



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 556/Dtech13/233P

IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003

AND

IN THE MATTER of disciplinary proceedings against
CARL TRACEY STOKES,
Registered Dental Technician and
Clinical Dental Technician
formerly of Waikanae now of
Australia

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 C T Stokes by telephone from Australia

Introduction:

1. On 15 January 2013 a Professional Conduct Committee (PCC) laid a charge against Mr C T Stokes, a registered dental technician and clinical dental technician, who was previously based in Waikanae but now lives in Australia.
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 Stokes, a registered dental technician and a clinical dental technician, practised the professions of dental technology practice and clinical dental technology practice between on or around 1 April 2012 and 27 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 with regard to APC charges:

3. In *Dr E*¹ 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***

¹ 503/Den/12/219P

disciplinary offence under section 100(1)(d).

(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.”

Hearing:

5. The hearing was conducted in two phases.
6. The first phase related to liability. Mr Stokes joined the hearing at its commencement by telephone from Australia, and indicated that he did not wish to continue to participate for the purposes of the liability hearing.
7. The Tribunal received submissions from Counsel for the PCC with regard to liability, and then adjudicated on liability.
8. For the second phase, Mr Stokes again joined the hearing by telephone from Australia. The Tribunal announced its conclusion that the charge was upheld; submissions were then heard from Counsel for the PCC and from Mr Stokes as to penalty.

The facts:

9. The PCC provided affidavit evidence in support of the assertions in the charge. For that purpose, affidavit evidence was placed before the Tribunal from Ms C A Young, Deputy Registrar of the Dental Council, Ms P M Huitema, Chairperson of the PCC,

and Ms W J Wells, Practice Manager of Vivian Street Dental in Palmerston North, where Mr Stokes had worked as a clinical dental technician from time to time.

10. The key dates in the chronology of events as confirmed by the affidavits are:
- 10.1. On 1 March 2012, an Annual Practising Certificate renewal form was sent to all dental technicians and clinical dental technicians, including Mr Stokes.
- 10.2. Additionally, on 2 March 2012, the Dental Council wrote to Mr Stokes at the postal address listed on the register at the time, namely 13 Koromiko Road, Waikanae. A letter reminded Mr Stokes that his APC would expire on 31 March 2012.
- 10.3. On 8 March 2012, the application form sent to Mr Stokes on 1 March 2012 was returned to the Dental Council undelivered. A Dental Council staff member spoke to Mr Stokes and obtained change of address details; the APC application form was then forwarded to him at the P O Box address provided by him.
- 10.4. On 14 March 2012, the Dental Council's letter dated 2 March 2012 was also returned to the Dental Council undelivered. A Dental Council staff member telephoned Mr Stokes that day and recorded the following:
- "Called to advise about returned mail, but phone went to answer phone where Carl said he had been in a car crash and was not answering his phone until at least March 15. Left a message to advise that we had returned mail and that his APC application would have been sent to the wrong address."*
- 10.5. On 14 March 2012, the Dental Council's letter to Mr Stokes dated 2 March 2012 was forwarded to him at the P O Box he had provided on 8 March 2012.
- 10.6. On the same day, Mr Stokes returned the call from the Dental Council. A Dental Council staff member recorded the conversation as follows:
- "Carl returned Scott's call from this morning. I confirmed with him that the APC application is in the mail to his P O Box address now, but that if he wishes to complete an APC now that he can download and complete one from our website. I also advised him that the APC application that we*

were posting back will have his old address stated but to just cross it out and put his new address on."

- 10.7. On 19 March 2012, the Dental Council sent a reminder letter to Mr Stokes' PO Box address, making it clear that if he intended to practise at any time during the next APC cycle (1 April 2012-31 March 2013) he must hold a current practising certificate. He was further advised that it was unlawful to practise without a current APC.
- 10.8. On 27 March 2012, the Dental Council sent a bulk APC reminder by text message to all practitioners who had notified the Dental Council of their cellphone number, including Mr Stokes.
- 10.9. At midnight on 31 March 2012, Mr Stokes' APC expired.
- 10.10. On 3 April 2012, the Dental Council wrote to Mr Stokes reminding him once again of his APC obligations, and that if he was practising at that time without a current practising certificate, he would be doing so unlawfully and should cease immediately.
- 10.11. On 17 April 2012, the Registrar of the Dental Council wrote to Dental Protection Ltd, ACC, and the Ministry of Health to give notice that registered dental technicians and clinical dental technicians (including Mr Stokes) did not hold current practising certificates.
- 10.12. On 18 April 2012, a Dental Council staff member telephoned Mr Stokes and recorded the following:

"Called Carl on his cellphone and said that I was calling regarding his APC, he said that he sent the form on Monday. I asked if he had received our letter with regards to getting confirmation of his fitness to practise from his doctor following the car accident he had been in. I explained that someone had tried to call him regarding mail we received "returned to sender" and that they got his message saying he was not answering his phone due to being in a car crash. I asked if he would be able to obtain something from his doctor, he said that he had not gone to the doctor, he was not injured, he was just a bit sore, he had only been rear ended in his car ..."

10.13. On 26 April 2012, Mr Stokes completed APC application form was received by the Dental Council. When the Dental Council telephoned his practice to find out if he had been practising, the Dental Council was told that:

"... Carl does not work on a Friday but had been working this week on Monday, Tuesday and Thursday. The receptionist did not know if he had worked last week as she was on holiday last week."

10.14. Thereafter a PCC was established, and, upon requesting information eventually received an undated letter from Mr Stokes by email on 24 August 2012. It stated:

"There are a few reasons that I was late with registration. The last 6mth, apart from the birth of my daughter in September, have been a nightmare. My cousin was killed in a car crash just north of paraparaumu in late September, And my son was admitted to wellington hospital march/april with pneumonia, and I have been involved in two separate nose to tail crashes, one where I was going to visit my wife and new born daughter in wellington, I was rear ended waiting in wellingtons traffic, and the other when I was coming home to have a shower and break from staying with my son, I was rearended at the lights in plimmerton. We have also moved three times since December 2011. From waikanae, to paraparaumu then back to waikanae.

I was in wellington hospital with my son for the 11 days he was in isolation in wellington hospital, As my wife was looking after our new born baby. As soon as I realised that my registration had [lapsed], I got onto it straight away, I didn't see any patients, I only received a couple of courier work from dentists, as I told them I was not at work until my son was better. Being self employed and not working hurt us financially. I did not intentionally submit my registration late, I was worried for my son, and also it was the third, and thankfully final move.

[sic]"

10.15. Subsequently, on 10 September 2012, and upon the PCC requesting further information, Mr Stokes stated by letter of 10 September 2012:

"...my patient information is on the [basedairy] web programme. as i have cancelled it since my move 3 mths ago i do not have access anymore. i know you requested that i give you acces re my son, sorry but i cannot give you that. And i cant [supplyou] with a discharge letter, as it is in a lockup storage unit in paraparaumu. re my cars, [therr] was one police report for the first incident, as he happened to be [gabg] past just after it happened, and the insurance company (tower) said [obe] was not needed for the second one. Getting back to the extra information, my

wife was diagnosed with severe post natal depression, and she was in [wellibgtion] hospital from 3-5 april. while i was in with my son and checking on her, the staff were keeping an eye on her and our new born girl.. with numerous sessions with the [psycatrist], it was suggested that we move away from our current surroundings and preferably closer to family. my wife is english, but that is to far for me, she had family in adelaide, and there was a job going here. i also mentioned to the [psycatrist] that with her suffering this depression... and with me looking after the kids, mataining the house, and running a business, that my marriage was on a [tgin] edge...so moving to Australia, getting a nine to five job, kids in daycare, and nice family to help, can hopfully make my wife better...im sorry if this is not enough [informatio] for you to make [you] decision, hopefully you can now understand why i was 2weeks late in my registration, it [wssnt] intentional, but i [registared] as soon as i realised what the date was. if you decide to cancel my registration, hence not allowing me to work in australia, so be it.

[sic]"

10.16. Subsequently, the PCC sought advice from Capital and Coast DHB as to whether Mr Stokes' son had been treated in Wellington Hospital, as well as his wife who had recently had a daughter at that hospital. The DHB replied stating:

"I have reviewed the electronic records database (called the Medical Applications Portal) at Capital and Coast District Health Board, which details presentations to the Emergency Department, in-patient admission, and out-patient presentations for both Wellington and Kenepuru Hospital.

