



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 481/Dtech11/199P

IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003

AND

IN THE MATTER of disciplinary proceedings against
DANIEL GEORGE
SUTHERLAND Dental
Technician, of Whakatane

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING Held in Tauranga on 28 August 2012

TRIBUNAL: Mr B A Corkill QC (Chairperson)

Ms B Ross, Mr K Lock, Mr K Scott and Mr G Byrne, and
(Members)

Ms K Davies (Executive Officer)

Ms J Kennedy (Stenographer)

APPEARANCES: Dr J Coates, for the Professional Conduct Committee

No appearance for Mr D G Sutherland

Introduction:

1. On 5 December 2011 a Preliminary Proceedings Committee (PCC) appointed by the Dental Council laid charges against Mr D G Sutherland under the Health Practitioners Competence Assurance Act (the HPCA Act). He is a registered dental technician. The charges allege the giving of treatments which were outside the scope of dental technician and/or which were restricted activities; placing advertisements for such activities; and practising dental technology without an APC.

The Charges:

2. The charges state:

"PARTICULARS OF CHARGE ONE

1. *That between on or around 23 July 2010 and 26 July 2010 Mr Sutherland provided treatment to Mr Ian McCormick that he knew or ought to have known was outside his scope of practice as a dental technician and/or were restricted activities under the Act that he was not permitted to perform under his scope of practice as a dental technician. In particular:*

- a. *On or about 23 July 2010 Mr Sutherland took an impression of Mr McCormick's upper mouth for the purpose of manufacturing an upper denture and/or*
- b. *On or between 23 July 2010 and 26 July 2010 Mr Sutherland manufactured an upper denture for Mr McCormick without the prescription of a specialist dentist, dentist, clinical dental technician, medical practitioner, or other practising health practitioner; and/or*
- c. *On or about 26 July 2010 Mr Sutherland directly supplied Mr McCormick with the new upper denture that he had manufactured on the basis of the impression of Mr McCormick's mouth and without a prescription from a specialist dentist, dentist, clinical dental technician, medical practitioner, or other practising health practitioner.*

AND/OR

2. *That between on or around 20 May 2010 and 18 April 2011 Mr Sutherland placed a number of advertisements which promoted his services in making and fitting dentures directly to members of the public, and/or provided such services directly to members of the public, when he knew or ought to have known that such services outside his scope of practice as a dental technician and/or were*

restricted activities under the Act that he was not permitted to perform under his scope of practice as a dental technician.

The conduct alleged in paragraphs 1 to 2 above either separately or cumulatively amounts to professional misconduct under section 100(1)(a) and/or section 100(1)(b) of the Act.

PARTICULARS OF CHARGE TWO

3. *That between on or around 1 April 2010 and 18 April 2011 Mr Sutherland practised the profession of dental technology when he did not hold a current practising certificate.*

The conduct alleged in paragraph 3 is a ground on which a health practitioner may be disciplined under section 100(1)(d) of the Act.”

Hearing:

3. There was no appearance by Mr Sutherland at the hearing.
4. The Tribunal received evidence as to service of the charges on Mr Sutherland by substituted service according to an order of the District Court to that effect; attempts were made to personally serve him, notices were placed in the local newspaper, and emails advising of proceedings were sent. The Tribunal was satisfied that proper service had occurred in terms of the District Court order.

Evidence:

5. The PCC adduced evidence from six witnesses in support. The witnesses who gave oral evidence were Mr I McCormick, Mr A N Hill, and Mrs N F Hill (these witnesses all gave evidence as to issues of fact); Mr M Rogers, the Deputy Registrar of the Dental Council, who gave evidence relating to the relevant events from the Dental Council's point of view;¹ and Mr J Aarts who gave expert evidence. An affidavit from the Chair of the PCC, Mr P W Rieger, as to the history of its investigations was also produced.

¹ Ms C A Young had sworn an affidavit on these matters, but as she was unavailable Mr Rogers assisted the Tribunal with regard to the necessary evidence from the Dental Council.

Distinction between dental technician and clinical dental technician:

6. For the purposes of the present charges it is necessary to describe the fundamental distinction between a dental technician and a clinical dental technician.
7. Dental technicians are not trained to deal with patients and have no direct patient contact. They work in a laboratory setting and produce or manufacture the denture and appliances on prescription. A clinical dental technician may carry out the activities of a dental technician but may also interact directly with patients by taking impressions and/or fitting dental appliances.
8. This distinction is evident from the scopes for practice in respect of each of the two types of practitioner² and in the New Zealand Code of Practice, as promulgated by the Dental Council.
9. Included in the Code of Practice is the following:

9.1. *"The Practice of Dental Technology:*

Dental technicians design, make and repair fixed and removable oral and extra-oral appliances and prostheses eg dentures, crowns, bridges, and implant supported prostheses to the prescription of another registered health practitioner eg dentist, dental specialist, clinical dental technician or medical practitioner who is authorised by their scope of practice to fit the appliance or prosthesis.

In this context prescription is defined as an instruction, either written or verbal by an appropriately registered practitioner to a dental technician or clinical dental technician to carry out a procedure contained in their registered scope of practice. This authorisation should be included, or noted, in the patient's record.

² As contained in the New Zealand Gazette (19 May 2005, p1947) which describes the scope for clinical dental technology practice and in the New Zealand Gazette (7 December 2006, p4856) which defines the scope of dental technology practice.

