New Zealand Health Practitioners Disciplinary Tribunal

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DECISION NO: 605/Den13/240P

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 Mwaffak Rabih** of Wellington, registered dentist

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr D M Carden (Chair)

Dr C Lloyd, Dr P Luteru, Dr S Salis and Ms J Huria (Members)

Miss D Gainey (Executive Officer)

Ms J Kennedy (Stenographer)

Hearing held at Wellington on 20 and 21 November 2013

APPEARANCES: Dr J Coates and Ms A Miller for the Professional Conduct Committee

Mr H Waalkens for the practitioner, Dr Mwaffak Rabih

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Introduction

1. Dr Mwaffak Rabih is a registered dentist practising in Wellington. On 29 May 2012 Dr Rabih was visited at his practice by the complainant, a sales representative, and exchanges took place between them. These were both oral and physical. Dr Rabih has largely denied that these occurred. The matter was investigated and a Charge was laid by the Professional Conduct Committee ("**the PCC**") of the Dental Council of New Zealand ("**the DCNZ**") under the Health Practitioners Competence Assurance Act 2003 ("**the HPCA Act**") which has been heard by the Tribunal.

The Charge

2. Prior to the hearing in preliminary exchanges an order was made by the Tribunal under section 98 of the HPCA Act permanently suppressing the name and identifying details of the complainant who is referred to as "the complainant" in this decision. An order was also made for interim suppression of the name and identifying details of Dr Rabih which continued at the hearing and continues until further order of the Tribunal.

3. The Charge read as follows.

> ***"TAKE NOTICE*** *that pursuant to section 91 of the Health Practitioners Competence Assurance Act 2003 ("the Act") a Professional Conduct Committee of the Dental Council established under section 71 of the Act has reason to believe that grounds exist entitling the Health Practitioners Disciplinary Tribunal to exercise its powers under section 100 of the Act and charges that Dr Mwaffak Rabih, a registered dentist, conducted his dealings with [the complainant], an employee of a dental supply company, in such a way that amounts to professional misconduct.*
>
> ***PARTICULARS OF CHARGE***
>
> *At or around or between 6.00 p.m and 7.00 p.m on 29 May 2012 at Dr Rabih's dental practice located at Miramar Avenue, Miramar, Wellington, during the course of a meeting arranged to discuss dental supplies, Dr Rabih conducted himself inappropriately and/or in an unprofessional manner. In particular:*

1. *Dr Rabih asked [the complainant] "how come every time I see you, you are looking more beautiful than the last time" or words to that effect.*

2. *Dr Rabih rubbed his finger up and down [the complainant's] leg, against [the complainant's] wishes and without her consent.*

3. *Dr Rabih asked [the complainant] if he could kiss her.*

4. *Dr Rabih kissed [the complainant] on the face and neck, against [the complainant's] wishes and without her consent.*

5. *Dr Rabih asked [the complainant] if he could touch her breast.*

6. *Dr Rabih touched and groped [the complainant's] breast with his hands, against [the complainant's] wishes and without her consent.*

7. *Dr Rabih placed his hands on [the complainant's] shoulders and pressed himself against [the complainant's] body, against [the complainant's] wishes and without her consent.*

8. *Dr Rabih pressed his erect penis into [the complainant's] side, against [the complainant's] wishes and without her consent.*

9. *Dr Rabih grabbed [the complainant's] shoulder with force and pulled her on to his knee, against [the complainant's] wishes and without her consent, and said into [the complainant's] ear "please sit on my knee, please sit on my knee" or words to that effect.*

10. *Dr Rabih said to [the complainant], a few times, "so what happens now, where do we go from here" or words to that effect.*

The conduct alleged above either separately or cumulatively amounts to professional misconduct pursuant to section 100(1)(b) of the Act."

4. The Charge was denied by Dr Rabih and heard by the Tribunal on 20 and 21 November 2013 and both parties were represented by counsel as noted above.

The evidence for the PCC

The complainant

5. The complainant gave evidence that she was employed by a supplier of professional dental products. As part of the role she visited dentists in dental practices for supply of such products and demonstration of new products. In July 2011 she visited Dr

Rabih's practice to introduce herself. She met with him on many occasions in the succeeding months at his surgery. This was sometimes by appointment and other times casually if she was in the area. She only went for business reasons such as promoting a conference, course or product, dropping brochures or cold calling. On every occasion, she said, Dr Rabih always said or did something inappropriate. Although this made her feel "*a little bit uncomfortable at times*" it was not sufficient for her to refuse to meet with him. Examples were comments about her physique or his looking her over or complimenting her physique. Although she deals with many dentists, she said that she had never been made to feel inappropriate or had "*sleazy comments*" made but with Dr Rabih it was like that from the first time she met him.

6. The complainant said that on 2 April 2012 she ran a course in Wellington with a colleague demonstrating a new product, a "Wave one" machine. Dr Rabih was present at the demonstration and placed an order to buy the product on condition he could pay in two payments which the complainant agreed to. The following day the complainant sent two mails to Dr Rabih. The first referred primarily to the two installment payments that had been sought. It included an offer to "*spend some time with you so you are comfortable using the system.*" The second email referred to outstanding accounts that needed to be cleared before the order could be released, but then offered a visit to Dr Rabih's practice to "*make sure that [he was] comfortable using the new equipment*" and offered to visit at the end of the day. There was no reply to those emails.

7. On 22 May 2012 the complainant sent a personally addressed, but generic, email to all of her account clients offering a 30% discount on certain products (not including a Wave one) and this was sent to Dr Rabih. Dr Rabih replied to that the following day enquiring about how long the 30% offer lasted but including: " … *the waveone device is still in the box … I waiting to set a meeting with you to do some tryals. Let*

me know what date is suitable to <u>you, it</u> has to be after work someday (wednesday is good for me 7ish if possible)" [sic]. After further exchanges of emails about dates Dr Rabih sent an email to the complainant on 24 May 2012 reading "*Tuesday 29th at 6pm will be good.*" The complainant said that this was the only arrangement made for the meeting time and date and that she was never contacted by Dr Rabih's staff about this appointment.

8. The complainant also said that on the day before she was due to meet with Dr Rabih she contacted a colleague who she knew had dealt with Dr Rabih on a number of occasions. She said she told her colleague she was feeling a bit anxious about the meeting with Dr Rabih and asked whether Dr Rabih had ever requested an out of hours appointment with her. The colleague said that he had not as he had always requested lunchtime appointments. When the complainant asked her colleague whether she thought it was safe for her to meet with Dr Rabih at 6 o'clock the colleague laughed it off with a casual comment. There was a conflict in the evidence from the complainant and from her colleague as to what the remark was that was made and this is referred to below.

9. The complainant said that she was "*still feeling quite hesitant*" about the visit but that she needed to go to ensure Dr Rabih knew how to use the equipment properly. She said she rang Dr Rabih's practice just before lunchtime on 29 May 2012 and spoke to the receptionist asking her to make sure "*everything was set up and ready to go.*" She said that the reason for this was that she "*just had a gut feeling about the meeting.*" She said that she had the impression that someone else was going to be there that evening.

10. On the day in question, 29 May 2012, the complainant said[1] she was wearing a gold loosely fitted dress to her knee, and had a long black cardigan that had long sleeves. Because she was running late for the 6.00 pm. appointment, she said she rang the practice to say she was running late and the phone was answered by Dr Rabih who the complainant said "*never answers the phone but on this particular day he did.*" When she arrived at the practice the door was opened for her by Dr Rabih as she approached it. There was no one else there and the complainant proceeded to the second surgery where the equipment was set up.

11. The complainant described the layout of the room in detail with there being two chairs, one normally for an assistant and one normally the dentist's chair. She sat on the assistant's chair with her feet on the railing and she noticed that Dr Rabih was "*sitting sort of about [her] knees.*" Dr Rabih, the complainant said, was sitting "*with his legs really wide apart, and then he inched a little bit forward so his legs were touching [hers]*."

12. When she started the process with the equipment, the complainant said, Dr Rabih used the Wave one motor from start to finish all on his own. She said it was clear he knew how to use it; and that not one other dentist than Dr Rabih has ever asked for a retrial or re-demo in the four courses with this equipment that she has run for a total of 53 dentists. She also said that the course which Dr Rabih attended was "*hands on*" so that Dr Rabih did the course then step-by-step. The trial use of equipment lasted between 20 and 30 minutes with the complainant making some comments about the process and with her assessment that Dr Rabih knew what he was doing. The complainant described there having been "*an uncomfortable silence.*"

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[1] Transcript page 29

13. After the demonstration the complainant retrieved the box and warranty papers and Dr Rabih offered her a coffee. While the complainant completed the papers Dr Rabih made the coffee from an adjoining staffroom and the complainant said she looked in his direction and Dr Rabih had "*walked out of the staffroom and was just staring at [her]*." The complainant described her reaction to that as "*creepy*" and said that Dr Rabih came back into the room with the coffee which he put on the desk and she started explaining the warranty papers.

14. The complainant said that she had her legs crossed and was sitting on the assistant's chair. She said that "*just out of the blue*" Dr Rabih said "*How come every time I see you you're looking more beautiful than the last*" [the words which comprise Particular 1 of the Charge]. The response from the claimant was to "*laugh it off*" and say "*it's nice to know the gym is working.*" Dr Rabih then, the complainant said, with his finger rubbed it on her leg, up and down twice on her shin and she moved away.

15. Straightaway, the complainant said, Dr Rabih asked her "*can I please kiss you*?" [the words which comprise Particular 3 of the Charge] and she replied "*oo, no*" turning her head and frowning. "*Within a split second*" when she went to turn her head back, the complainant said Dr Rabih's lips were planted on her face and he was kissing her on her face and neck. She said that all she could feel was "*saliva and drool running down neck."* She pulled away and asked what he thought his wife (who works at the practice) would think and the reply was "*oh I don't want to talk about her.*"

16. The complainant said she tried to change the situation by asking Dr Rabih about his practice but that he said he did not want to talk about that to which the complainant replied "*well I do, I'm actually quite interested.*" She said she was not in fact interested but rather more trying "*to get away from what had just happened.*"

17. After that Dr Rabih, the complainant said, moved round in the chair with wheels until he was directly in front of her as she was sitting with her hands on her lap folded together. Dr Rabih, she said, then said "*can I please touch your breast*?" [the words which comprise Particular 5 of the Charge] to which she said "*no*" with her "*body reaction ... to squeeze [her] shoulders together with [her] hands wrapped.*" She said that Dr Rabih immediately started groping her breast – that it wasn't a "*quick one or two second thing*" but was probably about 15 to maybe 20 seconds longer. She said that she "*looked at him at this time, all shuddered, and his eyes were closed.*"

18. The complainant pulled away, she said, and Dr Rabih took his hands off. Dr Rabih, she said, then stood up while she was sitting in the chair, walked around to her right-hand side, had one hand on her left shoulder and the other on her right shoulder and was pressing himself against her. She said she "*could feel his erection inside as he was pressing into [her] side."* She said she stood up and her chair moved and hit something and Dr Rabih ended up sitting in the chair she had been in. While Dr Rabih was sitting and she was standing, Dr Rabih, she said, grabbed her shoulders with force and pulled her back so that she was sitting on his knee and he said "*please sit on my knee, please sit on my knee*" [the words which comprise Particular 9 of the Charge]. After this had been said, the complainant said, she stood up and walked over to the bench to get her equipment. She said that Dr Rabih "*snapped out of it and it was like he was back to being normal*"; that he stood up and said a few times "*so what happens now, where do we go from here*" [the words which comprise Particular 10 of the Charge]. She went down to her car and at "*that stage [she]*

wasn't upset" she was "*so shocked* ". She described of Dr Rabih[2] "*at various, few stages I saw aggression, I saw anger and then I saw him as his normal self."*

19. She "*just wanted to get out*", the complainant said, so she drove round the corner and stopped, sitting there for about 15 minutes and thinking "*oh my God what just happened*?". She said she tried to ring her husband but that went to voicemail so she rang her boss and told him what had happened; and he told her to go to the Police. The complainant said she could not do that at that stage she just wanted to go home and shower which she did and at which time she told her husband what had happened. She said her husband wanted her to go to the Police too but she did not want to do that at that stage so she stayed at home and "*stayed up most of the night.*"

20. The next day, the complainant said, she was due to go to Taranaki for work but as she was driving her boss rang and said he wanted her to go home. She said she was "*just inconsolable that day.*" She said she "*just wanted to get out of Wellington so [she] continued to drive up to Taranaki.*"

21. The following day, Thursday, she saw the counsellor at the Taranaki Family Centre organised by the Human Resources Department of her work with a session lasting a couple of hours. She described this as the "*the best thing*" because she is "*normally a very strong personality person ... brought up as part of a very strict private family.*" In addition to telling her boss she confided in two colleagues, including the colleague she had spoken to before her meeting with Dr Rabih and with whom she has kept in contact regularly, discussing the various steps of the process.

