



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 555/Dtech13/232P

IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003

AND

IN THE MATTER of disciplinary proceedings against
SIMON JOHN DEVINE,
Registered Dental Technician of
Raglan

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING held at Auckland on 30 May 2013.

PRESENT:

Mr B A Corkill QC, Chairperson

Mr J Batchelor, Ms T Burke, Ms A Kinzett and Mr K Lock
(Members)

Ms K Davies (Executive Officer)

Ms J Kennedy (Stenographer)

APPEARANCES:

Ms A Miller for the Professional Conduct Committee

Mr S J Devine appeared in person

Introduction:

1. In December 2012, a Professional Conduct Committee laid a charge against Mr S J Devine, a registered dental technician of Raglan.
2. The charge as amended at the hearing is as follows:

"PARTICULARS OF CHARGE

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Mr Devine, a registered dental technician, practised the profession of dental technology between on or around 1 April 2012 and 20 April 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."

Legal principles:

3. In *Dr E¹* the Tribunal outlined the elements of a charge under section 100(1)(d) of the Health Practitioners Competence Assurance Act 2003 (HPCA Act):

"76. This is an absolute offence which does not require any consideration of whether the matter warrants disciplinary Tribunal sanction to maintain standards, for the protection of the public or to punish the practitioner. Those are important considerations in relation to any penalty. In any case where the three elements are established, namely that the practitioner was registered and has practised when not holding a current practising certificate the Charge is made out and any questions of protection of the public, maintaining professional standards or punishment of the practitioner go to penalty."

4. As was submitted by the PCC, it does not need to establish:

"19(a) an intention to flout professional obligations: see White (Opt10/168P at [9]), and also see Henderson (Phar12/210P at [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).***

¹ 503/Den/12/219P

- (b) *that the breach was deliberate (see Ms H (Psy09/128P (at [6] and [7]))):*

Counsel for the PCC acknowledged that there was an inadvertent, as opposed to a calculated and deliberate, breach of section 100(1)(d). Counsel for Ms H also emphasised that the lapse was an innocent one, and that she did not blame others...The Tribunal considered that the elements of the charge were clearly established...

- (c) *that the practitioner knew or ought to have known of the absence of the annual practising certificate (see Bhatia (Med10/151P):*

74. The criteria set out in section 100(1)(d) states that the practitioner has practised while not holding a current practising certificate (emphasis added). The use of the words “not holding” would suggest that it is the fact of being without an APC which constitutes the charge, rather than the “knowing” of the absence of the APC. The Tribunal determines that the test is objective not subjective.”

The facts:

5. The hearing was able to proceed on the basis of an agreed summary of facts, which is as follows:

- "1. *Simon John Devine has been a registered dental technician since 5 June 2008. Mr Devine is registered within the dental technology scope of practice under the Health Practitioners Competence Assurance Act 2003, and his practice is limited to removable partial denture work.*
2. *From the date of his registration Mr Devine has been required to hold a current annual practising certificate (APC) in order to practise the profession of dental technology.*

Background

3. *On 1 March 2012 the Dental Council posted out APC renewal application forms for the 2012/2013 practising year to all registered dental technicians.*
4. *On 2 March 2012 the Dental Council also sent an email to all registered dental technicians, including Mr Devine, advising that:*

We would like to remind all practitioners registered in any of the professions listed above... that your current Annual Practising Certificate (APC) expires on 31 March 2012. The APC forms for the new cycle are in the post and you should receive your form within the next few days.

If you do not receive your APC or retention form please download the correct form at the following link: www.dcnz.org.nz/dcforms

Additional Processing APC Fee

*The Additional Processing APC Fee is a new fee which was consulted upon in December 2011, and recently gazetted. It is in effect a late fee costed to recover the additional secretariat time spent following up those practitioners who have failed to renew their APCs by the start of the next practising cycle. This means that if you are renewing your APC and fail to get your completed and correct application accompanied by the correct amount to the Dental Council by **Friday 30 March 2012** you will be charged a late fee of \$45.00 (GST inclusive), in addition to your APC fee and the Disciplinary Levy.*

...

