr S

**Introduction:**

1. Dr S is a registered dentist.
2. On 15 November 2011, a Professional Conduct Committee (PCC) laid a disciplinary charge against Dr S under the Health Practitioners Competence Assurance Act 2003 (the Act).
3. The hearing was held on 14 March 2012. Initially, Dr S advised that he would participate in the hearing; he attended the initial timetabling conference, and subsequently there were various communications from the Executive Officer to Dr S, including arrangements being made for written submissions to be provided by a lawyer retained on his behalf (but who was not instructed to appear); shortly before the hearing, Dr S advised the Executive Officer that he would not be attending the hearing. The Tribunal was, however, satisfied that Dr S was fully on notice as to the charge and the arrangements for the hearing. This went to the extent of him agreeing a summary of facts as well as providing the written submissions mentioned above.

**The Charge:**

4. At the commencement of the hearing, Counsel for the PCC made an application to amend the charge, effectively shortening the period during which it was alleged that Dr S had practised without an Annual Practising Certificate (APC). The Tribunal was satisfied that advance notice of the application to amend had been given to Dr S and his lawyer, and that as the amendment involved reducing the period under review it could not be said there was any prejudice to him. Accordingly the charge was amended, so that it proceeded in the following form:

*"Particulars of charge*

*Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Dr S, a registered dentist, practised the profession of dentistry between on or after 1 October 2010 to on or around 30 April 2011, when he did not hold a current practising certificate.*

*This is a ground on which a health practitioner may be disciplined under section 100(1)(d) of the Act."*

**Facts:**

5. As indicated above, the charge was able to be heard on the basis of an agreed summary of facts which stated:<sup>1</sup>

"1. Dr S has been registered as a dentist since ...<sup>2</sup> 1972, initially under the Dental Act 1963, then the Dental Act 1988, and later under the Health Practitioners Competence Assurance Act 2003.

**Background**

2. From the date of his registration Dr S has been required to hold a current annual practising certificate (APC) entitling him to practise the profession of dentistry.
3. From the date of his registration until 31 May 2006, the practising certificate cycle for dentists and dental specialists was 1 June – 31 May each year.
4. In 2006 the practising certificate cycle for dentists and dental specialists was changed to a 1 April – 31 March year. To effect this change, the APC issued on 1 June 2006 was for a shorter 10 month period, and expired on 31 March 2007.
5. In 2010 the practising certificate cycle for dentists and dental specialists was changed from a 1 April – 31 March year, to a 1 October – 30 September year.

**Dr S**

6. On or around 26 February 2010 the Dental Council sent a standard form letter to all dentists and dental specialists advising that:

*As you are aware your Annual Practising Certificate (APC) is due for renewal on 1 April 2010. You will receive your application to renew your APC in early March.*

*This year will see the first step in a two step process to change the APC cycle for dentists and dental specialists to a 1 October – 30 September practising year. Under the Act we are unable to put in place an 18 month APC, therefore we have implemented a 6 month transition period to enable us to apply the new annual cycle from October this year.*

*Accordingly the APC which you will receive in April will be for a period of 6 months only; and you will then be required to apply for an*

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<sup>1</sup> The summary of facts has been anonymised having regard to the non-publication orders made – see below.

<sup>2</sup> Information removed having regard to order of non-publication.

*APC for the period 1 October 2010 – 30 September 2011, in September 2010.*

*The Dental Council has approved a six month fee of \$374.00 for all Dentists and Dental Specialists for the period 1 April 2010 – 30 September 2010.*

*The move from a 1 April - 31 March APC cycle to a 1 October – 30 September cycle is a consequence of two things:*

- *a requirement to gain efficiencies to smooth the extreme volume of processing currently faced by the secretariat in March and April each year; and*
- *a recognition that dentists and dental specialists face other costs as at 31 March in each year, for example, professional indemnity insurance premiums and NZDA membership fees.*

...