22. On her return to Wellington on Friday of that week she felt angry, the complainant said, because she went against her "*gut feeling.*" She described how she still gets anxiety particularly when she goes to the area where Dr Rabih practises as it "*brings*

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[2] Transcript page 30

it all back" and that she has "*panic attacks*" about it. She said that she regrets that she should have stopped the inappropriate comments when they began when she first met Dr Rabih but that "*when it comes to personal stuff [she is] really quite shy and [her] way of reacting is to joke and laugh about matters and then change the subject or just ignore it.*"

23. The complainant denied that she had ever led Dr Rabih on, remembering that he had once asked her if she was happily married which she said she was. The complainant described it is "*really unusual*" for dentists to make time for sales reps; that Dr Rabih used to invite her into his surgery, sit down and talk "*small talk and personal stuff.*" She said she often talked to him about new products but she could tell he was not listening as he would look her up and down which she could tell by his body language was inappropriate. Other than on 29 May 2012, the complainant said, there was always someone else at the practice.

24. The complainant said it was unusual for a dentist to wait 50 minutes to see a territory manager and that "*no dentist would wait 50 minutes for a territory manager*"; and that she felt "*like Dr Rabih set [her] up."* In retrospect she said she wished she had scratched Dr Rabih's face or hurt him so that his wife would have known but that the first thing she thought about was her safety. She said she thought she might be raped, that it was in the particular suburb, winter and dark and no one would hear her. She said she did not know if Dr Rabih had locked the door and her reaction was to "*try and defuse the situation because [she] thought that if [Dr Rabih] got angry that could have provoked him …*" She said she tried to defuse the situation by changing the conversation a number of times.

25. The complainant said she went to the Police on Friday 1 June 2012 which was the day she had come back from Taranaki. She said she went to the Police "*for the simple reason to tell someone about what had happened [and that she] actually felt*

quite good" after having been to the Police. She said the Police wanted her to press charges but that this could take a year to complete. She said she spoke to her husband about this later and was terrified at the thought of that straggling over a period of one year.

26. At the Police station she spoke to a Detective Constable who took notes in her notebook but the complainant did not sign a statement and she was not sure what had been written. She referred to a draft statement prepared by the Police officer which she saw later and in which she said there was some mistakes. She instanced the reference to her having received a call from Dr Rabih to set up a meeting but that was not correct. The complainant said that at the time she just wanted to "*put it in a box, put the lid on it and try and deal emotionally with it and move on in [her] life.*" She decided not to sign a statement which she says is now a big regret.

27. The complainant was aware that the Police had sent a copy of the draft statement to the Dental Council and said she met with representatives of the Dental Council in late June 2012. She said that she felt it was necessary that something be done about what Dr Rabih had done as she did not want it to happen to anyone else.

28. The complainant produced to a letter dated 27 July 2012 from Dr Rabih which she had received which reads:

> "*Dear [name],*
>
> *It was never my intention to cause you any harm or upset and I am very sorry that my actions have upset you and caused you distress. I unreservedly apologise for what has occurred and hope that you can forgive me and accept my apology.*"

29. The complainant referred to a copy of comments that Dr Rabih had made to the draft Police statement and said she was "*completely amazed*" to read what was written much of which she said was "*completely untrue*" and caused her to be upset. She did acknowledge that Dr Rabih had previously asked her if her breasts are real or not

and on that occasion she dismissed his question and did not give him a straight answer. The complainant referred to the incident as having had a "*really big impact*" on her and her personal life and that she "*couldn't let [her] husband touch [her] for about 5 months.*"

30. The complainant gave evidence about her interest of body sculpturing (the details of which are suppressed as they might identify her). This involved gymnasium work with the complainant being involved in international competitions. She distinguished this from bodybuilding as such and described the dietary steps she takes. She said she does not discuss this with her business customers at all. She said in evidence:[3]

> *"When I would go in there he would, obviously - he would always stare me up and down and every time he was talking to me he would stare at my chest and not my face, and one particular time he said to me, you look very muscular, you must go to a gym. And so body sculpturing – because I remember him saying you must go to a gym and he made the comment, I don't like my women muscular, and he said, asked about the gym, and that's how the body, I suppose the figure competing, body sculpturing got brought up."*

31. The complainant denied that on 29 May 2012 she pointed to her breasts and said to Dr Rabih that they were not natural. She also said[4] that on a previous occasion when Dr Rabih was looking her up and down he asked if her breasts were real and she responded: "*When I compete internationally sometimes you have to make a personal choice whether to go down that line or not."*

32. The complainant denied giving Dr Rabih permission to touch her breasts.

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[3] Transcript page 26
[4] Transcript page 28

The complainant's colleague

33. Evidence was called from the colleague of the complainant to whom reference has already been made. The colleague referred to her former work for the same supplier of dental products as the complainant. She referred to their both having worked in sales for the company and having had many of the same customers. She also referred to having known Dr Rabih professionally for some time first as a nurse around 10 years ago and then as a customer when she was in sales.

34. The colleague said that the complainant had talked about Dr Rabih and including "*about [his] eyes being all over her.*" She said that Dr Rabih never behaved inappropriately to her but knew that the complainant felt uncomfortable around him. She referred to a telephone conversation with the complainant in late May 2012 when she was told that there was a meeting booked for 6.00 p.m. the next day and was asked whether she had had any out-of-hours meetings with Dr Rabih and whether she thought it would be safe for the complainant to go. The colleague said that she had not had any out-of-hours meetings but that she thought the complainant would be OK and "*probably laughed it off a bit.*"

35. The colleague then referred to a call from the complainant a few days later when the complainant was "*quite distressed*" and said that Dr Rabih had forced himself on the complainant and kissed her, touched her breasts, that she felt his erection being pushed into her, and that he said he had always "*fancied her*". The colleague said that the complainant said that Dr Rabih had been "*forceful with her*" and that she could tell the complainant was "*traumatised*" so she encouraged the complainant to lay a complaint. The colleague said[5]

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[5] Transcript page 81

> "*Well, when she rang she was sort of all over the place. She's normally a very calm, collected sort of a girl and she was distressed when I spoke to her. She had said that she had spoken, she had had some contact with [the employer] and the people in [the employer] Australia had been supporting her; that she was finding it difficult to do her work, to go into practices; and, hard to focus; her sleep was affected."*

36. Dr Rabih had contacted the colleague, she said, some weeks after the complainant had told her what had happened. Dr Rabih asked the colleague to come and see him and when asked what this was about said he did not wish to discuss it over the telephone, that it was a personal matter. The relationship between the colleague and Dr Rabih had never been anything other than professional, the colleague said, so she said to him that she did not wish to meet with him and referred to company policy. The colleague said there was a "*no doubt in the [her] mind that he wanted to talk ... about what had happened with [the complainant*]."

37. The colleague referred to close contact she had had thereafter with the complainant who told her about the meeting with the Dental Council and it was about this time that she had received the phone call from Dr Rabih. She said that the complainant "*has been significantly affected by what has happened ... [that it had] affected her work and her trust in dentists."*

38. In response to a question as to whether the colleague had seen the complainant flirting she said[6]:

> "*She just doesn't - she's the sort of girl that stands there in a crowd but she doesn't propel herself forward, if you know what I mean, she's not gregarious or out there. She's just quite quiet, yeah."*

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[6] Transcript page 83

Ms Carolyn Young – Deputy Registrar, Dental Council

39. As Deputy Registrar of the Dental Council, Ms Young said she was familiar with the circumstances concerning the Charge. She referred to contact having been made to the Council from the Police in June 2012 and on 14 June 2012 having received an email from Detective Constable Speak with a draft statement that she said had been typed following the initial account from the complainant. The Detective Constable confirmed that the complainant had not read the draft statement. Ms Young produced it.

40. Ms Young said that the Registrar of the Dental Council had writtten to Dr Rabih on 5 July 2012 and produced a copy of the letter to him. That letter read:

> "*Dear Dr Rabih*
>
> ***Conduct notification***
>
> *We have received information from the Police which raises a question about the appropriateness of your professional conduct.*
>
> *The Police received a complaint concerning your behaviour at your place of work on 29 May 2012. The complainant described to the Police, and to us, what had occurred when she attended your [location] practice premises for an appointment; and that you made unwanted sexual advances on her. The complainant disclosed that she felt threatened by your actions and had feared for her safety.*
>
> *A primary concern for the Dental Council is the protection of public safety through a regime of accountability for oral health practitioners to ensure they are safe and fit to [practise] their professions. As a registered dentist you will be well aware of your responsibilities to conduct yourself in a professional manner at all times, in compliance with your legal obligations under the Health Practitioners Competence Assurance Act 2003 and the Dental Council Codes of Practice and Statements, including set standards of ethical conduct.*
>
> *As it has been alleged that you have engaged in improper conduct, it is appropriate for us to raise this with you and seek your response to the allegation…*"

41. She also produced a copy of Dr Rabih's reply dated 8 July 2012 which reads:

"*Hi there*

I am writing in reply to your letter dated 5 july 2012.

I am in a state of shock and disbelieve of what you are referring to.

I view myself with high professional and moral standard, and I am aware of all my professional responsibilities.

I reviewed all my patients on 29 th may, and tried hard to remember; I could not recall any incident that can remotely be interpreted as sexual advances, let alone fearing for safety.

I have three dental assistants and there is at least one assistant inside the treatment room at any given time.

The door of the surgery is always open and exposed to the waiting room.

Would you please be kind enough to clarify what you are referring to? And weather I need a legal advice" [sic].

42. Ms Young wrote to Dr Rabih on 19 July 2012 informing him the name of the complainant and attaching a copy of the draft statement provided by the Police. Ms Young also produced a letter from Dr Rabih's lawyers dated 27 July 2012 which provided a response to Dr Rabih to the allegations contained in the draft statement, attached a copy of the letter of apology referred to above, and attached one of the emails that had been sent from Dr Rabih to the complainant on 3 April 2012, but no others.

The evidence for Dr Rabih

Dr Mwaffak Rabih

43. Dr Rabih described the background to his practice of dentistry in New Zealand. He referred to the working relationship he had with the complainant's colleague and then that colleague having introduced the complainant to him. He referred to a visit from the complainant to his practice on 18 November 2011 and three emails offering equipment and a demonstration.

