New Zealand Health Practitioners Disciplinary Tribunal

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DECISION NO: 503/Den 12/219P

IN THE MATTER of the Health Practitioners Competence Assurance Act 2003

-AND-

IN THE MATTER of a Charge laid by pursuant to Section 91(1)(b) of the Act against Dr E, Registered Dentist, of X

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr D M Carden (Chair)

Drs R East, C Lloyd, and P Luteru and Ms B Ross (Members)

Miss D Gainey (Executive Officer)

Ms H Hoffman (Stenographer)

Hearing held at X on 23 November 2012

APPEARANCES: Ms A Miller for the Professional Conduct Committee

Mr R Harrison for the practitioner, Dr E

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Introduction

1. Dr E is, and has since 1965 been, a dentist in practice. His practising certificate fell due for renewal on 1 October 2011. It was not renewed with completion of the appropriate form and payment of fee until 7 November 2011. It was claimed that during that time Dr E practised as a dentist without holding a current practising certificate. A Charge was laid against him by the Professional Conduct Committee ("**PCC**") of the Dental Council of New Zealand ("**Dental Council**").

The Charge

2. The Charge under the Health Practitioners Competence Assurance Act 2003 ("**the HPCA Act**") brought by the PCC was as follows:

> ***"TAKE NOTICE*** *that a Professional Conduct Committee of the Dental Council established under section 71 of the Health Practitioners Competence Assurance Act 2003 ("the Act") has determined in accordance with section 80(3)(b) of the Act that a disciplinary charge should be brought against Dr E before the Health Practitioners Disciplinary Tribunal.*
>
> *The Professional Conduct Committee has reason to believe that grounds exist entitling the Tribunal to exercise its powers under section 100 of the Act.*
>
> ***PARTICULARS OF CHARGE***
>
> *Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge against Dr E, a registered dentist, practised the profession of dentistry between on or after 1 October 2011 and 7 November 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."*

3. That Charge was heard by the Tribunal at X on 23 November 2012. The PCC and Dr E were represented by counsel.

4. An Agreed Summary of Facts dated 26 October 2012 was produced and signed by both counsel for the parties. It is an agreement as to facts but does not constitute an

admission of the Charge which was denied by Dr E. That Agreed Summary of Facts read as follows:

1. *Dr E has been a registered dentist since 25 June 1965, initially under the Dental Act 1963, then the Dental Act 1988, and later under the Health Practitioners Competence Assurance Act 2003. Dr E is registered within the General Dental Practice scope of practice, and the Periodontic Specialist scope of practice. A copy of Dr E's registration details, and notice of scope of practice (for the material time) is at page (**1**) and (**2**) of the Agreed Bundle of Documents.*

2. *From the date of his registration Dr E has been required to hold a current annual practising certificate (APC) in order to practise the profession of dentistry.*

3. [Not to be published by order of the Tribunal].

Background

4. *Dr E is employed by xx ("xx"). xx provides affordable and accessible dental services, including at the practice in X, for Maori and those on low incomes. xx's dental services also have an arrangement with the Otago Dental School and provide the opportunity for dental students to work at the clinics under the supervision of dentists including Dr E.*

5. *On 2 September 2011 the Dental Council posted out APC renewal application forms for the 2011/2012 practising year to all dentists and dental specialists. On the same date, the Dental Council also sent an email to all dentists and dental specialists, including Dr E, reminding all practitioners that their APC were to expire on 30 September 2011. A copy of the 2 September 2011 despatch confirmation and email forwarded to Dr E is at page (**9**) and (**10**) respectively of the agreed bundle of documents.*

6. *On 20 September 2011 the Dental Council sent an email reminder to all dentists and dental specialists, including Dr E, advising that his APC was due for renewal prior to 1 October 2011. A copy of the email forwarded to Dr E is at page (**12**) of the agreed bundle of documents.*

7. *At midnight on 30 September 2011 Dr E's APC expired.*

8. *On 6 October 2011 the Deputy Registrar of the Dental Council wrote to Dr E, who had not submitted an application to renew his APC. A copy of this letter is at page (**14**) of the agreed bundle of documents.*

9. *On 17 October 2011 a Dental Council staff member rang Dr E to ask about the APC form. A copy of the file note is at page (**16**) of the agreed bundle of documents.*

10. *On 19 October 2011 Dr E emailed the Dental Council advising that his employers had confirmed that his application form and payment would be forwarded to the Council on Wednesday 19 October. The Dental Council*

*responded noting that Dr E cannot practice until receipt of the completed form and payment. A copy of this email chain is at page (**17**) of the agreed bundle of documents.*

11. *On 21 October 2011 the Dental Council wrote to Dental Protection Limited, ACC, and the Ministry of Health to give notice that the registered dentists recorded in an attached schedule (including Dr E) did not hold current practising certificates. Copies of these letters are from page (**19**) of the agreed bundle of documents.*

12. *On 25 October 2011 the Dental Council received a cheque for $845.72 (being the APC fee) and a payment voucher from xx. The payment voucher recorded that the payment related to Dr E, but was not accompanied by the completed APC form. A copy of the payment voucher is at page (**25**) of the agreed bundle of documents.*

13. *On 26 October 2011 the Dental Council emailed Dr E to advise that the APC application had not accompanied the payment and requesting confirmation that he had sent his application for an APC. A copy of this email is at page (**26**) of the agreed bundle of documents.*

14. *By letter dated 3 November 2011 xx forwarded Dr E's completed APC application form which had been signed and dated by Dr E on 17 October 2011. A copy of this letter is at page (**27**), and a copy of Dr E's completed APC application form is at page (**28**), of the agreed bundle of documents.*

15. *On 8 November 2011 the Dental Council wrote to Dr E enclosing his APC for the 2011/2012 practising year. This letter also gave notice that Dr E had been referred to the Dental Council on 7 November 2011 for consideration of referral to a Professional Conduct Committee to investigate whether he had been practising unlawfully. A copy of this letter is at page (**36**) of the agreed bundle of documents. A Professional Conduct Committee was subsequently appointed to investigate this matter.*

16. *On 17 April 2012 Dr E attended a hearing of the Professional Conduct Committee by telephone. A transcript of this hearing is at page (**38**) of the agreed bundle of documents.*

17. *As part of the PCC investigation Dr E provided copies of his appointment records for the period Monday 3 October 2011 to Monday 7 November 2011. A copy of these records is at page (**50**) of the agreed bundle of documents, and show that:*

    (a) *Dr E saw 26 patients over three days in x on 31 October, 1 and 2 November 2011 (9 patients on each of 31 October and 1 November 2011, and 8 patients on 2 November 2011);*

    (b) *Patients were booked for treatment at xx between 3 October 2011 and 7 November 2011. A handwritten record notes that students worked on the days when patients were booked;*

(c) No patients were booked on 14 October 2011 and 24 October 2011 (Labour Day); and

(d) Dr E did not work on 3 October 2011, 4 November 2011 and 7 November 2011.

On 13 July 2012 a disciplinary charge was laid by the Professional Conduct Committee that, as a registered dentist, Dr E practised the profession of dentistry between 1 October 2011 and 7 November 2011, when he did not hold a current a practising certificate".