7. *The Dental Council's March 2010 newsletter, which was sent to all oral health practitioners, also advised that:*

***APC Cycle for Dentists and Dental Specialists***

*The practising certificate cycle for dentists and dental specialists has been changed from a 1 April - 31 March year to a 1 October – 30 September year. The Dental Council cannot by law issue a practising certificate for a period of more than one year.*

*Accordingly, to effect this change, there will be two APC cycles over the next 18 months for dentists and dental specialists.*

*The practising certificate to be issued on 1 April 2010 will be for a six-month period ending on 30 September 2010, at which time a second cycle will begin, with practising certificates being renewed on 1 October 2010 for the year ending 30 September 2011.*

*As a result of this change, a half-year practising fee of \$374 is payable by dentists and dental specialists for the practising period 1 April – 30 September 2010.*

*The change in practising year for dentists and dental specialists is aimed at spreading the Secretariat workload throughout the year. This will result in a reduction in operating costs.*

*[emphasis in original]*

8. *On or around 3 March 2010 the Dental Council sent an application form for the 1 April 2010- 30 September 2010 practising certificate to all practising dentists and dental specialists. The guidance notes that were included on this form advised practitioners that:*

## ***Annual Practising Certificate***

### ***Guidance Notes***

#### ***1 April 2010 – 30 September 2010***

***The Practising Certificate cycle for dentists and dental specialists is being changed from a 1 April -31 March year, to a 1 October – 30 September year. The Dental Council cannot at law issue a practising certificate for a period of more than one year, and accordingly to effect this change there will be two APC cycles over the next 18 months.***

***The practising certificate to be issued on 1 April 2010 will be for a six month period ending on 30 September 2010, at which time a second cycle will begin, with practising certificates being renewed on 1 October 2010 for the year ending 30 September 2011.***

*If you are a registered oral health practitioner, and you want to practise in New Zealand, you must hold a current Practising Certificate (APC). It is illegal to practise without an APC. By doing so practitioners risk prosecution, removal from the Register and non payment of ACC and dental benefit claims...*

*[emphasis in original]*

9. *On 21 April 2010 the Dental Council received Dr S' application for an APC for the period 1 April 2010 to 30 September 2010. The Dental Council issued Dr S with an APC for the six month period ending on 30 September 2010.*
10. *On or around 2 September 2010 the Dental Council sent an application form for the 1 October 2010 – 30 September 2011 practising certificate to all practising dentists and dental specialists. The cover letter which accompanied this application form advised practitioners that:*

#### ***Renewal of your Annual Practising Certificate***

*Your current Practising Certificate expires on 30 September 2010 and the new practising year commences on Friday 1 October 2010. Enclosed is your application for an Annual Practising Certificate (APC) for the year ending 30 September 2011, to be completed and returned to Council together with the appropriate fee, no later than 30 September 2010.*

...

*Standard post can take between 7 – 10 days if you are located outside of the main cities; **please ensure you allow sufficient time for postal delivery to ensure that your completed application is received by Council on or before 30 September 2010** and you do not find yourself in the position of having to cease practise until such time as your Practising Certificate is issued.*

*[emphasis in original]*

11. *On 2 September 2010 the Dental Council sent the following reminder to all dentists and dental specialists, including to Dr S by email:*

***Annual Practising Certificates – Dentists and Dental Specialists***

*We would like remind all dentists and dental specialists that your current Practising Certificate expires on 30 September 2010. The APC forms for the new cycle are in the post and you should receive your form within the next week if you have not already received it.*

...

12. *The Dental Council sent a further reminder to all dentists and dental specialists, including to Dr S by email on 17 September 2010. This reminder advised practitioners that:*

***APC Renewal Reminder 2010/11***

*As you are aware your Annual Practising Certificate (APC) is due for renewal prior to 1 October 2010. All APC and Retention forms were sent out on the 2<sup>nd</sup> of September, if you have not received your form please download a form from our website at the following links:*

...

*If you intend to practise at any time during the next APC cycle (1 October 2010 – 30 September 2011) you must hold a current practising certificate. You are advised that under the Health Practitioners Competence Assurance Act 2003 it is unlawful to practise without a current APC.*

13. *The Dental Council's September 2010 newsletter, which was sent to all oral health practitioners, also advised that:*

***Annual Practising Certificates – Dentists and Dental Specialists***

*We would like to remind all dentists and dental specialists that their current annual practising certification (APCs) expire on 30 September 2010.*

*Please remember that it is a breach of the Health Practitioners Competence Assurance Act 2003 (the "Act"), and accordingly unlawful, to practise without a valid APC. Even if your employer is paying your fees, it is ultimately your responsibility to ensure that your APC form and payment are received by the Dental Council on or before 30 September 2010.*

...