44. Dr Rabih denied saying anything inappropriate at that time including particularly asking if the complainant was happily married or any reference to her physique, body or legs. He said that his staff, with whom he has a very good relationship, would have observed him making inappropriate comments or eyeing the complainant as alleged and would have said something to him. He denied any set up to "prey" on the complainant.

45. Dr Rabih acknowledged attending the course on 2 April 2012 and the promotion of equipment by the complainant and his decision to buy one. He said that he had second thoughts and tried to cancel the order but this was not possible and the equipment sat unused. Following the complainant's next contact on 22 May 2013 he took the opportunity to advise her that he had not set the equipment up and had not used it before other than that at the April dental course. He said he was unfamiliar with how to use the equipment and asked the complainant if she could arrange a demonstration.

46. Dr Rabih then referred to the email exchanges concerning the appointment time and said that the complainant did not at any time advise him of any concern about coming in after work, with express reference to the email of 3 April 2012 which expressly refers to a visit after he had finished for the day. Dr Rabih said that demonstrations of new equipment are not unusual in his practice.

47. Dr Rabih said that on 29 May 2012 his last patient was completed by 5.20 p.m. and his staff left around 5.40 p.m., with the complainant ringing at 6.00 p.m. to say she was running late. He also said that he had had a lengthy appointment scheduled for 5.00 p.m. for complex extractions; but that during that day, 29 May 2012, that appointment was cancelled and he had the time then free.

48. Dr Rabih said that when the complainant arrived he was at the reception desk finishing off paperwork, that he welcomed her and they went to the treatment room

where the equipment was and where he usually has demonstrations. He said that the demonstration started on extracted teeth taking between 20 and 30 minutes and during that time he and the complainant talked about the system and different files for use with the equipment. There was no uncomfortable silence.

49. Dr Rabih said he did not accept the inference that he did not require a demonstration or that he knew what he was doing with the equipment, which he said he had not used before in his practice; and the only occasion on which he had experimented with it was at the course. He said he needed advice as to how to use the equipment and to discuss issues around its location.

50. Dr Rabih said he could not remember if his knees touched with those of the complainant during the demonstration but that, if they did, this was unintentional. He said that the chair on which he was sitting was lower than that on which the complainant was sitting and their knees would not have touched.

51. Dr Rabih said that after the demonstration the conversation lead to what he described as "*banter.*" He said the complainant was a willing participant in this commenting that he was known as the dentist with green eyes. Dr Rabih said that this led to the conduct in question. He said he thanked her for the comment and something to the effect that every time he saw her she looked more beautiful. Her response, he said, was that that the gym must have been working and that she then went on to say she did some form of body sculpting or modelling or something like that. Dr Rabih said he asked her what that was and the complainant explained about modelling and competitions and how it all worked.

52. Dr Rabih said that during the explanation the complainant pointed to her chest and said "*but these are not natural.*" He said that this led to him asking the complainant if he could touch them. He said the complainant said "*yes*". Dr Rabih said he did so by extending both of his arms and placing his hands on the top part of the

complainant's breasts over her clothes and then slightly cupping his hands over her breasts. He said that the complainant said words to the effect "*stop it Mike*" [the name by which Dr Rabih is also known] and Dr Rabih said he remembered the complainant asked him what his wife would think of this.

53. Dr Rabih said he immediately stopped and apologised to the complainant if he had made her feel uncomfortable. Dr Rabih said he asked the complainant if she would like a coffee, that she said "*yes*" and that he went and made one for each of them. Dr Rabih said that they continued talking about the equipment and the purchase of files for the equipment while drinking the coffee. He said there was no sign that the complainant was uncomfortable or upset; that the conversation was entirely amicable without any signs of strain or concern on the part of the complainant.

54. Dr Rabih said that after the complainant finished her coffee she went to depart, that they spoke briefly and that the last he saw of her was when she was at the door when they both said "*goodbye*." Dr Rabih said he realised by the time of his statement that his asking if he could touch the complainants breasts and in touching them was inappropriate and a lack of judgment on his part.

55. As to the specific Particulars of the Charge Dr Rabih:

    55.1. Accepted that the words to the effect as stated in Particular 1 were said but in the context referred to above.

    55.2. Denied that he had rubbed his finger up and down the complainant's leg against her wishes and without her consent (Particular 2).

    55.3. Denied that he asked if he could kiss the complainant (Particular 3).

    55.4. Denied that he kissed the complainant at all (Particular 4).

    55.5. Accepted that he asked if he could touch the complainant's breast (Particular 5).

55.6. Accepted that he touched the complainant's breast with his hands but denied any groping and said that the touching was with consent in the context of the exchanges referred to above (Particular 6).

55.7. Denied that he placed his hands on the complainant's shoulders or pressed himself against the complainant's body (Particular 7).

55.8. Denied that he pressed an erect penis into the complainant's side; or that he had an erect penis (Particular 8).

55.9. Denied that he grabbed the complainant by the shoulder with force or pulled her on to his knee or said any of the words referred to (Particular 9).

55.10. Denied that he said to the complainant the words referred to at any time (Particular 10).

56. Dr Rabih acknowledged that he had seen the statement of evidence offered by the complainant's colleague and acknowledged that he did telephone her one evening. He said that at that time he had received a letter from the Dental Council but was not aware of who the complainant was; but that he had reviewed his appointment book and seen the complainant's name in it and wondered whether she might have been the complainant to the Dental Council. Dr Rabih said he telephoned the colleague to arrange to meet her to discuss the matter but she declined to do this.

Ms Debra Watson

57. Ms Watson was the receptionist and dental assistant at Dr Rabih's practice working 32 hours per week and has done since 8 November 2006. She said her work entailed working closely with Dr Rabih often alongside him at the dental chair and she commonly sees him engaging and interacting with people including staff, patients, sales representatives and others. She said Dr Rabih was not a personal friend but she liked him and found him a "*pleasant, well-mannered and courteous man.*" She said

that she considered she was in a very good position to assess Dr Rabih's character and nature.

58. In response to the extract from the complainant's statement of evidence that Dr Rabih "*always said or did something inappropriate,*" Ms Watson said that Dr Rabih was "*just not like that*"; and that she had never heard him say anything inappropriate or acted inappropriately around others. Likewise, she said, any implication that Dr Rabih eyed women up or looked at them in an untoward manner was simply not characteristic of Dr Rabih. She said that it was most uncharacteristic to insinuate that Dr Rabih was in some way "*creepy*" or "*sleazy*" or made the complainant "*feel a little bit uncomfortable at times.*" Ms Watson has never felt this way and nor has she ever observed signs that others feel like this; and she has not heard complaints from others.

59. Ms Watson described Dr Rabih as professional in his manner and caring and understanding to others. She said that she disagreed that it was unusual for a dentist to take up an offer of a demonstration of equipment as Dr Rabih had done so often in her time with him; and it was not uncommon for sales representatives to provide demonstrations of their products.

Ms Shamiran Adam

60. Ms Adam had been employed by Dr Rabih from 30 October 2008 to 17 August 2012. She was asked who had organised for the complainant to attend the practice for the demonstration on 29 May 2012. She said that she had personally called the complainant regarding the meeting on 29 May 2012 at 6.00 p.m. She disagreed with the evidence from the complainant insofar as the complainant had denied this. Ms Adam also said that Dr Rabih asked that she, Ms Adam, also attend the demonstration to learn about the new equipment; but that, because they had

unexpectedly finished early on the night in question, she asked Dr Rabih if she could leave early and not attend the demonstration. Dr Rabih agreed to this.

61. Ms Adams said that until that point it was always anticipated that she would be at the demonstration and expressed surprise at the suggestion that the meeting was in order for Dr Rabih to prey on the complainant as suggested in her statement of evidence. Ms Adams said that there were demonstrations of new dental equipment from time to time during the time she was worked for Dr Rabih.

62. Ms Adams said that she left work after cleaning and sterilisation at 5.39 p.m. which she knows exactly because this is recorded in her time sheet for that day.

63. Ms Adams said it was "*certainly not true*" of what she knew of Dr Rabih that he is in any way inappropriate around women or "*sleazy*". She said that she considered herself well positioned to provide such evaluation as she worked closely with Dr Rabih for nearly 4 years and saw him networking with people. She said she also socialised with Dr Rabih at events such as team lunches and Christmas events and never considered him to act inappropriately. She had never heard of any issues with others concerning Dr Rabih's behaviour.

The case for the PCC

64. The PCC referred to the two categorisations of alleged misbehaviour, namely inappropriate touching and inappropriate and/or unprofessional comments or suggestions.

65. The PCC accepted that the onus of proof lay with it and referred to the principles applicable to a charge of this nature. The submissions made specific reference to *Chand*[7] where a nurse was found guilty of professional misconduct for having acted in an inappropriate and unprofessional manner in attempting to kiss a colleague.

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7 106/Nur06/49P

66. The PCC referred to Dr Rabih's acknowledgement in evidence that this was a professional relationship. Dr Rabih had said:[8]

> *"Because we are, we're supposed to have a professional relationship, so that's obviously the boundaries that we should have. At that - as I stated if (sic) my statement, there was a clear lack of judgement on my part but I did not go beyond that."*

67. The alleged conduct, the PCC submitted, took place at Dr Rabih's dental practice in the context of a professional business meeting and the complainant had no dealings with Dr Rabih outside of this professional relationship.

68. Codes and statements on ethical conduct, it was said, are necessarily broad and not a complete guideline for all appropriate behaviour or ethical obligations.

69. Reference was made to the following standards and guides which should have indicated to Dr Rabih the standards of his professional interactions with the complainant:

69.1. Principal 4 of the Principles of Ethical Conduct for Oral Health Practitioners (Dental Council statement) to uphold trust and professional integrity including with colleagues.

69.2. The duty and responsibility contained in the "Working as an Oral Health Practitioner in New Zealand: Handbook for the New Zealand Conditions of Practice" to maintain appropriate standards of personal behaviour, establish appropriate boundaries, and avoid sexual harassment which was defined as "*behaviour of a sexual nature that is unwanted or uninvited [and which] usually involves an abuse of power – it is not a mutual attraction between two people.*"

69.3. The ethical behaviours and actions including responsibility to colleagues in the NZDA Code of Ethics including of collegiality and support of staff.

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[8] Transcript page 109

70. Having referred to the principles and acknowledged guidelines for assessing credibility, the PCC then outlined considerations which it said must be weighed to determine credibility. These are referred to in detail in the Tribunal's assessment below. The PCC submitted that Dr Rabih's credibility was in question and that the version of events given by the complainant and other evidence for the PCC should be preferred.

71. Further reference was again made to the *Chand* case and the specific facts of it. Attention was drawn to the Tribunal's finding in that case that there was no other plausible explanation given as to what could have caused the complainant's reaction in that case and that the behaviour described was consistent with other evidence of escalating behaviour given by the complainant in that case. Analogy was drawn between those events and those of the evidence in the present case as with an account of the incident written in the *Chand* case within a day of the events in question described as "*a document written close to the event and when events were fresh in mind.*" Comparison was also drawn that in the *Chand* case where Mr *Chand* had prepared a written statement described by the Tribunal as "*vague as to what had occurred.*"

72. The PCC submitted that Dr Rabih's inappropriate and unprofessional dealings with the complainant reached the threshold for professional misconduct. It submitted that the behaviour was such that members of the public, apprised of the facts of the case, would reasonably conclude that the reputation and good standing of the dental profession was lowered by Dr Rabih's behaviour towards a woman with whom he had professional dealings within his dental practice premises.