5. There was admitted in support of the Charge by the PCC, an Agreed Bundle of Documents also dated 26 October 2012 which had been directed to be produced, and was in fact produced, on the following basis:

" …each document in the bundle:
(a) is what it purports to be on its face;
(b) was signed by any purported signatory shown on its face;
(c) was sent by any purported author to, and was received by, any purported addressee on its face;
(d) was produced from the custody of the party indicated in the index;
(e) is admissible evidence; and
(f) is received into evidence as soon as referred to by a witness in evidence, or by counsel in submissions, but not otherwise.

6. There was no other evidence in support of the Charge submitted by the PCC. Dr E was called to give evidence and was cross examined. There was called on his behalf, one further witness namely, Mr N.

The case for the PCC

7. It was submitted that there were three elements necessary to be established:

7.1. That Dr E was a registered dentist.

7.2. That Dr E practised as a dentist.

7.3. That Dr E did not hold a current practising certificate.

8. Relying on the Agreed Summary of Facts, the PCC submitted that all three elements were proven. Reference was made to: certain appointment records showing patients booked for treatment by him as a dentist; the transcript of an investigation that the

PCC had carried out and concessions made by Dr E during the investigation and; supervision of students by Dr E in the transcript.

9. It was submitted that a charge under section 100(1)(d) of the Health Practitioners Competence Assurance Act 2006 ("**the HPCA Act**)") is "*in the nature of a strict liability offence*". It was said that the PCC did not need to establish an intention to flout professional obligations, that the breach was deliberate or that the practitioner knew or ought to have known of the absence of an Annual Practising Certificate ("**APC**") (with reliance on authority cited).

10. Reference was made to communications to Dr E by e-mail and mail about the need to renew his APC and the consequences of his failure to do so. As to a suggestion that had been made that a "guilty mind" is necessary to be proven, or for there to be any requirement for the Tribunal to be satisfied that there was a need for disciplinary sanction to protect the public, maintain professional standards or to punish the practitioner, it was submitted that because this is in the nature of a strict liability offence those items do not need to be proven or made out.

Dr E's defence

11. It was accepted on behalf of Dr E that his APC had lapsed on 1 October 2011 and a new APC was not effective until 7 November 2011. Reference was made to certain facts concerning the communications to Dr E about the need to renew his APC. Reference was also made to the factual matrix concerning the process for renewal of his APC and payment of the appropriate fees.

12. It was said that this was not a matter "*deserving of a charge in the circumstances*" given Dr E's personal circumstances, his understanding of what the term "practising" meant and the reasonableness of that belief in the circumstances, and the delay "*brought about by administrative error*" on the part of Dr E's employer.

13. It was said that the PCC had a discretion as to whether or not to lay a charge and that in this case a charge was not warranted and that there was little or no discernible public interest in the matter.

14. Legal submissions were made on the question of whether Dr E was practising his profession while not holding a current practising certificate which will be considered in detail below.

Background

15. At the time his APC was due for renewal Dr E was employed by xx ("xx"), providing affordable and accessible dental services including a practice at x. Dr E had been in practice as a dentist since 1965 and since 1 July 2006 as an employee of xx.

16. There were two dentists at the surgery owned and operated by xx at [ ], Dr E and Dr A. xx also has an arrangement with the Otago Dental School under which students from that School were provided with clinical and cultural experience under the supervision of Dr E or Dr A.

17. Dr E said that he undertook administrative type duties because, as the owner, xx does not have a great deal of knowledge or experience in running or operating a dental practice. Employment arrangements are organised by one Ms I, the Manager of Dental Services for xx.

18. On 2 September 2011 the Dental Council posted out APC renewal application forms and sent an e-mail to all dentists and dental specialists, including Dr E reminding them that their APC's were due to expire on 30 September 2011. The Dental Council sent a further reminder on 20 September 2011 to Dr E and others about the same matter.

19. On 6 October 2011 the Deputy Registrar of the Dental Council wrote to Dr E who had not sent in an APC application and that letter included:

"**If you are practising at the moment without a current practising certificate, you are doing so unlawfully and 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 practice."

20. On 17 October 2011 a Dental Council staff member rang Dr E to ask about the APC form. On 19 October 2011 Dr E emailed the Dental Council advising that his employers had confirmed his application form and payment would be forwarded to the Council on 19 October 2011.

21. The Dental Council responded that day noting that Dr E could not practise until receipt of the completed form and payment. Counsel for Dr E emphasised that this e-mail only required receipt of the completed form and payment. That e-mail read:

> "*Dear E, thank you for your email.*
> *We look forward to receipt of your Annual Practicing Certificate application, please note that you cannot practice until we have received a completed form and payment"*.

22. The submission was made that this would have led Dr E into the belief that it was only receipt of the form and payment by the Council that was required before he could again practise. The Tribunal does not accept the explanation for these reasons:

22.1. First there was then no evidence before Dr E as to when the Council did in fact, receive the completed form and, indeed the evidence is that the completed form was not sent for some time later.

22.2. Secondly this is only a casual e-mail and Dr E would have been quite well aware from previous years' renewals of his APC that he could not practise until he had in fact himself received the new yearly Certificate.

22.3. Thirdly, Dr E had by then received, or should have received, the letter of 6 October 2011 which included the reference to receipt of the current practising certificate before resumption of practice.

23. Dr E said that at the time there were personal issues for him and possibly misunderstandings as to what steps were being taken to renew the APC and what he could and could not do in the meantime. Dr E acknowledges that he had a call from the Dental Council and accepts this was on 17 October 2011.

24. He said he was not aware of the earlier correspondence because he had not been checking either of two mailboxes that he used. The first mailbox at xxx was one which he and his late wife used when they were living there up until the time of her death. Since then he has not lived permanently in xxx and only infrequently cleared the mailbox. The second mailbox he described as his "*private practice mailbox*" which he kept open so that he "*could continue to receive professional correspondence and information*". He said that he had not been clearing the mail box on a regular basis and had not been receiving the correspondence from the Dental Council.

25. Dr E also referred to personal difficulties at the time which would have distracted him from renewal of his APC as would normally have taken place. He said that his late wife died [in] 2010. Mr N said that this was the time for Dr E's organising his late wife's huritau or unveiling which he described as part of the Maori cultural process of bereavement and grieving. Dr E was living with his children between [two cities] at this time and this was a period of grieving for his family. There were also personal issues and stress concerning [a family death] at the time and the counselling and help that he was giving [to a member of the family].

26. Dr E assessed from the documents, that following the telephone call on 17 October 2011, he filled out and completed the APC form and "*believed*" he would have passed this on to Ms I to be sent to the Dental Council along with payment. He did acknowledge that until the process of completing and lodging the form and paying the fee he could not practise without the APC having been sent and received. Accordingly, he said, he agreed with Ms I that he would not work at a dental chair but that there were plenty of administration duties that he could get on with in the meantime. He said he believed that this was compliance with the requirement not to practise until the APC had been sorted out. He said he undertook administration and "*back of house*" duties while Dr A continued to supervise students.