Help us to help you

The Council would like to ensure that all practitioners' APCs are issued as soon as possible and we kindly request that you ensure you complete your form correctly and include the correct amount as published. Any incomplete or incorrectly completed forms will be returned to the practitioner.

*Also bear in mind that standard post can take between 7 – 10 days if you are located outside of the main cities; please allow sufficient time for postal delivery to ensure that your completed application is received by Council on/before **Friday 30 March 2012** and you do not find yourself in the position of having to pay the Additional Processing APC Fee, or more importantly having to cease practise until such time as your APC is issued.*

(emphasis in original)

5. *On 19 March 2012 the Dental Council sent an email reminder to all dental technicians, including Mr Devine, advising that:*

As you are aware your Annual Practising Certificate (APC) is due for renewal prior to 1 April 2012. All APC and Retention forms were sent out on 1 March 2012, if you have not received your form please download a form from our website at the following links...

...

If you intend to practise at any time during the next APC cycle (1 April 2012 – 31 March 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.

Additional Processing APC Fee

...

Any incomplete or incorrectly completed forms will be returned to the practitioner.

Also bear in mind that standard post can take between 7 – 10 days if you are located outside of the main cities; please allow sufficient time for postal delivery to ensure that your completed application is received by Council on/before Friday 30 March 2012 and you do not find yourself in the position of having to pay the Additional Processing APC Fee, or more importantly to cease practise until such time as your APC is issued.

6. *On 27 March 2012 the Dental Council sent a third email reminder to those registered dental technicians, including Mr Devine, from whom an application to renew their APC had not yet been received. The email advised that:*

As you are aware your Annual Practising Certificate (APC) is due for renewal prior to 1 April 2012. As yet we have not yet received your application to renew your APC for the practising period 1 April 2012 to 31 March 2013, and we are accordingly not aware of your practising intentions for this period...

...

If you intend to practise at any time during the next APC cycle (1 April 2012 – 31 March 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.

...

Any incomplete or incorrectly completed forms will be returned to the practitioner.

...

(emphasis in original)

7. *At midnight on 31 March 2012 Mr Devine's APC expired.*
8. *On 3 April 2012 the Deputy Registrar of the Dental Council wrote to Mr Devine:*

We note that you have not yet submitted to the Dental Council (“Council”) your completed application to renew your Annual Practising Certificate (APC) for the practising period 1 April 2012 – 31 March 2013, and 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.

Please be aware that under the Health Practitioners Competence Assurance Act 2003 it is an offence to practise without a current APC punishable upon conviction by a fine of up to \$10,000.

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 resume practise.

...

Additional Processing APC Fee

The Additional Processing APC Fee is a new fee which was consulted upon in December 2011, and recently gazetted. It is in effect a late fee costed to recover the additional secretariat time spent following up those practitioners who have failed to renew their APCs by the start of the next practising cycle. This means that you will be charged a late fee of \$45.00 (GST inclusive), in addition to your APC fee and the Disciplinary Levy as your completed APC application has not been received.

Any incomplete or incorrectly completed forms will be returned to the practitioner.

...

If we have not heard from you by Monday 16 April 2012, your name and HPI number will be forwarded to the following agencies who will be advised that you have not renewed your APC:

- ACC
- Dental Protection Limited
- Ministry of Health, Compliance Unit

If we become aware that you are practising without an APC you will also be referred to a Professional Conduct Committee. We will not be sending any further communications to you before initiating action.

(emphasis in original)

9. *On 13 April 2012 the Dental Council received an APC renewal form from Mr Devine dated 27 March 2012.*
10. *By letter dated 13 April 2012 the APC renewal form was returned to Mr Devine:*

Thank you for completing and forwarding to us your application for your Annual Practising Certificate (APC). We are returning your application as it is incomplete and cannot be processed. Please refer to the sections listed below which need to be completed before you can be issued with an APC for the 2012/2013 practising year.

- *Section 2 – Payment*
- *Section 9 – Compliance with Professional Standards*
- *Section 10 – Health Practitioner Index*

We can confirm that [you] APC application was received by the Council after 1 April 2012 and therefore the Additional Processing APC applies to your application. As stated on page 2 of the Application, the total amount due on/after 1 April 2012 is \$723.37....Therefore please amend your cheque accordingly to the appropriate amount of \$723.37.