73. It was said that Dr Rabih's conduct raises "*serious questions about his understanding of appropriate professional boundaries.*"

74. The PCC submitted that the conduct was sufficiently serious to warrant disciplinary sanction, noting in particular:

74.1. That the alleged conduct demonstrates a significant departure from the professional and ethical standards that can reasonably be expected of a dentist in his dealings with another professional;

74.2. That the conduct can reasonably be regarded as sexually motivated and fits within the parameters of sexual harassment described above;

74.3. That the conduct involves a clear failure to observe appropriate professional boundaries in dealing with another professional; being unwanted, unwelcome and/or unprofessional;

74.4. That the conduct occurred in the treatment room of Dr Rabih's dental practice, evidencing a complete lack of respect for his professional working environment.

75. The PCC submitted that the Tribunal should be mindful that protecting the public includes taking steps to impose penalties to deter other professionals from offending in a similar way; and it plays an important role in setting and maintaining professional standards. A clear message, it was said, must be sent through the imposition of a penalty that conduct such as Dr Rabih's which has brought or was likely to bring discredit to the profession is completely inappropriate, is not accepted and will not be tolerated.

76. The Charge was made out, it was submitted, cumulatively or separately as to each alleged Particular as professional misconduct under section 100(1)(b) of the HPCA Act and further that that conduct warranted disciplinary sanction in order to protect the public, maintain professional standards and punish Dr Rabih.

The case for Dr Rabih

77. Submissions were made for Dr Rabih too that the onus of proof lay with the PCC with the standard of proof on the balance of probabilities a high one within the civil standard range, the gravity of the allegation being an important factor as affirmed in *Joseph.*[9]

78. The evidence on each Particular must be considered separately, the evidence on one being entirely uninfluenced by the evidence on others with separate findings on each. A conclusion as to the overall gravity of the conduct can only be reached in respect of those Particulars found to be established.

79. Three steps must be proved, namely the factual allegations in respect of each Particular to the requisite standard; whether, for each Particular found, the acts in question have fallen below appropriate professional standards; and whether the breach has been sufficiently below the appropriate standards to warrant an adverse disciplinary finding.

80. It was then submitted that the Tribunal should accept the evidence of Dr Rabih over that of the complainant.

81. Even if the Tribunal did not do that, however, it was submitted that it did not follow that the Charge must be found proved or established. Criticism was levelled at there being no evidence adduced of appropriate standards or that these had been proven to be breached. It was said that it was "*unique*" for the prosecution not to call evidence in a case where standards are alleged to have been breached.

82. Reliance was placed on *Dr G v Director of Proceedings*[10] for the submission that it behoves the prosecution to call evidence by way of direct evidence or guidelines to

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[9] 506/Med12/228P

[10] CIV 2009-404 –000951, Auckland HC, Duffy J, 13/10/09

establish the appropriate standards. Reference was made to three cases[11] in which it was said that that had been done.

83. In reliance on *Lake v Medical Council*[12] it was submitted that it was not for the Tribunal to draw the line as to the appropriate standards and that there needs to be called evidence to say what these are alleged to be which the doctor would then have the opportunity to challenge and have the standards, that are articulated as applicable, tested and argued. Counsel said:[13]

> *" ... what are the circumstances in which it's said that this brings the profession into disrepute? I've no ability to challenge. If someone had been articulating that, I would have cross-examined him or her on that in the way these cases ought to be conducted. Instead, I get the sense of it that the PCC are saying, oh well, you go away and you think about it and you make your decision. And on the strength of the Lake case, that would not be right."*

84. Counsel drew attention to the various codes of practice, statements or guidelines available to the dental profession issued by the Dental Council of New Zealand and available on its website. The Code entitled "*Sexual Boundaries in the dentist – patient relationship*" was, it was submitted, silent on the topic of the facts of this case and circumstances and rather dealt with sexual behaviour in the dentist/patient relationship. It was further submitted that the Code of Ethics issued by the NZDA failed to provide any guidance with respect to the subject circumstances. That Code, it was submitted, primarily focuses upon the dentist's responsibility to patients but also to the public and colleagues but does not contain guidance on the subject topic. Advice from the NZDA is recommended in a case where it is considered there may have been "*inappropriate conduct",* it was submitted.

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[11] *Dr YZ* 225/Med07/65D: *O v PCC* [2011] NZAR 565 and *Singleton* 373/Phys10/158P
[12] Auckland HC: HC 123/96; Smellie J: 23/1/98
[13] Transcript page 259

85. Counsel for Dr Rabih submitted that it was a fundamental error for the PCC not to have called evidence to establish the appropriate standards in discharge of its onus of proof and the Charge could not succeed. Counsel said that a search conducted through the Auckland High Court Library Research Services for cases in New Zealand, Australia and the United Kingdom of similar cases on the subject matter, that is a professional charged with alleged inappropriate conduct of a sexual nature but not with a patient and not in circumstances where the disciplinary charge is secondary to a criminal conviction, revealed no such cases.

86. It was accepted by the submissions that the circumstances will be rare of necessity involving substantially more serious misconduct than present in the subject case for there to be a case of professional misconduct without such proof of breach of standards.

87. Counsel said[14]

> *" ..professional disciplinary cases are recognised as being part and parcel of the setting of standards, and I recognise that and I embrace that, and what that means is that absent as there is no guidance or standard or commentary at all on this type of situation in dentistry, this Tribunal has a valuable role in making your own comments as to what you would regard as being an appropriate standard, but that's not a standard that you can then retrospectively impose on Dr Rabih. He, like any other dentist, is entitled to know that these are the standards and what we expect of our professional members."*

88. It was further submitted for Dr Rabih that, even if the Charge was found to be made out, it did not cross the threshold of warranting disciplinary sanction. Reference was made to the purpose in section 3 of the HPCA Act to "*ensure that health practitioners are competent and fit to practise their professions.*"

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[14] Transcript page 252

89. In reliance on authority[15] it was submitted:

89.1. First that the disciplinary sanction required was for the purpose of protecting the public and/or maintaining standards or punishing the practitioner;

89.2. Secondly where the conduct "*is found not to be professional misconduct, because it is lower – level misconduct in the course of a practitioner's practice or it is conduct outside the scope of practice, the tribunal or court needs to satisfy itself that the conduct adversely affects the practitioner's fitness to practise in order to determine that the conduct warrants a disciplinary sanction."*

89.3. Thirdly not every breach of a policy will automatically amount to an adverse finding (in the case of *O v PCC* where guidelines on sexual relations with a patient was referred to)

89.4. Fourthly, relying on *O v PCC* and *J v Director of Proceedings* "*… a practitioner may successfully defend a disciplinary proceeding, either because the conduct did not constitute professional misconduct, or because it would be disproportionate to visit the conduct with any significant sanction*" and

89.5. Fifthly that "*… the threshold under the [HPCA act] remained high.*"

90. Reference was made to other professions. The Lawyers and Conveyancers Act 2006 and its predecessor the Law Practitioners Act 1982 have, it was submitted, the same theme. The case *Complaints Committee No 1 of the ADLS v C*[16] was referred to and its adoption of the following passage from *Pillai* v *Messiter:*[17]

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[15] *Pillai* v *Messiter*: (1989) 16 NSWLR 197; *N* 211/Nur08/112D: *O v PCC supra; J v Director of Proceedings* Auckland HC; CIV 2006-404-2188; 17/10/06; Baragwanath J*; F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774

[16] [2008] 3 NZLR 105

[17] *Op cit*

> *"Both in law and in ordinary speech that term "misconduct" usually implies an act done wilfully with a wrong intention, and conveys the idea of intentional wrongdoing. The term implies fault beyond the error of judgment; a wrongful intention, and not a mere error of judgment; but it does not necessarily imply corruption or criminal intention, and, in the legal idea of misconduct, an evil intention is not a necessary ingredient. The word is sufficiently comprehensive to include misfeasance as well as malfeasance; and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences."*

91. Counsel for Dr Rabih submitted that the HPCA Act "*has reflected the significance of threshold before an adverse disciplinary finding is made*" and referred to Hansard and the use of the word "*significant*" in this context. It was submitted that, even if established, the Charge did not reach the threshold of seriousness so as to warrant an adverse disciplinary finding.

92. It was submitted that there was no evidence that Dr Rabih's conduct has brought the profession into discredit nor any evidence that this is likely to have occurred. It was submitted that at its highest Dr Rabih's conduct was morally wrong but that was not a test for professional misconduct (relying on *O v PCC* at paragraphs 93 and 95). It was submitted that the disciplinary charge should be dismissed and that this would be consistent with other cases to which reference was made.

93. Reference was then made to the criteria to be considered in assessing credibility with reference to *Vatsyayann*[18] and *Farynia v Chorny.*[19] It was said there was compelling character evidence pointing against an adverse finding to Dr Rabih.

94. The submissions then went through the respective evidence of Dr Rabih and the complainant to support the submission that Dr Rabih's evidence met the credibility test but that the complainant's was "*littered*" with issues that either "*defy common*

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[18] 355/Med10/152P
[19] [1952] 2 DLR 354

sense or were for her flags of poor/suspect credibility." These submissions are considered in detail below.

Charge – General Principles

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

96. 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. 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.[20]

97. In *B v Medical Council*[21] Elias J (as she then was) said:

> "*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*."

98. Section 101(1)(b) of the HPCA Act provides that the Tribunal, after conducting a hearing on a Charge laid, may find that a 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.

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[20] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1; see also *Professional Conduct Committee v Dawson* - 300Nur09/139P and *Professional Conduct Committee v Karagiannis* - 181/Phar08/91P

[21] Noted in [2005] 3 NZLR 810

99. The Tribunal regularly follows the principles enunciated in its decision *PCC v Nutall*[22] which included:

> "*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:*
>
> *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.*"

100. The Tribunal takes into account extracts from *Collie v Nursing Council of New Zealand*[23] where 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*."

101. Each Particular must be considered individually and each proven Particular cumulatively in the context of the overall Charge.[24]

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22 8Med04/03P

23 *Collie* v Nursing Council of New Zealand [2000] NZAR 74

24 *Duncan v Medical Practitioners Disciplinary Tribunal* [1986] 1 NZLR 513; *Chan v Medical Practitioners Disciplinary Committee* (Court of Appeal CA70/96; 8/8/96; Richardson P, Keith and Neazor JJ)

Credibility

102. There are credibility issues that arise in this case.

103. The principles to be applied in the case of credibility questions have been summarised in various Tribunal decisions including *Mr Y.*[25] In the Tribunal's decision in that case dated 19 December 2008 the Tribunal said:[26]

> *26 The test for "credibility" was stated by a Canadian appellate court*[27] *as being that the real test of the truth of the story of a witness must be at harmony with the preponderance of the probabilities which are practical, and which an informed person would readily recognise as reasonable in that place and in those conditions.*
>
> *27 Accordingly, the Tribunal, where relevant, must consider such factors as:*
> *(a) The manner and demeanour of the witness when giving evidence.*
> *(b) Issues of potential bias, that is, to what extent was evidence given from a position of self interest.*
> *(c) Internal consistency or, in other words, whether the evidence of the witness was consistent throughout, either during the hearing itself, or with regard to previous statements.*
> *(d) External consistency or, in other words, was the evidence of the witness consistent with that given by other witnesses.*
> *(e) Whether non-advantageous concessions were freely tendered.*
>
> 28 *Essentially, what is involved is an analysis of all the evidence, rather than merely asserting that one party rather than another is to be believed*.