With the information you have provided, I located the file for Elliott Stokes of 13 Koromiko Road, Waikanae, whose parents are listed as Carl and Donna Stokes. I can confirm that Elliott was not admitted to Wellington Hospital between mid-March and mid-April of 2012.

Apart from the further files relating to Donna Stokes and her daughter, no other patient with that surname was located under any of the three addresses you provided."

10.17. On 8 October 2012, following a request by the PCC a Community Constable from the Waikanae Police stated:

"...I can confirm that Mr Stokes was involved in a minor traffic crash in Wellington on 21 April 2010. There is no record of any other traffic incidents involving him.

There was a fatal crash north of Paraparaumu on 30 September 2011. There is no information to link Mr Stokes with any of the victims."

10.18. Finally on 5 November 2012, Mr Stokes wrote to the PCC stating:

"we were not at koromiko rd in waikanae at the time my son was in hospital. i did not have to contact the police for my second accident as my insurance said i did not have to....also i wasnt aware i had to supply the police with a family history [regardibg] my cousin...i really wish i was making this up, the year since september 2010 had been the worst in my life. i know you've already made up your mind, and nothing i say will change it, ive been under so much pressure and stress since the birth of my daughter, and subsequent problems with my wife, ill be glad when this is over, and youve made your decision. if I have to leave the industry, so be it.

[sic]"

11. The PCC submitted that the three elements of the charge were made out as follows:

- "6. *As to the first element, the Council's records confirm that Mr Stokes has held registration as a dental technician since 17 November 2000 and as a clinical dental technician since 5 December 2005 (paragraph 2 Ms Young's affidavit).*
7. *As to the second element, it is noted that the scope of practice for dental technology, which describes the profession of dental technology, provides (among other things) that:*

The Dental Council defines the practice of Dental Technology as processes and procedures associated with the design, manufacture and repair of fixed and removable oral and extraoral appliances and prostheses prescribed by a practising dental specialist, dentist, clinical dental technician, medical practitioner or other practising health practitioner.

This involves:

- *Selection of appropriate dental materials for the design, manufacture and repair of fixed and removal oral and extraoral appliances and prostheses...*
- *Processes and procedures associated with the design, manufacture and repair of:*
 - *Complete removable dentures and overdentures.*
 - *Removable partial dentures including precision attachments.*
 - *Fixed and removable orthodontic appliances.*
 - *Crowns and bridges including precision attachments on natural teeth and implants*
 -

....

(exhibit CY2, page 10 Ms Young's affidavit)

8. *In contrast, a clinical dental technician is permitted to have direct patient contact for the purposes described in the clinical dental technology scope of practice. The scope of practice for clinical dental technology allows for (among other things):*

....

- *taking impressions and undertaking other non-invasive clinical procedures involved in the fitting of removable complete dentures and the fitting of some other types of removable dentures and oral and extraoral appliances...*
- *taking impressions and undertaking other non-invasive clinical procedures involved in the trial fitting and repair of removable complete and partial implant overdentures prescribed and the final fitting by a dentist or dental specialist.*

(exhibit CY2, page 12 Ms Young's affidavit)

9. *It is submitted that Mr Stokes did practise as a dental technician and/or a clinical dental technician during the period in question. In support of this submission it is noted that:*

- (a) *Mr Stokes acknowledged to the PCC that he did do some work during this time. In particular, he advised the PCC that:*

(i) *he "didn't see any patients, I only received a couple of courier work from dentists" (exhibit PH6, page 18 Ms Huitema's affidavit); and*

(i) *he "did minimal work" (email to PCC, exhibit PH4, page 15 Ms Huitema's affidavit).*

- (b) *Mr Stokes did not provide the PCC with copies of his appointment books for the relevant period (as requested):*

(i) *Mr Stokes advised the PCC in September 2012 that: "my patient information is on the basediary web programme. As I have cancelled it since my move 3 months ago I do not have access anymore" (Mr Stokes' email to PCC, exhibit PH8, page 25 Ms Huitema's affidavit); and*

(ii) *Basediary advised the PCC that it is the responsibility of practitioners to download their patient and clinic information before ceasing to use the service (paragraph 3(i) Ms Huitema's affidavit).*

It is acknowledged that for these reasons there is no formal record of Mr Stokes' practice during the period in question.