14. *On 30 September 2010 Dr S' APC expired. On 8 October 2010 the Dental Council wrote to Dr S as follows:*

*Dear Dr S*

***Practising Certificate Application – Practising Period 1 October 2010 – 30 September 2011***

*I note that you have not yet submitted to the Dental Council ("Council") your application to renew your Annual Practising Certificate (APC) for the practising period 1 October 2010 – 30 September 2011, and we are accordingly unaware of your practising intentions for this period. If you intend to practise at any time during this period you must hold a current practising certificate.*

*You are advised that under the Health Practitioners Competence Assurance Act 2003 it is an offence to practise without a current APC punishable upon conviction by a fine of up to \$10,000.*

***If you are practising at the moment without a current practising certificate, you must cease immediately; complete your APC application form, including the Workforce Survey, and return it to the Dental Council together with your practising fee. Only when you have received a current practising certificate may you resume practise. ...***

...

*If we have not heard from you by Friday 15 October 2010, your name and HPI number will be forwarded to the following agencies who will be advised that you have not renewed your APC:*

- ACC
- Dental Benefits
- Dental Protection Limited
- Ministry of Health, Compliance Unit

*If we become aware that you are practising without an APC you will also be referred to a Professional Conduct Committee....*

*[emphasis in original]*

15. *On 24 November 2010 a Dental Council employee telephoned Dr S and left a message on his answer phone asking whether he was working or not. Dr S did not return this call.*
16. *On 20 April 2011 the Dental Council received an application from Dr S for an APC for the 1 October 2010 - 30 September 2011 practising year. This application was accompanied by a covering note from Dr S which stated:*

*Please accept my sincere apologies for the lateness of this application – there are compelling reasons for this.*

17. *The Dental Council's Deputy Registrar telephoned Dr S later that day to enquire as to the reasons why his application was late, to find out whether*

*Dr S had been practising since 30 September 2010 when his APC expired, and to remind Dr S that he was not lawfully entitled to practise until an APC was issued.*

18. *Dr S advised the Deputy Registrar...<sup>3</sup> that things were returning to normal, and that he had managed to practise during this time. When asked about the 8 October 2010 letter and the phone calls that had been made to his practice, Dr S advised that he had had problems with the post and staff. Dr S confirmed that his address had not changed during this period.*
19. *On 27 April 2011 the Dental Council wrote to Dr S and requested further information about his late application:*

*The Registrar has requested that you provide, in writing an explanation [sic] as to why your APC application is over 6 months late. You have indicated that you continued to practice during this time but had just not been able to complete the paperwork.*

*This letter also reminded Dr S that he was not lawfully entitled to practise until an APC was issued, and that if he had not done so already, he should cancel all appointments until further notice.*

20. *On 4 May 2011 the Dental Council received a letter from Dr S by facsimile, which provided:*

*...<sup>4</sup>*

*I trust this explanation will suffice.*

21. *The Dental Council carefully considered Dr S' APC application and on 5 May 2011 the Dental Council issued Dr S with an APC for the remainder of the practising year (i.e. to 30 September 2011).*
22. *On or about 23 May 2011 the Dental Council referred Dr S to a Professional Conduct Committee (PCC) for practising without a current APC.*
23. *On 15 September 2011 the PCC met with Dr S and his wife as his support person. During this meeting:*
- (a) *...*
- (b) *...<sup>5</sup>*
- (c) *Dr S confirmed that he had received a letter from the Dental Council dated 8 October 2010 which instructed him to cease practise because he did not hold a current APC, but that he did not think that*

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<sup>3</sup> Information removed having regard to order of non-publication.

<sup>4</sup> Information removed having regard to order of non-publication.

<sup>5</sup> Information removed having regard to order of non-publication.



*he had read it at the time. Dr S advised that he had had difficulties with staff, and that some of the correspondence was not attended to;*

- (d) Dr S advised that he did not consider that the stress associated with the personal issues he had to deal with in his private life had impacted on his professional life;*
  - (e) Dr S confirmed that he had been practising dentistry in the period from 30 September 2010 and advised that dentistry gave structure to his life;*
  - (f) Dr S acknowledged that the structure provided by dentistry did not run to dealing with the administrative matters or the mail in his practice. Dr S advised that because of the staffing issues he had cut back on the amount of clinical work he did. Dr S advised that he would see 12 to 16 patients a day on average, whereas previously he would have seen 20 patients a day; and*
  - (g) The PCC confirmed with Dr S that over the past six years there had been five instances where he had not submitted his application for an APC on time (including the period that is the subject of the current charge).*
24. *Following the conclusion of its investigation, the PCC advised Dr S that a charge would be laid before the Health Practitioners Disciplinary Tribunal. A charge was duly laid on 9 November 2011.*
25. *Dr S has subsequently provided the PCC with a copy of his appointment book for the period 18 April 2011 to 7 May 2011. This appointment book shows that Dr S did not have any appointments booked on 20 April 2011; this is the date that the Deputy Registrar advised Dr S that he was not entitled to practise until an APC was issued. The appointment book also shows that Dr S continued to see patients on 21, 23, 28, 29 and 30 April 2011, but that the appointments scheduled for 2, 3, 4, and 5 May 2011 were cancelled (crossed out in the appointment book).*
26. *Dr S admits that he practised the profession of dentistry between 1 October 2010 and 30 April 2011, when he did not hold a current APC."*