104. The Tribunal has applied those principles in relation to any items of evidence where credibility is at stake.

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[25] *May* 197/Phar08/99P, *Vatsyayann* 355/Med10/152P, *Dawson* 300/Nur09/139P and *Katamat* 378/Phar10/162P

[26] Paragraph 26

[27] *Farynia v Chorny* [1952] 2 DLR 354 (BCCA)

Charge – factual disputes - discussion

105. The Tribunal has considered all evidence and submissions in the context of those principles and has decided that it prefers the version of events given by the witnesses for the PCC to that given by the witnesses to Dr Rabih.

106. The totality of the evidence given by the complainant rang true with the Tribunal. There were some areas where she may have been able to make concessions and did not; but that does not alter the Tribunal's conclusion that the totality of her evidence as a whole was consistent.

107. It was consistent that, in the context that she had had previous exchanges with Dr Rabih which included personal matters and which led to her having some concerns about him that she contacted her friend, the colleague, before the meeting on 29 May 2012 to discuss these concerns with her. It is inconsistent, to take Dr Rabih's version, that she would express those concerns to her colleague and seek the reassurance but then proceed the following day to consent to Dr Rabih's touching her breasts.

108. The Tribunal finds the way she had dealt with the unfolding events on the night in question was credible and consistent with concerns she must have felt in that environment at the time of a winter's night. How she processed matters after the event, whom she told and how she completed her counselling sessions and consultation with the Police are also consistent.

109. By contrast, Dr Rabih sought to portray this as a consensual connection followed by a quiet and dignified departure; but that is inconsistent with his evidence that the complainant said on leaving that she did not want to look at him again. His initial responses to the Dental Council following its formal inquiry were evasive. The Tribunal concludes that he was aware to whom the Council's letter referred and

chose to avoid this. The email that his lawyer gave to the Dental Council did not give the full picture of the email exchanges.

110. It was submitted for Dr Rabih that the evidence of the complainant was "*littered*" with issues or assertions that either defied common sense or were for her flags of poor or suspect credibility. Although she confirmed that she was a "*very assertive"*[28] person with a "*strong personality*" and said that none of her evidence was contaminated by exaggeration, this was not, it was submitted, plainly so.

111. An instance of that was said to be the complainant's evidence about the touching of her breasts by Dr Rabih. That Dr Rabih did touch the complainant's breasts is not an issue as he has acknowledged this. What was challenged by counsel for Dr Rabih was that this was without consent from the complainant and lasted as long as the complainant said in evidence.

112. Reference was made to the statement in her brief on the evidence: "*It wasn't a quick one or two second thing. I know at the time it possibly seemed forever but it was probably about 15 to maybe 20 seconds long* …" The complainant also said "… *I looked at him at this time, all shuddered, and his eyes were closed.*"

113. When challenged by cross-examination about the time involved, the witness was asked to pause for a period of time which was measured first at 10, then 15, then 20 seconds. It was put to her that she would not sit here for the period of time allowing a man to grope her breasts unwantedly. Her reply was:

> *"When you're talking about something that, you know, trying to gauge an exact time is very difficult. I didn't sit there and - my body language - I was sitting like here, my hands were like here, he groped my breasts and it seemed like, at the time it seemed like an eternity. I didn't put a stop watch to say exactly how many seconds that was so I obviously gauged in that. I would still stick to say 10 to 15, say 15 seconds from the time he asked and then groping, and then I pulled away. It seemed forever."*

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[28] Transcript page 34

114. When asked why she did not push Dr Rabih's arms away when this was occurring, the complainant described that she was "*defensive*" which she demonstrated and which is recorded and acknowledged by her as "*this witness has her hands on her thighs and moves her shoulders back when she describes pulls away like this."* The reply that she gave referred to above was described as "*unpersuasive.*"

115. Challenge was also made concerning the inconsistency between her statement of evidence which referred to the "*groping*" as having lasted about 15 to maybe 20 seconds and the direct evidence that the period of time was "*20 seconds from the time he asked to touch my breasts to when I pushed away."*

116. Counsel for Dr Rabih challenged the time duration issue and challenged why the complainant did not respond and react more positively than she described, and said that her response was "*the antithesis of a response of an assertive person. Rather, it [was] conduct consistent with consent to touch her breasts.*"

117. The evidence of Dr Rabih was as set out above, namely with the opening banter with reference to green eyes, the complainant's beauty, the gym work she was doing working on her appearance, the reference to body sculpting or modeling, and the complainant's having pointed to her chest and referred to her breasts as not natural which in turn, Dr Rabih said, led to his asking if he could touch them which was agreed to.

118. When asked in cross-examination if this was a "*sexual encounter,*" Dr Rabih said:[29]

> *"It's quite, it's a moment of lack of judgement and a moment of curiosity -*
> *Q. Curiosity?*
> *A. Curiosity in terms of with somebody who is, I don't know, this is how things developed but it did not have sexual content in it."*

119. When challenged about the "*lack of judgment*" comment in the context that Dr Rabih said that the complainant consented to the touching, Dr Rabih said:[30]

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[29] Transcript page 107

> *"Because we are, we're supposed to have a professional relationship, so that's obviously the boundaries that we should have. At that - as I stated if my statement, there was a clear lack of judgement on my part but I did not go beyond that."*

120. Dr Rabih said that in the professional relationship this type of encounter should not occur.[31]

121. The Tribunal has assessed this evidence from both parties carefully. It accepts that the complainant would have had significant difficulty in accurately recollecting the length of time that this physical encounter took place. If the complainant had not consented to this physical touching, that encounter would have been traumatic for her and she would have had to assess the correct reaction. This would have partly been a conscious assessment and partly an automatic reaction. Even if the complainant had consented to the touching, her assessment of time given significantly later could not be expected to be accurate.

122. Likewise, the Tribunal does not accept that her response to the behaviour was consistent only with consent. It accepts that the response was consistent with a lack of consent as is said by the complainant. The Tribunal has taken account of the environment, the fact that the parties were alone, the fact that Dr Rabih's physique, the fact that there was no immediate help available if the complainant called out, the environment of the neighbourhood and the darkness of the winter night. The complainant would have had to deal with the matter as she thought best at the time, part of which would be conscious, part of which would be subconscious reaction.

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[30] Transcript page 109
[31] Transcript page 109

The Tribunal accepts that the reaction as described by the complainant was consistent with her not having consented to the physical contact as is alleged.

123. That reaction is consistent with the complainant's following behaviour which she describes as having pulled away after the physical contact she referred to, she tried to stand up with force sending her chair moving to hit something and when there were further approaches by Dr Rabih she then moved away, collected her materials and left. The Tribunal accepts that this was a credible reaction. Even Dr Rabih in his own evidence said that after he had touched the complainant's breasts, she said words to the effect "*stop it Mike.*"

124. The submissions for Dr Rabih relied on the prior encounters that the parties have had other than the professional connections. When she was referring to the events of the night, the complainant denied having pointed to her breasts and referring to their not been natural. She then said:[32]

> *"It was previously where he had referred - I can't even exactly remember the words, where he said he did, on a previous occasion when the, the same conversation with the body sculpting, in his practice, when he would constantly look at my chest and not my face, he did ask if they were natural or were they real, and I did - all I remember is saying is something along the lines of, when I compete internationally sometimes you have to make a personal choice whether to go down that line or not. But then again, I did not say that – I did not confirm or answer his comment about whether they were real or not."*

125. The complainant had also said:[33]

> *"When I would go in there he would, obviously - he would always stare me up and down and every time he was talking to me he would stare at my chest and not my face, and one particular time he said to me, you look very muscular, you must go to a gym. And so body sculpturing – because I remember him saying you must go to a gym and he made the comment, I don't like my women muscular, and he said, asked about the gym, and that's how the body, I suppose the figure competing, body sculpturing got brought up."*

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[32] Transcript page 28
[33] Transcript page 26

126. It was said that this was inconsistent with an emphatic response that she had never provided Dr Rabih with any encouragement on any occasion when in her evidence she said:

> *" ... you say that you at no time encouraged Dr Rabih, you didn't lead him on, or anything like that?*
> *A. No, I didn't.*
> *Q. That's your evidence, isn't it?*
> *A. Yes."*

127. It was said for Dr Rabih that he was correct in saying that the complainant's breasts were "*not natural*" and he knew this because the complainant told him so on 29 May 2012.

128. It was said too that the explanation from the complainant was at odds with her suggestion that she is a private person who did not tell her customers she was into body sculpting.

129. The subject of whether the complainant's breasts were natural or not had come up previously. Even the complainant acknowledges this. The Tribunal does not interpret, however, the response that the complainant gave concerning the previous occasion as recorded above as being encouragement. From her version of the exchange it was clear that the complainant was very guarded in her responses to the approach and questioning from Dr Rabih and this could not be regarded as encouragement such as to justify his later behaviour. The Tribunal does not find any inconsistencies in this respect of the complainant's evidence.

130. Inconsistency is also submitted in relation to inappropriate action that the complainant said always occurred with Dr Rabih and comparison was made with

130.1. Evidence from the colleague, Ms Watson and Ms Adam;

130.2. The tenor of the complainant's emails;

130.3. The use of a ☺ logo on two emails to Dr Rabih and the change from her evidence that this occurred on "*all of [her] emails*" to the "*majority*"; and

130.4. The change in her evidence from his having acted inappropriately "*every time*" to "*many times*" and then to "*he's never been appropriate*…;" but acceptance there was no hint of anything inappropriate in his emails.

131. The Tribunal does not consider that the tenor of the complainant's emails is in any way suspect or provides any ground for not accepting the consistency of her evidence. These emails are all consistent with a professional relationship. The Tribunal does not consider that there can be any credibility issues attached on the part of either witness.

132. The use of the ☺ in the contexts that it was understandable. The fact that this is not on all of the emails from the complainant to Dr Rabih does not help either in that her evidence referred to business emails generally. Even any inconsistency in relation to the amount of times she used the ☺ expression does not, in the opinion of the Tribunal, impact on the complainant's credibility. The concession from "*all emails*" to "*the majority*" was readily made by the complainant.[34]

133. The Tribunal considers that the exchanges concerning the appointed time were entirely consistent with normal business practice. It was the job for the complainant to effect sales of products for her employer and she had to weigh this obligation against any personal insecurity she may have felt. The Tribunal does not consider there is inconsistency between her having written the emails that she did and propose

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[34] Transcript page 44

the times that she did in the context of concerns that she had expressed about her relationship with Dr Rabih.

134. Likewise, the Tribunal does not attach any significance to the reaction of other witnesses to Dr Rabih. It was the relationship between the complainant and Dr Rabih that was of concern and it is perfectly understandable that there may have been a different relationship between Dr Rabih and other persons.

135. The time of the appointment for the meeting between the complainant Dr Rabih and the way the time was fixed were aspects of consistency and credibility raised on behalf of Dr Rabih. First, it was put to the complainant[35] that she would not propose a time outside office hours with Dr Rabih if she genuinely thought that he was "*sleazy,*" or there was some risk associated. Secondly, it was said that there was inconsistency concerning the arrangement of the time where on the one hand the complainant said that this was done only by emails but Ms Adam's express evidence that was she called the complainant regarding that meeting.

136. It was argued that the complainant had a determined view that Dr Rabih had set up the meeting to prey on her and that this was not acceptable on any objective basis. It was said that her credibility was in question because she gave evidence implying that she regarded the demonstration as contrived.