27. By 21 October 2011 the Dental Council had not received the APC application form from Dr E, it wrote to three agencies giving notice that certain registered dentists recorded in a schedule, including Dr E, did not hold current practising certificates.

28. After the Dental Council had received, on 25 October 2011, a cheque for the appropriate fee, $845.72, and a payment voucher from xx, an e-mail was sent on 26 October 2011 to Dr E advising that the APC application had not accompanied the payment and requested confirmation that this had been sent. The cheque for that sum had been issued by xx and dated 20 October 2011 but Mr N acknowledged that it was an oversight on the part of xx not to include the completed APC form when the payment was sent to the Dental Council on 20 October 2011.

29. Mr N said that this oversight was not picked up until he called the Dental Council "*in early November*" to inquire into the status of Dr E and was told that the application form was still awaited. Mr N said that this was rectified by the form being sent by xx to the Dental Council dated 7 November 2011.

30. In the meantime Dr E had consulted with patients and provided dental services at x on 30 October and 1 and 2 November 2011. Pages from xx's appointment book for

those dates were produced and Dr E acknowledged openly that he had done so. His response was that by then he thought all the formalities were completed and had expected his employer to have both paid the practising fee and lodged the necessary form.

31. The APC for Dr E was issued by the Dental Council on 8 November 2011 but by 7 November 2011 the matter had been referred to the Dental Council for consideration of referral to a Professional Conduct Committee as did in fact occur. The letter to Dr E from the Dental Council dated 8 November 2011 included:

> "*Regardless of the outcome of Council's deliberation, a copy of this letter will be retained on your file, and will be taken into account in the event that you submit a late APC application in the future. In the event that Council determines that a Professional Conduct Committee should investigate your conduct, you will be notified accordingly*".

32. It was acknowledged to the Tribunal by counsel for the PCC, first that there had been a tightening of policies in relation to late renewal of practising certificates but secondly, that there had not necessarily been formal notice given to practitioners that this was so. Dr E said that he was not aware that there had been a change of policy or general tightening or that charges would likely be laid in circumstances such as this and that earlier his delay in renewal of his APC had not resulted in any disciplinary process.

33. The PCC conducted a hearing on 17 April 2012 and the transcript was provided to the Tribunal. Dr E in his evidence said that at the time he was in [another town] visiting his daughter who was unwell, that the interview was conducted with him on his mobile phone, that he had to kneel alongside the bed where he spread his papers for the purpose of the interview, and that he felt intimidated by the process.

Charge – general principles

34. The burden of proving the Charge is on the Professional Conduct Committee.

35. The standard of proof is the balance of probabilities, the standard that applies in civil litigation. The gravity of the allegation is an important factor. The more serious the allegation, the greater part must be the degree of satisfaction on the balance of probabilities.

36. The Supreme Court has affirmed this in *Z v Dental Complaints Assessment Committee*[1] that the balance of probabilities standard is to be applied flexibly, dependent on the seriousness of the matters to be proved and the consequences of proof. It affirmed that the standard in disciplinary proceedings is that civil standard of balance of probabilities. It endorsed the judgment in *Briginshaw v Briginshaw.*[2]

37. The Tribunal has followed the principles enunciated in *Z* and in its decisions including *Professional Conduct Committee v Dawson*[3] and *Professional Conduct Committee v Karagiannis.*[4]

38. In *PCC v Chand*[5] the Tribunal applied the principles as stated in *B v Medical Council of New Zealand,*[6] Elias J (as she then was) said:[7]

> "*The structure of the disciplinary processes set up by the Act, which rely in large part upon judgment by a practitioner's peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that usual professional practice, while significant, may not always be determinative: the reasonableness of the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards are not to be permitted to lag. The disciplinary process in part is one of setting standards*."

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1 [2009] 1 NZLR 1
2 (1938) 60 CLR 336 per Dixon J
3 300/Nur09/139P
4 181/Phar08/91P
5 106/Nur06/49P
6 Noted in [2005] 3 NZLR 810
7 At page 15

39. The provisions of section 100(1)(d) empower the Tribunal to find that:

> *"the practitioner has practised his or her profession while not holding a current practising certificate*."

40. In the context of misconduct the Tribunal has often said, as it did in Nutall[8]:

> *"In particular, the Tribunal believes the test as to what constitutes professional misconduct continues to involve a two step process:*
>
> *71.1 The first step involves an objective analysis of whether or not the health practitioner's acts or omissions in relation to their practice can be reasonably regarded by the Tribunal as constituting:*
>
> *Malpractice; or*
>
> *Negligence; or*
>
> *Otherwise meets the standard of having brought, or was likely to bring discredit to the practitioner's profession.*
>
> *71.2 The second step of the process requires the Tribunal to be satisfied that the health practitioner's acts or omissions require a disciplinary sanction for the purposes of protecting the public and/or maintaining professional standards and/or punishing the health practitioner.*"

41. It was submitted for the PCC that a charge under the section 100(1)(d) of the HPCA Act was an absolute offence and did not require the second step to be established. Counsel for Dr E submitted first, that because any practising by Dr E (if there was any) without a practising certificate was inadvertent and properly explained, there could be no offence established. Secondly, he submitted that if there were any offending, this was not such as to require disciplinary sanction (effectively inviting the Tribunal to apply the second step).

42. The extract from *Nutall* and other cases referred to above relates to misconduct charges but a charge under section 100(1)(d) of the HPCA Act is absolute in its terms and, once the three elements referred to have been established, that is that, the practitioner was registered, that he or she had not renewed an APC, and that he or

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8 8/Med04/03P

she was practising in the profession during the period of non-renewal, the charge is made out.

43. In *Henderson*[9] Mr Henderson, a pharmacist, was charged with certain charges which included practising without a practising certificate. In relation to a submission based on the facts that any practising without a certificate was inadvertent the Tribunal said:

> "*35. The establishing of a charge under section 100(1)(d) of the HPCA Act does not require the PCC to establish that the practitioner* intended to *practise the profession of pharmacy without a current APC. Previous decisions of the Tribunal have clearly established that there is a failure to comply with an important professional obligation even if the breach is inadvertent or innocent. In H*[10] *notwithstanding that the fact there had been an inadvertent lapse by a practitioner continuing to practise when she did not hold an APC, the elements of the charge were accepted by the Tribunal as being made out.*
>
> *36. The principal purpose of the Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions; and the holding of an APC is a cornerstone requirement of the accountability regime of the Act. Having regard to these factors the Tribunal is satisfied that it cannot have been intended by Parliament that intention is an element of the disciplinary offence under section 100(1)(d).*"

Issues arising

44. Essentially in relation to the renewal of his APC Dr E advanced these issues:

44.1. That there were two mailboxes that he was using, one for his then private residence at xxx and the other the mailbox for his former practice. But because of personal circumstances he was not clearing either of those regularly.

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[9] 477/Phar12/210P & Phar12/213P
[10] 256/Psy09/128P

44.2. That when the matter came to his attention first, on 17 October 2011 he completed the APC renewal form and signed and dated this and handed it to xx for it to process along with payment of the appropriate fee.