### **Submissions:**

6. The PCC submitted, in summary:
- 6.1. There were three elements to be proven by the PCC namely that during the relevant periods Dr S:
    - 6.1.1. was a registered dentist;
    - 6.1.2. practised as a dentist; and

- 6.1.3. did not hold a current practising certificate.
- 6.2. These elements had to be proved to the requisite standard, on the balance of probabilities.
- 6.3. As to the first element Dr S accepted and the Council's records confirmed that he had held registration as a dentist since 1972.
- 6.4. As to the second element Dr S accepted that he had practised the profession of dentistry between the dates pleaded, and this was consistent with information provided by him as follows:
  - 6.4.1. On 20 April 2011 he confirmed orally to the Deputy Registrar of the Council that he had worked continuously since 30 September 2010.
  - 6.4.2. On 15 September 2011, he confirmed to the PCC that he had been practising dentistry during the period from 30 September 2011. In particular he advised:
    - 6.4.2.1. He worked four days a week in one location, and one day in another.
    - 6.4.2.2. He saw an average of 12-16 patients a day.
    - 6.4.2.3. He was conscious of not having an APC during the relevant period and that he continued to practise.
    - 6.4.2.4. His appointment book for the period 18 April to 30 April 2011 confirmed he had appointments to see patients on 18, 19, 21, 23, 28, 29 and 30 April 2011.
- 6.4.3. As to the third element, Council's records confirmed Dr S did not hold a current APC from 1 October 2010 to 5 May 2011; and he confirmed this in his affidavit of 20 December 2011.

6.4.4. The agreed summary of facts demonstrated that he was reminded on a number of occasions that his APC would expire on 30 September 2010, and that it was unlawful to practise without such.

6.4.5. Following the expiry of his APC, he was reminded on multiple occasions that he was not lawfully entitled to practise until an annual practising certificate had been issued.

6.4.6. He was advised of the serious consequences of practising without an APC; in particular he was advised by the Deputy Registrar on 20 April 2011 that he was not legally entitled to practise until an APC was issued. Notwithstanding that fact he continued to see patients on five days thereafter.

6.4.7. He acknowledged to the PCC he was conscious of not having an APC during the period in question and that he continued to practise.

7. No submissions with regard to liability were received on behalf of Dr S.

**Discussion as to liability:**

8. The Tribunal accepts the submission of the PCC that there are three elements of the charge; for the reasons given by the PCC, the Tribunal is completely satisfied that each element of the charge is established.

9. At the hearing the Tribunal announced this conclusion, and then received submissions as to penalty from the PCC (orally and in writing) and on behalf of Dr S (in writing).

**Penalty submissions:**

10. The PCC submitted:

10.1. After providing submissions as to the functions of disciplinary processes, and other general sentencing principles applied by the Tribunal (set out more fully below) it was submitted the Tribunal is to have regard to any aggravating and mitigating factors to determine a reasonable penalty.

10.2. The PCC submitted that the following cases were relevant to the Tribunal's considerations:

10.2.1. *Ms H*;<sup>6</sup> she was a registered psychologist who practised her profession from 2005 to 2008 when not holding a current APC. The Tribunal stated this represented a failure to maintain an important professional obligation, and indicated that it needed to emphasise the importance of the APC regime with the associated professional obligations that fall on an individual practitioner. She was fined \$4,000.00 (reduced on appeal to \$2,000.00),<sup>7</sup> censured, and ordered to pay costs.