137. The complainant said:[36]:

> *"I do feel he went - looking back and looking at all the lead-up to it, and using wanting another demo as an excuse to get me in there at an outside of hours appointment, and you know, turning up and there is absolutely nobody there, after hearing my work colleague saying he's always request - she's dealt with him many times and he's always requested lunchtime appointments.*
> *Q. Are you prepared to concede that you just might have misinterpreted Dr Rabih in this regard?*

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[35] Transcript page 46
[36] Transcript page 47

A. No.
Q. Absolutely no possibility of that?
A. No"

138. The Tribunal finds it inconsistent with any suggestion that the complainant "set up" the meeting with Dr Rabih with the fact that she had spoken to her colleague on the day before expressing her concerns about the appointment. The Tribunal accepts the evidence of the colleague. She had nothing to gain or lose from giving the evidence and her demeanour impressed the Tribunal. If the complainant had been planning to "set up" Dr Rabih in this way, she is unlikely to have confided in her colleague as she did.

139. Ms Adam, who had said in her evidence-in-chief that she personally called the complainant regarding the 6.00 p.m. meeting on 29 May 2012 conceded in cross-examination that this was not to arrange the meeting as such but to confirm the date and time.[37]

140. The evidence that the complainant gave about Dr Rabih's motivation behind setting up the meeting at the time that he did is her own post-event assessment of the facts. The words used by the complainant herself indicate hindsight "*looking back and looking at all the lead-up to it,*" and not necessarily a view that she had at the time. The Tribunal cannot say that that assessment was right or wrong or call her credibility into question over it.

141. The Tribunal does not place significant weight on the apparent conflict so far as the arrangement of the time was concerned. The emails speak for themselves and these are clearly an exchange which resulted in an agreed date and time. There was then in fact no need for Ms Adam to be involved in any further arrangement as such and it was perfectly in order for her to make a contact to confirm the time. There is

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[37] Transcript pages 218 - 219

inconsistency as to when she made the call because she spoke of earlier contact with the complainant in relation to cancellation of the order for the equipment and said that the contact concerning the time was about a week thereafter.[38] That is inconsistent with the period of time that elapsed between the order and the 29 May 2012 meeting.

142. Likewise, the Tribunal cannot draw any conclusions from the suggestion that Dr Rabih did not need to have the demonstration in question. Certainly he had been to the presentation and had carried out the training course there, but that is not to say that he necessarily felt sufficiently confident about how to run the machine, particularly after it had sat unwrapped for some time. The complainant may well have perceived that Dr Rabih did not need any further training with the machine but it was part of her after-sales service to ensure that requests of that nature were met and that is why she responded to requests from Dr Rabih accordingly. Again the Tribunal interprets her interpretation of that sequence of events as being after the event and with hindsight and not something in her mind at the time; but does not attach any lack of credibility weight to that perception.

143. It was argued that the evidence of "*saliva and drool running down [the complainant's] neck*" totally lacked credibility and had "*all the hallmarks of the fanciful – if not at least excessive exaggeration.*"

144. The evidence from the complainant in cross-examination[39] was:

> *"I turned my head and in a split second his lips were on my face and he was kissing my neck, and I could feel, I could actually feel saliva dripping down my neck when he was kissing my neck, my face and neck.*
> *Q. And what's drool, saliva and drool, running down my neck?*
> *A. I describe it as saliva from his mouth was dripping down my neck."*

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[38] Transcript pages 210 - 211
[39] Transcript page 69

145. The complainant was then asked why this matter had not been referred to in the draft statement that was produced by the Police. That statement included: *"Without any acknowledgment he just 'launched' himself forward and began kissing my neck and throat"*. The complainant said:[40]

> *"I do specifically remember saying, when I was talking with [the detective constable], about saliva and drool around my neck because she made the comment that they would like to swab - if we go ahead and make a statement and press charges they could sign the dress and swab off."*

146. It was submitted for Dr Rabih that before this response the complainant's initial answer to cross-examination was she could not recall because she had never seen a statement and further that she agreed she had told Ms Young of the Dental Council that the statement was correct, which she then confirmed in an email dated 19 July 2012.

147. The Tribunal's assessment of this evidence is that the complainant's reaction to the kissing was as she has described it and the Tribunal accepts her version of that event. The Tribunal does not find any inconsistency in how the matter was recorded by the Police. There was only a draft statement prepared which the complainant did not see for some time after. The Tribunal accepts as consistent the evidence that the complainant referred to the matter with the detective constable who in turn in reply referred to the dress for the purpose of a swab.

148. In confirming to the Dental Council that the draft statement was correct, this was in itself accurate because the draft statement in that respect was correct – it simply excluded reference to the "*drool and saliva.*"

149. The Tribunal is further of the view that, even if the language used was excessive or colourful, that does not affect the credibility of the complainant's evidence as to the

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[40] Transcript page 71

kissing; nor does it affect the Tribunal's view of the credibility of the remainder of the evidence given by the complainant.

150. The submissions for Dr Rabih were that there could not be "*cherry picking*", that is accepting some parts of the evidence as credible but not others and the rejection of one part of the evidence must result in rejection of it all on the balance of probabilities.

151. The Tribunal is of the view that the evidence given by the complainant on the critical factors in question on the day were sufficiently credible that her evidence as a whole should be accepted. Any aspects of inconsistency that there may be are rather accuracy of recall than credibility issues.

152. The Tribunal does not consider that the complainant's actions after the event in any way throw the credibility of her account into doubt. The Tribunal accepts that straight after the event she tried to telephone her husband and then rang her employer who told her to go to the Police. It was entirely consistent with her account that she then spoke to her husband at home later and he wanted her to go to the Police.

153. The complainant went the next day to Taranaki and was there for several days. During that time she was assisted by the HR department of her employer with a counsellor at the Taranaki Family Centre and spoke to her manager and friends. On her return from Taranaki she went to the Police the next day and gave certain details to the detective constable. She then said that she just wanted to "*put it in a box, put the lid on it and try and deal emotionally with it and move on in [her] life.*"

154. The Tribunal finds that account credible and an acceptable reaction from a woman in this circumstance. The Tribunal does not find it remarkable that the complainant should attend the Police station and speak to the detective constable but then decline to sign a statement and embark further on the prosecution process. The Tribunal

accepts the explanation from the complainant that this was expected by her to be unnecessarily stressful and she decided not to proceed at that stage.

155. The complainant denied that the concern about the consequences of making a false complaint were her motivation behind not proceeding. The Tribunal accepts that. Under cross-examination[41] the complainant explained that her request to the detective constable that this not be a "*formal complaint*" referred to a formal complaint through the Police process; and her reasons for not wanting the statement to be sent to Dr Rabih. She denied that any causation was an awareness on her part that she was to "*blame*" for the incident and the Tribunal accepts that.

156. The Tribunal does not attach any weight to the fact that other persons to whom the complainant first made a complaint about this matter were not called to give evidence. The Tribunal accepts the complainant's reasons for not wanting her husband or the other colleagues to be called as witnesses in this matter. Likewise, although submissions were not addressed to this issue, the Tribunal does not place significant weight on the inconsistencies in what the complainant said she had said to her colleague before the day in question and what the colleague herself said. The complainant had said that the colleague had said: "... *as long as he's talking to you and looking at your eyes and not your chest you'll be fine*". The colleague said in evidence and repeated this under re-examination: " … *well if they stay on your chest, you're okay.*" The Tribunal cannot say that the evidence of the complainant was incredibile just because of that inconsistency. It was a casual "throwaway" line between friends on some day before the events in question and its accuracy is not of significance.

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[41] Transcript page 40

157. The Tribunal does not consider that any inconsistencies in the draft statement that was prepared by the Police detective constable with what the complainant has said in her evidence indicates a lack of credibility. The draft statement was prepared by the detective constable following the interview and notes that that person had taken. It was only a draft. There was certainly opportunity for misunderstanding on the part of the detective constable as to what had been said and translation of this into the more formal form of a written statement. There may have been detail that was omitted in the initial interview that has since been provided by the complainant. The Tribunal does not place any significance on that – this was only an initial interview in the first place followed by a draft statement recast after the interview by the interviewer.

158. Dr Rabih himself offered that as the complainant was leaving the premises she said: "*I don't know how I can look at you again*" which the Tribunal finds is more consistent with the complainant's version of events that night than Dr Rabih's.

159. The Tribunal has found the evidence of the complainant consistent throughout. The Tribunal also finds that that evidence is consistent with evidence from other witnesses for the PCC.

160. Of importance is that the complainant had nothing to gain by making these allegations or giving evidence in support of the PCC's Charge against Dr Rabih. It was argued for Dr Rabih that there may have been significant motivation for the complainant to pursue this matter in this way which are unknown to the Tribunal and of which there has been no evidence, such as her relationship with her husband and impact of this matter on him.

161. Dr Rabih was asked by the PCC whether he knew any reason why the complainant should fabricate any aspect of this matter but he could give no reason. Submissions on behalf of Dr Rabih were critical of this line of questioning but they do go to the

issue of self - interest. The Tribunal has had to assess whether there has been any self - interest on the part of the complainant in giving the evidence that she has.

162. The Tribunal has concluded that the complainant has given her evidence in this matter genuinely to support the Charge that has been made by the PCC against Dr Rabih. There is no evidence that the complainant has anything to gain from this process. There has been a traumatic event for her, she pursued this initially with her discussion with colleagues, her husband and friends and then her initial approach to the Police and now that the Charge has been being brought by the PCC, she has put herself through the trauma of giving the evidence that she has.

163. The Tribunal was impressed with the demeanour of the complainant and the witnesses called by the PCC and has no reason to doubt the credibility on that ground.

164. As to concessions being freely made it cannot be said that the complainant did so to any notable degree. Against that, however, is the fact that the complainant was being extensively cross-examined about personal matters of a sexual nature and was understandably defensive in her responses. The Tribunal does not consider that this affects her credibility.

165. So far as Dr Rabih is concerned, a primary consideration is the letter he wrote dated 8 July 2012 to the Registrar of the Dental Council, transcribed above. That letter was written in the face of the letter he had received (also transcribed above) from the Dental Council which included reference to a complaint to the Police about behaviour at his workplace on 29 May 2012. There was reference to an "*appointment*" and "*unwanted sexual advances on"* the complainant – not named in the letter. Dr Rabih's letter speaks of having "*tried hard to remember*" and that he "*could not recall any incident that can remotely be interpreted as sexual advances, let alone fearing for safety.*"

166. Certainly his letter expressly refers to his having reviewed "*all my **patients***" (emphasis added); and certainly he asked for clarification of the matter. Submissions on Dr Rabih's behalf were that it was in order for him not to make any commitment until he knew the name of the complainant and more detail about what was being alleged. The Tribunal finds it incredible, however, that, even on Dr Rabih's own version of what events occurred on the 29 May 2012, he could have forgotten by 8 July 2012 that he had had the exchanges with the complainant, particularly so far as touching of breasts was concerned. Indeed Dr Rabih conceded[42] that he did consider it might have been the complainant.

167. One thing Dr Rabih did do after receiving the letter from the Dental Council was to contact the complainant's colleague. He said that this was at the time he had received the letter from the DCNZ but he was not aware who may have made the complaint and he wanted to meet with the colleague to discuss the matter. The fact that Dr Rabih should contact a former professional colleague for this purpose does suggest to the Tribunal that he was aware that the complaint may have come from a business associate which should have alerted him to the presence of the complainant in his premises on the day if he had not already recalled this.

168. The Tribunal finds that Dr Rabih's response to the formal Dental Council approach throws doubt on the credibility of his evidence.

169. Criticism was made by the PCC concerning a response that was sent by Dr Rabih's lawyers dated 27 July 2012 and the content of it. That letter was written in response to further detail having been supplied by the Dental Council in a letter dated 19 July 2012. The Tribunal does not accept the criticism made on behalf of the PCC in this regard. The letter merely transcribes the sequential paragraphs from the draft

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[42] Transcript page 112

statement by the complainant. As noted above, that statement was a draft only and was not expected to be a comprehensive statement by the complainant. There is then inserted by the lawyer the response to the sequential allegation. The evidence was that the letter was drafted by the lawyer based on notes taken at interview with Dr Rabih. Although the evidence was also that Dr Rabih approved the content of the letter before it was sent, the Tribunal does not attach significance to any inconsistencies there may have been in the letter with the evidence that is given to the Tribunal. The words in the letter would therefore primarily be those of the lawyer.