44.3. That from that time he was only attending to administration and "*back of house*" duties and this was not practising as a dentist.

44.4. That by 30 October 2011 when he did commence doing actual dental work in x, he thought that sufficient time had elapsed since the matter had been processed and that the APC would have been paid for and issued and it was in order for him to practise dentistry as he did on that and subsequent days.

Mail not received

45. The Tribunal does not accept that, even given the personal circumstances and pressure that Dr E was under at the time, he is excused because he did not receive or in fact look at the mail and e-mail reminders that were sent to him.

46. It was his obligation as a practising dentist to renew his Practising Certificate annually and to keep the Dental Council informed of his correct and most relevant means of communication. It was for Dr E to ensure that he received communications from the Dental Council from time to time. The fact that he had two mailboxes was his choice. The fact that he chose to continue with his former practice mailbox and leave that as being his address for communications was again his choice. That he did not clear the box as regularly as he might was his responsibility. The Dental Council had done its best to ensure that Dr E was notified about the pending lapse of his practising certificate and the obligation he had to renew it. Particularly after 17 October 2011, when Dr E acknowledges that he had received reminders and that the matter had not received attention, the obligation was on him to do all that was needed to ensure that he complied.

47. All those matters of fact notwithstanding, the onus is on any practitioner to renew an Annual Practicing Certificate from time to time and to ensure that the formalities of that are dealt with in a timely and effective fashion. Dr E must have had that experience over many years past when he was in practice on his own account and must have been aware of the necessity to renew his practising certificate annually.

48. There are certainly matters of mitigation which are referred to below in the context of penalty, but that does not alter the responsibility that he had to ensure renewal of his APC, particularly when reminders had been sent to the last known address for him.

Supervision of students –Practising as a dentist?

49. Dr E was first registered as a dental practitioner [in] 1965. His Scopes of Practice at relevant times were those of General Dental Practice and Periodontic Specialist.

50. The Notice of Scope of Practice issued by the Dental Council of New Zealand is pursuant to sections 11 and 12 of the HPCA Act which sets out the definition of the practice of dentistry, and includes several specific references to tasks, but also includes:

> *"Practice in this context goes wider than clinical dentistry to include teaching, research, and management, given that such roles influence clinical practice and public safety."*

51. Dr E denies that he practised as a dentist at any time from 1 October to 27 October 2010. As to supervision of students, he says first, that this was done by his associate, Dr A; secondly, that any supervision of students that he did undertake was not practising as a dentist; and thirdly that, if he were practising as a dentist at the time, he should be excused from any fault because he did not believe he was practising as a dentist in the supervision of students.

52. The APC relied on extracts from the appointment book for the period from 3 October 2011 to 7 November 2011. There is the notation "*Students Working*" or to that effect on many of these appointment book entries.

53. Reference was made for the PCC to the extracts from the PCC interview on 17 April 2012 where Dr E acknowledged that he was in fact supervising students. He referred to the appointment records that were produced as bookings on his computer and in relation to his dental chair. He said that he would "*supervise maybe two and the other dentists would do the other two*" (which he corrected at the hearing that there were only two students, one supervised by each of the dentists, Dr A and himself) and "*that is what I'm referring to is that my role was to supervise those students*."[11] The extract includes:

> "*Some patients I don't even have to make a comment the students just get to work and they come out and ask any question if I'm there, of this job and I would say just start a treatment plan, you go ahead and do that. I had no problem showing the x-ray, and if there is a problem there, I might just say well ok, I think you should go and see say Dr S in there, if you need help one of us can comment on it, or else the other one an [sic] supervise you on it*."
>
> In answer to the question: "*So mainly during that time you were doing supervision of students, there were some prescriptions that you've already discussed with Maurice that you signed but …"*
>
> Dr E replied *"That's true, there is no doubt about that*".[12]

54. He acknowledged that there were some occasions when he might show the students something or work on a client himself during that period of supervision. The PCC relied on the Scope of Practice extract relative to Dr E's practice as applying to a dentist or periodontist specialist.

55. The PCC emphasised that before 17 October 2011 (when Dr E said he first realised that he had not renewed his APC) he was supervising students and that nothing had

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[11] NOE page 25
[12] Exhibit 2, Agreed Bundle, page 42.

changed between then and 27 October 2011, despite his having realised on 17 October 2011 that he had not yet renewed his APC and was not entitled to practise as a dentist. Accordingly, the PCC argued that insofar as Dr E was supervising students before 17 October 2011 he continued to do so as the records indicate and as he acknowledged in the PCC interview.

56. The Tribunal is satisfied on the facts as established by the PCC investigation and the evidence provided to the Tribunal that Dr E was himself supervising students between 1 and 27 October 2011.

57. The second issue raised is whether supervision of students is practising the profession of dentistry and it was submitted on Dr E's behalf that it is not.

58. Reference was made to certain definitions in the HPCA Act, namely "**practise a profession** or **practise**", **health profession** or **profession**", "**health service**" and "**scope of practise.**"

59. Reference was also made to section 8 of the HPCA Act which reads:

> "8 *Health practitioners must not practise outside scope of practice*
>
> *(1) Every health practitioner who practises the profession in respect of which he or she is registered must have a current practising certificate issued by the responsible authority.*
>
> *(2) No health practitioner may perform a health service that forms part of a scope of practice of the profession in respect of which he or she is registered unless he or she—*
>
> *(a) is permitted to perform that service by his or her scope of practice; and*
>
> *(b) performs that service in accordance with any conditions stated in his or her scope of practice.*
>
> *(3) Nothing in subsection (1) or subsection (2) applies to a health practitioner who performs health services—*
>
> *(a) in an emergency; or*
>
> *(b) as part of a course of training or instruction; or*
>
> *(c) in the course of an examination, assessment, or competence review required or ordered by the responsible authority*."

60. Emphasis was placed on section 8(3)(b) " … *as part of a course of training or instruction* …". It was submitted that the administration or "*back of house*" duties that Dr E said he had undertaken does not fall within the scope of practice for a dentist. It was said that the signing off of prescriptions for students or assisting them in a training capacity would not come within the scope of practice.

61. The Tribunal does not accept the submission.

61.1. First, on the facts it has been found that Dr E was doing more than administration or "*back of house*" duties as suggested.

61.2. Secondly, there was no change in his work patterns after 17 October 2011 when he said that he had discussed with Ms I that he would change his role but the notes still showed that there were students working and he confirmed that he was continuing to supervise them, even although he argues that supervision is not practising.

61.3. Thirdly, the reference in section 8(3) to the exemption for performing health services "*as part of a course of training or instruction*" refers to the **recipient** of the training or instruction and not the giver of that training or instruction. It is clear that the person giving training or instruction must be appropriately qualified to give that training or instruction and, where necessary, must hold an annual practising certificate in the work for which training or instruction is given. It is the person who is **receiving** the training or instruction that need not have a current practising certificate because that person is being trained or instructed so as to achieve better qualification. Thus, in the case of students, while they are in the course of training or instruction, such as exactly was occurring at xx, they need not have a current practising certificate; but conversely the person giving the training or instruction must. That is the whole purport of section 8(3). That

interpretation is reinforced by subparagraphs (a) and (c) of section 8(3) which refer to performance of health services in an emergency or in the course of an examination or the like ordered by the responsible authority.