10.2.2. *Ms O*;<sup>8</sup> she was a registered occupational therapist who practised from 2005 to 2009 without a current APC. There were a "*host of personal circumstances*" which were raised in mitigation. The Tribunal commented that:

*"Professional discipline exists for the provision of protecting the public by ensuring that practitioners who hold themselves out to be health practitioners continue to be registered and have current practising certificates. This is a means of ensuring that they are ... safe to practise and for maintenance of public standards."*

The Tribunal censured *Ms O* and ordered her to pay a fine of \$1,400.00 as well as costs of \$2,000.00 (having regard to her impecuniosity).

10.2.3. *Mr White*;<sup>9</sup> he was a registered optometrist who practised for two periods in 2010 when not holding a current APC (during the second period his APC had been suspended following a failure to complete a recertification programme). The Tribunal reiterated that all health practitioners have a significant professional responsibility to apply and

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<sup>6</sup> 256/Psy09/128P.

<sup>7</sup> *GS v Professional Conduct Committee* [2010] NZAR 417.

<sup>8</sup> 274/Ot09/132P.

<sup>9</sup> 366/Op10/168P.

obtain a current APC in order to practise. He was fined \$1,250.00 and costs of \$3,500.00 (having regard to his difficult financial circumstances).

10.2.4. *Mr Patel*;<sup>10</sup> he was a registered optometrist who practised his profession for a period of 65 days when not holding an APC. An aggravating factor was the considerable lengths the Board had gone to in reminding practitioners including this practitioner of the obligation to maintain a current APC. He was censured and fined \$1,250.00; he was further fined on a related matter. He was also ordered to pay costs.

10.3. The PCC submitted it was appropriate to impose a penalty in the present case because Dr S had practised in a regulatory environment that required him to hold a current APC, for 40 years; he ought to have been aware of the legal requirement to obtain a current practising certificate in order lawfully to practise his profession.

10.4. Whilst he had experienced personal difficulties and hardship, those difficulties did not excuse a practitioner from undertaking his or her professional obligations. Registration brings privileges and responsibilities, and the onus is on each individual practitioner to comply with the statutory requirements.

10.5. Dr S practised as a dentist for nearly seven months at a time when he did not hold a current APC; this was a significant lapse.

10.6. There were a number of aggravating factors including:

10.6.1. He was reminded on a number of occasions his APC would expire on 30 September 2010 and that it was unlawful to practise without a valid APC.

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<sup>10</sup> 392/Opt11/177P.

10.6.2. Following the expiry of his APC he was reminded he was not lawfully entitled to practise until an APC had been issued.

10.6.3. He was advised there would be serious consequences if he practised without an APC, including referral to a Professional Conduct Committee.

10.6.4. Despite a call by the Deputy Registrar on 20 April 2011, when he was advised he was not entitled to practise until an APC was issued, he continued to see patients thereafter.

10.6.5. He acknowledged to the PCC he was conscious that he did not hold a current practising certificate during the period in question, yet he continued to practise.

10.6.6. While he previously stated he had forgotten about "*the change in timing for the Dental Council registration, which for the last 39 years was always in April*", the PCC submitted the cycle had changed in an orderly fashion; there had been extensive publicity and reminders sent to dentists and dental specialists regarding the changes.

10.6.7. The PCC submitted it was appropriate to record Dr S had acknowledged to the Council and the PCC that he had practised his profession without holding a current APC, and he had formally admitted the charge.

10.6.8. The Tribunal needed to send a clear message to the profession that practising without an APC was unacceptable in any circumstances. This was because:

10.6.8.1. The principal purpose of the Act is for the health and safety of the public; APCs are an important aspect of meeting that purpose.

10.6.8.2. An APC is in effect notice to the world that a practitioner is fit and competent to practise. The process for considering and issuing practising certificates allows for a degree of scrutiny where, for example, there may be concerns as to competence.

10.6.8.3. Failure to comply undermines the fundamental premise on which the regulatory regime operates.

10.6.9. The PCC accordingly submitted there should be a censure and a fine of between \$1,250.00 to \$2,000.00, together with an order for costs. The Tribunal was advised that the costs of the PCC's investigation and prosecution was approximately \$23,000.00 (excluding GST), and the Tribunal's costs were approximately \$13,000.00 (excluding GST).

11. For Dr S it was submitted as to penalty:

11.1. The various functions of the disciplinary process were summarised; it was submitted the Tribunal was required to balance the relevant aggravating and mitigating circumstances to fix a reasonable and appropriate penalty.