- (c) *However, Mrs Wendy Wells, the practice manager at Vivian Street Dental in Palmerston North, has deposed that:*
- (i) *Mr Stokes ran his own business out of the Vivian Street surgery up until June 2012. He managed his own appointment book (paragraph 2 & 3, Mrs Wells' affidavit);*
 - (ii) *During that time he would mostly see his patients in the morning, and then return to Waikanae later in the afternoon where he completed his dental tech work at a laboratory he had there (paragraph 4 Mrs Wells' affidavit);*
 - (iii) *Mr Stokes was renting the surgery during April 2012. Mrs Wells says that at that time she worked afternoons, arriving at around midday, and: "On most days when I arrived at work Mr Stokes would still be at work seeing patients when I arrived" (paragraph 5, Mrs Wells' affidavit);*
 - (iv) *She worked full time hours during the week of 16 April to 20 April 2012: "Mr Stokes was definitely coming into the surgery that week. I did see him on many occasions during April 2012, but I cannot say the exact dates. He was definitely seeing patients"; and*
 - (v) *The reception desk is in a central area in the practice. Mrs Wells would see Mr Stokes whenever he was at work: "I would talk to him, and I would see his patients as they arrived for appointments with him, and when they left the surgery. I can see all the comings and goings from this desk" (paragraph 7, Mrs Wells' affidavit).*
- (d) *Finally, it is noted that Mr Stokes was self-employed and that he indicated to the PCC that his dental technology practice was his sole source of income.*
10. *It is submitted that this evidence demonstrates that it is more likely than not, on the balance of probabilities, that Mr Stokes was carrying out tasks as a dental technician and/or clinical dental technician following the expiry of his APC on 31 March 2012.*
11. *It is also relevant to refer to Mr Stokes explanations for the delay in renewing his APC; it is submitted that these explanations were also used by Mr Stokes to support his assertion that he did only minimal work over the period in question. These explanations included:*
- (a) *That his son was in isolation at Wellington Hospital with pneumonia from mid-March to mid-April 2012, and he was with him the majority of that time; and*

- (b) *He was involved in two separate nose-to-tail accidents (one when visiting his wife and newborn daughter in Wellington, and another when coming home from staying with his son in hospital).*

12. *It is noted that:*

(a) *Mr Stokes:*

(i) *did not provide the PCC with a statutory declaration supporting the veracity of the information relating to those explanations, as expressly requested by the PCC in its letter dated 3 September 2012 (see exhibit PH7, page 21 Ms Huitema's affidavit);*

(ii) *informed the PCC that: "I know you requested that I give you access re my son, sorry but I cannot give you that and I can't supply you with a discharge letter, as it is in a lockup storage unit in Paraparaumu. re my cars, there was one police report for the first incident, as he happened to be going past just after it happened, and the insurance company said one was not needed for the second one" (exhibit PH8, page 25 Ms Huitema's affidavit); and*

(iii) *failed or refused to sign consent forms authorising the PCC to obtain information relating to the explanations referred to above.*

(b) *The PCC's investigation revealed:*

(i) *Mr Stokes' son "was not admitted to Wellington Hospital between mid-March and mid-April of 2012" (letter from C&CDHB, exhibit PH12, page 31 Mrs Huitema's affidavit); and*

(ii) *While Mr Stokes had been involved in a minor traffic accident in Wellington in April 2010, there was no other record of any other traffic incidents involving him (letter from Police, exhibit PH13, page 32 Mrs Huitema's affidavit).*

13. *It is submitted that the matters discovered by the PCC impinge on the credibility of Mr Stokes' statement that he did only minimal work, and did not see patients, over this period.*

...

