



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

DECISION NO: 536/Den12/231P

IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003

-AND-

IN THE MATTER of a Charge laid by a Professional
Conduct Committee pursuant to Section
91(1)(b) of the Act against **Dr Choonsik
Moon**, Registered Dentist, of Auckland.

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr D M Carden (Chair)
Dr S Salis, Dr P Luteru, Dr W Ross and Dr A Gunder (Members)

Miss D Gainey (Executive Officer)

Hearing held at Auckland on 20 March 2013

APPEARANCES: Dr J Coates for the Professional Conduct Committee
Mr H Waalkens QC and Ms V Knell for the practitioner, Dr
Choonsik Moon

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Introduction

1. Dr Choonsik Moon is a registered dentist who practises in dental surgeries in both Northcote and Henderson, Auckland. On 24 April 2012 the Dental Council of New Zealand (“**the Dental Council**”) suspended Dr Moon’s registration as it considered that he had failed to comply with certain medical emergency practices which were serious and unsatisfactory, potentially impacting on the health and safety of members of the public. Although the suspension order took effect from 26 April 2012, between that date and 8 May 2012 Dr Moon continued to perform services that formed part of the scope of practice of dentistry. On 8 May 2012, the Dental Council wrote to Dr Moon advising that it was satisfied that he was now compliant with the Medical Emergencies Code and that the order to suspend had ceased. A Charge has been brought against Dr Moon under The Health Practitioners Competence Assurance Act 2003 (“**the HPCA Act**”) by a Professional Conduct Committee (“**the PCC**”) appointed by the Dental Council. The Charge was heard by the Tribunal.

The Charge

2. The Charge (which had earlier been amended) read 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 Choonsik Moon 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

That between the period 26 April 2012 and 8 May 2012 Dr Moon performed services that formed part of the scope of practice of dentistry

when he knew or ought to have known that his registration had been suspended as at 26 April 2012 by way of order of the Dental Council.

The conduct alleged amounted to professional misconduct pursuant to section 100(1)(a) and/or (b) of the Act.”

3. At the hearing Dr Moon, through counsel, admitted the Charge. An agreed Summary of Facts was produced which read as follows:

1. *Dr Choonsik (Andy) Moon has been a registered dentist since 19 May 1997. Dr Moon is registered in the general dental scope of practice. Dr Moon holds a current annual practising certificate.*
2. *Dr Moon practises (and at all material times practised) at dental surgeries known as “Andy Moon Dental Surgery” at Northcote and “Toothcare West” at Henderson, Auckland.*
3. *On or around 28 September 2011 Dr Moon completed an application for an annual practising certificate for the 1 October 2011-30 September 2012 year, and submitted this application form to the Dental Council. A copy of Dr Moon’s application for a practising certificate is at page 1 of the agreed bundle of documents.*
4. *By way of order of the Dental Council dated 24 April 2012 the Dental Council suspended Dr Moon’s registration. The Dental Council considered that Dr Moon’s failure to comply with the Dental Council’s Code of Practice for Medical Emergencies in Dental Practice was serious and unsatisfactory, potentially impacting on the health and safety of member of the public. The suspension order took effect on 26 April 2012. Dr Moon was advised that the order remained in effect until Dr Moon satisfied the requirements of the recertification programme by being fully compliant with the Dental Council’s Code of Practice relating to emergency equipment. A copy of the Dental Council’s order, together with the Council’s letters to Dr Moon dated 24 April 2012 and 10 April 2012 relating to the suspension of his registration, are at pages 5 to 8 of the agreed bundle of documents.*

5. *On the basis of concerns that Dr Moon may have been practising notwithstanding the suspension, a Dental Council agent, Dr Robert East, visited Dr Moon's practice in Henderson. When Dr East arrived at the practice Dr Moon was with a patient. A copy of Dr East's email report to the Dental Council is at page 10 of the agreed bundle of documents.*
6. *On 8 May 2012 the Dental Council wrote to Dr Moon advising that the Council was satisfied that Dr Moon was now compliant with the Medical Emergencies code of practice. Dr Moon was advised that the order to suspend his registration ceased to be effective from that date.*
7. *On 9 May 2012 Dr Kirsten Miller, a community dentist for the Auckland Regional Dental Service contacted the Dental Council to notify the Council about some referral notices from Dr Moon from the period when he was suspended. Dr Miller subsequently forwarded further information to the Dental Council which confirmed that Dr Moon had been treating patients while suspended. Dr Miller had contacted the receptionist at Dr Moon's surgery and the receptionist had confirmed that the treatment had been provided to the patients on the same day as dated on the approval forms. A copy of the information provided to the Dental Council by Dr Miller is at pages 12 to 22 of the agreed bundle of documents.*
8. *On 11 October 2012 Dr Moon wrote to the Professional Conduct Committee acknowledging that he continued to practise dentistry when he was aware that he was suspended and was not permitted to practise as a dentist. A copy of Dr Moon's letter is attached at page 23 of the agreed bundle of documents.*
9. *The period during which Dr Moon practised while his registration was suspended was 26 April 2012 to 8 May 2012.*
10. *By way of order dated 22 March 2012 Dr Moon was declared bankrupt. His insolvency status is 'current bankrupt'.*

4. The agreed Summary of Facts was signed by counsel for the PCC and for Dr Moon.
5. There was also an Agreed Bundle of Documents produced by consent on the basis that had been canvassed at a preliminary conference namely:

“.. 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. For the PCC it was submitted that, despite the admission of the Charge by Dr Moon, the PCC had the onus to establish the Charge to the satisfaction of the Tribunal.

