



New Zealand  
Health Practitioners  
Disciplinary Tribunal

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**DECISION NO:** 569/Den13/249P  
**IN THE MATTER** of the Health Practitioners  
Competence Assurance Act 2003

-AND-

**IN THE MATTER** of a Charge laid by a Professional  
Conduct Committee pursuant to  
Section 91(1)(b) of the Act against  
**DR JOSEPH FALANIKO**  
**ARCHIE PETELO**, registered  
general dental practitioner and  
orthodontic specialist of  
Christchurch.

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**TRIBUNAL:** Mr D M Carden (Chair)  
Dr R East, Dr C Lloyd, Dr S Salis and Mr Q Hix (Members)

Miss D Gainey (Executive Officer)  
Ms K O'Brien (Stenographer)

Hearing held at Christchurch on 5 August 2013

**APPEARANCES:** Dr J Coates for the Professional Conduct Committee  
Mr H Waalkens QC for the practitioner, Dr Joseph Petelo

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## **Introduction**

1. Dr Joseph Falaniko Archie Petelo is a registered general dental practitioner and orthodontic specialist practising in Christchurch. Before his Annual Practising Certificate (“**APC**”) expired on 1 October 2012 he was sent reminders by the Dental Council of New Zealand (“**Dental Council**”) of the need to renew this. Despite those reminders he did not complete the necessary application or pay the appropriate fee for renewal in time and it was not until 10 October 2012 that he received the renewed APC. Between 1 October 2012 and 10 October 2012 Dr Petelo did practise the profession of dentistry. The matter was investigated by a Professional Conduct Committee (“**PCC**”) of the Dental Council which laid a Charge before the Tribunal.

## **The Charge**

1. The Charge read as follows:

*“**TAKE NOTICE** that a Professional Conduct Committee of the Dental Council established under section 71 of the Health Practitioners Competence Assurance Act 2003 (“the Act”) has determined in accordance with section 80(3)(b) of the Act that a disciplinary charge should be brought against Dr Joseph Falaniko Archie Petelo before the Health Practitioners Disciplinary Tribunal.*

*The Professional Conduct Committee has reason to believe that grounds exist entitling the Tribunal to exercise its powers under section 100 of the Act.*

### **PARTICULARS OF CHARGE**

*Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Dr Petelo, a registered general dental practitioner and orthodontic specialist, practised the profession of dentistry between on or around 1 October 2012 and 10 October 2012 when he did not hold a current practising certificate.*

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

2. At the hearing an Agreed Summary of Facts signed both for the PCC and by Dr Petelo was produced which read as follows:

***“Agreed Summary of Facts***

1. *Dr Joseph Petelo has been a registered dental practitioner 21 December 2004 and a registered orthodontic specialist since 5 April 2012.*
2. *From the date of his registration Dr Petelo has been required to hold a current annual practising certificate (APC) in order to practise his profession.*

***Background***

3. *On 3 September 2012 the Dental Council posted out APC renewal application forms for the 2012/2013 practising year to all registered dentists and dental specialists. Renewal forms are sent to the practitioner’s address as advised to the Dental Council.*
4. *Dr Petelo’s APC renewal forms were sent to his prior address and were not forwarded on to him.*
5. *On 4 September 2012 the Dental Council sent an email reminder to all dentists and dental specialists, including Dr Petelo, advising that his APC was due to expire on 30 September 2012.*
6. *Dr Petelo says that the email reminder was sent to one of four email addresses that Dr Petelo operated at the time. He unfortunately did not clear or read this email at the time and was struggling with email correspondences at that time of his practice.*
7. *On 14 September 2012 the Dental Council sent another email reminder to all dentists and dental specialists, including Dr Petelo, reminding all practitioners that their APC was due for renewal prior to 1 October 2012. The reminder advised that:*

*If you intend to practise at any time during the next APC cycle (1 October 2012 to 30 September 2013) you must hold a current practising certificate, you are advised that under the Health Practitioners Competence Assurance Act 2003 it is unlawful to practise without a current APC.*

8. *On 24 September 2012 the Dental Council sent a further email reminder to all dentists and dental specialists, including Dr Petelo, again reminding all practitioners that APCs were due for renewal before 1 October 2012 and advising that it was unlawful to practise without a current APC.*
9. *On 27 September 2012 the Dental Council sent out a bulk text reminder to all dentists and dental specialists, including Dr Petelo. The text stated: “Dental Council reminder to submit your APC/Retention form before 30/09/12.”*

10. *All three emails were sent to the most recent email address notified by Dr Petelo to the Dental Council, that is: josephpetelo@hotmail.com. In each case, transmission was successful.*
11. *At midnight on 30 September 2012 Dr Petelo's APC expired.*
12. *On 1 October 2012 the Deputy Registrar of the Dental Council sent a letter to Dr Petelo advising that:*

*I note that you have not yet submitted to the Dental Council ("Council") your application to renew your Annual Practising Certificate (APC) for the practising period 1 October 2012 to 30 September 2013. We are accordingly unaware of your practising intentions for this period. If you intend to practise at any time during this period you are required by law to hold a current practising certificate.*

...