16. *It is a matter for the Tribunal to determine whether it accepts Mr Stokes' account of events or whether it prefers the evidence of the PCC which tends to discount Mr Stokes account of his practice over the relevant period. It is submitted that:*

- (a) *Mr Stokes' assertion as to the extent of his practice over this period is significantly undermined by: his failure or refusal to confirm the veracity of his explanations (by statutory declaration); the fact that his explanations were found wanting; and in light of Mrs Wells evidence; and*
- (b) *The logical conclusion on the basis of the evidence before the Tribunal is that Mr Stokes practised his profession for greater periods than he has suggested, and that this occurred between on or around 1 April 2012 and 27 April 2012.*

17. *Finally, as to the third element, Mr Stokes' practising certificate expired at midnight on 31 March 2012 (paragraph 13 Ms Young's affidavit). The Council's records confirm that a practising certificate was not issued to Mr Stokes until 27 April 2012 (exhibit CY1, page 8 Ms Young's affidavit).*

Intention and knowledge

18. *The PCC submits that to establish a charge brought under section 100(1)(d) HPCA Act it is sufficient to show that the practitioner was registered, that he or she had not renewed their APC, and that he or she was practising the profession during that period.*

...

20. *It is further submitted that in order to prove the charge it is not necessary for the PCC to establish that disciplinary sanction is required for the purpose of protecting the public and/or maintaining professional standards and/or punishing the health practitioner (as is required with a charge of professional misconduct).*

...

21. *Notwithstanding those matters, the documents before the Tribunal demonstrate that:*

- (a) *Mr Stokes was sent two written reminders that his APC would expire on 31 March 2012. Mr Stokes was expressly advised that it was unlawful to practise without a current practising certificate (exhibit CY7, page 22 Ms Young's affidavit);*
- (b) *Mr Stokes was also sent a text reminder on 27 March 2012 to submit his application for an APC before 31 March 2012 (exhibit CY8, page 24 Ms Young's affidavit);*
- (c) *Despite being advised that his APC would expire on 31 March 2012, it is apparent that Mr Stokes practised as a dental technician and/or clinical dental technician without first ensuring that he was lawfully entitled to practise;*

- (d) *Following the expiry of his APC Mr Stokes was reminded, in writing, that he was not lawfully entitled to practise until an APC had been issued (exhibit CY9 (letter dated 3 April 2012), page 25 Ms Young's affidavit);*
- (e) *Despite being formally advised that he was not entitled practise until an APC had been issued it is apparent that Mr Stokes continued to see patients at his practice at Vivian Street Dental during April 2012 (see in particular paragraph 6 Mrs Wells' affidavit).*
22. *The PCC submits that the evidence before the Tribunal is sufficient to establish, on the balance of probabilities, that Mr Stokes was a registered dental technician and clinical dental technician, that he practised the profession of dental technology and/or clinical dental technology between on or around 1 April 2012 and 27 April 2012, and that he did not hold a current practising certificate at the time of that practise.*
23. *It is respectfully submitted that the Tribunal ought to have no real difficulty in concluding that the charge laid under section 100(1)(d) has been proven to the requisite standard."*

Discussion as to liability:

12. The Tribunal considers the submissions made for the PCC to represent an accurate description of the events, with regard to three elements which the Tribunal must consider:
- 12.1. As to the first, it is clear that Mr Stokes held registration as a dental technician since 17 November 2000, and as a clinical dental technician since 5 December 2005. Under the Health Practitioners Competence Assurance (Restricted Activities) Order 2005, clinical procedures involved in the insertion and maintenance of fixed and removable orthodontic or oral and maxillofacial prosthetic appliances fall within the definition of "*restricted activities*". Consequently, under section 9(4) of the Act, a person may not perform that activity unless he or she is a health practitioner who is permitted by his or her scope of practice to perform that activity. The relevant scopes are described at paragraphs 7 and 8 of the PCC's submissions. Accordingly, in order to conduct

those activities, a practitioner must be registered, as Mr Stokes was. The first element is established.

12.2. Turning to the second element, which is whether Mr Stokes practised as a dental technician and a clinical dental technician in the period 1-27 April 2012, the Tribunal accepts the submissions made at paragraph 9 of the PCC's submissions. There is direct evidence to this effect from Ms Wells, who confirmed that in the week of 16-20 April she was working full time, and that Mr Stokes definitely came into the surgery and was seeing patients in that period (paragraph 9(c) of the PCC's submissions). The Tribunal finds that Mr Stokes saw multiple patients in that week; and that it is probable he also saw other patients across the period of the charge given that he was renting premises and going into the Vivian Street surgery from time to time as Ms Wells has confirmed. The second element is established.