62. Finally, it is submitted for Dr E that there are good grounds for him to hold a genuine belief that his activities from 17 October 2011 were not within the scope of practice or were exempt. It is said, on his behalf, that he had a genuine belief he was not practising as such and so understood himself to be complying with the direction. The Tribunal does not accept that for two reasons.

62.1. First, there is no ground to excuse a health practitioner for not having a current practising certificate and there was some mistaken belief as to the requirements for the renewal. The requirement for an annual practising certificate is absolute and the responsibility lies with the practitioner. The practitioner must initiate whatever is required to renew the practising certificate annually and the responsibility lies solely with the practitioner, first, to do that and secondly, not to practise until the annual practising certificate has in fact been received. The Dental Council has apparently undertaken a course of an early reminder to dental practitioners for renewal and that will assist dental practitioners in the renewal of their annual practising certificates in a timely and responsible fashion.

62.2. Secondly, the Tribunal does not accept that Dr E did not hold a genuine belief about his activities being acceptable. From 17 October 2011 he knew that his annual practising certificate had not been renewed and there was a requirement first for him to do so and secondly not to practise until it had been done. He says he made arrangements with Ms I for other work. This quite clearly indicates that Dr E knew that supervising students, as he had done before, was no longer acceptable.

63. The Tribunal is satisfied on the evidence that through the whole of the period from 3 to 27 October 2011 nothing had changed despite Dr E's having learned on 17 October 2011 that he had not yet completed formalities for renewal of his APC. The Tribunal is satisfied that Dr E was involved in sufficient activity of supervision to have fallen within the definition of the Scope of Practice which required that he had the current APC while he was doing this.

64. The necessity for students to be supervised by an appropriately qualified person was emphasised for the PCC, with reference being made to the risk to patients if a student, not properly or fully qualified, was working without supervision or under the supervision of someone else not appropriately qualified. It was argued for the PCC that until Dr E had a renewed APC he was not appropriately qualified for any supervision.

Practising in x

65. In relation to 31 October and 1 and 2 November 2011 the records clearly show, and Dr E acknowledges, that he practised as a dentist in x. At that stage he did not have a current annual practising certificate and the Dental Council had not received both the fee and the application form.

66. Dr E's answer to that is that he had completed the application form on 17 October 2011 and had supplied this to his employer xx for it to forward to the Dental Council with the appropriate fee payment. Mr N, the chief executive of xx, acknowledged that the practice had been purchased from Dr E in 2006 and that Dr E had worked in the practice as an employee since then. He said that xx had in place systems for flagging the expiry of the annual practising certificates for various health practitioners to ensure compliance with the requirement for renewal. He said that xx would either reimburse the health practitioner if payment were made by the

practitioner direct or it would pay directly to the professional body on production of an invoice.

67. Mr N said that Dr E had paid on his own account in the past and sought reimbursement, but on this occasion it was drawn to his attention on 17 October 2011 that there had not been renewal. On that day he met with Dr E who explained his personal circumstances as set out above. He says that Dr E "*was stood down at this time, he had agreed to carry out administration duties and it was understood that he would not be seeing patients*." He said that "*until the APC renewal was arranged*", Dr E was not to practise as a dentist.

68. Mr N said that the cheque for the fee, $845.72, was issued on 20 October 2011 and that the APC form had been completed and signed by Dr E dated 17 October 2011. He said that in early November 2011 he enquired of the Dental Council as to the status of Dr E and was told that the application form was still awaited although the payment had been received on 26 October 2011.

69. The form had been held by xx on its files in error and should have been sent and Mr N acknowledged this. He immediately sent the form to the Dental Council. He assured the Tribunal that the issues concerning renewal of the APC for Dr E would not be repeated and that systems had been improved.

70. It is Dr E's case that, having provided the completed form to xx on 17 October 2011 he understood this form and the appropriate fee, would be sent to the Dental Council and that the renewed APC would issue. He assumed this had been done by the end of October 2011 and that it was in order for him to practise dentistry in x on the dates set out. He said that he was confident there would not be a repetition of these events and that his "*personal situation is more settled*".

71. On Dr E's behalf it was submitted that: while he did work within the scope of his practice on these three days; because he had attended to the formalities and; in light

of the email advice that he had received (referred to above at paragraph 20) he considered himself "*entitled to rely on assurances given by his employer that the matter was in hand and both payment and form had been sent through to the Council*."[13]

72. It was submitted that it had was "*reasonable from these exchanges for Dr E to assume that this matter was being taken care of by his employer and by the time Dr E saw patients in x, the application form received by the Council*."[14] It was submitted that Dr E cannot be held responsible for administrative errors on the part of his employer on which he relied. It was submitted that "*it was reasonable for Dr E to believe that his activities in this time were compliant*."[15]

73. The Tribunal does not accept those submissions. It is the responsibility of practitioners to renew their annual practising certificate. The practitioner may be aided in this by reminders and facilitation from the appropriate council. The obligation is not to practice until the annual practising certificate is in hand. It is not enough for the fee to be paid and an application form to have been received by the appropriate council. It is not enough for a practitioner to leave the matter in the hands of his or her employer and then to practise in some expectation that their responsibilities have been discharged.

74. Accordingly, the Tribunal finds that the Charge has been made out in respect of the three days of practising in x.

75. For these reasons the Charge is found in all respects to have been made out. It is the view of the Tribunal that Dr E practised his profession of dentistry between 1

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[13] Exhibit 6, Submissions on behalf of Dr E, para 17.
[14] Exhibit 6, Submissions on behalf of Dr E, para 20.
[15] Exhibit 6, Submissions on behalf of Dr E, para 21(b).

October 2011 and 4 November 2011 when he did not hold a current practising certificate.

76. This is an absolute offence which does not require any consideration of whether the matter warrants disciplinary Tribunal sanction to maintain standards, for the protection of the public or to punish the practitioner. Those are important considerations in relation to any penalty. In any case where the three elements are established, namely that the practitioner was registered and has practised when not holding a current practising certificate the Charge is made out and any questions of protection of the public, maintaining professional standards or punishment of the practitioner go to penalty. As was said in *Henderson*[16] referred to in paragraph 42.

> *"40. There was some discussion at the hearing as to whether section 100(1)(d) requires a threshold of seriousness before a charge can be established. Counsel for the PCC conceded that there was such a threshold; however the matter was not fully argued. In this case there could be no doubt on this issue. The holding of an APC ensures that practitioners are safe to practise and ultimately that the public is protected. The process of applying for an APC involves – as is clear on the facts of this case – a process by which it can be confirmed to the regulatory authority that there is continuing competency and/or compliance with recertification requirements. Once issued it is notice to the world that the practitioner is fit and competent to practise.*
>
> *41. Having regard to the circumstances in which the continuing breach occurred in this case where there was a longrunning failure to meet recertification requirements, the Tribunal concludes the circumstances are sufficiently serious as to warrant discipline."*

77. The Tribunal announced this decision to the hearing and submissions were then made on penalty which is now were dealt with.