...

Your current APC expired on 31 March 2012 if you are practising at the moment without a current practising certificate, you are doing so unlawfully and you must cease immediately. Only when you have received a current practising certificate may you resume practise.

*If we have not heard from you by **Monday 16 April 2012**, your name and HPI number will be forwarded to the following agencies who will be advised that you have not renewed your APC:*

- *ACC*
- *Dental Protection Limited*
- *Ministry of Health, Compliance Unit*

If we become aware that you are practising without an APC you will also be referred to a Professional Conduct Committee. We will not be sending any further communications to you before initiating action.

11. *On 17 April 2012 the Registrar of the Dental Council wrote to Dental Protection Limited, ACC, and the Ministry of Health to give notice that, among others, the registered dental technicians recorded in an*

attached schedule, including Mr Devine, did not hold current practising certificates: "The Annual Practising Certificates for these practitioners expired on 31 March 2012 and to date; applications for renewal of their Annual Practising Certificates have not been received by the Dental Council".

12. *On 18 April 2012 a Dental Council staff member rang and spoke to Mr Devine. The file note of this call records:*

Called at practice regarding his APC, I said that he didn't currently hold an APC and wasn't entitled to practise. I said that I noted we received his form in on the 13th but that it was incomplete and had been fastposted back to him and asked if he had received it. He said that he had received it and amended it and fastposted it back on Monday 16th to our street address, not the PO Box address. I said we had not yet received it and that meant he didn't have an APC at this time, he said he was surprised about that and that hopefully it would come in tomorrow...

He said that he felt most of section 9 Compliance with Professional Standards was not applicable to him which is why he didn't answer all the questions and just ticked the Not Applicable box, I said we would have a look at his answers when we got his form in.

13. *On 20 April 2012 the Dental Council received Mr Devine's completed application form. Under section 9, Compliance with Professional Standards, Mr Devine had handwritten:*

I didn't answer question nine because I'm a non clinical dental technician and no direct contact patients or the public only register clinical dental practitioners ie clinical dental technicians, Dentists, Orthodontic & Oral Surgeons. I have since ticked some.

14. *Mr Devine also provided a handwritten note with his completed application form which stated:*

Attn Carolyn Young.

It wasn't possible to have application forms and payment returned by Mon 16th-04-2012 as I only received your letter on Sat 14-04-2012 and your letter is post marked Fri 13-04-2012. Also DCNZ have made a huge increase in fees this year \$211.39 [wich] is a 50 per cent [wich] is pretty tuff in these financial times. I thought non clinical Dental Technician fees were lower than clinical DT in the past and similar to the Dental Therapists/Hygienists and Orthodontic Auxiliary as we are supervised by Registered Clinical Dental Practitioners.

*Regards,
Simon Devine.*

15. *On 20 April 2012 [a Dental Council] the Registrar of the Dental Council wrote to Mr Devine enclosing his APC for the 2012/2013 practising year. The Registrar advised that:*

As you are aware, your previous APC expired on 31 March 2012. Your application for a further APC was received by the Dental Council after that expiry date. [It] you continued to practice after 31 March 2012, you were doing so unlawfully.

...

Notwithstanding that we have issued you with an APC, Council will be asked at its next scheduled meeting to consider referring you to a Professional Conduct Committee to investigate whether you have been practising unlawfully...

16. *A PCC was subsequently appointed to investigate whether Mr Devine had practised the profession at a time when he did not hold a current practising certificate.*
17. *On 17 October 2012 the Chair of the PCC wrote to Mr Devine:*

Firstly thank you for your time by way of telephone conversation today and for understanding how there has been some challenges with your hotmail email address in terms of you receiving correspondence from the PCC.

I acknowledge that you requested all matters are to be posted to you at the above address.

To recap I am the Chairman of the... (PCC) set up by the Dental Council under the Health Practitioners Competence Assurance Act 2003 to investigate the alleged matter of you practising the profession of dental technology without a current [APC] during the period 1 April 2012 to 20 April 2012 despite being told not to do so in a letter dated 3rd April 2012.

It would be helpful if you could provide to the PCC evidence of the hours you worked during the period 1 April 2012 and 20 April 2012.