Counsel submitted:

- 6.1. That on the basis of authorities cited and in light of relevant admitted facts there was misconduct both in respect of the malpractice or negligence and in respect of acts or omissions bringing, or likely to bring, discredit to the dental profession.
- 6.2. That the misconduct in question was sufficient to justify disciplinary sanction.
- 6.3. That there was a deliberate and flagrant disregard for the Dental Council’s order which was improper, immoral, illegal and unethical and a deliberate failure to obey an instruction of the Dental Council.
- 6.4. That Dr Moon’s conduct posed a significant risk to the public. There were serious concerns that he did not have adequate emergency equipment and protocols in place.

6.5. That Dr Moon's wrongdoing was deliberate and conscious and that, while he knew he was not permitted to do what he was doing, he chose to carry on regardless.

7. Although the Charge was admitted by Dr Moon, the Tribunal must consider it independently and make its own assessment.

Charge – General Principles

8. The burden of proving the Charge is on the PCC.
9. 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 must be the degree of satisfaction on the balance of probabilities.
10. 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
11. The Tribunal has followed the principles enunciated in *Z* in its decisions including in *Decisions Professional Conduct Committee v Dawson*³ and *Professional Conduct Committee v Karagiannis*.⁴
12. The PCC also referred to the Tribunal's decision in *PCC v Chand*⁵ In that case the Tribunal applied the principles as stated in *B v Medical Council of New Zealand*.⁶ Elias J (as she then was) said⁷:

¹ [2009] 1 NZLR 1

² (1938) 60 CLR 336 per Dixon J

³ 300Nur09/139P; 28/4/10

⁴ 181/Phar08/91P; 3/10/08

⁵ 106/Nur06/49P

⁶ Noted in [2005] 3 NZLR 810

⁷ at page 15

“The structure of the disciplinary processes as 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 a 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 permitted to lag. The disciplinary process in part is one of setting standards.”

13. Orders can be made under section 101 of the HPCA Act if the Tribunal, after conducting a hearing on a Charge laid, makes one or more of several available findings.

14. These findings include:

14.1. *“[T]he practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time that the conduct occurred⁸”; or*

14.2. *“[T]he practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred.⁹”*

15. The Tribunal enunciated these principles in its decision *PCC v Nutall*¹⁰:

“71 The Tribunal is of the view that much of the jurisprudence concerning the meaning of professional misconduct under earlier legislative regimes continues to be relevant under the HPCA Act. In particular, the Tribunal believes that 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:

⁸ s. 100(1)(a)

⁹ s. 100(1)(b)

¹⁰ 8Med04/03P

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."*

16. Those are principles which the Tribunal has followed in other cases and are appropriate in this case.
17. Reliance has been placed by the Tribunal, as it does now, on the principles enunciated in *Medical Law in New Zealand, 2006* at para 23.65 that, although malpractice is often equated with negligence, it is perhaps better considered as a broader concept, capable of encompassing neglect, but also of extending to trespassory conduct in the process of caring for patients in relation to consent, breaches of patient confidence and fiduciary obligations, and certain other forms of conduct.
18. In the context of professional misconduct as provided in section 2 of the Nurses Act Gendall J noted in *Collie v Nursing Council of New Zealand* at paragraph 21¹¹ :

"Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness. That sort of test must still apply to the malpractice/negligence definition in s. 2(a) of the Act."

¹¹ [2000] NZAR 74

19. He then said at paragraph 23:

“Clearly it envisages conduct in the performance of the nurse’s usual professional duties if it amounts to “malpractice or negligence”. That requires, in line with authorities and the accepted view, that the negligence or malpractice be of a serious degree and such as to be substantially below the standards expected of a nurse.”

20. In *Collie v Nursing Council of New Zealand*¹² the Court described the term “to bring discredit to the nursing profession” in the following way:

“To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard with the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned.”

21. Having taken those general principles into account, the Tribunal is of the view that the Charge is made out in all respects.

22. The Bundle of Documents included Dr Moon’s application for Annual Practising Certificate (“APC”) dated September 2011 in which he had checked the “Yes” box referring to “Medical Emergencies in Dental Practice.”