Persons undertaking dental technology work as described in the gazetted scope of dental technology practice must be registered and hold a current annual practising certificate."

9.2. *"The Practice of Clinical Dental Technology:*

Clinical dental technicians design, make and repair fixed and removable oral and extra-oral appliances and prostheses in the same way as dental technicians. Clinical dental technicians can also work as independent practitioners and deal directly with the public in making and fitting:

- *Complete removal dentures*
- *some other types of removable dentures and oral and extra oral appliances under specific conditions as set out below.*

Persons undertaking clinical dental technology work as described in the gazetted scope of clinical dental technology practice must be registered and hold a current annual practising certificate.

To be registered as a clinical dental technician applicants are required to be registered as a dental technician and to have completed an accredited one-year full time or two-year part time Postgraduate Diploma in Clinical Dental Technology from the University of Otago (or equivalent)" (emphasis added).

10. The Code of Practice has as Appendix 1 a detailed description of the scope of dental technology practice, and of the scope of practice for clinical dental technology practice, which is consistent with the foregoing.

11. As was stated by the expert called for the PCC Mr Aarts, the clinical dental technician scope differs from dental technician scope in that a dental technician cannot undertake the process of impression taking and/or fit a dental appliance. A dental technician can manufacture an oral appliance under prescription either as a registered dental

technician or not, but the work of a clinical dental technician must be carried out by a registered clinical dental technician.

Restricted activities:

12. Section 9 of the HPCA Act provides that an Order in Council may be made on the recommendation of the Minister declaring an activity that constitutes or forms part of a health service to be a restricted activity.

13. It goes on to state:

*"No person may perform, or state or imply that he or she is willing to perform, an activity that, by an Order in Council made under this section, is declared to be a restricted activity unless the person is a health practitioner who is permitted by his or her scope of practice to perform that activity."*³

14. The Health Practitioners Competence Assurance (Restricted Activities) Order 2005 defines the following as a restricted activity:

"Clinical procedures involved in the insertion and maintenance of fixed and removable orthodontic or oral and maxillofacial prosthetic appliances."

15. It will be necessary to consider these provisions further, with regard to the first and second particulars of charge 1.

Evidence of Mr I McCormick:

16. Mr McCormick was a patient of a clinical dental technician, Ms V Anderson. He needed a replacement denture.

17. Ms Anderson was concerned about Mr Sutherland's activities. She encouraged Mr McCormick to attend Mr Sutherland for the purpose of having the work performed, for which she would pay the fee.

18. The evidence which is the basis of the first particular focuses on the arrangement which was then made for Mr McCormick to attend Mr Sutherland so as to have his damaged denture replaced.

³ Section 9(4).

19. A preliminary legal issue which must be addressed is whether this arrangement falls within the concept known in criminal law as "*entrapment*".
20. Although New Zealand law does not specifically recognise a defence of entrapment, the Courts have accepted that in some cases the actions of law enforcement agents which encourage the commission of an offence may be such as to justify the exclusion of evidence derived from the entrapment.⁴
21. However it is clear from such cases that there is a distinction between situations in which law enforcement officials and/or their agents have merely provided an opportunity to those "*predisposed*" to commit offences of a particular kind, and situations where the activities of such agents have initiated, encouraged, or stimulated offences "*by a person who would otherwise have been a non-offender in a general sense*", and who was not "*in any event ready and available to commit the offence*": Adams on Criminal Law.⁵
22. Counsel for the PCC submitted with regard to the present circumstances that having regard to the above distinction, this was not a situation which would render it unfair to admit Mr McCormick's evidence.
23. The Tribunal is satisfied that an opportunity was provided to Mr Sutherland to perform an activity which he was predisposed to carry out. There is ample evidence that Mr Sutherland was advertising and operating a denture repair service.⁶ The evidence does not disclose that but for the approach by Mr McCormick, Mr Sutherland would not otherwise have conducted the activities which are the subject of the charge.
24. Accordingly, the Tribunal is satisfied that Mr McCormick's evidence is properly admissible.

⁴ *R v Liu* [2009] NZCA 409, at paragraphs [11] and [15].

⁵ Para CA24.32.

⁶ See analysis of the relevant evidence, below.

Chronology:

25. On the basis of all the evidence, the Tribunal finds the following is a summary of relevant events:
 - 25.1. December 1989: Mr Sutherland was registered as a dental technician on the basis he held a certificate in dental technology.
 - 25.2. 1996-2009: Mr Sutherland paid APC fees from 1996 to 2005; because it was believed in December 2008 he was practising without an APC, he was referred to a PCC. This resulted in him eventually contacting the Dental Council and paying his APC for the 2008/2009 and 2009/2010 years.
 - 25.3. 25 May 2009: Mr Sutherland applied for registration in the additional scope of clinical dental technology. Initially there was an issue because a certified copy of his qualification was not available; then on 30 October 2009 he was advised that because his qualification was completed in 1989 there was a recency of practice issue.
 - 25.4. December 2009: a Dental Council newsletter was sent to all registered oral health practitioners and published on the Dental Council's website; it reminded practitioners about the need to ensure that their APC application and payment were returned to the Dental Council before 31 March 2010.
 - 25.5. 22 January 2010: a letter was sent to Mr Sutherland reminding him of Continuing Professional Development (CPD) requirements for 2006-2009; if by 31 March 2010 he had failed to demonstrate that he met the minimum verifiable hours and peer contact activities, he would not be issued with a practising certificate.
 - 25.6. 3 March 2010: an APC application form was sent to Mr Sutherland; the Dental Council newsletter of March 2010 repeated the advice given in the December 2009 newsletter.

