



New Zealand  
Health Practitioners  
Disciplinary Tribunal

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**DECISION NO:** 441/DH11/190P

**IN THE MATTER** of the Health Practitioners  
Competence Assurance Act 2003

-AND-

**IN THE MATTER** of disciplinary proceedings against  
**GERRIE GERTRUDE JANSSEN**  
of Auckland, Dental Hygienist

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**PENALTY DECISION**

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

Ms Gay Fraser (Executive Officer)

**HEARING:** On the papers

## **Introduction**

1. Ms Janssen was found guilty by the Tribunal in a decision dated 22 December 2011 in respect of a charge which had been brought against her by the Professional Conduct Committee (PCC.)
2. The Tribunal must now decide what penalties to impose upon Ms Janssen.
3. In imposing a penalty, the Tribunal must have regard to the law setting out the principles to be applied in the imposition of penalty and also having regard to other decisions made by the Tribunal to ensure parity (where appropriate) amongst the health professional groups.

## **The Law - Penalty**

### **Principles of Sentencing**

4. A penalty must fulfil the following functions. They are:
  - a. Protecting the public

Section 3 of the Health Practitioners Competence Assurance Act 2003 (the Act) sets out the purposes of the legislation. 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.*”
  - (b) Maintenance of professional standards

This was emphasised in *Taylor v The General Medical Council*<sup>1</sup> and *Dentice v The Valuers Registration Board*<sup>2</sup>.

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<sup>1</sup> [1990] 2 All ER 263

<sup>2</sup> [1992] 1 NZLR 720

(c) Punishment

While most cases stress that a penalty in a professional discipline case is about the maintenance of standards and protection of the public there is also an element of punishment – such as in the imposition of a fine or censure. See for example the discussion by Dowsett J in *Clyne v NSW Bar Association*<sup>3</sup> and Lang J in *Patel v Complaints Assessment Committee*<sup>4</sup>.

(d) Where appropriate, rehabilitation of the practitioner must be considered – see *B v B*<sup>5</sup>.

5. The comments of Justice Gendall in *PCC v Martin*<sup>6</sup> are helpful in considering penalty in this case. He said at paragraph 24 and paragraph 26:

*“[24] Removal from the Register or striking-off may have the consequences of a punishment but as has been made clear in many cases the order is not made by way of punishment but because the person was not a proper and fit person to remain registered as a professional person. If the conviction and the actions of the practitioner lead to the conclusion that he/she is not fit to be registered as a nurse, or to practise in a particular profession, then de-registration or suspension is inevitable...”*

*[26] The appropriate starting point seems to me to ask: “What orders will protect the public, through advancing the properly responsible standards and practice of nursing?” rather than to ask: “Should the professional be punished again?””*

6. Also relevant are the comments of Randerson J in *Patel v Dentists Disciplinary Tribunal*<sup>7</sup>. Randerson J stressed that the Tribunal had to consider carefully the “alternatives available to it short of removal and to explain why lesser options have not been adopted in the circumstances of the case”<sup>8</sup>.
7. To the cases set out above must be also added the decision of Justice Keane in *A v. The Professional Conduct Committee*<sup>9</sup>. The Court cited with approval a House

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<sup>3</sup> (1960) 104 CLR 186 at 201-202

<sup>4</sup> HC Auckland CIV 2007-404-1818, Lang J, 10/8/07

<sup>5</sup> HC Auckland, HC 4/92, Blanchard J, 6/4/93; [1993] BCL 1093

<sup>6</sup> HC Wellington, CIV 2006-485-1461, 27/2/07

<sup>7</sup> HC Auckland, AP77/02, 8/10/02

<sup>8</sup> at para 31

<sup>9</sup> HC Auckland, CIV-2008-404-2927, Keane J

of Lords decision; *Taylor v The General Medical Council*<sup>10</sup>, and took from that decision four explicit and one implied points (as paragraph 80):

1. *“First the primary purpose of cancelling or suspending registration is to protect the public, but that inevitably imports some punitive element.*
  2. *Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate.*
  3. *Thirdly, to suspend implies a conclusion that cancellation would have been disproportionate.*
  4. *Fourthly, suspension is most apt where there is ‘some condition affecting the practitioner’s fitness to practise which may or may not be amenable to cure’.*
  5. *Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish”.*
8. His Honour also said (at paragraph 82) that the Tribunal cannot ignore the rehabilitation of a practitioner, and referred to *B v. B*<sup>11</sup>.
  9. The Tribunal must also consider previous decisions of the Tribunal and assess how other health professionals guilty of similar offences have been penalised.
  10. The offence that Ms Janssen was found guilty of was assault with a weapon (section 202C(a) of the Crimes Act 1961) which reflects adversely on her fitness to practise.

### **Submissions of PCC and Ms Janssen**

11. The PCC sought to have Ms Janssen suspended from practice for between 3 to 6 months. It also submitted that Ms Janssen should be censured and ordered to practise under supervision. It sought costs and publication of Ms Janssen’s name.
12. Mr Waalkens QC submitted that no penalty need be imposed upon Ms Janssen as the finding of misconduct was sufficient penalty in itself. In the alternative, he submitted that she should receive a suspended sentence (of suspension).

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<sup>10</sup> [1990] 2 All ER 263-266

<sup>11</sup> supra

13. He submitted that censure itself would also be a significant penalty but denied there was any need for conditions upon Ms Janssen's practice. He also submitted that there should be credit given to Ms Janssen for her co-operation with the disciplinary process when considering what costs should be imposed.