Penalty

78. The PCC referred to the statutory provisions, authority on the legal principles and comparable cases. Reference was made to Dr E's having practised his profession for over 45 years and that he "*ought to have been aware of the legal requirement to*

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[16] 477/Phar12/210P & Phar12/213P

obtain a current practising certificate."[17] It was submitted that any misunderstanding as to management tasks and supervision as being within the Scope of Practice should not excuse his actions nor should Dr E's "*assumption*" that his practising certificate had been issued.

79. There were a number of aggravating factors emphasised, including: the repeated reminders by email, the reminder that once the APC had expired Dr E was not entitled to practise until a further APC had been issued; advice to Dr E of the consequences of practising without an APC; the supervision of students and dental practise referred to by Dr E despite those advices and; Dr E's senior position in the profession, having been a member of Q for over 6 years.

80. In mitigation it was recorded that Dr E had been cooperative and frank in his interview with the PCC. The PCC submitted that it was appropriate for the Tribunal "*to send a clear message to the profession.*"[18] It noted that the principal purpose of the HPCA Act is to protect the health and safety of the public, that a practising certificate is notice to the world the practitioner is fit and competent to practise, and that a failure to comply with requirements for an APC undermines a fundamental premise.

81. The PCC sought an order for censure, an order for payment of a fine between $1,500.00 and $2,000.00, and an order for contribution to costs. It opposed any application for suppression of name.

82. For Dr E it was submitted that the Charge was "*a very technical and low level breach*,"[19] emphasis was made on the personal circumstances and loss of close

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[17] Submissions of counsel for the PCC, para 24(a)
[18] Submission of counsel for the PCC para 27.
[19] Submission of counsel for Dr E, para 22.

family members, the contribution that Dr E had given both to the profession and to his people through xx and other tribal involvement, the significant social value of those services to Maori and those on low income within the area, Dr E's co-operation from the outset, and that Dr E is someone towards the end of his career with an unblemished record and considerable service to the profession.

83. It was submitted that the Charge or any penalty does not serve as a reminder to ensure that the APCs are up to date, that any breach had come about by miscommunications and/or misunderstandings, that this is not a situation of knowingly breaching the requirement for an APC, and there is no issue of misconduct or other questions of fitness to practice. It was submitted that the Charge and any penalty does not serve either as a deterrent nor to meet any requirement for denunciation; and that there is no prospect of repetition.

Penalty - general principles

84. The authority to impose penalties on the practitioner under section 101 of the Health Practitioners Competence Assurance Act 2003 are:

84.1. That registration be cancelled.

84.2. That registration be suspended for a period not exceeding 3 years.

84.3. That the health practitioner be required, after commencing practice following the date of the order, for a period not exceeding 3 years, to practice his or her profession only in accordance with any conditions as to employment, supervision, or otherwise specified.

84.4. Censure.

84.5. A fine of up to $30,000.00 (but not if he or she has been convicted of a relevant offence or damages have been awarded against him (which do not apply here)).

84.6. Costs.

85. The functions of disciplinary proceedings are:

85.1. Protecting the public especially having regard to the provisions of s. 3(1) of the Act which reads:

"The principal purpose of this Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions."

85.2. Maintaining professional standards[20]. The Tribunal takes into account the following extract from the judgment in *Young v PCC*[21]:

"The protection and maintenance of professional standards is an important part of the protection of the public. It is through the maintenance of high professional standards that the public is protected. Deterrence is in the same category. This is intended to discourage others from acting in the same way reflected in the severity of the punishment imposed."

85.3. Punishing the practitioner in question[22]

85.4. In appropriate circumstances, rehabilitation of the practitioner[23]

86. In *A v Professional Conduct Committee*[24] the High Court, having considered the range of sanctions available to the Tribunal, cited with approval the decision in *Taylor v The General Medical Council*[25] and said that four points could be expressly and a fifth impliedly derived from the authorities namely:

"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."

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20 Refer *Dentice v Valuers Registration Board* [1992] 1 NZLR 720; *Ziderman v General Dental Council* [1976] 2 All ER 344

21 Wellington HC: CIV 2006-485-1002: 1/6/07: Young J

22 Refer *Dentice*; also *Patel v Complaints Assessment Committee* (Auckland High Court (CIV 2007– 404 – 1818; 13/8/07; Lang J; and *Winefield* 83/Phar06/30P).

23 *Patel*; also *J v Director of Proceedings* (Auckland High Court CIV 2006 – 404 – 2188; 17/10/06; Baragwanath J.

24 Auckland HC; CIV 2008 - 404 –2927; 5/9/08; Keane J; para 81.

25 [1990] 2 All ER 263

87. The Court went on[26]:

> *"Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v B (HC Auckland, HC 4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele v 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."*

88. The Tribunal is also mindful of the remarks of Randerson J in *Patel v Dentists Disciplinary Tribunal*[27]. That case involved an appeal by a dentist, whose name had been removed from the register by the Dentists Disciplinary Tribunal, in relation to charges arising from his treatment of an elderly couple for whom he carried out crown and bridge work which was accepted by the Court as being "*grossly incompetent and completely unacceptable*"[28].

89. In discussing the purpose of disciplinary proceedings the court said:

> "*[28] The Dentist Act does not provide any guidance on this subject but I am satisfied that the following statement of principle by Eichelbaum CJ in Dentice v Valuers Registration Board [1992[1 NZLR 720, 724-725 is apposite in this case:*
>
> > *Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them; see, generally, Re A Medical Practitioner [1959] NZLR 784 at pp 800, 802, 805 and 814. In New Zealand, such provisions exist in respect of medical practitioners, barristers and solicitors, dentists, architects, pharmacists, real estate agents and a number of other professionals and callings, as well as valuers; …*
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> *[29] In the light of those general purposes, it is also relevant to consider the purpose of the removal of a practitioner's name from a professional*

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[26] Para 82
[27] Auckland HC; AP77/02; 8/10/02;
[28] Paragraph 32

register. There is authority for the proposition that removal from a professional register has a protective purpose and is not designed to punish the professional concerned: Re A Medical Practitioner [1995] 2 QBR 154, 164. Plainly, removal from the register does serve to protect the public but it also serves the function identified in Dentice of maintaining professional standards and maintaining public confidence in the standing of the profession. It also acts as a deterrent to the individual concerned and others in the profession.

[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 practice against the need for removal and its consequences to the individual: Dad v General Dental Council at 1543. As the Privy Council further observed:

> *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 Council 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".

90. The Tribunal has also taken specific account of the following cases referred to it:

90.1. *Dr S*[29], a registered dentist charged with practising for a period of approximately six months without an APC. The circumstances were very similar in that case to the present. Reminders had been sent to Dr S both for a 6 month renewal when renewal dates were changed and then for the annual renewal. Dr S was late in his applications for which he said there were "*compelling reasons*" (and the reasons were not available from the reported

[29] 445/Den11/198P

decision). The Tribunal there took into account the pattern of multiple reminders and expressed considerable doubt as to how seriously Dr S took the obligation to hold a current APC. The Tribunal had no confidence that Dr S took the issues seriously. A fine of $2,000.00 was imposed; censure was ordered; a contribution of $12,000.00 towards costs was ordered and the Tribunal ordered the suppression of Dr S's name.