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

*(Emphasis in original).*

13. *The letter of 1 October 2012, again, was sent to Dr Petelo's previous address.*
14. *On 2 October 2012 a Dental Council staff member sent a copy of the Deputy Registrar's letter dated 1 October 2012 to Dr Petelo by email. Dr Petelo responded to this email, stating:*

*Thanks for the email. I will send the form in ASAP. It must be sitting at work ready to go.*

15. *By return email of the same date the Dental Council staff member advised:*

*Thank you for your reply. Please note that you do not currently hold an APC and therefore are not entitled to practise until an APC has been issued to you. The form is available for download from our website and may be faxed or scanned and emailed back to our offices, granted you are paying via credit card.*

*We would recommend that you download and complete a form.*

16. *On 10 October 2012 a Dental Council staff member telephoned Dr Petelo at his practice. A practice staff member advised that Dr Petelo could not come to the phone as he was with patients. The Dental Council staff member's file note of the call records:*

...advised Dr Petelo could not come to the phone as he was with patients and she would put me through to his receptionist, Di. Di answered the phone, I advised who I was and that I was phoning from the Dental Council and that he does not currently hold a practising certificate and is not entitled to practise could he come to the phone please. The phone went silent for a moment and she asked if he could ring me back. I reiterated that he should not be practising and needs to ring me immediately.

17. Dr Petelo returned the call. The Dental Council staff member's file note of the call records:

Joseph phoned back. I advised that I phoned as we had not received his application for Annual Practising Certificate. He said no, he's recently moved home and didn't know if that had affected it. I advised that on review of his file I note that we had emailed him that he is required to return his completed Application for Annual Practising Certificate and that he had responded to that email. I said I understood he is practising today, he said yes. I said he would need to cease practise immediately and could not recommence until his APC had been issued. He said he would download the form and return it to us. I said it could be emailed or faxed. And reiterated that he absolutely should not be practising.

18. Dr Petelo says that he assured the staff member that he would follow the advice given and would immediately cease practice and would not recommence until his APC had been issued. Dr Petelo indeed did cease dental practice and did not recommence until his APC was issued as referred below.
19. Later the same day, 10 October 2012, Dr Petelo replied to the Dental Council's email of 2 October 2012. He advised:

I am writing to let you know that I have [now] submitted my application by fax. I apologise for the delay. I have two main reasons for this. Firstly, I have been awaiting my new credit card to be sent to my new residential address which is the card that I use to pay my council registration fees. For this reason alone I did not submit my registration form because I don't have a cheque book and do all of my transactions via the internet banking. I could have perhaps gone down to the bank to get a bank cheque however I was informed by BNZ that my credit cards would be here ASAP. They sent the mail to my old address.

In addition, I was also attempting to locate my APC registration letters that have been misplaced through me moving. I understand I could have downloaded these forms but again was going to coincide this with the arrival of the credit cards. Time got away from me.

...

PS: APC sent via fax. Please let me know if it has not reached you today.

20. *By letter dated 10 October 2012 the Dental Council's Registrar wrote to Dr Petelo enclosing his APC for the 2012/2013 practising year. The letter advised:*

*As you are aware, your previous APC expired on 30 September 2012. If you have continued to practise since 30 September 2012, you have been doing so unlawfully.*

*The Council draws your attention to the fact that practising without a current APC is a disciplinary offence under section 100(1)(d) of the Health Practitioners Competence Assurance Act (HPCA Act), and is an offence under section 7(2) of the HPCA Act (which may be prosecuted by the Ministry of Health and is punishable on summary conviction by a fine not exceeding \$10,000).*

*In this instance, Council will consider at their next scheduled meeting whether or not to refer you to a Professional Conduct Committee to investigate whether you have been practising unlawfully...*

21. *On 11 October 2012 a Dental Council staff member emailed Dr Petelo to advise that his APC had been issued on 10 October and had been sent to him with a letter from the Registrar.*
22. *The Dental Council subsequently resolved to refer Dr Petelo to a Professional Conduct Committee (PCC) for consideration of whether he had practised his profession between 1 October 2012 and 10 October 2012 when he did not hold a current APC.*
23. *On 17 December 2012 the Chair of the PCC wrote to Dr Petelo regarding its investigation, and inviting him to provide submissions, information, and relevant documents by 21 January 2013 for its consideration.*
24. *On 20 January 2013 Dr Petelo emailed a letter, dated 17 December 2012, to the Chair of the PCC. The letter stated, among other things:*