The evidence you could be provided [sic] is for instance, sending copies of your appointment book or a letter from your employer. Or if you were was [sic] on holiday evidence by way of record of holidays taken.

The PCC also offers you the opportunity to furnish an explanation as to why you did not complete the requirement to obtain an Annual Practising Certificate by the 31st March 2012.

18. *On 25 October 2012 Mr Devine wrote to the Chair of the PCC by email, stating among other things:*

I was late paying the annual practising certificate fee, however once I received a letter from the Dental Council dated the 3rd of April, received by me on the 4th April, I completed the application, wrote a cheque for the appropriate fee and placed that on a courier on the 4th April. My understanding was that I would be registered from that date. I do accept that for the 3 day period, being Monday the 2nd of April, Tuesday the 3rd and Wednesday the 4th of April I did complete some work as follows:-

One Metal Partial Denture for Mr [] of the Maxiofacial/Dental Dept. Waikato Hospital and one Metal Partial Denture for Mr [] of []. Rotorua.

Subsequently the Easter holidays fell in that period, being Friday the 6th April to Tuesday the 10th April, and I see in hindsight that may have contributed to delaying correspondence reaching the Dental Council and also reaching me by return. This is because it was not until the letter [date] the 13th April 2012 from the Dental Council, received by me on the 16th April, that I was aware of the late fee payable (my cheque was returned to me) and having to complete the two sections, being questions 9 and 10.

On the 16th April I rang the Dental Council and spoke to Carolyn Young on the phone to clarify section 9 and 10 as the form had changed from previous years. I then paid the new fee by cheque and completed the application with an explanation on the same day, being the 16th april. This was then couriered back to the Dental Council on the 16th april, being a Monday. For some reason this was not received by the Dental Council until the 20th April which was when they registered me and advised me of my registration.

...

I can advise that the nature of my practice is non clinical and the answers that I had originally given in question 9 of the application I considered were not relevant to me as I do not deal with clients or public and this caused a delay obviously subsequently in my application being returned as being incorrect. The nature of my practice is simply receipt by courier of impressions or moulds from either clinical dental technicians or dentists and I would make the assumption that this is split 50/50 between the two. Therefore I do not run an appointment book, I am self – employed and do not run a wage book. I am simply dependent on when work gets couriered to me by either a clinical dental technician or a dentist.

As indicated above, the Easter break fell in the period of 1 April to 20th April and at the time I was caring for my wife who has been

very ill this year. I believe that I paid my fee on the 4th and was entitled to work after that date. Obviously this assumption has proved to be incorrect.

*You have asked for a reason as to my delay in completing the requirements to obtain an Annual Practising Certificate by the 31st March 2012 and I would like the Committee to give some weight to the following factors. My wife has historically always done all administration for my business including dealing with the Dental Council. Unfortunately my wife has been extremely unwell since January of the [sic] year and I have had to deal with caring for her, running my business and dealing with our household.
[]...*

During that period I had been trying to cope with all these matters and I accept that I have not coped with everything very well and I have gotten behind with my administration aspects of my business which has led to the matter at hand.

I realize that personal circumstances should not come into the professional world in a perfect world, however this year my world has been far from perfect. I have been under extreme stress this year and my management of the issue has not been how I would normally deal with these matters and unfortunately, it has led to this Professional Conduct Committee having to take place.

..."

Chronology:

6. The Tribunal finds that the chronology is:
 - 6.1. On 1 March 2012, the Dental Council posted out APC renewal application forms for the 2012/2013 practising year to all registered dental technicians. It appears the application for APC ultimately signed by Mr Devine, on 27 March 2012, was the document attached to the reminder of 1 March.
 - 6.2. On 2, 19 and 27 March 2012, email reminders were sent and received. They were sent to the email address which Mr Devine had provided to the Dental Council for the purposes of formal notifications.
 - 6.3. On 3 April 2012, the Deputy Registrar of the Dental Council wrote to Mr Devine pointing out that if he was practising at the time without a current practising certificate he would be doing so unlawfully and should cease

immediately; and that any incomplete or incorrectly completed forms would be returned to the practitioner. This prompted Mr Devine to write out a cheque (on 4 April 2012) for the purposes of the APC, and despatch his APC application to the Dental Council.