23. There was produced to the hearing the copy of a letter dated 10 April 2012 from the Dental Council to Dr Moon referring to two complaint referrals the Council had received from the Health and Disability Commissioner concerning the standard of care provided; and a report from the professional adviser prepared following his review of Dr Moon’s practice. The latter referred to the particular concern that Dr Moon failed to comply with the Code of Practice for medical emergencies in dental practice; that Dr Moon did not have an acceptable emergency kit, there was no

¹² *Supra*, at paragraph 28

24. oxygen supply, resuscitation equipment or drugs evident at the practice, and that Dr Moon's policy in the event of an emergency was to call 111 for assistance. The letter referred to the provisional view reached by the Dental Council that the failure to comply with the Code of Practice was such that the Council should suspend Dr Moon's registration until he was fully compliant. Dr Moon was invited to make submissions and it was made clear to him that if the final order to suspend was made, he would not be able to practise lawfully until such time as he was fully compliant with the Code of Practice. This letter was posted to Dr Moon's postal address and couriered to Dr Moon's physical address.
25. There having been no further submissions from Dr Moon to the Dental Council, the Council affirmed its proposal to suspend and notice of this was given to Dr Moon by letter dated 24 April 2012. That letter included:

"You must not practise on or after Thursday 26 April 2012 and you will need to rebook any patients already booked to see you."

The formal order of the Council (which was produced at the hearing) was enclosed with that letter and made quite clear that Dr Moon's registration had been suspended.

26. When the agent for the Dental Council, Dr Robert East, visited Dr Moon's practice because of concerns he was first told by the receptionist that Dr Moon was busy with a patient. After identifying himself to Dr Moon, Dr East accompanied Dr Moon into a room identified as Surgery 3 where he was shown a comprehensive emergency kit along with a portable oxygen cylinder and other equipment. Dr East was then taken by Dr Moon on a tour of the premises and two working surgeries. When asked if he was busy, Dr Moon replied that he was *"quite busy, working two and a half days at Lincoln North and two and a half days at his other surgery in Northcote."*

27. Copies of the form, Application for Approval to Provide Treatment, from Dr Moon to the Ministry of Health were produced showing Dr Moon having treated patients while suspended, as is mentioned in the agreed Summary of Facts.
28. The letter dated 11 October 2012 from Dr Moon to the PCC accepted that he was aware, at the time that he was not permitted to practise as a dentist but referred to personal pressures and that he *“put [his] head in the sand and hoped this nightmare would end.”*
29. It was both malpractice and negligence for Dr Moon to practise when he was suspended from practising; and it brought discredit to the dental profession for him to do so. The whole regulatory regime concerning practising certificates is enacted to ensure that standards are maintained. The provisions of Codes of Practice are to maintain standards. This applies to emergency equipment. Dental practitioners must be properly equipped to deal with emergencies and to have the equipment and knowledge that the Codes of Practice dictate. To fail to do so is to place the public at risk.
30. Once the decision had been made to suspend Dr Moon because of his failure to comply with those Codes of Practice, it was then entirely incumbent upon him to comply with the order for suspension. The matter was outside Dr Moon’s control until the Dental Council had revoked or withdrawn that order. Clearly what was at issue was compliance with the Codes of Practice so far as emergency equipment was concerned. Even if Dr Moon had obtained the necessary equipment and was fully compliant with the Codes of Practice, that did not of itself entitle him then to resume practice. It was a requirement, as the letters to him said, that the Dental Council and its agents satisfy themselves that there was compliance before the suspension would be lifted.

31. It was malpractice and negligence for Dr Moon to resume practice even when he may have reached a stage of compliance with those Codes of Practice. It was an act which brought discredit to the dental profession for him to do so before the order for suspension imposed on him by the Dental Council was lifted. The Tribunal finds the charge made out in all respects.
32. The Tribunal announced the decision to the hearing and the matter proceeded to consider penalty.

Penalty: the PCC submissions

33. The PCC submitted that Dr Moon's conduct was at the serious end of the scale. It said that the aggravating factors included the Dr Moon knowingly, deliberately and flagrantly ignored the Dental Council suspension order; and that Dr Moon's actions directly put the public at risk. The suspension was imposed because of Dental Council concerns about the risk his practice posed to the public and it was submitted that Dr Moon showed no regard for the safety of the public.
34. It was noted by way of mitigation that Dr Moon had acknowledged his wrong-doing and co-operated with the Tribunal process.
35. The PCC urged that consideration be given to an order for suspension for a period between 12 and 18 months with an order that, on resumption of practice, a condition for supervision with details set by the Dental Council be imposed; that Dr Moon be censured and that an order for contribution to costs be made. Reference was made to comparable cases. It was submitted that there was certainly no distinction where a suspension had been imposed by the Tribunal rather than by the Dental Council - indeed it might be regarded as worse, particularly because of the different functions of suspension by the respective bodies and that there was an opportunity for Dr Moon to remedy matters before any suspension was imposed.

Penalty: Submissions for Dr Moon

36. Although accepted not to be any defence to the breach, it was submitted that Dr Moon's personal circumstances, as mentioned in his letter to the PCC, referred to were mitigating explanatory factors. These included:
- 36.1. That Dr Moon was going through a marriage break-up.
 - 36.2. That Dr Moon had significant financial pressures and has since been declared bankrupt.
 - 36.3. That Dr Moon had major health issues.
 - 36.4. That following the sale of his dental practice in March 2012 Dr Moon was obliged to meet minimum turnover levels.
37. It was said again that he "*buried his head in the sand*" which was said to be an ironically coincidental explanation for why he was suspended in the first place. It was emphasised that Dr Moon had made no attempt whatsoever to try to hide or mask the fact that he was practising whilst suspended.
38. In mitigation the following factors were mentioned:
- 38.1. That Dr Moon is a 47 year old dental practitioner with no relevant prior convictions or adverse findings against him.
 - 38.2. That Dr Moon practises from two locations and that at each of these he employs a part-time dentist as an independent contractor.
 - 38.3. That Dr Moon has no other unresolved complaints and indeed no complaints with respect to his practice as a dentist since the suspension period in question.
 - 38.4. That Dr Moon has fully co-operated with the Dental Council and the PCC throughout this matter.
 - 38.5. That Dr Moon is a competent dentist showing insight into his misconduct.