*I am writing in response to the investigation that I practised without an APC during 1 October 2012 to 10 October 2012.*

*In response to the above accusation I would like to indicate that I did practice during this time as an Orthodontist, however I would please like you to consider my letter to explain how this embarrassing situation has come about. At the outset, I would like to apologise to the Dental Council and promise that this will never happen again.*

*Firstly, I would like to say that although I was aware my APC was soon due for renewal, I had not realised it had lapsed until I was phoned on the 10 October 2012. At that time I did cease work, immediately completed the forms and faxed them to the Dental Council with my APC fee via my business credit card. My patients were cared for by my Orthodontic Auxiliary staff under supervision by Mr Len Glass (registered Orthodontist) who was working on that day.*

*Secondly, I can only apologise to the Dental Council and indicate that this year has been a hectic year for me. I understand being extremely busy is not an excuse, but please consider how the following situations did affect my awareness and had an effect on being able to submit my APC on time. I have just graduated from Otago University with a DClinDent (Orthodontics) and purchased Mr Len Glass Orthodontics based in Christchurch. I grew up in Christchurch and wished to return to settle down and practice Orthodontics. When I moved back we lived in a rental home because our house was severely damaged after the earthquakes. The rental home was too small and therefore prior to the APC due date we moved into a new home closer to my work....We have been living out of boxes and a previous printed APC form was not in a visible position to remind me. In addition, I believe that I had not updated my new address with the Dental Council. Furthermore, I had not organised for mail to be forwarded from my previous address...Although emails and text were sent, I can only apologise to say that it obviously did not remind me to complete the form and send this in. Therefore moving house, living out of boxes, trying to run a busy orthodontic practice has obviously been a factor that did result in me being 10 days late to renew my APC.*

*Thirdly, I had changed credit cards with BNZ and did not receive my new business credit card by the date initially indicated by the bank, as I endeavoured to pay my APC with this...If required I can BNZ to verify this but I can honestly say this was a factor why when I did sit down to complete my APC form earlier I stopped because I did not see bank details (account number) to enable me to transfer the APC fee via internet banking and I do not know where my business cheque book is as it has been misplaced with moving home....*

*Fourthly, I would like to state that I did intend to renew my APC on time, as I was on time with my previous APC, as I never want to be late again in my professional career...*

*Please consider the above reasons as a summation of the potential reasons that I believe resulted in my embarrassingly, unintentionally forgetting to renew my APC on time. I can only promise that it will never happen again.*

25. *The PCC was provided with information from the Dental Council that Dr Petelo's application for an APC for the 2011/2012 practising year had been submitted on time, but that the 2010/2011 application had been 74 days late. By letter dated 13 December 2010 Dr Petelo had been advised by the Dental Council that practising without a current practising certificate is unlawful, and a disciplinary offence under the HPCA Act. Dr Petelo was informed that a copy of its letter "will be retained on your file, and will be taken into account in the event that you submit a late APC application in the future".*
26. *In May 2013 a disciplinary charge was laid by the PCC alleging that Dr Petelo had practised the profession of dentistry between 1 October 2012 and 10 October 2012 when he did not hold a current a practising certificate.*



27. *Dr Petelo admits that he practised his profession between 1 October 2012 and 10 October 2012 when he did not hold a current practising certificate.”*

3. There was also an Agreed Bundle of Documents produced by consent on the basis that had been canvassed at a preliminary conference namely:

*“.. each document in the Bundle:*

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

4. For the PCC it was submitted that there were the three elements to be proven, namely that during the relevant period:

4.1. Dr Petelo was a registered general dental practitioner and orthodontic specialist.

4.2. Dr Petelo practised dentistry; and

4.3. Dr Petelo did not hold a current practising certificate at the time of that practice.

5. As to the first element, the PCC referred to the Dental Council records confirming registration at the relevant time and the admission of this at paragraph 1 of the Agreed Summary of Facts. As to the third element, the PCC also referred to records that the APC expired at midnight on 30 September 2012 and further that an APC was issued to Dr Petelo after the application was received on 10 October 2012. As to the second element, practising dentistry during the period, the PCC referred to the acknowledgement in the Agreed Summary of Facts referred to above. It also noted that the file note dated 10 October 2012 recorded the Dr Petelo could not come to the phone because he was with patients and also the Dr Petelo confirmed with the Dental Council staff member that he was practising on the day.