- 25.7. 8 April 2010: a letter was sent to Mr Sutherland noting that he had not submitted his application to renew his APC for the current year. He was advised that it was an offence to practise without a current practising certificate. If he was practising, he was told to cease doing so immediately as he held no APC.
- 25.8. 19 April 2010: Mr Sutherland rang the Dental Council to say he had recently divorced and due to financial problems he needed a further two weeks before he could pay his bills.
- 25.9. 4 May 2010: Mr Sutherland rang the Dental Council and advised he would "*do internet banking today and send in APC application*".
- 25.10. 7 May 2010: the Dental Council's financial records show a receipt for an APC payment by Mr Sutherland of \$736.00. This payment was not accompanied by an APC application form. This amount was the correct amount for a dental technician's APC (the figure for a clinical dental technician's APC was \$889.00).
- 25.11. 20 May 2010: Mr Hill, who had worked as a clinical dental technician in Whakatane since 1997, wrote to the Dental Council stating that Mr Sutherland was "*actively working and advertising his services in denture making*". He said that although Mr Sutherland did not have "*clinical*" status, he had advertised his services in all the local supermarkets on their customer services boards, the local paper, and he had business cards in other businesses around town. Copies of a variety of such advertisements were provided. He also advertised his services on the door of premises which he occupied in Whakatane.
- 25.12. 25 May 2010: the Deputy Registrar of the Dental Council spoke to Mr Sutherland. Mr Sutherland advised her he had been doing clinical work

since 1988 when he had been told after completing a one day course that he was able to work as a clinical technician. He said that he had never denied carrying on clinical practice and would continue to practise as a clinical technician. He believed he was trained in good faith and that good faith meant he could work as a clinical dental technician without having a formal qualification for registration. He was not prepared to undertake any further training and had no intention of being registered as a clinical technician but would continue to practise as such.

- 25.13. 27 May 2010: an application form for registration in an additional scope of practice (ie as a clinical dental technician) and associated documentation and description of requirements was forwarded to Mr Sutherland by the Dental Council.
- 25.14. 18 June 2010: Mr Sutherland was sent a letter by the Deputy Registrar advising him he had been selected to complete a Code of Practice compliance audit. An audit questionnaire was enclosed.
- 25.15. On the same day Mr Sutherland rang and spoke to the Intermediate Registration Officer apparently in response to the letter of 27 May 2010 which had required amongst other things a Hepatitis B and C report. In the telephone conversation he said he would have the Hepatitis test performed in the following week; but he did not believe he should have to do a one year postgraduate course just to take impressions. He had been taking impressions for over 20 years. He said he did not like to be bullied and believed the Dental Technician Board was dishonest. He was going to ring the Dean of the Otago Dental School and also seek legal advice.

- 25.16. 29 June 2010: the Deputy Registrar received a call from Mr Hill advising Mr Sutherland was still practising as a clinical technician. This was followed up by an email of the same day and resulted in a decision that a practice visit should be undertaken.
- 25.17. 4 July 2010: Ms Anderson emailed the Dental Council relaying evidence which had been provided to her that Mr Sutherland was practising outside his scope.
- 25.18. 7 July 2010: the letter of 18 June 2010 which had been sent to Mr Sutherland was returned to the Dental Council. It had been incorrectly addressed.
- 25.19. 15 July 2010: apparently following a telephone conversation with Mr Sutherland about the letter of 18 June 2010 which had been returned, a copy was forwarded to him by email. The email also explained that the conditions of practice questionnaire needed to be completed and returned as soon as possible. Also attached was an annual practising certificate form for completion. Then it was stated:
- "Please note that we have receipted your payment for the APC and just require the completed form before you can be issued with an APC."*
- 25.20. 19 July 2010: a letter was sent by the Deputy Registrar to Mr Sutherland advising of an intended practice visit on 30 July 2010 by Mr B Williams.
- 25.21. 27 July 2010: an email was sent by Mr McCormick to the Deputy Registrar, complaining about the treatment he had received from Mr Sutherland.
- 25.22. 3 August 2010: Mr Williams travelled to Whakatane to carry out the practice audit. Mr Sutherland was not present for the appointment.

- 25.23. 13 August 2010: on this date the practice visit was conducted by Mr Williams. It was subsequently the subject of a report to the Dental Council.
- 25.24. 13 September 2010: an email from Mrs Hill was sent to the Council attaching further copies of advertisements placed in various locations in Whakatane relating to Mr Sutherland's denture repair service.
- 25.25. 30 November 2010: the Health and Disability Commissioner referred a complaint concerning Mr Sutherland's professional conduct to the Dental Council.
- 25.26. 3 December 2010: a letter was sent to Mr Sutherland inviting him to comment on the complaints which had been received (from Mr Hill and Ms Anderson) before a decision was taken whether to refer the matter to the PCC for investigation; it was also stated that despite the email of 15 July 2010, Mr Sutherland had not returned a completed application form for an APC. It was confirmed that he did not hold an APC for the 2010/2011 period and that practising without a current APC was unlawful; if he was practising he must cease doing so immediately. It was stated that if the application for the APC was not received by 20 December 2010, the \$736.00 APC fee would be refunded. Reference was also made to the practice audit; given he was not holding a current APC the recertification programme to which it related would not be advanced at that time.
- 25.27. 17 January 2011: since the application for the APC had not been received, the sum of \$736.00 was refunded by way of a cheque made out to Mr Sutherland. The letter enclosing the cheque was sent to one of the last known addresses held by the Dental Council. The Tribunal was advised the cheque was not presented so it became stale.