11.2. In effect Dr S had carried on his profession without the requisite "licence" for a duration of seven months.

11.3. However there were the following mitigating factors which were relevant:

11.3.1. He had entered an immediate plea of guilty.

11.3.2. He had been cooperative and the matter was able to be dealt with on the basis of an agreed summary of facts.

11.3.3. He had no previous convictions and had been a registered dentist since 1972.

11.3.4. He had some reasonably compelling personal circumstances that he was enduring at the relevant time.

- 11.3.5. He had shown remorse and was apologetic for his omission.
- 11.4. It was submitted the matter involved a compliance issue (albeit a serious one) as opposed to a lack of professional standards.
- 11.5. It was submitted that Dr S took no issue as to the penalty sought by the PCC, as outlined above.
- 11.6. With regard to costs it was submitted this should be at the lowest possible level taking into account:
- 11.6.1. Dr S' cooperation.
- 11.6.2. The indication, early, of a guilty plea.
- 11.6.3. That the charge was able to be dealt with on the basis of an agreed summary of facts.
- 11.7. Submissions as to name suppression were given; this topic is dealt with below.
12. The PCC gave submissions in reply. Strong exception was taken to the submission for Dr S that the matter was a compliance issue. The PCC submitted that the breach was serious, since it related to an important aspect of the regulatory regime.

**Penalty – legal principles:**

13. As is apparent from many previous decisions of the Tribunal, in considering penalty it needs to take into account the functions of the disciplinary process in:
- 13.1. Protecting the public.
- 13.2. Maintaining professional standards.
- 13.3. Punishment.
- 13.4. Rehabilitation.
14. In *G v New Zealand Psychologists Board*<sup>11</sup> general sentencing principles such as denunciation and deterrence may also be relevant, and can properly be considered.

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<sup>11</sup> 5 April 2004, Gendall J, High Court, Wellington CIV-2003-485-2175.



15. The Tribunal is required to balance relevant aggravating and mitigating factors, in fixing a reasonable and proportionate penalty. It should also consider previous cases so as to ensure, as far as was possible, consistency.

**Penalty – discussion:**

16. The Tribunal considers there are the following aggravating factors:

- 16.1. There was a pattern of multiple reminders to members of the profession generally and to Dr S in particular, as to the need to pay the APC in a timely way; those reminders extended to a clear statement that to practise without an APC was illegal. These are matters which any health professional should be very well aware of, and need to take seriously. In this case, however, failure to meet those reminders was rendered more serious when the Deputy Registrar of the Dental Council spoke to Dr S on 20 April 2011 when he was advised yet again that he was not entitled to practise until an APC had been issued. Notwithstanding that specific reminder, he continued to see patients on no fewer than five days. This was a serious error of judgment. He was already in breach of the Act. He should have stopped seeing patients then and there. The fact that he saw many patients on five further days is especially serious.
- 16.2. The Tribunal has considerable doubts as to how seriously Dr S took the obligation to hold a current APC. In many previous decisions, as outlined above, the Tribunal has reiterated the importance of the APC requirements. The process of applying an APC is not a process of completing rudimentary paper work. It involves completing questions which relate to fitness of practice issues, competency issues, and compliance with professional standards. The obligation to complete a workforce survey is also important, as it informs the Dental Council of a practitioner's practice circumstances. If by this process a regulatory authority is alerted to competence issues, there are various steps

open to that authority, such as the imposition of conditions on the APC, or even a decision not to issue an APC. Once issued, as was submitted for the PCC, an APC is notice to the world that a practitioner is fit and competent to practise. As has been said previously, the APC regime is therefore an important cornerstone of the regulatory regime.

- 16.3. It is useful to reiterate the dicta of the High Court in the *H* case<sup>12</sup> where the Court stated:

*"... an APC is a fundamental and important requirement ... The Tribunal was entitled to take the view that the requirement to obtain an annual practising certificate was an important professional obligation and of sufficient significance to justify the imposition of the fine in addition to censure ..."*<sup>13</sup>

- 16.4. The evidence placed before the Tribunal gives no confidence that Dr S took these issues seriously, or even had sufficient insight to acknowledge they were important in his subsequent communications with the Dental Council and the PCC.

- 16.5. One of the responses Dr S gave to the PCC was that he had forgotten about *"the change in timing for the Dental Council registration, which for the last 39 years was always in April"*. The evidence is clear that the Dental Council did change the APC cycle, but it did so in an orderly way, with considerable notice to members of the profession as to the steps it was taking and the reasons for doing so. For a practitioner to say that he had forgotten about these changes suggests that the obligations with regard to holding a current APC were not taken seriously.