6.4. The application was received on 13 April 2012. The application form made it clear that:

6.4.1. Applicants needed to allow at least 10 working days for an APC to be issued.

6.4.2. The correct amount due for payment (ie \$678.37 if payment was made before 31 March 2012, and \$723.37 if payment was made after 1 April 2012. Because payment was being made after 1 April 2012, the correct amount was \$723.37. However, Mr Devine's cheque of 4 April 2012 was for \$678.37, being the applicable amount if application was made prior to expiry of the APC on 31 March 2012).

6.5. The Dental Council letter of 13 April 2012 was received by Mr Devine on 16 April 2012; he sent the document, duly completed, to the Dental Council that day, and spoke to the Dental Council as well with regard to the format of the application form. According to the date stamp on the application form, it was received by the Dental Council on 20 April.

The three elements:

7. The elements required to be proven by the PCC in relation to the charge are:

7.1. That Mr Devine was a registered dental technician: is clearly established on the information in the Agreed Summary, and it is not in dispute.

7.2. That he practised as a dental technician during the period of the charge (1-20 April 2012): this is so. Mr Devine himself acknowledged that on 2, 3 and 4 April 2012 he completed two partial dentures. The Tribunal is satisfied that

Mr Devine did practise the profession of dental technology by carrying out work which falls within the scope of practice for dental technology.

7.3. As for the third element, Mr Devine's practising certificate expired on 31 March 2012, and a new practising certificate was not issued to him until 20 April 2012.

8. As indicated in the case referred to at paragraph 4 above, it is unnecessary to prove an intention to flout professional obligations; nor is it an element of the offence that the practitioner knew or ought to have known of the absence of an APC. However the Tribunal nonetheless refers to two matters which were raised by Mr Devine:

8.1. Mr Devine stated that he understood he would be regarded as having an APC as soon as he despatched it. It was quite clear on the application form and the follow-up emails, that this was not the case; nor is it the effect of section 30(3), which provides that the operative date is the date of receipt of the application for renewal. In any event, this understanding could only have been relevant as from 4 April (because the application form was not submitted until that date), and Mr Devine acknowledged he was practising without a practising certificate prior to that date.

8.2. As regards the email reminders sent in the course of March, Mr Devine stated that the email address held by the Dental Council was in fact his wife's email address; however, he confirmed to the Tribunal that he had provided it to the Dental Council as his point of contact; and the Tribunal notes that this email address was recorded in the APC application unamended.

9. The Tribunal was satisfied that the three elements of the charge were made out, and the charge was accordingly established.

Penalty:

10. The Tribunal considered penalty issues.

11. The PCC included submissions as to the following:
- 11.1. The standard legal principles with regard to penalty, which are set out below.
- 11.2. Reference was also made to other cases which it was said were comparable, which are referred to below:
- 11.2.1. *Dr E*:² Dr E was a registered dentist who practised his profession between 1 October 2011 and 4 November 2011 without holding a current practising certificate. A penalty of \$500.00 was imposed, as well as an order for costs of \$5,000.00.
- 11.2.2. *Dr S*:³ Dr S practised his profession between 1 October 2010 and 30 April 2011 when he did not have a current practising certificate. The Tribunal censured *Dr S* and ordered him to pay a fine of \$2,000.00 (noting there were no submissions as to his financial circumstances) and costs of \$12,000.00.
- 11.2.3. *Mr Henderson*:⁴ Mr Henderson was a registered pharmacist who practised his profession between 4 May 2010 and October 2010 without holding a current practising certificate. He was censured, ordered to pay a fine of \$2,000.00, and an order of costs of \$20,525.00.
- 11.2.4. *Ms H*:⁵ Ms H was a registered psychologist who practised her profession between 1 April 2005 and 20 June 2008 without holding a current practising certificate. There was an order of censure, and a fine of \$4,000.00, but this was reduced to \$2,000.00 on appeal.⁶ She was also ordered to pay costs of \$4,000.00.

² 503/Den12/219P

³ 445/Den11/198P

⁴ 477/Phar12/210P & Phar12/213P

⁵ 256/Psy09/128P

⁶ *GS v Professional Conduct Committee* [2010] NZAR 417

11.2.5. *Ms O*:⁷ Ms O was a registered occupational technician who practised her profession between 1 April 2005 and 3 March 2009 without holding a practising certificate. Ms O was censured, ordered to pay a fine of \$1,400.00, and costs of \$2,000.00.