### **Jurisdiction**

14. Both counsel addressed the issue of whether or not the Tribunal had jurisdiction to suspend a suspended sentence as the Medical Disciplinary Tribunal did in the case of *Dr Gray* (MPDT 182/01/72D). Dr Gray had embarked upon a sexual relationship with a patient. He was suspended from practice but this suspension was in itself suspended. Under the Health Practitioners Competence Assurance Act 2003 this has been done in cases which include *Dr Marchand* (280/Med09/133P) and *Dr Payne* (405/Den11/184P).
15. Counsel for the PCC submitted the Tribunal had no jurisdiction to make these orders saying that the Tribunal was a creature of statute and that it did not have any express power to suspend an order for penalty. He submitted that there was no implied power because there could only be an implied power if it was reasonably necessary to enable the Tribunal to exercise its statutory functions. He submitted there was no such need given the flexibility in the range of sentencing options provided for under s.101. He raised a number of practical difficulties, for example, how matters ought to be recorded under s.152(1)(b) by the Registrar and under s.138. Thirdly, he submitted that a suspended sentence had the effect of prolonging the life of the PCC.
16. Mr Waalkens QC, not unsurprisingly, did not agree and submitted that this had been done by the Court on several occasions and had been given implied approval by Justice Lang in *Macdonald v PCC*<sup>12</sup>.
17. The Tribunal considers that the correct way of analysing the Tribunal's ability to suspend an order of suspension is that the Tribunal is simply delaying the start date for the suspension. Thus the Tribunal may make an order that a practitioner will be suspended for a period of months but sets the date on which the

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<sup>12</sup> (CIV-2009-404-1516, High Court, Auckland, 10/7/09).

suspension starts sometime in the future. It then may prescribe a number of conditions which, if met, will mean that the order for suspension does not come into effect. This is the approach that the Tribunal adopted in *Marchand* and in the Tribunal's view, this is the correct approach.

### **Discussion**

18. The PCC in its submissions refers to a number of previous cases of the Tribunal which it submitted would assist the Tribunal in its decision as to the appropriate penalty. The Tribunal considers that many of these cases reflect far more serious assaults than Ms Janssen committed. The Tribunal considers that cases such as *Petcher* (Nur07/54P) do create a guide to appropriate sentencing. However, it hardly needs to be said that each case needs to be determined on its own facts. Ms Janssen has committed one assault for which she received 100 hours of community service and a fine. From this sentence, it can be seen that although serious, the assault was at the lower end of the scale.
19. The Tribunal has said on many occasions that violence will not be tolerated in health professionals. This is so even when the violence does not occur in the course of a health professional's work. However, it is also required to consider rehabilitation of the practitioner. Ms Janssen has clearly worked hard to rehabilitate herself.
20. The Tribunal considers that suspension for three months is the appropriate penalty to reflect the seriousness of the charge and from previous cases which have come before the Tribunal with practitioners charged with assault and convictions arising out of assault. It also accords with the Tribunal's own assessment of the charge and penalty. However, the Tribunal considers that it is appropriate that this order for suspension not operate for a period of six months from the date of this order. If the Registrar of the Dental Council certifies that there have been no further complaints against Ms Janssen within that six month period then the order for suspension will not take effect. If the Registrar is unable to provide this certification for the Tribunal because of a further complaint against Ms Janssen, then the period of suspension will take effect.

21. The Tribunal also records its strong disapproval for the conduct that has occurred in this case and censures Ms Janssen.
22. The costs of the Tribunal, the investigation of the PCC and the hearing before the Tribunal by the PCC amount to approximately \$33,000 (exclusive of GST). Ms Janssen is entitled to some credit for her co-operation but nonetheless did dispute whether or not the conviction reflected adversely on her fitness to practise and so cannot be given complete credit for a guilty plea. Nonetheless the Tribunal considers that a costs order of 25% of the costs of the investigation, the PCC's prosecution before the Tribunal and the Tribunal would be appropriate (s.101(1)(f)(ii), (iii) and (iv)).

### **Name Suppression**

23. Ms Janssen has not sought name suppression and the Tribunal makes no orders but does order that there be publication of this decision and a summary of the decision on the Tribunal's website and a notice stating the effect of the order to be published on the Dental Council's website and in the Dental Council's newsletter

### **Summary of Orders**

24. The Tribunal accordingly orders as follows:
  - a. Ms Janssen's registration as a health practitioner shall be suspended for a period of three months with effect from 20 September 2012; This order will only take effect if the condition at paragraph 24(6) below is not fulfilled by 20 September 2012.
  - b. The Tribunal imposes the following conditions upon Ms Janssen's practice:
    - i. That she is in six months time, to provide to the Tribunal a certificate from the Registrar of the Dental Council confirming that no further complaints have been made against her;

- ii. If this condition is fulfilled, then the suspension set out at 24(a) will not take effect on 20 September 2012 (or at all);
- c. Ms Janssen is censured;
- d. Ms Janssen is to pay costs of 25% of the costs of the PCC's investigation and prosecution and the costs of the Tribunal to be divided equally between the Tribunal and the prosecution.
- e. The Tribunal directs the Executive Officer to publish a copy of this decision and a summary on the Tribunal's website. The Tribunal further directs the Executive Officer to publish a notice stating the effect of the Tribunal's decision on the Dental Council's website and in the Dental Council's newsletter.

**DATED** at Auckland this 20th day of March 2012

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K G Davenport  
Deputy Chair  
Health Practitioners Disciplinary Tribunal