6. It was submitted that the PCC did not need to establish an intent to flout professional obligations, that the breach was deliberate, that the practitioner knew or ought to have known of the absence of the APC, or that disciplinary sanction was required for the purpose of protecting the public, maintaining professional standards or punishing the health practitioner. Authorities were referred to.
7. Reference was made to the documents demonstrating that:
  - 7.1. Dr Petelo was sent three email reminders about the expiry of his APC and was expressly advised that it was unlawful to practise without a current practising certificate.
  - 7.2. The emails were sent to the most recent address notified to the Dental Council by Dr Petelo and that the records confirmed that reminders were successfully sent to that email address.
  - 7.3. Despite being advised that his APC would expire on 30 September 2012, Dr Petelo did practise dentistry between 1 and 10 October 2012 without first ensuring that he was lawfully entitled to practise.
8. It was submitted that on the evidence before the Tribunal it was established that Dr Petelo was a registered dental practitioner, that he practised dentistry between on or around 1 October 2012 and 10 October 2012, and that he did not hold a current practising certificate at the time of that practice.
9. There were no submissions in reply made by counsel for Dr Petelo on the basis that he acknowledged that the Charge was made out to the requisite standard.
10. It is necessary for the Tribunal to consider the matter independently of the concession by Dr Petelo and it proceeded to do so. The Tribunal advised that it had found that the Charge was made out for reasons which would be given later in writing and this decision records those reasons.

### Charge – general principles

11. The burden of proving the Charge is on the PCC.
12. 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.
13. 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<sup>1</sup>. The standard in disciplinary proceedings is that of the civil standard of balance of probabilities.
14. The Tribunal has followed these principles in many of its decisions.
15. The Tribunal has also applied the principles as stated in *B v The Medical Council*<sup>2</sup> Elias J (as she then was) said:<sup>3</sup>

*“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.”*

16. Orders can be made under section 100(1)(d) of the Health Practitioners Competence Assurance Act 2003 if the Tribunal, after conducting a hearing on a Charge laid,

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<sup>1</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1; endorsing the judgment in *Briginshaw v Briginshaw*; (1938) 60 CLR 336 per Dixon J

<sup>2</sup> Noted in [2005] 3 NZLR 810

<sup>3</sup> at page 15

finds that the practitioner has practised his or her profession while not holding a current practising certificate.

17. A charge under section 100(1)(d) of the HPCA Act is absolute in its terms and, once the three elements are established that the practitioner was registered, that he or she had not renewed an APC, and that he or she was practising in the profession during the period of non-renewal, the Charge is made out.
18. In *Henderson*<sup>4</sup> Mr Henderson, a pharmacist, faced certain charges which included practising without a practising certificate. In relation to a submission based on the facts that any practising without a certificate was inadvertent the Tribunal said:

“35. *The establishing of a charge under section 100(1)(d) of the HPCA Act does not require the PCC to establish that the practitioner intended to practise the profession of pharmacy without a current APC. Previous decisions of the Tribunal have clearly established that there is a failure to comply with an important professional obligation even if the breach is inadvertent or innocent. In H*<sup>5</sup> *notwithstanding that the fact there had been an inadvertent lapse by a practitioner continuing to practise when she did not hold an APC, the elements of the charge were accepted by the Tribunal as being made out.*

36. *The principal purpose of the Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions; and the holding of an APC is a cornerstone requirement of the accountability regime of the Act. Having regard to these factors the Tribunal is satisfied that it cannot have been intended by Parliament that intention is an element of the disciplinary offence under section 100(1)(d).”*

### **Charge – discussion**

19. The Tribunal accepts the submission that only the three elements referred to are required to be proven and that, once that has been done, the Charge should be found

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<sup>4</sup> 477/Phar12/210P & Phar12/213P

<sup>5</sup> 256/Psy09/128P

to be made out. Reference does not need to be made to the question of whether the Charge warrants disciplinary sanction.

20. The facts clearly indicate that the reminders were sent to the email address that Dr Petelo had notified to the Dental Council. The letter of reminder dated 1 October 2012 was sent to Dr Petelo's previous mail address and emailed to him under cover of the email dated 2 October 2012. The evidence is clear that that was received by Dr Petelo because of his email response. The Tribunal notes that this appears to have been sent from his iPhone which may suggest that he was not at his office at that time, but that is not raised by him or on his behalf and is a clear acknowledgement of his having received the reminder and of the obligation to renew.
21. It was not until the telephone call of 10 October 2012 that Dr Petelo appreciated the gravity of the situation, who gave the response recorded at paragraph 17 of the Agreed Summary of Facts and it was reiterated to him that he should not be practising. It was later that day that he advised the Dental Council by email that he was submitting the application by fax.
22. While giving reasons for his continuation of practice in his letter of 20 January 2013, Dr Petelo acknowledges that he was practising during the relevant period without an APC. There may be mitigating factors there which could go to penalty, but the letter clearly acknowledges a breach of the requirements which is also acknowledged by the Agreed Summary of Facts and by Dr Petelo through counsel to the Tribunal.
23. The Tribunal finds the Charge made out as was announced to the hearing at the time.