11.2.6. *Mr White*:⁸ Mr White was a registered optometrist who practised his profession between 1 April 2010 and 3 May 2010, and 13 May 2010 and 1 July 2010, when he did not hold a practising certificate (during the second period his APC had been suspended following a failure to complete a recertification programme). The Tribunal made an order censuring Mr White, ordered him to pay a fine of \$1,250.00, and costs of \$3,500.00.

11.3. Mr Devine had practised since registration in June 2008 in an environment which required him to hold a current APC in order to practise. He knew or ought to have known of the legal requirement to obtain a current practising certificate.

11.4. Registration brings with it privileges and responsibilities, the onus being on each individual practitioner to comply with the requirements imposed on him by the regulatory regime.

11.5. The Tribunal had previously accepted that even inadvertent or unintentional lapses in meeting this professional obligation is nonetheless deserving of the imposition of penalties. This is consistent with the importance of the practising certificate regime, and a need for practitioners to take this obligation very seriously.

⁷ 274/OT09/132P

⁸ 366/Opt10/168P

- 11.6. It was submitted that the aggravating factor was that three email reminders were sent; the mitigating factor was that Mr Devine cooperated with the PCC's investigation.
- 11.7. It was submitted that the Tribunal should impose an order of censure, and a fine of between \$500.00 and \$1,000.00, as well as an order for costs. It was submitted that the PCC's costs were in the range of \$7,500.00 to \$8,500.00 excluding GST. The Tribunal's costs were \$8,130.28, excluding GST.
12. Mr Devine stated:
 - 12.1. He had cooperated fully with the PCC, answering all questions to the best of his ability and not denying that he had practised during the time in question.
 - 12.2. He had cooperated with regard to the hearing of the matter, including agreeing an agreed summary of facts.
 - 12.3. He felt no compassion or discretion had been shown in his situation, giving as an example the letter dated 13 April 2012 which was sent to him stating that he had until 16 April 2012 to pay, otherwise the authorities would be notified by 17 April 2012. He did not receive the letter until 16 April 2012, and despatched a reply immediately; but he could not comply with the timeframe imposed by the Dental Council. He felt there was an element of unfairness and predetermination in the process.
 - 12.4. He made reference to personal circumstances which had been stressful and created difficulties. He had to take over responsibility for administrative work, which would not have been the case previously. He had no issue that he was late in paying, but he thought the pressing of the disciplinary charge was overkill.
 - 12.5. He felt the system needed to be changed to allow for a late filing fee, rather than having a process which causes a lot of stress and costs. He pointed out

that the only option for payment was by way of cheque or credit card, which was dependent on the mail system; internet banking was not an option but should be; nor was payment by instalments. He felt these were options which needed to be looked at.

Penalty – legal principles:

13. As for sentencing principles, there is a convenient summary of these contained in *Roberts v Professional Conduct Committee*⁹ where Collins J identified the following eight factors as being relevant whenever the Tribunal is determining an appropriate penalty. They are which penalty:

- "(1) most appropriately protects the public and deters others;
- (2) facilitates the Tribunal's "important" role in setting professional standards;
- (3) punishes the practitioner;
- (4) allows for the rehabilitation of the health practitioner;
- (5) promotes consistency with penalties in similar cases;
- (6) reflects the seriousness of the misconduct;
- (7) is the least restrictive penalty appropriate in the circumstances; and
- (8) looked at overall, is the penalty which is "*fair, reasonable and proportionate in the circumstances*".

14. Reference was also made to other cases which it was said were comparable including:

14.1. *Dr E*:¹⁰ Dr E was a registered dentist who practised his profession between 1 October 2011 and 4 November 2011 without holding a current practising certificate. A penalty of \$500.00 was imposed, as well as an order for costs of \$5,000.00.