90.2. *Mrs H*[30], a pharmacist practising between April 2005 and June 2008 without a current APC. Although she had annually renewed her practising certificate earlier, for those years she did not do so until the matter was drawn to her attention. Her reason, apparently accepted by the Tribunal, was that she had joined the College of Clinical Psychologists and believed that sufficed as an alternative to a practising certificate. Although her failure to obtain a practising certificate was regarded as innocent and inadvertent, it was said to represent a failure to maintain an important professional obligation and Ms H was censured and fined (the fine being reduced on appeal to $2,000.00) with an order for $3,900.00 contribution to costs.

90.3. *Ms O*[31], the case of an occupational therapist who practised while not having an annual practising certificate for 4 years. Her explanation related to changes of processes. The Tribunal censured her and fined her $1,400.00 based on the sums of $400.00 and $500.00 in respect of certain years when the certificate had not been renewed. It ordered her to make a contribution of $2,000.00 towards costs

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[30] 256/Psy09/128P; on appeal *GS v Professional Conduct Committee* [2010] NZAR 417
[31] 274/OT09/132P

90.4. *White*[32]. Mr White, a registered optometrist, was charged with practising optometry for two periods of months during 2010. Renewal of his APC had been declined for Mr White because he had not undertaken a required Diagnostic Pharmaceutical Agents (DPA) Recertification Programme. While these requirements were being finalised Mr White did continue to practise as an optometrist. Despite an elaborate process of the information to members of the profession as to the requirements of the DPA Recertification Programme Mr White was, to use the words of the decision, "lax" in meeting the practical requirements and he was found to have practised while not having a current APC. Mr White was censured, fined $1,250.00 and ordered to pay $3,500.00 towards costs. The Tribunal rejected a submission that section 30(3) of the HPCA Act, which provides for a deeming provision during the process of renewal of an APC, applied in this case because the APC had already lapsed.

Penalty – discussion

91. There are these aggravating features to the Charge:

91.1. There had been reminders sent to Dr E by both e-mail and mail which should have reminded him of the necessity to renew his APC but which he did not take into account.

91.2. The onus was on Dr E to renew his practising certificate and not to practise until he had received the renewed APC.

91.3. Dr E was a senior practitioner as a dentist and had renewed his APC regularly in the past and should have been aware of the requirements.

92. Against this are these mitigating factors:

92.1. Dr E had had significant personal stress and issues.

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[32] 366/.Opt10/168P

92.2. He did not have as regular access to his e-mail and mail as he had had previously, however he had explanations for this which the Tribunal accepts.

92.3. The lapse in this case was only over a period of weeks.

92.4. The practising in this case was largely that of supervision of students. Although this has its own responsibilities and importance, the Tribunal does not regard this as being as direct as his practising on his own; which, of course, he did for the three days in question at the end of October 2011.

92.5. There were only the three days of actual practice as a dentist in question.

92.6. When the matter was drawn to Dr E's attention he attended to it by raising it with his employer and completing the APC application renewal form.

92.7. It was his employer who let him down by failing to process the payment and submit the form in a prompt and timely manner. That led Dr E into a belief, ill-founded and on which he should not have relied, that all had been done.

92.8. There was an e-mail from the Dental Council which referred to his not being able to practise until it had received the fee and form; and although Dr E must have known that this was not the final requirement, it may have led him to believe that that was the primary thrust for the council.

92.9. There had been earlier years where there had been greater laxity on the part of the council in its enforcement of the renewal requirements.

92.10. Dr E's age, experience and professional record which, on the one hand should have alerted him to the requirements, but on the other hand can be accepted as being a mitigating factor.

92.11. The contribution by Dr E to the local community in the work that he does for xx and for local Maori and low income families.

93. Having regard to these issues and taking into account to the extent other appropriate cases before the Tribunal which have been mentioned, it is the view of the Tribunal the only penalty should be a small fine and Dr E is fined $500.00.

94. The Tribunal does not consider that an order for censure is warranted, this being an offence very much at the minor end of the scale and for which there are reasonable explanations, particularly as to reliance on the employer for completion of renewal of the APC.

95. The Charge against Dr E and the penalties imposed do not in any way reflect on his competence either at the present or in the past as a dentist. They relate solely to the obligation he had to renew his APC and his failure to do so in a timely manner.

Costs

96. The principles applicable to costs are these. In *Cooray v Preliminary Proceedings Committee*[33] there is reference to a 50% contribution. That is in the context, however, of a starting point and other factors may be taken into account to reduce or mitigate that proportion. If Dr E does not pay or contribute to the cost of this proceeding to any extent, those costs, or that deficiency, must be met by other members of the dental profession. As was said in *O'Connor v Preliminary Proceedings Committee* [34]

> *"It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature empowered the different bodies to impose orders for costs".*

97. In *Winefield*[35] the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:

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[33] Wellington HC: AP 23/94; 14/9/95; Doogue J
[34] Wellington HC; AP 280/89; 23/8/90; Jeffries J
[35] 60/Phar06/30P

97.1. The hearing being able to proceed on an agreed statement of facts.

97.2. Co-operation of Mr Winefield.

97.3. The attendance of Mr Winefield at the hearing.

97.4. Consistency with the level of costs in previous decisions.

97.5. Costs not paid by Mr Winefield would fall on the profession as a whole

98. The Tribunal was advised that the approximate costs for the PCC amounted to some $14,000.00 excluding GST and that the costs for the HPDT amounted to some $14,276.00 excluding GST, a total of $28,276.00.

99. The Tribunal is of the view that, having regard to the circumstances of the case and all the information that was placed before it the proper contribution to order against Dr E is $5,000.00. This is to be divided equally between the PCC and the Tribunal.

Suppression of name

100. Dr E made an application for an order under section 95 of the HPCA Act that his name and identifying details and those of his employer not be published. There was no direct application by his employer for any such order.

101. The subject of prohibition on the publication of name or particulars is dealt with by s. 95 of the Act which includes:

"***95 Hearings to be public unless Tribunal otherwise orders***

(1) Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section or unless section 97 applies.

(2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:

…

(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person."

102. The presumption in section 95(1) of the Act that the Tribunal's hearings shall be in public are the primary principle and endorse the principle of open justice; but section 95(2) does give the Tribunal discretion to grant name suppression.

