



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 430/DH11/190P

IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003

-AND-

IN THE MATTER of disciplinary proceedings against
GERRIE GERTRUDA
JANSSEN of Auckland,
Registered Dental Hygienist

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Ms K Davenport (Chair)
Ms E Denne, Ms K Wade, Ms A Kinzett, Ms S Morriss
(Members)

Ms G Fraser (Executive Officer)
Ms H Hoffman (Stenographer)

HEARING: Held in Auckland 16 December 2011

APPEARANCES: Mr J Coates for Professional Conduct Committee
Mr A H Waalkens QC for respondent

Introduction

1. Ms Janssen is a registered dental hygienist. She faces the following charge:

”TAKE NOTICE that pursuant to sections 91 and 100 of the Health Practitioners Competence Assurance Act 2003 (“the Act”), a Professional Conduct Committee appointed by the Dental Council of New Zealand under section 71 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

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays the following charge under section 100(1)(c) of the Act:

PARTICULARS OF CHARGE

That on 1 June 2010, Ms Gerrie Gertruda Janssen, registered Dental Hygienist of Auckland, was convicted and sentenced in relation to an offence against section 202C of the Crimes Act 1961 (assault with a weapon) that occurred on 6 September 2009; this being an offence punishable by imprisonment for a term of three months or longer.

And that, in the circumstances, this conviction reflects adversely on Ms Janssen's fitness to practise.”

Facts

2. The agreed summary of facts is:

1. *“ Ms Gerrie Gertruda Janssen has been registered with the Dental Council as a Dental Hygienist since 18 September 2004.*
2. *On or around 9 September 2009, the Police charged Ms Janssen with assault with a weapon under section 202C(a) of the Crimes Act 1961. This was in relation to an incident at Sky City Casino on 6 September 2009, during which Ms Janssen assaulted another patron using a bottle and wine glass as a weapon.*
3. *Ms Janssen pleaded guilty to the charge.*
4. *On 1 June 2010, Ms Janssen was convicted of an offence against section 202C(a) of the Crimes Act 1961. This is an offence that it [] punishable by a maximum term of imprisonment of 5 years.*
5. *A copy of the Police Summary of Facts is **attached**.*
6. *Ms Janssen was sentenced to 100 hours of community work and was ordered to pay reparation of \$200.”*

3. From the Police statement of facts the Tribunal can see that Ms Janssen was on a night out at Sky City. She fell into an altercation with another patron at Sky City, as a

result of which the complainant was hit over the head with an empty 330ml RTD bottle and a wine glass was thrown at him and smashed in his face.

4. Ms Janssen admits the conviction but does not accept that the charge that she has been convicted of under s.202C(a) of the Crimes Act reflects adversely on her fitness to practise as a registered dental hygienist.

The Law

5. The grounds on which Ms Janssen may be disciplined are contained in s.100(1)(c) of the Act which provides that a practitioner may be disciplined where the Tribunal makes a finding that:

“...the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise.”

6. Thus, the Tribunal must be satisfied of two matters:
 - a) That there has been an offence which the practitioner has been convicted of; and
 - b) Secondly, that it reflects adversely on his or her fitness to practise.
7. Section 100(2)(b) provides that a conviction is one which has been entered by any Court in New Zealand or elsewhere for an offence punishable by imprisonment for a term of three months or longer.
8. Ms Janssen was convicted on 1 June 2010 and the PCC provided proof of the conviction.
9. The Tribunal finds that the first part of the test has been satisfied and the only question to be considered is whether the conviction reflects adversely on her fitness to practise?

10. Mr Waalkens QC submits that the conviction does not reflect adversely on her fitness to practise.
11. Mr Coates submitted that the conviction did reflect adversely on her fitness to practise. He referred the Tribunal to a number of other cases of the Tribunal in which the phrase has been discussed.
12. In *Pitwood* [84/Ost 06/42] the Tribunal undertook a comprehensive review of the meaning of the section. Mr Coates submitted the Tribunal should consider this case and the decisions of *Condon* [23/Nur05/13P], *Boyd* [311/05/125C] and others. He submitted that the Tribunal should find that the conviction did reflect adversely on her practise because:
 - (a) The conviction is for an assault with a weapon is a serious offence;
 - (b) It was a serious assault;
 - (c) At the time the wine glass was thrown the victim was on the ground;
 - (d) The assault was on the face which is an area of importance in the practise of dental hygiene;
 - (e) Ms Janssen told Police she committed the assault because she was angry and frustrated.
 - (f) Mr Coates submitted that dental hygienists regularly have to deal with stressed, nervous and, at times, aggressive patients;
 - (g) The assault is in breach of her professional obligations – Principle 4 of the Dental Council’s Statement of Principles of Ethical Conduct – requires oral health practitioners to uphold the integrity of their profession;

- (h) The conviction diminishes the reputation of the profession;
- (i) Conduct which offends the law must reflect adversely on fitness to practise.

13. Mr Waalkens submitted that the test was a factual one and on the facts of this case had not been made out. He submitted that the onus of proof is on the PCC and that they had not discharged this burden. He submitted that the PCC should have called expert evidence on this point so that Ms Janssen could have cross-examined that expert. He referred to *Lake v Medical Council of NZ* (HC Auckland HC 123/96, 23 June 1998, Smellie J) at pg 33 and following.

What does reflect adversely on Fitness to practise mean?