39. Various references were produced from professional colleagues and patients alike, which the Tribunal has taken carefully into account.
40. The submissions then analysed the different purposes of discipline as contained in the authorities to which reference will be made. The submissions then discussed cancellation and suspension in the context of the facts and the authorities. It was submitted that, if an order for suspension were considered, there should be a deferment of that with reference to various cases.
41. The submissions considered conditions that might be imposed saying that Dr Moon
- “... would not be adverse to any reasonable conditions which the Tribunal may consider necessary to impose in order to address [any particular risk to be addressed or minimised or such as seen of advantage in addressing any of the other principles of discipline]”* (emphasis in submissions).
42. It was said that the imposition of a fine “*may seem unattractive*” given Dr Moon’s bankruptcy and there were details given by him by declaration of his financial position. Dr Moon did not give evidence about this and was not available to be cross-examined. The declaration referred to his bankruptcy on 22 March 2012; his assets comprising a BMW Motor car and to “*incidental chattels, possessions and belongings*” totalling \$11,000.00. It was said that he and his wife own commercial property at Lincoln Road, Henderson, currently under sale because of the bankruptcy and, although it is worth approximately \$800,000.00, he said, the mortgage is somewhere of the order of \$650,000.00 and he does not know what, if anything, he would receive from the sale. He said in the declaration that his liabilities were unsecured creditors of potentially \$9,120.00. He has made an arrangement through his accountant with the Official Assignee to be paid \$1,000.00 per week by way of living allowance with the balance being provided to the Official Assignee for payment to creditors. He gave details of his weekly outgoings totalling \$1,000.00

and said he had no other assets or income whether by family trust arrangements or otherwise.

43. Counsel on behalf of Dr Moon accepted that a censure was inevitable and that this represented a significant penalty in its own right.

Penalty - principles

44. The penalties which the Tribunal is authorised to impose on the practitioner under section 101 of the HPCA Act are:

44.1. That registration be cancelled.

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

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

44.4. Censure.

44.5. 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 does not apply in this case)).

44.6. Costs.

45. The functions of disciplinary proceedings have been canvassed by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*.¹³ In that case the practitioner, Mr Roberts, had had his registration as a nurse suspended by the Tribunal for a period of three years, the maximum provided. The charge against him included having had an “*inappropriate and/or sexual relationship*” between him and a patient.

46. Before dealing with the specific facts of the Roberts case, the Court referred to the following factors which the Tribunal is required to take into account in determining penalty.

46.1. What penalty most appropriately protects the public, a factor identified as the principal purpose of the HPCA Act in section 3, namely:

“... 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.”

46.2. The important role of setting professional standards.¹⁴ The Tribunal takes into account the following extract from the judgment in *Young v PCC*.¹⁵

“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.”

46.3. A punitive function¹⁶ but this is:

“... often viewed as a by-product of the penalties imposed by the Tribunal and that protecting the public and setting professional standards are the most important factors for the Tribunal to bear in mind when setting a penalty.”¹⁷

46.4. Rehabilitation of the health professional with reference to *B v B*.¹⁸ The Court recorded in *Roberts* at paragraph 47 that:

¹³ 2012] HC 3354; Wellington HC; CIV -2012-404-3916; 12/12/12; Collins J

¹⁴ Refer also *Dentice v Valuers Registration Board* [1992] 1 NZLR 720; and *Ziderman v General Dental Council* [1976] 2 All ER 344

¹⁵ Wellington HC: CIV 2006-485-1002: 1/6/07: Ronald Young J

¹⁶ Refer also *Dentice*; also *Patel v Complaints Assessment Committee* (Auckland High Court (CIV 2007– 404 – 1818; 13/8/07; Lang J; and *Winefield* 83/Phar06/30P)

¹⁷ *Roberts* paragraph 46

¹⁸ HC Auckland, HC 4/92, 6 April 1993) Blanchard J See also *Patel*; also *J v Director of Proceedings* (Auckland High Court CIV 2006 – 404 – 2188; 17/10/06; Baragwanath J

“[a] reason why rehabilitation may be an important consideration is that health professionals and society as a whole make considerable investments in the training and development of health practitioners. Where appropriate, the Tribunal should endeavour to ensure that these investments are not permanently lost, provided of course the practitioner is truly capable of being rehabilitated and reintegrated into the profession.”