12.3. The third element relates to whether an APC was held. The evidence confirms that Mr Stokes' previous APC expired on 31 March 2012; and that a completed APC application form was not received by the Dental Council until 26 April 2012. For that period Mr Stokes did not hold an APC. The third element is established.

13. Accordingly the charge is established.

Penalty:

14. The Tribunal announced its conclusion to the effect the charge was established, and received submissions as to penalty.

15. For the PCC it was submitted:

15.1. Since his registration in November 2000 Mr Stokes had practised in a regulatory environment that required him to hold a current APC in order to

practise. He knew or ought to have known of the legal requirement to do so, before practising his profession.

- 15.2. Registration brings privileges and responsibilities, and the onus is on each individual practitioner to comply with the regulatory requirements.
 - 15.3. The Tribunal had previously accepted that even inadvertent or unintentional lapses in meeting this obligation were deserving of the imposition of penalties – predominantly orders of censure and a fine.
16. It was submitted there were aggravating factors as follows:
- 16.1. Mr Stokes was sent three reminders prior to the expiry of his APC (2 March 2012, 19 March 2012 and 27 March 2012).
 - 16.2. In a letter of 3 April 2012 the Deputy Registrar advised Mr Stokes amongst other things that if he was practising at that time without a current practising certificate, he was doing so unlawfully and he should desist immediately.
 - 16.3. He was also advised of the serious consequences of practising without a current practising certificate, including the possibility of the situation being referred to a PCC.
 - 16.4. Notwithstanding these reminders and warnings, he continued to practise.
 - 16.5. It was submitted that a further aggravating factor was that Mr Stokes did not fully cooperate with the PCC's investigation; his suggestion to the PCC that he undertook only minimal practice during the period did not ring true.
17. As a matter of principle, the PCC submitted:
- 17.1. An annual practising certificate is an important aspect of meeting the principle purpose of the HPCA Act, which is to protect the health and safety of the public.
 - 17.2. A practising certificate is, in effect, notice to the world that a practitioner is fit and competent to practise.

- 17.3. A registered practitioner's failure to comply with the requirement to hold a current practising certificate undermines the fundamental premise on which the regulatory regime operates.
- 17.4. The PCC accordingly submitted that there should be an order of censure, and a fine of between \$500.00 and \$1,500.00; and that he should make a contribution to costs; it was submitted the PCC costs would be in the range of \$16,000.00 to \$18,000.00 excluding GST.
- 17.5. The Tribunal's costs were \$8,130.00.
18. Mr Stokes, who joined the hearing by telephone for penalty purposes stated:
- 18.1. He knew he had acted wrongly, and took responsibility for doing so. He did not "*willingly realise*" the APC had expired.
- 18.2. If he has to pay a fine, he would, though he did not know how he would do so as he had no money. There were personal circumstances to which he referred, including details of his financial debts.
- 18.3. He did not propose to return to practice in New Zealand, and wanted to live in Australia. He did not want to own a business, and was enjoying working for someone else as an orthodontist in South Australia. He had learned much since he had transferred to Australia.

Penalty – legal principles:

19. As for sentencing principles, there is a convenient summary of these contained in *Roberts v Professional Conduct Committee*² 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 [2012] NZHC 3354 at [44]-[51]

- (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.*"

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

20.1. *Dr E*:³ 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.

20.2. *Dr S*:⁴ 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.

20.3. *Mr Henderson*:⁵ 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.

20.4. *Ms H*:⁶ Ms H was a registered psychologist who practised her profession between 1 April 2005 and 20 June 2008 without holding a current practising

³ 503/Den12/219P

⁴ 445/Den11/198P

⁵ 477/Phar12/210P & Phar12/213P

⁶ 256/Psy09/128P

certificate. There was an order of censure, and a fine of \$4,000.00, but this was reduced to \$2,000.00 on appeal.⁷ She was also ordered to pay costs of \$4,000.00.

20.5. *Ms O*:⁸ 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.

20.6. *Mr White*:⁹ 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.