170. Criticism was also made of the fact that the only email that accompanied the lawyers' letter was the one dated 3 April 2012 at 6.50 pm. This was just one of the emails that were presented to the Tribunal in evidence. It was the email which referred to the outstanding debts to be paid before the order for new equipment could be implemented and which included the ☺ sign. The Tribunal accepts that it was deceptive on the part of Dr Rabih through his lawyers to provide only one of several critical emails which were exchanged concerning the very matters which were at issue and which form the subject of the Dental Council inquiry letter; especially as this email was one that had the ☺ sign.

171. Another issue was the timing and content of the apology given by Dr Rabih dated 27 July 2012. That apology is, of course, dated the same date as the lawyers' letter and was sent with that lawyers' letter. Dr Rabih was asked why he thought it was necessary to give a full and unreserved apology and his reply[43] was:

> *"I thought that there is a complaint, I wanted to provide a ladder for her, if there is a complaint, to come down the tree, like to say look, I'm really sorry. In my try to call [the colleague], I, you know, like I thought, all my thinking, like look, I can meet [the complainant] and apologise to her,*

[43] Transcript page 150

> *that's my thought of course. The conversation did not happen with me and [the colleague] but my thought when I'm ringing is, well, I know [the colleague] for very long time and she's my colleague and I've seen [the complainant], so as you said, I can offer the apology, I can apologise to you in person, I'm really sorry if I offended you in any way. That was - I was prepared to do that, yeah, because I did not think that that what happened is that, is that grand that it will develop in such a manner*."

172. The Tribunal has drawn the inference that the apology was written on the lawyers' advice. The Tribunal accepts the complainant's criticism that it does not read as a genuine apology, but at the same time the Tribunal does not place any weight against Dr Rabih on that account. The Tribunal accepts Dr Rabih's explanation as to why he did this. He realised that the complaint had been made and that the complainant was upset about the matter and had been caused distress. Perhaps with his lawyer's help, but at least with advice from the lawyer, he wrote an apology accordingly to seek to help the situation. The Tribunal does not read that apology as being any admission on the part of Dr Rabih.

173. As to self-interest, it almost goes without saying that Dr Rabih has much to lose in this matter if the complaint and the evidence of the complainant are accepted. There is a huge amount at stake for him professionally if that occurs. That could have encouraged him to downplay matters in his account of the events on the day (and events preceding) as the Tribunal finds it did in respect to his response initially to the Dental Council.

174. It was argued on behalf of Dr Rabih that he has made a significant concession in his evidence by admitting to having requested to touch, and then having touched, the complainant's breasts. That concession is consistent with what had been said by him through his lawyers in the response to the Dental Council and that was also referred to. He could have simply denied that event, as he denied the other factual content. The Tribunal has no evidence as to what his motivation may have been in making the concession and it gives Dr Rabih the credit for having done so in its assessment

of the factual matrix. The explanation given by Dr Rabih that his touching the breasts was "*curiosity*" does not ring true in the context of the environment on the night and also Dr Rabih as the Tribunal perceived his demeanour giving evidence.

175. The evidence of Dr Rabih was consistent with that of his two other witnesses. One of those witnesses, Debra Watson, is still Dr Rabih's receptionist and dental assistant; and it might be said that she has self-interest in giving evidence to support her employer. The same cannot, however, be said of Ms Adam, who is now working in Australia and no longer employed by Dr Rabih.

176. The substantive content of Ms Watson's evidence was in relation to characterisation issues such as the "*sleazy*" attitude of Dr Rabih to the complainant and his other untoward characteristics and mannerisms. Those matters are largely subjective and "in the eye of the beholder" and the Tribunal does not attach significant weight to the differences between the perceptions by Ms Watson and those by the complainant.

177. One aspect of Ms Adam's evidence concerned the confirmation of the appointment which is dealt with above. As noted there, the Tribunal does not attach significant weight to the fact that the complainant referred to the time and date being arranged by email (which is confirmed by the emails) while Ms Adam referred to having confirmed the detail. Ms Adam's evidence also covers the issue concerning her not having been at the demonstration; but her absence is not a factor which has weighed largely in the Tribunal's assessment of the matter. The appointment had been made for 6.00 pm. by arrangement by email. At that stage that was to accommodate an appointment which Dr Rabih had for an extensive procedure; which appointment was then cancelled at a late stage. That allowed for the release of Ms Adam from the premises and demonstration as she had sought; and the Tribunal accepts that. The Tribunal has not drawn the inference that this was a "set-up" by Dr Rabih to leave him alone with the complainant; but rather that, given the circumstances as they in

fact developed on the night, Dr Rabih took advantage of the developing situation when he had found himself alone with the complainant.

178. Ms Adam also gave evidence about "characterisation" issues which, as stated above, are more subjective.

179. The Tribunal accordingly finds that, although there is consistency in the evidence of the three witnesses for Dr Rabih, that does not help the Tribunal to assess the credibility of Dr Rabih's evidence alone on critical matters; and the Tribunal rejects his evidence insofar as, on these critical matters, this is inconsistent with that of the complainant.

180. As to demeanour, the Tribunal preferred the way in which the complainant gave her evidence to that in which Dr Rabih did so. This was a fine balance and the Tribunal made due allowance for the fact that English was not Dr Rabih's first language.

181. It is after having weighed up those issues in the context of judicial guidance as to credibility principles that the Tribunal has formed the view that it prefers the evidence of the complainant on critical issues to that of Dr Rabih.

182. Having reached that conclusion therefore, it follows that the Tribunal accepts the complainant's evidence about the individual Particulars of the Charge. As noted above, these are divided into two categories, one being words that were said and the other being acts that were done.

183. In respect of the latter, acts done, each Particular alleges that this was without the complainant's consent. Particular 9 is a combination of words and acts and the Tribunal finds that both occurred.

184. So far as Particular 10 is concerned, the Tribunal finds that these words were spoken by Dr Rabih to the complainant. They are, however, in themselves, the Tribunal finds, relatively innocuous and do not constitute conduct in an inappropriate or

unprofessional manner that brought or was likely to bring the dental profession into disrepute. Particular 10 is therefore disregarded.

185. Those Particulars which relate to acts, Particulars 2 (rubbing a finger up and down the complainant's leg), 4, (kissing on the face and neck), 6 (touching and groping breasts – and the Tribunal notes that the Charge is laid in the singular "*breast*"), 7 (placing hands on shoulders and pressing against body), 8 (pressing erect penis into side) and 9 (grabbing shoulder with force and pulling on to knee) each and all relate to criminal activity.

186. Each is alleged to have been done, and each has been found by the Tribunal to have been done, without the complainant's consent. That means that, in each case, there has been criminal activity.

Breach of standards

187. The question therefore for the Tribunal is whether that activity and those findings amount to misconduct under section 100(1)(b) of the HPCA Act,[44] that is whether each and/or all of them, separately or cumulatively, brought or were likely to bring the dental profession into disrepute.

188. The Tribunal rejects the submissions made on behalf of Dr Rabih that there need be called evidence to prove that appropriate standards have been breached. This case is one where there has been proven to the satisfaction of the Tribunal that there has been criminal activity on the part of the health practitioner, Dr Rabih, namely a sexual assault. That that criminal activity is a breach of professional standards is something for the Tribunal to assess on its own interpretation of the HPCA Act, particularly section 100(1)(b), and in light of first the facts as found and secondly other decisions of the Tribunal and of the courts.

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[44] See paragraph 98 above

189. Taking the principal allegation, the touching of the complainant's breast, this is admitted by Dr Rabih and his only defence to this is that it was with consent. The Tribunal has rejected that defence and found in favour of the complainant's version of events. That means that the finding has been made that there was sexual assault by the touching of the complainant's breast by Dr Rabih.

190. The Tribunal does not accept that that needs to be proven by independent evidence as a breach of professional standards. That decision applies in respect of those aspects of the Charge which relate to the conduct bringing or being likely to bring discredit to the dental profession. Proven criminal activity by a dental practitioner can bring discredit to his profession. This is especially so when the activity occurred in the dental practitioner's own professional rooms at night with a colleague with whom he had professional dealings and the contact with whom had been initiated by for professional purposes, namely the demonstration of equipment that had been sold by the colleague to the dentist. The Tribunal, comprising in the majority members from the dental profession, is well placed to decide whether that activity did in fact bring or was likely to bring discredit to the dental profession; and the Tribunal finds in this case that this was so.

191. That principle stands in marked contrast to the authority relied on by Dr Rabih, *Dr G v Director of Proceedings* referred to above.[45] The judgment of 30 October 2009 was initially an interim judgment in that case to allow for the medical practitioner to undergo a sexual misconduct assessment. As it transpired, the judgment made final findings on one issue, namely whether a consensual sexual relationship between the medical practitioner and the complainant arose out of a doctor/patient relationship

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[45] Paragraph 82; CIV 2009-404 –000951, Auckland HC, Duffy J, 13/10/09

but allowed further submissions on the issue of whether the conduct as found constituted professional misconduct that attracted disciplinary sanction.

192. There had been various consultations between the medical practitioner and the complainant in that case. There was an overlap between some of these and the period of the sexual relationship between them. The judgment was first critical of conclusions that had been reached by the majority of the members of the Tribunal where the reasoning behind the conclusions had not been expressed. The importance of reasons to support findings made in judicial decisions was emphasised, particularly in the context of the decision reached by the minority member (which also did not express the standards and objectives applied to arrive at that view).

193. There was reference at paragraph 41 to there having been produced no evidence of the standards and criteria generally accepted in the medical profession for determining when there is a current doctor/patient relationship. That followed an earlier passage[46] where the court held that in determining if a current doctor/patient relationship existed there required to be a case specific analysis which would include an evidentiary inquiry into the existence, nature and duration of such a relationship with reference to *YZ v Director of Proceedings.*[47] The judgment referred to the recognition by the Court in that case of the relevance of the Tribunal members' technical experience, as well as their educated common sense to answering the question; with the conclusion that the Tribunal would be entitled to apply its own reasonable objective standards and criteria to reach such a determination, citing from the case:

> *"The Tribunal would be entitled to apply its own reasonable, objective standards as to the extent of professional contact required between any patient and a doctor before an on going patient/general practitioner relationship is deemed to exist. Practitioner members of the Tribunal*

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[46] Paragraph 20
[47] Wellington HC CIV– 2007-485-2631; 3-10-08; Dobson J

> *would be entitled to apply their own objectively measurable criteria to that inquiry…"*

194. The judgment in *G* said:[48]

> *"Because the currency of the relationship is not obvious, I consider that once it was contested, any decision on the relationship's currency demanded expression of the criteria being applied and the rationale for relying on the evidence that forms part of the majority's decision. As it stands, the majority's decision falls short of Dobson's J's test in Z, and the views I have reached on what was required."*

195. The Court found that the failure by the majority to express a proper basis for its finding on the duration of the doctor/patient relationship was in error that made the decision on this issue unreliable and wrong. Further, the Court found, because the decision was the touchstone for the majority proceeding to find the practitioner guilty of professional misconduct, the decision on that issue was similarly affected.