46.5. That any penalty imposed is comparable to other penalties imposed upon health professionals in similar circumstances. The Court recognised that each case would require a careful assessment of its own facts and circumstances, and that rarely would two cases be identical. The emphasis was that the Tribunal should try to ensure a degree of equity between health professionals who appear before the Tribunal and stressed that, in cases involving sexual misconduct,

*“there is no logical reason why different categories of health professional should be treated differentl.”*¹⁹

46.6. Assessing the health practitioner’s behaviour against the spectrum of sentencing options that are available and trying to ensure that the maximum penalties are reserved for the worst offenders.

46.7. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances with reference to *Patel v Dentists Disciplinary Tribunal*.²⁰

46.8. Whether the penalty proposed is

“... fair, reasonable and proportionate in the circumstances presented.”

47. The court referred to the penalty imposition as involving a *“finely balanced judgment”* and not being a *“formulaic exercise.”*

¹⁹ *Roberts* at Paragraph 48

²⁰ Auckland HC: AP 77/02; Randerson J; 08/10/02

48. In *A v Professional Conduct Committee*²¹ 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*²² 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.”

49. The Court went on²³:

“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 interests 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’.”

50. The Tribunal is also mindful of the remarks of Randerson J in *Patel v Dentists Disciplinary Tribunal*.²⁴ 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, accepted by the Court as being “...grossly incompetent and completely unacceptable.”²⁵

51. 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

²¹ Auckland HC; CIV 2008 - 404 –2927; 5/9/08; Keane J

²² [1990] 2 All ER 263

²³ *A v Professional Conduct Committee, supra*, paragraph 82

²⁴ *Supra*

²⁵ Paragraph 32

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 professions and callings, as well as valuers; ...*

*[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 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”.

Penalty: discussion

52. It is a serious matter for any dental practitioner not to comply with an order of the Dental Council. Where a dental practitioner has been suspended for good reason by the Dental Council, it is quite wrong for there to be any breach of that order. The function of suspension by the Dental Council is to ensure compliance with necessary Codes of Practice such as the one which was found to have been breached in this case. The suspension process is an important method by which the Dental Council can ensure that those Codes are complied with and remedial steps are put in place by the relevant dental practitioner. It is not enough simply to take steps to remedy the breach, there must also be the necessary advices to the Dental Council and the approval on its behalf that that has been done to a satisfactory standard such that it can decide whether to lift the suspension or not.
53. Although Dr Moon has apparently taken steps to comply with the appropriate Codes once this was drawn to his attention, he did not go the further step of making sure that he refrained from practice until the Dental Council and its representatives had approved those steps and the suspension order had been lifted.
54. It is imperative for the Tribunal to stand behind the Dental Council in its discharge of those regulatory functions and to ensure that orders for suspension by it are complied with fully. A breach of the Tribunal's own order for suspension is expressly dealt with by section 100(1)(g) of the HPCA Act. The failure to comply with the suspension order by Dr Moon amounts to professional misconduct for the reasons that have been given and must be treated accordingly. The message must be sent to the dental profession that the regulatory functions of the Dental Council are of importance, the Codes of Practice must be complied with, and that, if there is a

suspension by the Dental Council because of a failure to comply with those Codes of Practice, that order for suspension must not be breached. If there is a breach, this is misconduct which the Tribunal will penalise appropriately.

55. It is only in that way that the public can be protected. Specifically in this case, the failure to have adequate provision for medical emergencies which resulted in the suspension by the Dental Council was, as is stated above, placing the public at risk. The suspension by the Dental Council was intended to remedy that and to protect the public. The breach by Dr Moon of that suspension order then in turn placed the public at risk, despite the fact that he may have had the appropriate emergency equipment by then because the law requires compliance with Dental Council suspensions and for that Council to decide whether there has been compliance.
56. It was submitted that the public are not in any danger with respect to the conduct in question; and, although that strictly applies in itself to the non-compliance with an order for suspension, it is the background to the order which goes to the heart of protection of the public. Dr Moon was suspended by the Dental Council because he did not have appropriate emergency equipment resources. It was for the Dental Council, or a representative on its behalf, to decide whether what Dr Moon had then brought to his practice was sufficient to comply with the Code of Practice and sufficient to protect the public. Until that decision was made, it was the public at risk and it is the importance of enforcing the suspension order until it was lifted by the Dental Council that lies with this Tribunal's process.
57. It is also necessary to set standards to ensure that any order of the Dental Council is honoured in full. It is only in that way that the standards that the Dental Council are enforcing are maintained for the protection of the public. The Tribunal does not accept the submission made on Dr Moon's behalf that there is no evidence of a need for general deterrence or of specific deterrence. While it was said that Dr Moon

understood that his conduct was unacceptable and that there was no chance of a repeat, the fact remains that he did offend in this way and the message needs to be sent to him specifically and to the dental profession as a whole that standards of compliance with Dental Council orders and suspensions must be set and maintained.

58. Although there was reference in the submissions to *Z v Dental Complaints Assessment Committee*²⁶ to this extract:

“... [T]he purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned,”

the fact remains that the HPCA Act does allow the Tribunal to impose the punitive penalties at least of censure and fine.