Penalty – discussion:

21. The Tribunal considered that the following were aggravating factors:

21.1. Mr Stokes had decided to become registered, and had to accept the obligations and consequences that flowed as a result. The holding of an APC is a central requirement of the regulatory regime, and is a means by which that authority can be sure that appropriate standards are being maintained. It assists in ensuring that the objects of the Act are met.

21.2. There were multiple reminders. Particularly significant was the telephone conversation with Mr Stokes on 14 March 2012, when a member of the Dental Council staff spoke to Mr Stokes and confirmed that his APC application was in the mail to him. It must have been apparent from that time onwards that his

⁷ *GS v Professional Conduct Committee* [2010] NZAR 417

⁸ 274/OT09/132P

⁹ 366/Opt10/168P

APC was about to expire; and as an experienced practitioner he should have been aware that from 1 April 2012 he could not practise without holding an APC.

21.3. Mr Stokes worked in April 2012 as a clinical dental technician. There were not the checks and balances that might be thought to exist in respect of a dental technician receiving work from a clinical colleague.

22. As regards mitigating factors:

22.1. It is apparent there were some relationship difficulties, although the evidence was not particularly clear as to the timing of this. Mr Stokes had some pressures at the time of the birth of his daughter, and there were ongoing relationship issues thereafter which resulted in him transferring to Australia for work purposes, and apparently having primary care of his children.

22.2. There is some indication of financial debts, being amounts due to dental companies and in respect of credit cards. However, it would seem that Mr Stokes is now in a more secure financial position than he may have been in the latter stages of his time in New Zealand, although he still has debts and responsibilities to his children. Whilst there are some issues as to Mr Stokes' credibility, the Tribunal is satisfied that there was an element of hardship at the time of the breaches.

23. A fine has been sought within the range of \$500.00-\$1,500.00. Balancing the above factors and having regard to the comparable cases described above, the Tribunal considers the appropriate fine is \$1,500.00.

24. An order of censure is also appropriate to formally mark the breach which has occurred.

Costs:

25. An order for costs has been sought.
26. The legal position with regard to costs is that the Tribunal is required to take 50% of the total reasonable costs, and then take into consideration any aggravating or mitigating factors relating to costs; the Tribunal is also required to consider the financial circumstances of the practitioner.
27. The main mitigating factor in the present case is that the proceeding was not defended, and was able to be dealt with in an efficient way by the provision of affidavits, with the witnesses not being required for questioning and with Mr Stokes joining the Tribunal by telephone from Australia.
28. Against that, however, is the somewhat protracted nature of the PCC's investigation, in that detailed inquiries needed to be undertaken with regard to Mr Stokes' explanations. It transpired those "*explanations*" were not altogether accurate, and Mr Stokes had somewhat exaggerated his reasons for not obtaining an APC in a timely way, when he should have. In short, the PCC was required to devote more effort to establishing the correct position than should have been necessary. This must be reflected in the quantum of costs which the Tribunal now orders.
29. It is again necessary to refer to Mr Stokes' financial circumstances. It appears he is in a more secure financial position in Australia than he was in New Zealand and he does have debts and responsibilities to his children.
30. In all those circumstances the Tribunal has determined that a total quantum of \$9,000.00 in respect of costs is appropriate.
31. On the somewhat limited information the Tribunal has, it may not be straightforward for Mr Stokes to pay the fine and costs immediately; that, however, is a matter which will need to be discussed carefully between the Dental Council and Mr Stokes –

although it is of course for the Dental Council to determine how it should enforce the orders made by the Tribunal.

Non-publication of name:

32. Prior to the hearing an interim order of non-publication of Mr Stokes' name was made; after the hearing he applied for an order of permanent non-publication of name. The reasons he gave were:

32.1. The Dental Technician group is small in New Zealand.

32.2. It was not his intention to be late in applying for an APC.

32.3. The stigma of a finding that he practised without registration would be damaging to his wellbeing, particularly as he was already under stress for personal reasons.

33. With regard to this application, the PCC submitted:

33.1. Publication of Mr Stokes' name is relevant to the accountability of the disciplinary process – a person's identity is also an essential part of the transparency of that process.