25.28. 9 February 2011: a PCC was established by the Dental Council. The PCC wrote on several occasions to Mr Sutherland to give him an opportunity to respond to the complaints, but he did not do so. It determined that the present charges should be brought against Mr Sutherland

Charge 1, Particular 1: treating Mr McCormick outside of scope, and/or conducting restricted activities:

26. The first subparticular of this charge relates to the taking of an impression.
27. The background is that on Ms Anderson's initiative, a friend of Mr McCormick rang Mr Sutherland and made an appointment for him to be seen on 23 July 2010.
28. On that date when Mr McCormick attended, he noticed a sign on the door of the premises he attended that had words on it like "*Dental Technologist*". There were two rooms. A person introduced himself as "*Danny Sutherland*". Mr McCormick confirmed he was there for an appointment.
29. Mr Sutherland, said Mr McCormick, was dressed casually. He waited in the first room which he called a waiting room.
30. Mr McCormick said that while he waited, Mr Sutherland was "*treating another woman*". She said she had an ulcer. She removed her denture which Mr Sutherland took into the second room and worked on. Mr McCormick heard a machine going which he assumed was in relation to that work. Then Mr Sutherland returned and handed the woman her teeth on a paper towel. This all happened in front of Mr McCormick.
31. Then Mr Sutherland came out "*... with a mixed up gooey mixture on a paper towel. He handed it to me and told me to push it into my mouth, in the top of my mouth, and work it into my gums with my two thumbs.*".

32. Mr Sutherland left Mr McCormick to do this for about five minutes, and then returned and told him that would be long enough. He told Mr McCormick to use his thumbs to pluck the material from his mouth.
33. Mr Sutherland was not wearing gloves.
34. Mr McCormick took the mould away to another room and created a wax mould. He then had Mr McCormick try the wax mould in his mouth to test it for size and comfort. He then took it back to the second room.
35. Mr Sutherland explained he would make a plate over that day and drop it off for him at his home the next day, if the job was completed. He said he lived in Kawerau where Mr McCormick lived.
36. Mr McCormick said he paid Mr Sutherland \$450.00 cash; he did not obtain a receipt as he forgot to do so.
37. In fact, the plate was not delivered the next day so Mr McCormick rang Mr Sutherland on the following Monday morning. He confirmed the plate was ready and that he could collect it.
38. When he picked up the plate he tried it on. It felt comfortable.
39. Mr McCormick then attended Ms Anderson's premises and gave her the newly created plate. She pointed out that it did not sit correctly, and that it would affect his eating. But she commented that it had been well made. Subsequently Ms Anderson, over three appointments, made a new top dental plate for Mr McCormick. After that happened, she returned to Mr McCormick the plate which Mr Sutherland had made. He still has it, and wears it from time to time.
40. Mr McCormick confirmed that an email sent to the Dental Council dated 27 July 2010 correctly recorded these events, although he had not seen the email previously.

41. He confirmed Mr Sutherland had not touched his mouth, or examined him. However he directed the operation of placing the mixed up material in his mouth, and told Mr McCormick what was he was to do next.
42. He said he would not have attended Mr Sutherland for longer than half an hour at the most.
43. The first subparticular asserts Mr Sutherland took an impression of Mr McCormick's upper mouth for the purpose of manufacturing an upper denture. From the foregoing evidence the Tribunal finds this is established. Although Mr Sutherland did not take an impression in the sense that he put his hands in Mr McCormick's mouth, he was the controlling agent giving instructions. It was as a result of those instructions the impression was "*taken*".
44. The second subparticular asserts Mr Sutherland manufactured an upper denture for Mr McCormick without having a prescription from a health practitioner. There is no doubt on the evidence of Mr McCormick which the Tribunal accepts that there was no prescription and that Mr Sutherland did manufacture the upper denture between the date on which he first saw Mr Sutherland (23 July 2010) and the date which Mr McCormick collected the denture (26 July 2010). This subparticular is established.
45. The third subparticular overlaps the previous two to some extent, by asserting that Mr Sutherland directly supplied Mr McCormick with the new upper denture that he had manufactured on the basis of the impression of Mr McCormick's mouth, and without a prescription. These elements are established for the same reasons as above.
46. The preamble to the three subparticulars requires the Tribunal to be satisfied:
 - 46.1. That Mr Sutherland knew or ought to have known he was providing treatment outside his scope of practice as a dental technician. It is clear that Mr Sutherland was purporting to carry out the activities of a clinical dental

technician. No prescription was provided to him yet he was prepared to take the impression and prepare the new denture. The evidence from the Dental Council as to conversations held with Mr Sutherland make it clear that he knew he was not a clinical dental technician but was acting as one; that is why at two points he discussed the possibility of applying for registration as such. He did not. The Tribunal finds that he knew he was acting outside of scope.