59. There needs to be some punitive element in the order of the Tribunal because there has been the deliberate breach by Dr Moon of the suspension that had been ordered.
60. To achieve rehabilitation the imposition of conditions on Dr Moon will assist in ensuring that he understands the law and ethics involved.
61. The aggravating features in this case are these:

61.1. Dr Moon had been given clear notice of the outcome of the review of his records and assessment of compliance with the Codes of Practice and the noted failure to comply in respect of medical emergencies in dental practice. He was told quite clearly what those deficiencies were. He was then given further notice of the suspension but, despite this, failed to comply with it. The breach was, as is submitted for the PCC, a knowing, deliberate and flagrant breach. Although he refers to having his head in the sand, Dr Moon did know that the suspension order had been made against him and why.

²⁶ [2009]1 NZLR 1 at paragraph 97

61.2. The Tribunal does accept that Dr Moon's actions put the public at risk. As stated above it was the risk from the failure to comply with the Codes of Practice that put the public at risk and the resultant failure to comply with the suspension order was a breach of standards in itself.

62. The mitigating features are:

62.1. The personal circumstances to which reference was made by counsel in submissions on Dr Moon's behalf. The Tribunal notes, however, that there cannot be as much weight placed on these factors given that Dr Moon did not give evidence and was not available to be cross-examined or questioned about them. It has been said in other decisions of this Tribunal that the failure of a practitioner to give evidence does, in some cases, restrict the Tribunal in its assessment of the matter and in giving full weight to what is alleged.

62.2. The fact that Dr Moon has had no previous convictions or other adverse findings by any disciplinary Tribunal or process or the HPDT or the Health and Disability Commissioner.

62.3. The Tribunal does not accept the submission that it is a mitigating factor that he practises from two locations in Northcote and Henderson, nor of the arrangements that he has for working there or for others to do so. That is simply a fact of the matter and, if this interferes with his proper compliance with Codes of Practice and orders of the Dental Council, then he will need to change that.

62.4. Dr Moon's full co-operation with the Dental Council and the PCC in this matter and the process before the Tribunal.

62.5. The things which are said about him in the various references which were produced.

63. The Tribunal has taken into account the following cases that may be said to be comparable, both of which were referred to by both counsel.

63.1. *Ranchhod*²⁷. In this case the doctor faced three particulars of a charge that he practised for some three months without an annual or interim practising certificate; that on two occasions he worked outside conditions imposed; and that he had worked for five days whilst suspended. The activity for Dr Ranchhod involved primarily health checks and certifications for insurance purposes. The doctor had earlier been convicted of misconduct in continuing to practise medicine while not holding a current APC and further, of altering his existing APC such that it purported to be current. The Tribunal considered that a suspension of nine months should have been ordered but a discount was appropriate and suspended Dr Ranchhod for seven months with conditions for the following three years requiring him to work in group practice and for supervision.

63.2. *Singh*.²⁸ Ms Singh, a nurse, had been suspended for six months by this Tribunal. During that time she worked for periods first of 10 days and then over three months as a nurse at two different locations. She altered her practising certificate to make it appear that it was current. Her registration as a nurse was cancelled and she was ordered to pay \$7,000.00 towards costs.

64. The Tribunal considered carefully whether this was a case where Dr Moon's name should be removed from the register but decided against this. This was not sought

²⁷ 410/Med10/161P

²⁸ 475/Nur12/212P

by the PCC and it is not a case which calls for that as being the only penalty available.

65. The Tribunal considered whether there should be suspension of Dr Moon from practice. This is a case which would normally have been appropriate for suspension. There are the aggravating and mitigating circumstances mentioned above. The offending is not such that on its own protection of the public and setting standards for the profession would be sufficiently dealt with simply by conditions, censure and fine.
66. There needs to be a strong message sent to Dr Moon, the Dental Council, the dental profession, and the public, that the Tribunal expects that any suspension order made by the Dental Council or any other professional body empowered to impose that must be honoured. No matter what the merits may be and no matter whether there has been remediation of the matters at issue, the fact remains that a suspension must apply and must be respected until it has been withdrawn.
67. Regard must be had to the other cases mentioned and the general principles of imposing penalty. The Tribunal is of the view that the severity of this case would warrant an order for suspension for 12 months.
68. Counsel for Dr Moon submitted that there should be an order for suspension of any suspension order. He said that a suspension which had the effect of interfering with Dr Moon's ability to continue his dental practice would have a significant bearing upon his ability to continue the arrangement that he has with the Official Assignee to benefit his creditors, a fact described by counsel as "*the public interest.*" As is said above, that arrangement is for payment from income earned to Dr Moon of a weekly allowance for his support with the balance being available through the Official Assignee in the bankruptcy to Dr Moon's creditors. It was further submitted that Dr Moon's patients would suffer unnecessarily should Dr Moon be unable to continue

in practice for a period. By referring to the references that had been provided it was submitted that Dr Moon had a large base of loyal patients and that, as a Korean dentist in the area where he practises in West Auckland approximately 70 per cent of his 11,000 registered patients are Korean. It was submitted that those patients would be unnecessarily and unreasonably disadvantaged if the Tribunal were to interfere with Dr Moon's ability to continue practising as a dentist. It was further submitted that Dr Moon may be at risk of being replaced by the practice where he works if his ability to practise is suspended; and that there would be a risk of disadvantage to the two independent contractors who worked for him. Reference was made to his financial obligations to his family of wife and three children and it was submitted that there was a compelling and strong public interest in an outcome that enabled Dr Moon to continue his work as a dentist.