**Penalty: submissions for the PCC**

24. The submissions for the PCC referred first to the functions of disciplinary process and the relevant penalty factors as enunciated in the cases. Reference was made to what was said to be comparable cases which the Tribunal has taken into account.
25. It was submitted that
  - 25.1. Since Dr Petelo's registration in June 2008 he had practised in a regulatory environment that had required him to hold a current annual practicing certificate in order to practise.
  - 25.2. Dr Petelo knew, or ought to have known, of the legal requirement to obtain a current practising certificate in order lawfully to practise his profession.
  - 25.3. Registration brings with it privileges and responsibilities and the onus is on each individual practitioner to comply with the requirements imposed on him or her by the regulatory regime.
  - 25.4. The Tribunal has previously accepted that even inadvertent or unintentional lapses in meeting this professional obligation is deserving of the imposition of penalties which have been predominantly orders of censure and a fine. It was said that this is consistent with the importance of the practising certificate regime and the need for practitioners to take this obligation "*very seriously.*"
26. The following aggravating factors were mentioned:
  - 26.1. That Dr Petelo had received three email reminders prior to the expiry of his APC and the text of these is referred to above.
  - 26.2. That the formal letter from the Dental Council dated 1 October 2012 expressly advised Dr Petelo that it was unlawful to practise without a current practising certificate and he should cease immediately.

- 26.3. That the Dental Council relied on communication information supplied to it by practitioners and Dr Petelo was required to notify promptly the Dental Council of any change in address which he had failed to do. In any event there was the clear acknowledgement by email of receipt by Dr Petelo on 2 October 2012 of the letter of 1 October 2012.
- 26.4. That this is not the first time that Dr Petelo has made a late application for an APC and that he was on notice from the Dental Council in relation to a previous late application in 2010. There was produced to the Tribunal a copy of the letter that had been sent to Dr Petelo by the Dental Council dated 13 December 2010 enclosing his APC for the 2010/2011 year. That letter clearly referred to the fact that practising after the expiry of an APC was unlawful and a disciplinary offence under section 100 of the HPCA Act. It also referred to that being an offence under section 7 of the HPCA Act which could be prosecuted resulting in a summary conviction and fine not exceeding \$10,000.00. The PCC emphasised that at that stage the council decided it would not refer Dr Petelo to a PCC to investigate and would not notify the Ministry of Health; but that a copy of the letter would be retained on his file and would be taken into account should he submit a late application for APC in the future.
27. It was acknowledged that a mitigating factor was Dr Petelo's co-operation with the PCC investigation.
28. It was submitted that one key purpose to be achieved with penalty in a case such as this where it may be said that the period of time was relatively short is to send a clear message to the profession that practising without a current practicing certificate for any length of time is unacceptable in any circumstances and will not be tolerated.

29. The PCC submitted:
- 29.1. That an annual practising certificate is an important aspect of meeting the principal purpose of the HPCA Act to protect the health and safety of the public.
- 29.2. That a practising certificate is, in effect, notice to the world that a practitioner is fit and competent to practise.
- 29.3. That a failure to comply with the requirement to hold a current practising certificate undermines a fundamental premise on which the regulatory regime operates.
30. The PCC submitted that an appropriate penalty would be:
- 30.1. An order for censure.
- 30.2. A fine between \$1,000.00 and \$1,500.00 which would mark disapproval for Dr Petelo's actions, punish him, and deter other practitioners; while also reinforcing the high standards expected within the profession and reiterating personal responsibility.
31. The PCC sought an order for contribution to costs referring to the continuing practice of his profession by Dr Petelo notwithstanding reminders. It said that the PCC's estimated costs was approximately \$8,500 - \$9,000.00. The Tribunal also must consider its costs in this context which were estimated to be some \$17,196.82.

#### **Penalty submissions – Dr Petelo**

32. It was emphasised that this was a first offence for Dr Petelo who appeared before the Tribunal with "*considerable embarrassment*" and was said to be "*gutted*" as a consequence. Reference was made to the explanations given by Dr Petelo in the Agreed Summary of Facts including:
- 32.1. That the renewal forms were sent to his prior address and not forwarded to him.