33.2. Non publication means that other dental technicians could be unfairly impugned. Thus in *Davy v The Professional Conduct Committee of the Nursing Council*¹⁰ the Court stated:

"... A person's identity has been regarded as an essential part of the transparency of a process. I consider this to be so plainly correct that it is not necessary to dwell on it. Suspicions about who it is, and why their identity is being guarded, will inevitably lessen the standing of a system such as that envisaged by the appellant's submission."

33.3. There is a public interest in knowing the identity of practitioners who have been found guilty of a disciplinary offence. Mr Stokes' lapse should not give

¹⁰ [2012] NZHC 765 at [11]

rise to different treatment particularly in the absence of compelling evidence of the risks publication would have on his wellbeing. As stated in *Tonga v Director of Proceedings*:¹¹

"[42] Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases ..."

- 33.4. Although Mr Stokes stated his lapse was unintentional, and he indicated that the lapse was insignificant (which was not accepted by the PCC) that alone is an insufficient basis for permanent name suppression. Distress and embarrassment associated with disciplinary charges is not uncommon for any practitioner appearing before the Tribunal. The factors identified by Mr Stokes could not be regarded as being "above and beyond" what might be expected in the circumstances.
- 33.5. There was no reliable evidence as to the nature of Mr Stokes' stress, nor any evidence as to how publication would be damaging to Mr Stokes' wellbeing.
34. The Tribunal is satisfied that the cases referred to by the PCC accurately summarise the key legal principles which the Tribunal is required to consider. The important principles of open justice must be recognised. In the preponderance of cases, once a charge is established, the probability is that the public interest will require the practitioner's name to be published.
35. That said, there are instances where a practitioner can establish that his or her circumstances are sufficiently compelling as to satisfy the Tribunal that it is appropriate to make an order, notwithstanding the importance of the public interest in knowing when a practitioner has been found guilty of a professional disciplinary offence.

¹¹ HC Christchurch, CIV-2005-409-002244 21 February 2006, by Pankhurst J

36. In *Anderson v PCC*¹² stated:

"[36] Private interests will include the health interests of a practitioner, matters that may affect a family and their wellbeing, and rehabilitation. Correspondingly, interest such as protection of the public, maintenance of professional standards, both openness and 'transparency' and accountability of the disciplinary process, the basic value of freedom to receive and impart information, the public interest knowing the identity of a practitioner found guilty of professional misconduct, the risk of other doctors' reputations being affected by suspicion, are all factors to be weighed on the scales.

[37] Those factors were also referred to at some length in the Tribunal. Of course publication of a practitioner's name is often seen by the practitioner to be punitive but its purpose is to protect and advance the public interest by ensuring that it is informed of the disciplinary process and of practitioners who may be guilty of malpractice or professional misconduct. It reflects also the principles of openness of such proceedings, and freedom to receive and impart information."

37. This dicta provides a helpful reminder of the correct approach to this matter.

38. The Tribunal considers that it is necessary, in order to protect and advance the public interest, that the public be informed of the outcome of this proceeding. Practitioners who do not comply with their professional obligations must recognise that publication of name will occur, unless there are particular factors which satisfy the Tribunal that a contrary approach is appropriate. The factors raised by Mr Stokes in this case are not sufficient as to persuade the Tribunal it should make an order of non-publication of name.

39. The Tribunal is not satisfied that in the present circumstances it should make an order. Accordingly the interim order of non-publication of name is discharged.

Conclusion:

40. At the conclusion of the hearing, the Tribunal announced the following outcomes:

¹² High Court, Wellington, CIV-2008-485-1646, 14 November 2008, Gendall J

- 40.1. That there would be an order of censure to mark the Tribunal's disapproval of the conduct it was required to consider.
- 40.2. Having regard to the aggravating and mitigating factors including Mr Stokes' financial circumstances, the Tribunal ordered a fine of \$1,500.00.
- 40.3. The Tribunal ordered Mr Stokes to pay a total sum of \$9,000.00 in respect of costs, exclusive of GST; that is:
 - 40.3.1. \$2,000.00 in respect of the costs and disbursements of the Tribunal.
 - 40.3.2. \$7,000.00 in respect of the costs and disbursements of the PCC.
- 40.4. 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