196. Having made that finding on the specific question of whether there was sufficient evidence that the doctor/patient relationship existed, the judgment proceeded to consider whether there was evidence on which the decision could have been made that there was professional misconduct. The judgment discussed the level of consultation that had occurred between the doctor and the complainant, including initially an immigration health check. Reference was also made to an interposing consultation the patient had had with another doctor for blood tests as part of an application for a health assistant's position. The court found that the view taken of the duration of the doctor/patient relationship had impacted on the finding by the majority of professional misconduct. The rhetorical question was asked:[49] "*Does it*

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[48] Paragraph 35
[49] Paragraph 46

amount to professional misconduct to provide medical services to someone with whom you have already commenced a sexual relationship?" It was in that context that one of the extracts on which the Dr Rabih's submissions rely was stated, namely to support the submission critical of the prosecution for not producing evidence from a medical ethicist or some similarly qualified expert on appropriate professional conduct. The judgment said:[50]

> *"The Tribunal is a specialist body and includes medical practitioners. Members of the Tribunal with specialist knowledge are entitled to apply their skill and specialist knowledge to the cases before them.* ***But this should not occur during the decision-making process behind closed doors in circumstances where the defendant professional has no idea of the standards and criteria against which his or her conduct is being measured****. In order for a defendant professional to have a fair opportunity to answer adverse views of his or her conduct, the ethical yardstick against which the conduct is being measured needs to be known" (emphasis added)."*

197. There then followed a discussion of relevant Medical Council guidelines referring to existing doctor/patient relationships, the length of the professional relationship in that case, frequency of conduct, and type of care provided as all relevant. The judgment said that the guideline's policy of zero tolerance was no more than a general principle and every case must be judged on its facts, referring to *Director of Proceedings v Medical Practitioners Disciplinary Tribunal & Wiles.*[51]

198. The Court could find no evidence to suggest that it was improper for Dr G, in terms of the guidelines, to commence the sexual relationship with the complainant that he did; and that the problem lay with the subsequent provision of medical services to the patient when she was also his lover. It was found that there was no evidence before the Tribunal and therefore the court of the circumstances in which it was considered appropriate or inappropriate for a medical practitioner to provide medical

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[50] Paragraph 48
[51] [2003] NZAR 250

services to someone who was already his lover, particularly when that person had been a former patient. This theme was repeated in paragraph 59 relied on by counsel for Dr Rabih. The Court found that that issue of whether or not the conduct was sufficient to meet the threshold for upholding the disciplinary charge remained a live issue and called for submissions from the parties.

199. Counsel also referred to *Lake v The Medical Council of New Zealand.*[52] In that case involving an obstetrician the decision to recommend an induced birth had been made. This was found to have been in error. The Medical Practitioners Disciplinary Council was found by the court to have applied its own standards in determining whether there had been conduct unbecoming the medical practitioner without having referred the content of its deliberations to the parties for submission and without having other independent evidence which had been tested at the hearing. The decision of the MPDC was found to have been ambiguous with an absence of reasoning indicating whether standards were being set or personal views substituted for expert evidence. Again, that case can be distinguished on its facts, given that it related to the specific obstetrical procedure and advice involved where clear evidence of the propriety of that was called for; as contrasted with the present case where there has been proven criminal activity involved.

200. The Tribunal considers that those cases, *G* and *Lake*, are distinguishable from the present case. In the present case the acts of Dr Rabih which form part of the Charge are, as stated above, criminal activity and there can be no question but that, that having been proved to the Tribunal, the Tribunal and its individual members with their expertise can decide whether that activity is or is not misconduct under section 100(1)(b) of the HPCA Act. The case is akin to *Chand*[53] where there was sexual

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52 Auckland HC: HC 123/96; 23/1/98: Smellie J
53 106/Nur06/49 P

contact alleged between Nurse Chand and a colleague which was denied by Nurse Chand. The Tribunal found in favour of the version given by the complainant and further questions as to whether this breached any professional standards did not arise.

201. Criminal activity, such as sexual assault and common assault, is in a significantly different category from moral questions involving a consensual relationship with a patient, former patient, staff member, or colleague.

202. When this prospect was put to counsel for Dr Rabih, his response was that criminal activity should normally be tested by prosecution in the Court because there was clear and express provision for any conviction of a criminal offence to form part of disciplinary process under section 100(1)(c) of the HPCA Act. Counsel said[54]

> *"Absolutely, given that the focus of the [HPCA] Act, this Act on criminal behaviour, as we all well know, is section 100(1)(c). This subverts that whole statutory regime by having a case tested on the civil standards of the balance of probabilities, albeit [at] this threshold, this sliding flexible issue where what is being articulated, as you say Mr Chair in the worst case is a criminal charge, is utterly unsatisfactory for the profession."*

203. The Tribunal does not accept that submission. It should not be a prerequisite for a health profession before laying a charge under section 100(1)(b) of the HPCA Act to require that a complainant or person affected lay a complaint with the Police and undergo the process of a criminal prosecution of an alleged offender. The Professional Conduct Committee of the relevant health profession is entitled to investigate a complaint made or matter brought to its attention and then to lay the charge it considers appropriate before this Tribunal.

204. The standard of proof is on the balance of probabilities rather than the higher standard applicable to the prosecution of a crime in the Courts. This topic was,

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[54] Transcript page 259

however, canvassed in the extract from the judgment in *Z* referred to above.[55] The more serious the allegation, the greater must be the degree of satisfaction on the balance of probabilities. 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. Where the charge before the Tribunal is based on allegations of criminal conduct, as is the case here, the Tribunal must assess the degree of satisfaction on the balance of probabilities that it must reach to determine whether there has been a breach of standards and the charge made out. The submissions for Dr Rabih accepted that principle in their reference to the *Joseph* case – see paragraph 77 above.

205. The Tribunal has been very aware of that issue in considering the facts of this matter and the allegations that had been made against Dr Rabih; and has fixed the degree of satisfaction that it must reach accordingly.

206. The oral exchanges between Dr Rabih and the complainant must be considered in the context of that criminal activity which has been found. Given that finding and those facts, the Tribunal is well placed to decide whether the accompanying words brought or were likely to bring discredit to the dental profession. The Particulars of the Charge must be considered separately and cumulatively. That is not to say, however, the each must be considered in isolation. Each separate Particular must be considered in the context of the factual matrix comprising the whole.

207. The submissions of counsel for Dr Rabih then in the context of the various codes of practice and statements of guidelines have little relevance. Those relate to consensual exchanges between a dentist and others.

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[55] Paragraph 96

208. The case may have been different had this been a situation that the Tribunal found that the connection between the complainant and Dr Rabih on the day in question was consensual, that is that the evidence of Dr Rabih were accepted and the complainant agreed to his touching her breasts. In that event, the Tribunal would have had to consider the detailed submissions made by both parties as to whether that consensual activity was a breach of the professional standards for Dr Rabih in his dental practice. What is noted in that context, however, is Dr Rabih's own acceptance of moral boundaries as recorded from the extract in paragraph 66 above.

209. The submissions for both parties referred in detail to the codes of practice and guidelines that could have applied. Whether the Tribunal needed to have expert evidence on the application of those codes and guidelines to the particular circumstances of the case is not a question which the Tribunal need therefore address.

210. The Tribunal need not, likewise, address the question advanced by counsel for Dr Rabih that, absent any codes or guidelines or other criteria by which consensual conduct may have been measured, the Tribunal need only have expressed its view on the propriety of that conduct in the context of professional obligations giving guidance for the future to members of the dental, and possibly other, professions without a finding against Dr Rabih of breach of professional standards which he had not heretofore had articulated in codes or guidelines or Tribunal decisions. That submission too would only apply had there been a finding in favour of Dr Rabih on factual matters, that is that the connection was consensual.

Threshold

211. The Tribunal must in this case consider whether the evidence and facts as found in the charge as proven, is sufficient to meet the threshold of warranting disciplinary sanction either for maintaining standards in the profession, protection of the public

or punishing the practitioner. This is the second step referred to in paragraph 99 above.

212. For Dr Rabih reliance was placed on extracts from the judgment in *Pillai v Messiter*[56] where it was said:

> *"Departures from elementary and generally acceptable standards could amount to ... such professional misconduct ... but the statutory test is not met by mere professional incompetence or deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of privileges which a company registration as a medical practitioner."*

213. Other submissions for Dr Rabih are referred to above. In reliance on the authorities cited, counsel submitted that, even if the Particulars of the Charge were found to be proven to an appropriate level, the threshold of seriousness was not met so as to warrant an adverse disciplinary finding.

214. The Tribunal does not accept that submission. The finding of the Tribunal on matters of fact is that Dr Rabih has been involved in the criminal activity of sexual assault and other assault on the complainant combined with words which, in the context of that physical activity, were likely to bring discredit to the dental profession.

215. The Tribunal considers that those findings do cross the necessary threshold of requiring disciplinary sanction for each of the three reasons. The first is maintaining professional standards. This activity occurred between the dental practitioner and a salesperson who had made an appointment to demonstrate a professional product that had been sold by the complainant through her company to the dental practitioner. It occurred in the dentist's own rooms. It occurred at night after the

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[56] (1989) 16 NSWLR 197

staff had left and when there was no one else present. It occurred after hours on a dark winter's night.

216. The Tribunal's view is that that is a breach of a dental practitioner's standards. The Tribunal further finds that it is necessary to maintain standards in the dental profession for there to be a finding against Dr Rabih that the Charge is made out; and for that to result in the appropriate consequences. It is only by that course that the dental profession will be encouraged to maintain its professional standards.

217. The finding is also necessary to protect the public. Any person entering a premises, whether this be by day or after hours at 6.00 p.m. on a dark winter's night, and whether this be when other staff are present or not, is entitled to be protected from criminal activity of sexual and other assault, especially when combined with provocative and inappropriate language.

218. The Tribunal finds that it is necessary to punish Dr Rabih for this behaviour. Questions of any penalty will be addressed in a later decision of the Tribunal after having heard submissions and any further evidence tendered. The Tribunal will take into account that there has been no criminal process in the Court which has resulted in any penalty for Dr Rabih (and the provision for imposition of a fine in section 101(1)(e) of the HPCA Act expressly excludes where there has been a conviction entered in a Court). Suffice it at this stage to say that the Tribunal is presently minded that there should be a penalty as a consequence of this behaviour so that the threshold is crossed on that ground.

Result

219. The Tribunal finds the Charge to be made out. It does not do so in any respect in respect of Particular 10. It finds each of Particulars 2, 4, 6, 7, 8 and that part of 9 which refers to physical activity, namely the grabbing of the complainant's shoulder and pulling of her on to his knee, to be made out separately and cumulatively. It

finds remaining Particulars, 1, 3, 5, and the remainder of 9 to be made out in the context that the words in those Particulars and each of them were expressed by Dr Rabih to the complainant in the context of the physical activity that had been occurring. It finds that the Charge is made out in respect of Particulars 1 – 9 both separately and cumulatively.

220. The Tribunal needs now to deal with the question of penalty. This can be done by written submission and evidence if that is so appropriate. If either party requires an oral hearing for evidence or submissions, that is to be sought with the written submissions and with reasons given.

221. Submissions and any evidence from the PCC are to be lodged with the Tribunal and served on Dr Rabih through counsel within 14 days of receipt of this written decision; reply submissions and any evidence from Dr Rabih are to be lodged with the Tribunal and served on the PCC through counsel within 14 days thereafter; and any reply submissions or evidence (strictly in reply) from the PCC is to be lodged with the Tribunal and served on Dr Rabih through counsel within 7 days thereafter.

Dated at Auckland this 20th day of February 2014

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David M Carden
Chairperson
Health Practitioners Disciplinary Tribunal