46.2. That the activities in question were restricted activities that Mr Sutherland was not permitted to perform under his scope of practice as a dental technician. Having regard to the legislative provisions summarised above⁷ the Tribunal is satisfied that the activities Mr Sutherland was conducting were within clause 2 of the Order in Council: that is, Mr Sutherland was involved in the insertion of a removable oral appliance.

47. The Tribunal concludes that particular 1 of the first charge is accordingly established. It is satisfied this conduct amounts to malpractice and brings discredit to the profession. It was carried out in a situation where:

47.1. Mr Sutherland deliberately chose to act outside of his authorised scope, knowing he was not permitted to do so. There was no adherence to hygiene as would normally be expected in respect of a clinical dental technologist. That is, there was no clinical area, Mr Sutherland wore no rubber gloves or a gown; nor was there any evidence of washing of hands or other precautions to ensure infection control.

47.2. There was no proper examination such as a detailed measurement, or inspection of the mouth for potential disease. Also, as Mr Aarts stated, often

⁷ Paras 12-14.

denture patients will only see a clinical dental technician every 15-20 years so this is the only opportunity to identify potential life threatening oral cancer or lesser disease which could affect the general health of the patient; the scope of practice of a clinical dental technician makes it clear that the practitioner has "*... a responsibility to ensure the patient's mouth is fit for purpose, and free of disease, disorder or abnormality.*" Mr Sutherland could not and did not fulfil such a responsibility. The members of the public who attended him were denied such treatment which they could expect to receive if attending a clinical dental technologist.

47.3. There was no evidence that proper notes of clinical consultation were kept.

48. Having regard to these factors, the Tribunal is satisfied that this particular is sufficiently serious as to warrant discipline.

Particular 2: placing advertisements directly to public for making and fitting dentures, being services outside scope of practice/restricted activities:

49. The Tribunal received evidence of Mr Sutherland advertising directly to the public from Mr and Mrs Hill who are based in Whakatane; and from Ms Anderson, who practises from Kawerau. In summary the evidence established advertising as follows:

49.1. A sign in the window of premises operated by Mr Sutherland behind The Strand, in the parking area of Kakahoroa Drive, Whakatane, which bore the word "*Dentures*". This was confirmed by a photograph taken at the end of July 2011. It also showed a phone number which is the same phone number as contained in other advertisements referred to below.

49.2. Printed business cards which stated "*Dentures and Repairs, all work guaranteed and WINZ quotes, insurance quotes*" and then gave the relevant phone numbers. Such cards were in a barber shop, fish and chip shops, local supermarkets, a hospice shop and a local kebab shop over the period May 2010

to at least April 2011. The cards clearly offered denture repair services directly to the public.

- 49.3. Customer service cards at supermarkets such as Countdown, New World, and PAK'nSAVE, in the period May 2010 to April 2011. These cards were handwritten and clearly indicated the offering directly to the public of a dental repair service. Some of them contained statements such as "*don't buy dentures from a middle man*"; "*my opposition has been seen taking these cards*"; "*don't be conned by radio ads my dentures are the best*"; "*trained in NZ ... better than the rubbish I've heard about*"; "*quality by a trained tech plus 30,000 hours*"; "*no middle man*"; "*dentures that fit look classy not like some*".
- 49.4. Yellow Page advertisements in the Eastern Bay of Plenty Yellow Pages and the Bay of Plenty Yellow Pages under the heading of "*Dentists and Dental Services*" or "*Dentures and Repairs*". The evidence was that the Yellow Pages extracts placed before the Tribunal were for the year 2011. The necessary paperwork authorising such advertisements would have been signed in approximately mid 2011, with publication not long thereafter. This is outside the period of the charge, but it is evidence which is consistent with the earlier advertisements, and reinforces an apparent intention on Mr Sutherland's part to operate a dental repair service on an ongoing basis.
50. The Tribunal is satisfied that the first element of Particular 2 is established in that Mr Sutherland did place a number of advertisements between 20 May 2010 and 18 April 2011 which promoted his services in making and fitting dentures directly to members of the public when he knew that such services were outside his scope of practice as a dental technician and/or were restricted activities under the Act that he was not permitted to perform under his scope of practice as a dental technician.

51. The second element of the charge requires consideration of whether he in fact provided such services directly to the members of the public when he knew or ought to have known that they were outside his scope of practice and; or were restricted activities. There is of course the evidence relating to the consultation with Mr McCormick, considered above; the Tribunal also has evidence that:

51.1. When Mr McCormick attended Mr Sutherland on 23 July 2010, he gave treatment of a clinical nature to a woman who attended Mr Sutherland's premises at the same time. She complained of an ulcer. The description of services given by Mr Sutherland's treatment – similar to the services rendered to Mr McCormick himself – suggests that he was purporting to conduct clinical dental technology services.

51.2. Mr Hill told the Tribunal that he now has a patient who had previously had dentures made for her by Mr Sutherland. Having regard to the evidence as to how Mr Sutherland operated, the Tribunal infers that it is probable the patient attended Mr Sutherland directly for the making of her dentures.