103. The test is whether it is "desirable" to prohibit the publication of the name or any particulars of the affairs of the person in question, in this case the practitioner, and the Tribunal must consider both:

103.1. The interest of any person and

103.2. The public interest.

104. There have been many public interest factors identified by other Tribunal decisions. These include:

104.1. Openness and transparency of disciplinary proceedings[36].

104.2. Accountability of the disciplinary process[37].

104.3. Public interest in knowing the identity of a health practitioner charged with a disciplinary offence[38].

104.4. Importance of speech and the right enshrined in section 14 New Zealand Bill of Rights Act 1990[39].

104.5. Unfairly impugning other practitioners.

105. There are also these statements of principle:

Panckhurst J in *Tonga v Director of Proceedings*[40]

> *"[F]ollowing an adverse disciplinary finding more weighty factors are necessary before permanent suppression will be desirable. This, I think, follows from the protective nature of the jurisdiction. Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in a preponderance of cases. Thus, the statutory test of what is "desirable" is necessarily flexible. Prior to the substantive hearing of the*

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36 *M v Police* (1991) CRNZ 14; *R v. Liddell* [1995]1 NZLR 538; *Lewis v. Wilson & Horton Ltd.* [2000] 3 NZLR 546; *Director of Proceedings v I* [2004] NZAR 635

37 *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360

38 *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360; F v *Medical Practitioners Disciplinary Tribunal* (Auckland High Court; AP21 – SW01; 5/12/01; Laurenson J

39 *R v. Liddell* [1995]1 NZLR 538; *Lewis v. Wilson & Horton Ltd.* [2000] 3 NZLR 546

40 *Tonga v Director of Proceedings* (Christchurch High Court; CIV 2005-409-2244; 21/2/06; Panckhurst J; para 42.

charges the balance in terms of what is desirable may incline in favour of the private interests of the practitioner. After the hearing, by which time the evidence is out and findings have been made, what is desirable may well be different, the more so where professional misconduct has been established".

Blanchard J in *B v B*[41]:

"In normal course where a professional person appears before a disciplinary Tribunal and is found guilty of an offence, that person should expect that an order preventing publication of his or her name will not be made. That will especially be so where the offence proved, or admitted, is sufficiently serious to justify striking off or suspension from practice."

Gendall J in *Anderson v PCC*[42]

"Private interests will include the health interests of a practitioner, matters that may affect a family and their wellbeing, and rehabilitation. Correspondingly, interests such as protection of the public, maintenance of professional standards, both openness and "transparency" and accountability of the disciplinary process, the basic value of freedom to receive and impart information, the public interest knowing the identity of a practitioner found guilty of professional misconduct, the risk of other doctors' reputations being affected by suspicion, are all factors to be weighed on the scales.

"Those factors were also referred to at some length in the Tribunal. Of course publication of a practitioner's name is often seen by the practitioner to be punitive but its purpose is to protect and advance the public interest by ensuring that it is informed of the disciplinary process and of practitioners who may be guilty of malpractice or professional misconduct. It reflects also the principles of openness of such proceedings, and freedom to receive and impart information."

106. Blanchard J in *B v B*[43] went on, however, to say:

"But where the orders made by a disciplinary tribunal in relation to future practice of the defendant are directed towards that person's rehabilitation and there is no striking off or suspension but rather, as here, practice may continue, there is much to be said for the view that publication of the defendant's name is contrary to the spirit of the decision and counterproductive. It may simply cause damage which makes rehabilitation impossible or very much harder to achieve."

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41 Auckland High Court HC4/92; 6/4/93;Blanchard J; p 99
42 Wellington High Court; CIV 2008 – 485 – 1646; 14/11/08; Gendall J; paras 36 and 37
43 Auckland High Court HC4/92; 6/4/93;Blanchard J; p 99

107. Reference was made on Dr E's behalf to public interest considerations, including those referred to in the case of *Dr S* mentioned above. The reasons for non-publication in this case put forward for Dr E were:

107.1. Reputational harm in circumstances when the Charge does not involve Dr E's professional abilities or competency, but risks being interpreted in this way if there is publication.

107.2. Dr E is a role model to Maori and publication will have a detrimental impact on this which will be out of proportion to the Charge.

107.3. Dr E's own standing in the community will also be affected.

107.4. There is no public interest that could outweigh the prejudicial effects on Dr E and his employer.

107.5. The interests of the public are not served by knowing the identity of either Dr E or his employer in a "case of this nature."

108. There had earlier been an application for "privacy" and continuing interim name suppression which referred to Dr E having been in practice since 1965 without issue, as to his professional abilities or competence and his standing in the community; the community health programmes and care delivered by his employer in the district and the important part that Dr E was said to play in the programme; that the publication of his name would be prejudicial to him personally and the dental services provided by his employer; that that prejudice "*could be significant given the possibility of negative publicity*"; that the public interest did not outweigh the potential prejudice; and that publication would not benefit any other person or the public interest.

109. The only evidence put forward to support the application were the affidavits of Dr E and Mr N. Dr E himself referred to his "*long and unblemished record as a dental practitioner*" and the importance for him to have name suppression. He referred to there being "*a very detrimental effect not only on [him] personally, but also upon*

[his] family, the work that [he is] now doing for xx and tribally for [his] own people." He referred to his service with Q and his reputation in the community saying that publication would be particularly damaging at this stage of his career "*as there will be those who will assume from this that [he has] been guilty of malpractice or similar conduct, when this is not the case*".

110. Mr N in his affidavit supported Dr E's application and said that publicity would "*be very damaging to him personally as well as the work that Dr E does for our practice and his people.*" He referred to the Dr E's being

> " *… very much a mentor both within [xx] and to wider Maori. He is someone who has had a successful career as a dental practitioner and is doing important work within [the] community and for his people. Any publicity that may arise … will inevitably cause harm to Dr E …*".

111. The Tribunal does not accept any ground based on how the decision may be misinterpreted. The decision must speak for itself and stand on its own feet and should be properly interpreted by any person giving publicity to it.

112. The Tribunal does not accept that there has been sufficient evidence of any detrimental effect that may arise in respect of Dr E's position as a role model or standing in the community. The fact is that Dr E did not renew his annual practising certificate when he should have; but weighed against this are the very significant mitigating factors to which this decision refers and any publication of the decision should refer to those important factors.

113. Dr E has apparently served the community and profession well over the many years of his practice. A small lapse in relation to his renewal of his annual practising certificate, as recorded above, should not interfere with that reputation. Any publication of the decision should emphasise in a balanced way the decision of the Tribunal and reasons behind it.

114. Other members of the profession, both senior and respected or junior and new to the profession, will learn that annual practising certificates must be renewed in a timely way and that there are consequences for failure to do so. This offending is very much at the lower end of the scale and the decision and any publication of it should reflect that.

115. Accordingly the application is declined.

Result and orders

116. Pursuant to section 101(1)(e) of the Health Practitioners Competence Assurance Act 2003 the Tribunal orders Dr E to pay a fine of $500.00.

117. Pursuant to section 101(1)(f) of the Health Practitioners Competence Assurance Act 2003 the Tribunal orders Dr E to pay a contribution towards the costs and expenses of the investigation, inquiry and prosecution of the Charge and the hearing in the sum of $5,000.00 to be divided as to the PCC, the sum of $2,500.00 and to the Tribunal, the sum of $2,500.00.

118. Pursuant to section 157(2) of the Health Practitioners Competence Assurance Act 2003 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 21st day of December 2012.

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David M. Carden
Chairperson
Health Practitioners Disciplinary Tribunal