- 32.2. That at the time he used four email addresses and had not cleared or read the email reminder of 4 September 2012.
- 32.3. That the Dental Council's letter of 1 October 2012 was sent to Dr Petelo's previous address.
- 32.4. That when Dr Petelo was telephoned on 10 October 2012 he immediately accepted the advice he was not to practise further until his APC had been issued and he did follow that advice.
- 32.5. That part of the explanation was change in credit cards.
33. References were produced which the Tribunal has read in detail and taken into account. It was submitted that the case does not warrant imposition beyond the penalties of censure and an order for contribution to costs and it was said that an *"adverse finding of a disciplinary offence having been committed ... is on its own sufficient to meet all the purposes and functions of discipline."* The adverse finding would be a black mark that Dr Petelo would carry against his name for the rest of his professional life and would serve as a salutary reminder to other dentists, it was said.
34. Reference was made to the principles behind the imposition of penalties as elaborated in the *Roberts*<sup>6</sup> case and others. It was said that no other penalty beyond censure and an order for costs was required to note the disapproval by the Tribunal of the fact that Dr Petelo did practise dentistry for a brief period without a current APC.
35. The fact that Dr Petelo had not sought name suppression was emphasised with reference to authorities recognising that the absence of an order for name suppression is one of those issues of proportionality which must be taken into account.

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<sup>6</sup> See below paragraphs 39 and 40

36. It was said that there was no requirement to provide specific deterrents to Dr Petelo because there was “*no realistic prospect that [he would] reoffend.*” It was further said there was no requirement for general deterrence there having been a clear message already sent to the profession that practising without a current APC would result in an adverse disciplinary finding.
37. It was submitted that comparable cases had “*more aggravating and significant adverse features*” than that of Dr Petelo and detail was argued. Having reviewed the cases, it was submitted that Dr Petelo’s offending was less significant than those other cases and consistency would support the proposition that the outcome should be censure and an order for contribution to costs.

#### **Penalty - principles**

38. The Tribunal does not consider that penalties of cancellation of registration, suspension of registration, or conditions following practice need be considered. The Tribunal is authorised under section 101 of the HPCA Act to impose a fine up to \$30,000.00 and to order costs.
39. The functions of disciplinary proceedings have been canvassed by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*.<sup>7</sup> In that case the practitioner, Mr Roberts, had his registration as a nurse suspended by the Tribunal for a period of three years, the maximum provided. The Charge against him included having had an “*inappropriate and/or sexual relationship*” between him and a patient.
40. The Court referred to the following factors which the Tribunal is required to take into account in determining penalty.<sup>8</sup>

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<sup>7</sup> [2012] HC 3354, Wellington HC, 12/12/12; Collins J

<sup>8</sup> *Roberts, supra*, paragraph 44

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

*“... [T]o protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.”*

40.2. The important role of setting professional standards.

40.3. A punitive function but this is:

*“ ... often viewed as a by-product of the penalties imposed by the Tribunal and that protecting the public and setting professional standards are the most important factors for the Tribunal to bear in mind when setting a penalty.”<sup>9</sup>*

40.4. Rehabilitation of the health professional. The court recorded that:

*“A reason why rehabilitation may be an important consideration is that health professionals and society as a whole make considerable investments in the training and development of health practitioners. Where appropriate, the Tribunal should endeavour to ensure that these investments are not permanently lost, provided of course the practitioner is truly capable of being rehabilitated and reintegrated into the profession.”<sup>10</sup>*

40.5. That any penalty imposed is comparable to other penalties imposed upon health professionals in similar circumstances. The court recognised that each case would require a careful assessment of its own facts and circumstances, and that rarely would two cases be identical.

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

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<sup>9</sup> Paragraph 46

<sup>10</sup> Paragraph 47

40.7. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances with reference to *Patel v Dentists Disciplinary Tribunal*.<sup>11</sup>

40.8. Whether the penalty proposed is

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

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

42. Those considerations have been affirmed in other court decisions.<sup>12</sup>

### **Penalty: discussion**

43. It is important that any health practitioner have a current practising certificate; and that that certificate is renewed regularly as required. It is not simply a matter of a fee being paid but the application form requires completion of certain details and the content of the form and the performance of the practitioner needs to be assessed before the renewed practising certificate is then issued. That takes time and it must be done in a timely fashion if there is to be continuity of the practising certificate applicable to the individual practitioner.

44. Although it is helpful for a responsible authority to send out reminders of the need to renew the certificate, the prime responsibility for this lies with the practitioner. It is the responsibility of every practitioner to ensure that the application is made and the appropriate fees paid in a timely fashion such that the practising certificate is issued before the previous one expires. Otherwise, the responsibility is then on the practitioner not to practise until the renewed certificate is received.