51.3. The evidence established that Mr Sutherland practised on an ongoing basis. He told Mr Hill in about March 2010 that he was setting up a lab; he appears to have a rented premises for the purpose, because in mid 2011 there was a sign on the floor of the premises which could be seen from the street indicating that the landlord was by then demanding rent from Mr Sutherland. This evidence suggests Mr Sutherland was no longer operating from those premises but had been. The totality of the advertisements also leads to a clear inference that across the period of the charge Mr Sutherland was offering a public service. It is likely he would have seen persons at those premises from time to time, over and above the persons about which the Tribunal has specific evidence.

51.4. And finally, there is the inference to be drawn from the conversations with the Dental Council that he was in fact rendering clinical dental technology services directly to members of the public.

52. The elements of Particular 2 are established. The Tribunal is satisfied this constitutes malpractice and brings discredit to the profession of dental technology. It is sufficient serious for the reasons given at paragraph 47 above as to warrant discipline, particularly when the offering and conducting of the services went on for so long. This is a very serious matter.

Particulars 1 and 2 considered cumulatively:

53. The charge requires the Tribunal to consider Particulars 1 and 2 cumulatively, as well as separately. The Tribunal is satisfied that a very serious situation is disclosed by the two established particulars, because:

53.1. The established particulars relate not only to a particular member of the public, but also to 11 months of advertising in the context where it is more likely than not that other members of the public were also attending him for denture work.

53.2. The breach was prolonged. As already noted, there was no clinical area, no gloves, no examination and no accurate measurements before and after the preparation of the denture. There was a significant potential for cross infection.

53.3. And as already described, there was a total disregard for the potential healthcare issues which could be discovered during clinical treatment.

54. Having regard to these factors, the Tribunal concludes there were significant breaches which definitely warrant discipline. The charge of professional misconduct is established.

Charge 2: practising dental technology whilst not holding a current practising certificate:

55. The charge requires the Tribunal to consider, first, the question of whether Mr Sutherland "... *practised the profession of dental technology*".
56. An issue which needs to be carefully considered is the issue that in fact Mr Sutherland was attempting to practise as a clinical dental technologist.
57. However:
- 57.1. He obviously knew he was not registered as such – hence his request on more than one occasion for documentation relating to obtaining registration as a clinical registered technologist. However he never took any step in that regard.
- 57.2. The amount he paid for his APC was \$736.00, which was the correct amount for a dental technician's APC; it was not the correct amount for a clinical dental technician's APC. Mr Sutherland was registered only as a dental technologist, and could therefore only seek an APC for that status, which he did seek.
- 57.3. It is to be noted that where a person seeks registration as a clinical dental technician, he or she is required to be registered first as a dental technician (as well as other criteria such as having completed an accredited one year full time or two year part time postgraduate diploma in clinical dental technology from the University of Otago, or equivalent). The scope of practice for a clinical dental technician is an "*additional scope*".
- 57.4. The HPCA Act does not preclude the possibility that a person might hold more than one scope as is the case here.
- 57.5. It could not have been Parliament's intent that where a health practitioner acts outside the scope for which he holds registration he could not be brought to account for not complying with those scope requirements, such as the requirement to hold an APC. Given that the principle purpose of the HPCA

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,⁸ the Tribunal considers that section 100(d) of the Act must be construed objectively whatever the actual intention of the practitioner may be. To hold otherwise would mean a registered health practitioner in circumstances such as the present could not be brought to account. That cannot have been Parliament's intention having regard to the purpose of the Act and the importance of the APC regime - a matter which has been commented on by the Tribunal on many previous occasions.⁹

58. Analysing the facts from an objective point of view, when Mr Sutherland was working on a removable denture in his laboratory, he was attempting to practise the profession for which he was registered. That is the profession for which the HPCA Act requires him to be accountable. This is the case even although he was not complying with the requirements of the scope of dental technology by not holding a prescription (he should have done so); or that he intended to act as a clinical dental technician (he should not have done so).
59. The second issue relates to the period which it is alleged that no APC was held. The charge pleads that this was "*between on or around 1 April 2010 and April 2011*". The evidence establishes:
- 59.1. Mr Sutherland did not hold an APC between 1 April and 7 May 2010, the latter date being when he tendered a cheque for an APC of \$736.00, which was accepted by the Dental Council.
- 59.2. On 11 January 2011 the Dental Council sent Mr Sutherland a cheque for \$736.00. The evidence is that the cheque has not been presented. However, it

⁸ Section 3(1).

⁹ *O 274/Ot09/132P, H 256/Psy09/128P, S 445/Den11/198P, White 366/Opt10/168P, GS v Professional Conduct Committee* [2010] NZAR 417.

was sent to one of the last known addresses held by the Dental Council. Under section 156 of the HPCA Act, the sending of the communication to Mr Sutherland is deemed to be completed. The significance of the refunding of the APC fee is that this was an acknowledgement beyond doubt that Mr Sutherland did not hold an APC. He held no APC from that date to 18 April 2011.

59.3. The position between 8 May 2010 and 10 January 2011 is less clear. As already recorded the cheque was receipted by the Dental Council on 7 May 2010 but it was not until 15 July 2010 that The Dental Council raised with Mr Sutherland that his APC application form was not completed. The cheque was not returned and the amount forwarded was not refunded. Nor was there any statement in the email that Mr Sutherland must not practise in the meantime (unlike other correspondence directed to Mr Sutherland). All he was told was that the Dental Council required the completed form in order to issue the APC.