17. The Tribunal has considered the following issues as to mitigation:

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<sup>12</sup> Known as *GS v A Professional Conduct Committee*, 1 April 2010, Venning J, CIV-2009-404-007080.

<sup>13</sup> At [22].

- 17.1. It is accepted that there was an immediate plea of guilty, and that Dr S was cooperative as far as the hearing process was concerned. Against that, however, is the fact that he chose not to attend the Tribunal hearing, which would have acknowledged the seriousness of the lapse which occurred.
- 17.2. It is accepted Dr S had been a registered dentist for many years, and there is no evidence of any previous issues.
- 17.3. Reliance was placed on personal circumstances (which are the subject of a non publication order). The Tribunal has given very careful consideration to these factors, and the extent to which they can properly be regarded as "mitigating". Dr S told the PCC that he did not consider the stress associated with those factors had impacted on his professional life, and that dentistry gave structure to his life. The Tribunal's concern, however, is that he was practising while having to deal with an extended stressful situation. He was to some extent practising in isolation (his primary employment was as a sole practitioner; he had secondary employment, nine hours per week, in a group practice). There is no evidence of support or steps taken to ensure his competence would be maintained whilst enduring ongoing stress. Continuing to practise in these circumstances suggests there may be issues as to insight and judgment. However, in the end the Tribunal has insufficient evidence as to the extent which this factor either was or is a serious problem; that is a matter for the Dental Council. For the purposes of penalty, the Tribunal has noted the context, and concludes it is a factor which mitigates to some extent the breaches which occurred, but it is not a powerful mitigating factor.
18. In the end, the Tribunal considers the breach which continued for seven months, and in the final days of the period under review it involved a deliberate decision to act contrary to advice given by the Deputy Registrar, as being serious.

19. The Tribunal is also required to have regard to the penalties imposed in previous cases, as outlined above.
20. As to a fine, both parties agreed that the range which was appropriate for the purposes of a financial penalty, was \$1,250.00 to \$2,000.00. The Tribunal considers in all the circumstances, (noting that no submissions were made as to financial circumstances) the appropriate fine is \$2,000.00.
21. The Tribunal must express its disapproval for these breaches by ordering censure.

**Costs:**

22. The principles which the Tribunal is required to consider when making any orders as to costs have been set out in numerous previous decisions.<sup>14</sup>
23. For present purposes it suffices to say that the usual approach is to take 50% of reasonable costs incurred, and then take into account all relevant circumstances, including issues such as cooperation and financial means and either increase or decrease the contribution to costs.
24. In the present instance, there was the cooperation provided by the way of an agreement as to the summary of facts, and by admitting the charge (although the Tribunal still carries the residual responsibility of determining whether the charge is made out). No details of financial means were provided, despite that opportunity being given by way of the provisions of writing submissions, or by the practitioner attending the hearing. Having regard to all factors, and to orders of costs which have frequently been made in previous decisions, the Tribunal has taken as a broad indication a starting point of 35% of the costs incurred by the PCC's investigation and at hearing, and in respect of the Tribunal hearing, which produces a figure of \$12,000.00.

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<sup>14</sup> For example, *Vatsyayann 374/Med10/152P*.

25. The Tribunal considers that payment of this sum strikes a reasonable balance between the appropriateness of costs being paid by the practitioner on this occasion, and the balance of the costs incurred being met by the profession.
26. The order will provide that Dr S pays:
  - 26.1. \$6,000.00 in respect of the costs of the PCC.
  - 26.2. \$6,000.00 in respect of the costs of the Tribunal.
  - 26.3. In neither case is GST payable.

**Non-publication of name:**

27. Prior to the hearing, an application was made for an interim order of non-publication of name. This was granted on 20 December 2011.<sup>15</sup> The written submissions filed by Counsel for Dr S requested that the interim order be made permanent, essentially with reliance being placed on the affidavit evidence that had been placed before the Tribunal at the interim stage.
28. The grounds related to personal circumstances which the Tribunal has ultimately determined should not be published, but which are fully set out in his affidavit of 20 December 2011, and which were not circumstances of the practitioner's making.
29. Also raised was the potential for reputational harm if publicity were to occur.
30. The PCC neither consented nor opposed the application for permanent non-publication of name.
31. In many previous decisions,<sup>16</sup> the Tribunal has evaluated the following public interest factors:
  - 31.1. Openness and transparency of disciplinary proceedings.<sup>17</sup>
  - 31.2. Accountability of the disciplinary process.<sup>18</sup>

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<sup>15</sup> 431/Den11/198P.