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<sup>11</sup> Auckland HC: AP 77/02; Randerson J; 08/10/02

<sup>12</sup> *Katamat v PCC* [2012] NZHC 1633 at paragraph 49 and *Joseph v PCC* [2013] NZHC 1131; at para 65-66

45. It is not a case of the receipt of the form by the responsible authority nor of the receipt of the appropriate fee; it is a case that the certificate must have been issued and received by the practitioner.
46. In this case several reminders were sent to Dr Petelo in a timely fashion and he had plenty of warning. Regrettably, he had changed his contact details and had failed to notify the Dental Council of the changes. This meant that he did not receive the reminders when sent. The obligation was on him to advise the Dental Council of these changes and also to ensure that the recipient of advices to the old addresses would forward these on in a prompt manner where relevant. This did ultimately occur but by then the current certificate had lapsed.
47. The Tribunal has considered other relevant cases. Although these are helpful as a guide and for the purpose of achieving some consistency in the profession and with other health practitioners, each case must be decided on its own facts. These cases are:
- 47.1. *Dr E*<sup>13</sup>. In this case a registered dentist practised his profession between 1 October 2011 and 4 November 2011. There were issues about his receipt of reminders for renewal of his APC and evidence of personal difficulties at the time. Dr E practised for a three day period during that time. He was fined \$500.00 and ordered to pay \$5,000.00 contribution to costs.
- 47.2. *Dr S*<sup>14</sup>. Dr S, a registered dentist, claimed that he had forgotten about the change in the APC cycle and practised his profession between 1 October 2010 and 30 April 2011 without an APC. The Tribunal noted that there had

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<sup>13</sup> 503/Den12/219P

<sup>14</sup> 445/Den11/198P

been a pattern of multiple reminders and Dr S was fined \$2,000.00 and ordered to pay costs \$12,000.00. In that case the Tribunal said:<sup>15</sup>

*“It is useful to reiterate the dicta of the High Court in the H case<sup>16</sup> where the Court stated:*

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

47.3. *Ms H*<sup>17</sup>. The charge against Ms H of having practised her profession as a registered psychologist between 1 April 2005 and 20 June 2008 was found made out. In mitigation she referred to her belief that payment of her fees to the College was an alternative to a practising certificate and her failure to obtain an APC was regarded as innocent and inadvertent. The fine imposed by the Tribunal was reduced by the High Court on appeal to \$2,000.00, the Court making the statement referred to in paragraph 34.2 above. Ms H was censured and ordered to pay \$3,900.00 towards costs.

47.4. *Mr Henderson*<sup>18</sup>. Mr Henderson faced a charge of practising his profession as a registered pharmacist between 4 May 2010 and at least October 2011 without a current practising certificate. The background to that was that he had not been issued with an APC in May 2010 for failure to comply with a re-certification programme. The charge was found made out and the Tribunal fined Mr Henderson the sum of \$2,000.00 and censured him, also ordering him to contribute \$20,525.00 towards costs.

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<sup>15</sup> At paragraph 16.3

<sup>16</sup> Known as *GS v A Professional Conduct Committee*, 1 April 2010, Venning J, CIV-2009-404-007080

<sup>17</sup> 256/Psy09/128P;

<sup>18</sup> Supra at paragraph 18

- 47.5. *Ms Griffen*<sup>19</sup>. In that case a dental therapist, living on an island with relatively delayed communications, had received appropriate reminders from the Dental Council for renewal of her APC and had thought she had left these with the appropriate personnel for completion. In fact that did not occur and she did practise for five days over the 18 day period. She was fined \$500.00 and ordered to pay \$2,000.00 towards the cost of the investigation and prosecution.
48. There are other cases referred to by counsel for the PCC and referred to in the decisions in the cases mentioned above, which the Tribunal has also taken into account.
49. The aggravating features in this case are these:
- 49.1. Dr Petelo had the clear warning in the letter dated 13 December 2010 from the Dental Council of his obligation to renew his current Annual Practising Certificate in a timely fashion and that failure to do so would disqualify him from being able to practise and lay him open to a disciplinary processes and might also result in prosecution under the HPCA Act.
- 49.2. That there were several reminders sent to Dr Petelo at the addresses that he had provided as his last available addresses and he had failed to notify the Dental Council of changes to his address and his email address nor had he organised for mail to be forwarded from a previous address.
- 49.3. That his advices to the PCC in his letter of 17 December 2013, while strictly accurate in referring to his having renewed the immediately preceding year, were misleading in failing to refer to the 2010/2011 year when he was late.