59.4 In August 2010 an attempt was made to carry out a practice review. The reviewer attended on 3 August but Mr Sutherland did not attend the interview. The review was carried out on 13 August. The reviewer then tendered a report to the Dental Council, confirmed in the letter sent to Mr Sutherland on 3 December 2010. There is no evidence that in the course of the practice review either the Dental Council or its agent the practice reviewer made it clear to Mr Sutherland that he should not be practising. Indeed the fact of the review carried an implication that he was permitted to practise, albeit subject to any review issues (although the Tribunal was given no details as to any concerns in that respect). The difficulty is that this interaction with Mr Sutherland amounted to being an implied affirmation that he was entitled to practise.

- 59.5 Advice that Mr Sutherland should not be practising without an APC – even though the payment had been receipted was not given until 3 December 2010. The letter was sent to an incorrect address, although it appears to have been sent to a current email address.
- 59.6 Finally, the letter of 17 January 2012 with cheque attached was sent to an address which qualifies under section 156 of the Act as a last known business address, and the position from then on was unambiguous.
60. In summary, from the period of May 2010 to January 2011, the position was not clear cut because:
- 60.1. The APC was retained by the Dental Council until it was refunded in January 2011.
- 60.2. The 15 July email to Mr Sutherland did not clearly state that he should not have been practising.
- 60.3. The circumstances of the practice review were somewhat ambiguous on the issue of whether Mr Sutherland was entitled to practise.
61. These factors persuade the Tribunal that it is not established that Mr Sutherland should be culpable for disciplinary purposes for the period 8 May 2010 to 10 January 2011.
62. Accordingly, of its own volition the Tribunal amended the dates of the second charge, so that the breach was for the periods:
- 62.1. 1 April to 7 May 2010; and
- 62.2. 11 January to 18 April 2011.
63. As previously discussed, there is no question that, as a matter of fact, Mr Sutherland was conducting an ongoing denture repair operation and thus practised the profession of dental technology.
64. The charge was accordingly established as amended.

Penalty:

65. At the hearing the Tribunal announced its conclusions on the two charges as above, and proceeded to deal with issues of penalty.
66. For the PCC it was submitted the Tribunal should give careful consideration to cancellation of registration, censure, payment of a fine, and contributing to costs.
67. Submissions were made as to aggravating factors (referred to below) and reference was made to other cases from which the Tribunal could obtain guidance.¹⁰
68. Submissions were also made as to costs. The Tribunal was advised that:
- 68.1. PCC total costs were likely to be in the range of \$50,000.00-\$54,000.00, excluding GST.
- 68.2. The Tribunal's costs were \$22,255.00, excluding GST.

Legal principles – penalty:

69. In determining the appropriate penalties, the Tribunal recognised the following functions of disciplinary proceedings:
- 69.1. Protecting the public – this object is reinforced by section 3 of the HPCA Act;
- 69.2. to maintain professional standards – this object is emphasised in *Taylor v General Medical Council* [1990] 2 All ER 263; *Ziderman v General Dental Council* [1976] 2 All ER 344 and *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720;
- 69.3. to punish the practitioner in question, as referred to in *Dentice v The Valuers Registration Board* and *Patel v Complaints Assessment Committee* (CIV-2007-404-1818, 13 August 2007, Lang J);

¹⁰ *Leach* 389/Nur11/179P, *Sellwood* 391/Mart11/178P, *Singleton* 398/Phys10/158P, *Conden* 23/Nur05/13P, *Pearson* 39/Nur05/23P.

- 69.4. where appropriate, to rehabilitate the practitioner, as referred to in *J v Director of Proceedings* (CIV-2006-404-2188, 17 October 2006, Baragwanath J), and *Patel* (supra).
70. The Tribunal is required to balance relevant aggravating and mitigating factors, in fixing a reasonable and proportionate penalty.
71. In *A v PCC* (5 September 2008, Keane J, CIV-2008-404-2927), the Court discussed carefully the range of sanctions available to the Tribunal, particularly cancellation and suspension.¹¹ The Court stated that four points could expressly be derived from the authorities, and implicitly a fifth:

“[81] First, the primary purpose of cancelling or suspending registration is to protect the public, but that “inevitably imports some punitive element”. Secondly, to cancel is more punitive than to suspend and the choice between the two terms on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is “some condition affecting the practitioner’s fitness to practise which may or may not be amenable to cure”. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.

[82] Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v B (HC Auckland, HC4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele v General Medical Council [2005] EWHC 2143, though “... the maintenance of public confidence ... must outweigh the interest of the individual doctor”, that is not absolute – “the existence of the public interest in not ending the career of a competent doctor will play a part”.”

72. In numerous cases, the need to consider and explain why lesser options have not been adopted is emphasised. But the Tribunal has to proceed on the basis of what is appropriate having regard to the public interest, and the need to maintain public confidence in the profession.¹² Randerson J put the matter in this way:

“[30] The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist’s fitness to practise against the need for removal and its consequences to the individual:

¹¹ Paras 77-82.

¹² *Patel*, supra, para 30 per Lang J; *L v The Director of Proceedings*, Woodhouse J, 25 March 2009, CIV-2008-404-2268 [47-48].

Dad v General Dental Council [2002] 1 WLR 1538. As the Privy Council further observed at 1543:

Such consequences can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.