14. In *Condon*, (HPDT Decision 23/Nur05/13P) the Tribunal found that a nurse's conviction for dishonest use of a colleague's credit card reflected adversely on her fitness to practise, saying:

*“It is accepted by the Tribunal that any breach of trust and especially the dishonesty offences for which Ms Condon has been convicted is conduct which must be regarded as totally unacceptable behaviour for any enrolled nurse. It is also the Tribunal's view that members of the public are entitled to expect to be able to have trust and confidence in the honesty of all members of the nursing profession ... Accordingly, the Tribunal believes that Ms Condon's actions ... reflect adversely on her fitness to practise in the wider sense, even if they did not incur in the workplace.
..... The reason why Ms Condon's actions reflect adversely on her fitness to practise is because she took a work colleague's credit card and used it dishonestly.”*

15. The Medical Practitioners Disciplinary Tribunal considered the words “reflecting adversely on a practitioner's fitness to practise” in *Zauka* (MPDT Decision 236/03/103C) saying:

“...it is not necessary that the proven conduct should conclusively demonstrate that the practitioner is unfit to practise. The conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine ...”

16. These cases show that fitness to practise does not, in the context of a conviction, relate only to the practitioner’s clinical ability. It must also involve a consideration of conduct which breaches the law or is immoral or unethical and a consideration of whether the conviction does reflect adversely on the practitioner’s fitness to practise. Registration carries with it obligations to behave in a way which is appropriate and which does not break the law. It is not, however, as Mr Waalkens submitted, a rubber stamp to be applied to any conviction. More is required. What is, and how does the Tribunal define “more”?

17. On the basis of the authorities the Tribunal has considered, and s.3(2)(a) of the Act (which sets out the purpose), the Tribunal determines that the term requires the Tribunal to consider the offence itself and to consider other factors such as:
 - (a) Seriousness of charge;
 - (b) Connection with the health professionals’ role;
 - (c) Nature of offence eg, dishonesty, sexual offending;
 - (d) Need to maintain standards.

18. Each case will be dependent on its own facts. The Tribunal is required to determine if Ms Janssen’s conviction for assault reflects adversely on her fitness to practise as a dental hygienist. Mr Waalkens submits that her job as a dental hygienist does not have the same standing in the community as say, a dentist or doctor, and therefore, it may

be that this conviction does not reflect adversely on her fitness to practise when it might reflect adversely on a doctor's or dentist's.

19. This incident was at the Sky City on a Sunday night. Ms Janssen was not intoxicated. She has advanced reasons for her actions (in her psychiatrist's report). Mr Waalkens submitted her actions were clearly wrong and inappropriate but still did not reflect adversely on her fitness to practise.
20. Mr Coates resisted any suggestion that there could be any different consideration applying to actions of a dental hygienist compared to a dentist or any other registered health professional. He said standards should be the same across the health professions.

Discussion

21. The charge is under the Crimes Act and is potentially very serious. Violence is a serious issue in our Society. Society generally abhors violence.
22. Dental hygienists have to manage the dental hygiene care of people at all levels of Society. Self control and self management are an important part of the role of a dental hygienist. They frequently have to deal with stressed or angry or anxious persons. Further, the assault was around the face which can cause permanent damage, as all dental hygienists know. Dental hygienists are registered health professionals and know that as part of this role they must do no harm, be caring and show empathy. The assertion that assault does not reflect adversely on a dental hygienist (compared with other registered health professionals) is rejected.

23. Ethical (in its widest sense of the word) behaviour is ethical behaviour no matter which professional health group a member belongs to. A suggestion that there should be some ranking of the professions could not be correct. It is true, however, that some crimes will be more likely to reflect adversely on some health professional groups than others but this is because of the nature of the work. For example, it may be more serious for a physiotherapist to be convicted of fraud than a podiatrist because of the physiotherapists' receipt of government funding. But each case depends on its own facts. Ethical behaviour includes the maxim "do no harm". This conviction is for doing harm to another person. Further, dental hygienists are respected professionals within the community and are responsible for their conduct and actions. Dental hygienists are part of a team with the dentist and are seen by members of the public as such. Part of continuing education for dental hygienists emphasises the need for communication and self control. Violence in response to anger, such as associated with this charge, does reflect adversely on Ms Janssen's fitness to practise. Therefore, the Tribunal concludes that this charge of assault with a blunt instrument does reflect adversely on Ms Janssen's fitness to practise.
24. Mr Waalkens submitted that the decision could not be reached by the Tribunal without expert evidence. The Tribunal does not agree. In its view, the specialised Tribunal with a majority of registered dental hygienists as members is the correct body to determine if the conduct reflects adversely on her fitness to practise. The Tribunal considers that its role is as described in *Lake v Medical Council of New Zealand* (HC Auckland, HC 123/96, Smellie J, 23 January 1998) at pg 35 which states:

“The other possibility, however, is that fully accepting the expert evidence called the tribunals nonetheless reached the conclusion that the level of care indicated by the evidence fell below what protection of the public and maintenance of standards within the profession required. If that is the correct interpretation of what happened, then the tribunals can be seen as performing a legitimate and indeed essential aspect of their statutory duties.”

25. This is what the Tribunal is doing in reaching its decision on this point.

26. The actual circumstances of the event and the steps Ms Janssen has taken to rehabilitate herself and address the issues, and the one-off nature of the crime, are all important issues which the Tribunal will consider when it deals with the question of penalty. Because of these issues, it may be that a relatively minor penalty will be appropriate. However, the Tribunal has no submissions on this and it would not be appropriate to reach any conclusions until it has The Tribunal asks counsel in their submissions to consider the issue of whether an order suspending a suspended order might be an appropriate order.

27. The Tribunal orders that the PCC file its penalty submissions by 31 January 2012, Mr Waalkens’ submissions in reply by 16 February 2012 and Mr Coates any submissions strictly in reply by 20 February 2012.

DATED at Auckland this 22nd day of December 2011

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 K G Davenport
 Deputy Chair
 Health Practitioners Disciplinary Tribunal