⁹ [2012] NZHC 3354 at [44]-[51]

¹⁰ *Supra*

- 14.2. *Dr S*:¹¹ Dr S practised his profession between 1 October 2010 and 30 April 2011 when he did not have a current practising certificate. The Tribunal censured *Dr S* and ordered him to pay a fine of \$2,000.00 (noting there were no submissions as to his financial circumstances) and costs of \$12,000.00.
- 14.3. *Mr Henderson*:¹² Mr Henderson was a registered pharmacist who practised his profession between 4 May 2010 and October 2010 without holding a current practising certificate. He was censured, ordered to pay a fine of \$2,000.00, and an order of costs of \$20,525.00.
- 14.4. *Ms H*:¹³ Ms H was a registered psychologist who practised her profession between 1 April 2005 and 20 June 2008 without holding a current practising certificate. There was an order of censure, and a fine of \$4,000.00, but this was reduced to \$2,000.00 on appeal.¹⁴ She was also ordered to pay costs of \$4,000.00.
- 14.5. *Ms O*:¹⁵ Ms O was a registered occupational technician who practised her profession between 1 April 2005 and 11 February 2009 without holding a practising certificate. Ms O was censured, ordered to pay a fine of \$1,400.00, and costs of \$2,000.00.
- 14.6. *Mr White*:¹⁶ Mr White was a registered optometrist who practised his profession between 1 April 2010 and 3 May 2010, and 13 May 2010 and 1 July 2010, when he did not hold a practising certificate (during the second period his APC had been suspended following a failure to complete a recertification

¹¹ Supra

¹² Supra

¹³ Supra

¹⁴ Supra

¹⁵ Supra

¹⁶ Supra

programme). The Tribunal made an order censuring Mr White, ordered him to pay a fine of \$1,250.00, and costs of \$3,500.00.

Penalty – discussion:

15. The Tribunal considers that the following aggravating factors exist in this case:
 - 15.1. Mr Devine decided to become registered, and thereby accepted the professional obligations that of a company registration. The APC is a cornerstone requirement of the Act, ensuring that the standards which the company registration can be maintained.
 - 15.2. The application form was received by Mr Devine in early March (because it was on hand to complete on 27 March 2012). Even though he had the form as at early March and worked on it prior to the end of the month, he did not take the step of sending it in a timely way as he should have.
 - 15.3. There were three email reminders; he had not notified the Dental Council that the email address was that of his wife and this might cause difficulties for him; he had to expect that it would be used by the regulatory authority.
16. There are the following mitigating factors:
 - 16.1. The period during which Mr Devine practised is relatively short, and in respect of two patients only.
 - 16.2. There were a number of personal factors, which affected the administration of Mr Devine's practice. It appears that he found administration challenging.
 - 16.3. There had been a pattern of previous late payments which had not been the subject of disciplinary charges, and in this particular case Mr Devine had a false sense of security on the issue.
17. The Tribunal is satisfied that an order of censure is appropriate. In censuring Mr Devine the Tribunal makes it clear that there is a personal responsibility on all dental technicians to apply for and obtain a current practising certificate in order to

practise within their profession.

18. Having regard to the various factors reviewed above, including Mr Devine's financial circumstances, the Tribunal considers that a fine of \$500.00 is appropriate.
19. As regards costs, the total costs were in the order of \$15,600.00. There was considerable cooperation, and some evidence of impecuniosity. Having regard to previous costs orders, the Tribunal considers an appropriate figure for costs to be \$1,750.00.

Conclusion:

20. The conclusions of the Tribunal are:
 - 20.1. The charge is established.
 - 20.2. There is an order of censure to mark the Tribunal's disapproval of the conduct it was required to consider.
 - 20.3. Having regard to the aggravating and mitigating factors including Mr Devine's financial circumstances, the Tribunal orders him to pay a fine of \$500.00.
 - 20.4. The Tribunal orders Mr Devine to pay a total sum of \$1,750.00 in respect of costs, exclusive of GST; that is:
 - 20.4.1. \$750.00 in respect of the costs and disbursements of the Tribunal.
 - 20.4.2. \$1,000.00 in respect of the costs and disbursements of the PCC.
21. 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 details of this decision in the newsletter of the Dental Council of New Zealand, and on the Dental Council website.

DATED at Wellington this 8th day of July 2013

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 B A Corkill QC
 Chairperson
 Health Practitioners Disciplinary Tribunal