69. Reference was made to other cases where the outcome had been that a suspension was itself deferred namely:

69.1. *Payne*.²⁹ A charge had been brought against Dr Payne arising from his conviction in a District Court on two charges of using false documents to obtain pecuniary advantage, which included forgery of invoices and using these; and one charge of obtaining by deception in claiming a pecuniary advantage of \$3,515.61. There were some 56 false invoices detailing work which had not been done and which invoices were created from genuine invoices sent to Dr Payne electronically. There were also some 60 invoices relating to purchase of teeth. Dr Payne was suspended for a period of nine months but that order was itself suspended for 24 months with the matter being

²⁹ 405/Den11/184P

able to be referred back to the Tribunal for reconsideration if circumstances called for this.

69.2. *Janssen*.³⁰ In this case a dental therapist was suspended for a period of three months to operate six months after the order of the Tribunal had been made, but expressly on the basis that that suspension would only take effect if Ms Janssen failed to provide to the Tribunal a certificate from the Registrar of the Dental Council confirming that no further complaints had been made against her.

69.3. *Dr Gray*.³¹ This was a decision of the Medical Practitioners Disciplinary Tribunal concerning a doctor who had entered into a sexual relationship with a patient whom he continued to treat. He was censured by the then Tribunal, fined and suspended for six months although the suspension was itself suspended.

69.4. *E*.³² Nurse E had engaged in a sexual relationship with her client's husband. She was suspended for six months but that suspension was itself suspended for 12 months and there were conditions which included supervision for the 12 month period. The suspension of the suspension was on condition that there was no complaint, disciplinary process, or issue arising against the nurse during that time with otherwise reference back to the Tribunal.

70. The Tribunal has considered those submissions carefully and is of the view that the operation of the 12 month suspension should be deferred for a period of 24 months from the date of this decision on the basis that, if the conditions referred to below are not met during that time, the matter will revert to the Tribunal for operation of the

³⁰ 441/DH11/190P

³¹ MPDT decision 182/01/72D

³² 354/Nur10/159P

suspension; but on the further basis that, if those conditions are met during the 24 month period, the suspension will not apply.

71. The reasons for this are because this will enable Dr Moon to continue in practice for the various reasons canvassed by counsel on his behalf and in the public interests identified in those submissions. It will ensure that during that time Dr Moon takes time to reflect on his practice and on the requirements that he has to comply with the law and the ethics of his profession and in particular prescribed recertification programmes under section 41 of the HPCA Act, orders of the Dental Council and the requirements of Codes of Practice on which any suspension order might be based. It will allow a period of time for Dr Moon to comply with the conditions referred to below as to completion of appropriate courses of ethics and for the mentoring period for 24 months to ensure compliance with the law, Codes of Practice, regulations and ethics of the profession as mentioned.
72. During that time he will have to ensure that his practice is conducted carefully and thoroughly in accordance with the law, regulations and the ethics of his profession. He must know that any failure to do so, which may result in complaint or other disciplinary or other process, could result in a reference of this matter by the PCC back to this Tribunal for the suspension ordered to take effect for 12 months.
73. The Tribunal considers that, combined with the conditions, censure and fine referred to below, deferring the suspension in this way will achieve the right balance between the competing interests of protecting the public and maintaining standards on the one hand and sending the right messages to the Dental Council, the profession and the public on the other.
74. The Tribunal does not consider that there should be an order for suspension on its own but rather tied in with the deferment process.

75. This is a case where Dr Moon should be censured. This is not a formality but is a mark of the Tribunal's and the profession's disapproval of the performance of professional duties by Dr Moon and will be a "*black mark*" against him now.
76. The Tribunal is also of the view that a fine should be imposed. This must reflect the Tribunal's concerns about the offence and the balance between aggravating and mitigating factors referred to above and the Tribunal has decided that there should be a fine of \$5,000.00.
77. The Tribunal considers that the matter must then be governed by conditions on Dr Moon's practice. Because Dr Moon can continue to practise those conditions can operate from the date of this decision. The Tribunal is of the view that this should be for the period of two years.
78. The aspects that need to be addressed by the conditions are an appropriate understanding and learning of the applicable ethics of the dental profession and guidance through a mentoring process to ensure application of those ethics to the practice that Dr Moon has.
79. The conditions which the Tribunal orders are therefore that for a period of two years from the date of this decision:
- 79.1. Dr Moon attend at his own expense such course or courses of training in the ethics of the dental profession as stipulated by the Dental Council and satisfy the Dental Council that he has attended and adequately passed those courses.
- 79.2. The Dr Moon be mentored, at his own expense, by a dental practitioner approved by the Dental Council to ensure that Dr Moon complies with all applicable laws, Codes of Practice, and ethical standards, with the mentor reporting to the Dental Council at such intervals as is directed by the Dental Council and that there be no adverse aspects of those reports.