[31] I respectfully adopt the observations of the Privy Counsel and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case.

As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.”¹³

Penalty – discussion:

73. The Tribunal must consider any aggravating and mitigating factors, and then assess a proportionate outcome.
74. The PCC raised a number of factors which it submitted are aggravating factors, which are broadly accepted by the Tribunal. In summary those factors are:
 - 74.1. Mr Sutherland conducted restricted activities that he was not permitted to perform. By definition they are the highest risk health services provided by health practitioners. The expert evidence established that there were potentially serious public safety issues posed by Mr Sutherland providing clinical services, particularly the risk of cross infection and the inability for possibly relevant health issues to be properly considered.
 - 74.2. Mr Sutherland knew he was not permitted to provide the clinical services he provided. He deliberately and cynically chose to ignore the requirements, for

¹³ *Patel v The Dentists Disciplinary Tribunal* HC AK AP77/02, 8 October 2002.

personal financial gain. In doing so he put members of the public at significant risk of harm.

- 74.3. Mr Sutherland persisted in providing clinical services even after having been put on clear notice his conduct was being investigated. At that point his conduct was reckless and knowingly so.
- 74.4. Mr Sutherland was repeatedly advised his practising certificate as a dental technician had expired. Yet he continued to practise without one.
- 74.5. There is an element of dishonesty in the conduct the Tribunal has been required to review, that is practising outside of scope when Mr Sutherland knew he should not have been, and practising without an APC. A fundamental requirement of all health practitioners is that they must be able to be trusted.
- 74.6. Mr Sutherland refused to engage with the PCC and with the Tribunal. This demonstrates a significant lack of insight, and hence the absence of what in other circumstances can be a mitigating factor.
75. No other mitigating factors were identified by the PCC, and the Tribunal is unable to discern any either.
76. The Tribunal considered that Mr Sutherland's practice was so inept that the issues cannot be dealt with either by way of the imposition of conditions simpliciter in relation to each charge, or even suspension plus conditions. The Tribunal simply has insufficient information with which to fashion conditions in any meaningful way when there are such fundamental problems; particularly serious is deliberate intention of acting dishonestly and contrary to the requirements properly imposed under the HPCA Act.
77. The only possible order which the Tribunal can make in these circumstances having regard to the health and safety of the public and the maintenance of professional

standards is to order cancellation of registration. No lesser penalty is appropriate in all the circumstances.

78. The Tribunal also orders censure. It must formally admonish Mr Sutherland for the serious breaches which the Tribunal has been required to review, and which are completely unacceptable.
79. Having regard to the orders of cancellation, the Tribunal is not satisfied that a fine should be imposed as well.
80. The final issue relates to costs. The authorities make it clear that 50% of reasonable costs is the normal starting point, with an increase if there are aggravating factors in relation to the conduct of the hearing, and a decrease if there are mitigating factors.
81. The authorities have been set out in many previous decisions of the Tribunal.¹⁴
82. There is some evidence that at times Mr Sutherland may have had financial difficulties. But the Tribunal has no information as to his current financial status, except that he appears to have vacated the premises where he was previously operating. It is not known what income activities he may be engaged in at present, or what assets and liabilities he may have.
83. Fifty percent of the costs incurred with regard to the hearing of the present charges is approximately \$38,000.00.
84. The balance of the costs incurred will be paid by the profession, and a fair division as between the profession on the one hand and Mr Sutherland on the other is 50%.
85. As regards means, the issue is not whether Mr Sutherland would be able to pay \$38,000.00 immediately. The issue of enforceability of a costs order is for the Dental

¹⁴ For example *Vatsyayann* 374/Med10/152P.

Council. That issue may require some working through with Mr Sutherland. The Tribunal is confident that the Dental Council will deal with that issue in a responsible way if Mr Sutherland engages properly with the Dental Council on the issue of costs.

86. In reaching its conclusion, the Tribunal has noted the dicta in *Vasan* that a high award of costs may well cause hardship, but can nonetheless be regarded as appropriate.¹⁵

Conclusion:

87. The charges of professional misconduct and failing to hold an APC when practising as a registered dental technician are established.
88. On each charge penalties are imposed as follows:
- 88.1. Mr Sutherland's registration as a dental technician is cancelled. Having regard to section 103(3) of the HPCA Act, this order shall take effect four days after this decision is posted by the Tribunal to Mr Sutherland's last known address.
- 88.2. Censure – the Tribunal must express its strong disapproval for the conduct it has been required to consider.
- 88.3. Costs:
- 88.3.1. Mr Sutherland is ordered to pay the sum of \$27,000.00 in respect of the costs and disbursements of the PCC. This sum does not include GST.
- 88.3.2. Mr Sutherland is order to pay the sum of \$11,000.00 in respect of the costs and disbursements of the Tribunal. This sum does not include GST.

¹⁵ *Vasan v Medical Council of New Zealand*, Eichelbaum CJ, Jefferies and Greig JJ, 18 December 1991, AP43/91 at p15.

89. The Tribunal directs that a copy of this decision and a summary be placed on its website. It further directs that a notice stating the effect of the Tribunal decision be placed on the Dental Council's website, and in the newsletter of the Dental Council.

DATED at Wellington this 16th day of October 2012

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B A Corkill QC
Chairperson
Health Practitioners Disciplinary Tribunal