<sup>16</sup> Eg, 51/Nur06/35P, and 65/Nur06/40P

<sup>17</sup> *M v Police* (1991) CRNZ 14; *R v Liddell* [1995] 1 NZLR 538; *Lewis v Wilson & Horton Ltd* [2003] 3 NZLR 546; *Director of Proceedings v I* [2004] NZAR 635

<sup>18</sup> *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360

- 31.3. Public interest in knowing the identity of a health practitioner charged with a disciplinary offence.<sup>19</sup>
- 31.4. Importance of freedom of speech and the right enshrined in section 14, New Zealand Bill of Rights Act 1990.<sup>20</sup>
- 31.5. Unfairly impugning other health practitioners.<sup>21</sup>
32. In supporting the possibility of publication of name the important "open justice" factors which have been articulated on many occasions. As Frater J put it in *I v Director of Proceedings* there is a presumption in favour of open justice under section 106(1), but the question is whether it should be departed from because it is desirable to do so.
33. The possibility that other health practitioners would be unfairly impugned. This is a factor which depends on the particular circumstances of the case, including the particular area where the circumstances arise. In this instance, it is a factor which can be dealt with by the location of practice being suppressed.
34. In favour of a non-publication order is:
- 34.1. The significant personal circumstances which are referred to in the affidavit evidence, and also in the report of the PCC which was placed before the Tribunal. In the Tribunal's view, these factors are very significant, and outweigh the factors in favour of publication of name in this instance. Important, in the Tribunal's view, is the way in which the relevant information relating to this issue was fully disclosed to the PCC, and its apparent acceptance of the genuineness of the factors raised. It would have been helpful if Dr S had attended the Tribunal's hearing and explained these matters directly

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<sup>19</sup> *Director Proceedings v Nursing Council*, supra; *F v Medical Practitioners Disciplinary Tribunal* (Laurenson J, 5 December 2001, HC Auckland AP21-SW01)

<sup>20</sup> *R v Liddell*, supra and *Lewis v Wilson & Horton Ltd*, supra

<sup>21</sup> This point has been emphasised on numerous occasions in the criminal Courts where Judges have declined name suppression to avoid suspicion falling on other members of a profession.

to the Tribunal himself, but in the circumstances the Tribunal is prepared to accept the way in which the information was conveyed to the PCC as confirming its reliability.

- 34.2. Although the Tribunal accepts that publication can give rise to reputational harm, that is a factor which exists in all cases. It does not consider that particular possibility as being a factor which is entitled to undue weight in the present case.
35. The Tribunal is satisfied, for the reasons just explained, that it is desirable to make a permanent order, but subject to a condition. The nature of the circumstances the Tribunal has been required to consider – especially the personal circumstances which have impacted on Dr S - are such that it is appropriate the Registrar of the Dental Council be aware of these matters, for the purposes of any particular steps which the Dental Council may wish to consider.

**Conclusion:**

36. The charge of practising without a current APC is made out.
37. The Tribunal imposes the following penalty orders:
- 37.1. An order of censure: the Tribunal must express its strong disapproval for the circumstances which arose in the present case, particularly as practising without a current APC followed multiple communications from the Dental Council, and then a specific warning. That is wholly unacceptable in respect of any health practitioner.
- 37.2. Dr S is ordered to pay a fine of \$2,000.00.
- 37.3. Dr S is ordered to pay a contribution to costs of:
- 37.3.1. \$6,000.00 in respect of the PCC's costs.
- 37.3.2. \$6,000.00 in respect of the Tribunal's costs.
- 37.3.3. In neither instance is GST payable.

38. There is to be a permanent order of non-publication of name, locality and personal circumstances. That order is subject to a condition that the Registrar of the Dental Council is at liberty to have access to the affidavit that was sworn by Dr S in support of his application for non-publication of name dated 20 December 2011, and the PCC determination of 26 September 2011.
39. The Tribunal directs that a copy of this decision and a summary be placed on the Tribunal's website. The Tribunal further directs that a notice as to the effect of its decision be placed in the newsletter of the Dental Council, and its website.

**DATED** at Wellington this 26th day of March 2012

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B A Corkill QC  
Chairperson  
Health Practitioners Disciplinary Tribunal