Costs

80. The PCC sought costs and estimated its costs at approximately \$14 – 16,000.00. In addition, the Tribunal must consider its costs, estimated at \$10,310.00. That makes a total of some \$25,000.00 as the estimated costs for this proceeding.
81. Dr Moon provided the declaration of means which is referred to above and reference was made to this by submissions on his behalf.
82. Under section 101(1)(f) of the HPCA Act the Tribunal can order a health practitioner to pay all or part of the costs and expenses of and incidental to any inquiry made by the PCC in relation to the subject matter, the prosecution of the Charge by the PCC and the hearing by the Tribunal.
83. 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 Moon does not pay or contribute to the cost of this proceeding to any extent, those costs 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”.*
84. In *Winefield*³⁵ the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:
- 84.1. The hearing being able to proceed on an agreed statement of facts.
- 84.2. Co-operation of Mr Winefield.

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

- 84.3. The attendance of Mr. Winefield at the hearing.
- 84.4. Consistency with the level of costs in previous decisions.
- 84.5. Costs not paid by Mr Winefield would fall on the profession as a whole
85. For Dr Moon it was submitted that a decision for contribution to costs would be “*unsupportable given all the circumstances*”. Reference was made to *Katamat v PCC*.³⁶ In that case the health practitioner, a pharmacist, was bankrupt and the High Court accepted a submission that it was wrong to impose a substantial costs award even on a lower than usual tariff in light of the practitioner’s lack of income or assets. It was submitted that a costs order must not have the effect of being a penalty; that Dr Moon had been cooperative throughout; and that he and members of his profession “*should not be dissuaded from cooperation as he has by an order for costs that might otherwise make such efforts of little practical benefit*”.
86. Having weighed up these issues the Tribunal is of the view that Dr Moon should pay some contribution to the total costs. This must take into account his own financial circumstances, but also the fact that, in terms of the decision that has been made, he will be able to continue with his work and receipt of income. It may be that he will have to negotiate with the Official Assignee some change to his arrangements and it may be that he will have to approach the Dental Council for arrangements to make instalment payments; but that option is available to him and should not impose too great a hardship on him. The order of the Tribunal should reflect the balance between those competing interests. The Tribunal does not accept the submission made that other parties may be dissuaded by a costs order against Dr Moon from cooperating with or participating in a disciplinary process in the future.

³⁶ [2012] NZHC 1633, particularly paragraphs 83 to 87

87. The decision of the Tribunal is that Dr Moon should contribute the sum of \$5,000.00 towards the cost of the prosecution to be divided equally between the PCC and the Tribunal. This is expressly on the basis that arrangements can be sought for instalment payments.

Orders

88. Dr Moon is censured pursuant to section 101(1)(d) of the Health Practitioners Competence Assurance Act 2003.
89. The Tribunal orders, pursuant to section 101(1)(e) of the Health Practitioners Competence Assurance Act 2003, that Dr Moon pay a fine of \$5,000.00.
90. The Tribunal orders, pursuant to section 101(1)(b) of the Health Practitioners Competence Assurance Act 2003, that Dr Moon be suspended for a period of one year commencing on the date two years after the date of this order but on the basis:
- 90.1. That such suspension will not take effect if the conditions referred to in paragraph 90 are satisfied and;
- 90.2. That leave is reserved to the PCC to apply to the Tribunal in respect of any matters which may arise during the two year period such as non-compliance with the conditions referred to in paragraph 90, for any disciplinary reason, for any failure to meet the requirements of the HPCA Act and in particular any recertification programme under section 41 of that Act, or otherwise.
91. The Tribunal orders, pursuant to section 101(1)(c) of the Health Practitioners Competence Assurance Act 2003, that Dr Moon may, after commencing practice following the date of the order for a period of two years, practise his profession only in accordance with the following conditions, namely:

91.1. Dr Moon attend at his own expense such course or courses of training in the ethics of the dental profession as stipulated by the Dental Council and satisfy the Dental Council that he has attended and adequately passed those courses.

91.2. The Dr Moon be mentored, at his own expense, by a dental practitioner approved by the Dental Council to ensure that Dr Moon complies with all applicable laws, Codes of Practice, and ethical standards, with the mentor reporting to the Dental Council at such intervals as is directed by the Dental Council and that there be no adverse aspects of those reports.

92. The Tribunal orders, pursuant to section 101(1)(f) of the Health Practitioners Competence Assurance Act 2003, that Dr Moon pay a contribution of **\$5,000.00** towards the cost of this prosecution, to be divided as to \$2,500.00 to the PCC costs and as the \$2,500.00 to the Health Practitioners Disciplinary Tribunal costs.

93. The Tribunal directs the Executive Officer to publish a copy of this decision and a summary on the Tribunal's website. The Tribunal further directs the Executive Officer to publish a notice stating the effect of the Tribunal's decision be published in the *Newsletter of the Dental Council of New Zealand* (section 157 of the HPCA Act).

DATED at Auckland this 22nd day of May 2013.

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David M Carden
Chairperson
Health Practitioners Disciplinary Tribunal