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<sup>19</sup> 544/Dth12/229P

50. The mitigating features in the case are:
- 50.1. That as soon as Dr Petelo was advised directly by telephone that he was not entitled to practise because he did not hold an APC, he ceased practise accordingly.
- 50.2. That Dr Petelo has co-operated with the PCC in the bringing of this charge against him and the completion of the Agreed Summary of Facts which has expedited the hearing of the matter.
- 50.3. That there was a relatively short period of time during which Dr Petelo did practise when he should not have.
51. The Tribunal does not accept his banking credit card explanation as a sufficient mitigating factor because that was a matter entirely for him to manage. Likewise, the Tribunal does not accept that there is no prospect of Dr Petelo's re-offending. He has already had the prior warning in 2010/2011 but failed to take that into account and there is no inevitable assurance that he will not default again; although, of course, it is certainly expected of him that he would not.
52. The Tribunal considered the question of whether the earthquakes in Christchurch might have upset an otherwise timely renewal of the APC, but that was not pressed by counsel on Dr Petelo's behalf and was resisted by counsel for the PCC on the basis that it was a common factor that many professionals in the Christchurch area had had to deal with and had done so successfully.
53. Having weighed all these issues, the Tribunal is of the view that the appropriate penalty to impose is a fine of \$500.00.
54. Dr Petelo is censured. This is not to be treated as a mere formality but is an expression of the concern that the Tribunal has about the breach of standards and of the HPCA Act by Dr Petelo.



## Costs

55. The PCC sought an order for costs and estimated its costs at some \$8,500.00 – \$9,000.00. In addition to that the Tribunal must consider its own costs and these have been estimated on a detailed basis at \$17,196.82. That is a total of some \$26,000.00. Dr Petelo and every other dental practitioner must realise that except to the extent that Dr Petelo contributes to this these costs, they will be borne by other practitioners. It was submitted that an appropriate proportion would be some 30-40%.
56. Under section 101(1)(f) of the HPCA Act the Tribunal can order a health practitioner to pay all or part of the costs and expenses of and incidental to any inquiry made by the PCC in relation to the subject matter, the prosecution of the Charge by the PCC and the hearing by the Tribunal.
57. The principles applicable to costs are these. In *Cooray v Preliminary Proceedings Committee*<sup>20</sup> there is reference to a 50% contribution. That is in the context, however, of a starting point and other factors may be taken into account to reduce or mitigate that proportion. If Dr Petelo does not pay or contribute to the cost of this proceeding to any extent, those costs must be met by other members of his dental profession. As was said in *O'Connor v Preliminary Proceedings Committee*<sup>21</sup>
- “It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs.”*
58. In *Winefield*<sup>22</sup> the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:

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<sup>20</sup> Wellington HC: AP 23/94; 14/9/95; Doogue J

<sup>21</sup> Wellington HC; AP 280/89; 23/8/90; Jeffries J

<sup>22</sup> 60/Phar06/30P

- 58.1. The hearing being able to proceed on an Agreed Statement of Facts.
  - 58.2. Co-operation of Mr Winefield.
  - 58.3. The attendance of Mr. Winefield at the hearing.
  - 58.4. Consistency with the level of costs in previous decisions.
  - 58.5. Costs not paid by Mr Winefield would fall on the profession as a whole
59. The Tribunal has concern that the dental profession is having to meet significant costs for a prosecution of this nature and that this prosecution process is apparently the only option available in the event of there not being a timely renewal of an APC where a practitioner continues to practise. While there is the responsibility on the part of the practitioner to renew the APC in a timely fashion and this was assisted by the steps that the Dental Council took to give reminders and chase the matter up, at the same time for there to be such a costly process as a consequence of failure to renew does fall heavily on the profession as a whole.
60. Because the dental profession has, through its representatives, decided to incur the cost in this prosecution, it is appropriate that it bear the larger proportion of costs in this case and the practitioner a lesser proportion of costs than might normally be the case and the Tribunal has taken that factor into account.
61. Having regard to all factors, the Tribunal has decided that the appropriate order for costs should be \$4,000.00, to be divided equally between the PCC and the Tribunal.

### **Orders**

62. Dr Petelo is censured pursuant to section 101(1)(d) of the Health Practitioners Competence Assurance Act 2003.
63. The Tribunal orders, pursuant to section 101(1)(e) of the Health Practitioners Competence Assurance Act 2003, that Dr Petelo pay a fine of \$500.00.
64. The Tribunal orders, pursuant to section 101(1)(f) of the Health Practitioners Competence Assurance Act 2003, that Dr Petelo pay a contribution of \$4,000.00

towards the cost of this prosecution, to be divided as to \$2,000.00 to the costs of the PCC and as to \$2,000.00 to the Health Practitioners Disciplinary Tribunal costs.

65. The Tribunal directs pursuant to section 157 of the Health Practitioners Competence Assurance Act 2003 that the Executive Officer publish a copy of this decision and a summary on the Tribunal's website. The Tribunal further directs that a notice as to the effect of its decision be placed in the newsletter of the Dental Council, and its website.

**DATED** at Auckland this 4<sup>th</sup> day of September 2013.

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David M Carden  
Chairperson  
Health Practitioners Disciplinary Tribunal