



New Zealand
Health Practitioners
Disciplinary Tribunal

Level 13, Mid City Tower, 139 Willis Street, Wellington 6011
PO Box 11649, Manners Street, Wellington 6142, New Zealand
Telephone: 64 4 381 6816 Facsimile: 64 4 802 4831
Email: kdavies@hpdt.org.nz
Website: www.hpdt.org.nz

DECISION NO: 554/Dtech13/236P
IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003
-AND-

IN THE MATTER of a Charge laid by a Professional
Conduct Committee pursuant to
Section 91(1)(b) of the Act against
**CHRISTIAAN JACOBUS
WOLMARANS**, registered dental
technician of Auckland.

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr D M Carden (Chair)
Ms T Burke, Mr J Batchelor, Mr K Lock and Ms A Kinzett
(Members)

Ms K Davies (Executive Officer)

Ms H Hoffman (Stenographer)

Hearing held at Auckland on 31 May 2013

APPEARANCES: Ms A Miller for the Professional Conduct Committee
The practitioner, Christiaan Jacobus Wolmarans, in person

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Introduction

1. Mr Christiaan Jacobus Wolmarans is a registered dental technician practising in Auckland. Before his Annual Practising Certificate (“APC”) expired on 31 March 2012 he was sent reminders by the Dental Council of New Zealand (“Dental Council”) of the need to renew this. Despite those reminders he did not complete the necessary application or pay the appropriate fee for renewal in time and it was not until 23 April 2012 that he received the renewed APC. Between 1 April 2012 and 23 April 2012 Mr Wolmarans did practise the profession of dental technology. The matter was investigated by a Professional Conduct Committee (“PCC”) of the Dental Council which laid a Charge before the Tribunal.

The Charge

1. The Charge read as follows:

“TAKE NOTICE that a Professional Conduct Committee of the Dental Council established under section 71 of the Health Practitioners Competence Assurance Act 2003 (“the Act”) has determined in accordance with section 80(3)(b) of the Act that a disciplinary charge should be brought against Mr Christiaan Jacobus Wolmarans before the Health Practitioners Disciplinary Tribunal.

The Professional Conduct Committee has reason to believe that grounds exist entitling the Tribunal to exercise its powers under section 100 of the Act.

PARTICULARS OF CHARGE

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Mr Wolmarans, a registered dental technician practised the profession of dental technology practice between, on or around 1 April 2012 and 23 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.”

2. At the hearing an Agreed Summary of Facts was produced which read as follows:

1. *“Christiaan Jacobus Wolmarans has been a registered dental technician since 4 July 2002. Mr Wolmarans is registered within the dental technology scope of practice under the Health Practitioners Competence Assurance Act 2003.*
2. *From the date of his registration Mr Wolmarans 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 sent an email to all registered dental technicians, including Mr Wolmarans, advising that:*

We would like to remind all practitioners registered in any of the professions listed above [including dental technician] 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.

....

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 registered dental technicians, including Mr Wolmarans, 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.

...

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.

6. *On 27 March 2012 the Dental Council sent a third email reminder to those dental technicians, including Mr Wolmarans, 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.

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)

7. *At midnight on 31 March 2012 Mr Wolmarans' APC expired.*
8. *On 2 April 2012 a Dental Council staff member telephoned Mr Wolmarans and recorded the following file note:*

Phoned Christiaan, advised that we had received his form in this morning and that a late fee would apply. In addition confirmation of his Emergency Care Training Course was not attached

...

9. *Also on 2 April 2012, the same staff member emailed Mr Wolmarans, stating:*

Further to my telephone call to you this morning, we have received your Application for Annual Practising Certificate this morning

....

You do not hold an APC, and therefore cannot practise until a new APC has been issued (section 7 of the Health Practitioners Competence Assurance Act 2003 ("the Act"))

(Emphasis in original)

10. *On 3 April 2012 the [Senior Registration Officer – corrected at the hearing]... of the Dental Council wrote to Mr Wolmarans. The letter was posted to the postal address identified on both his 2011/2012 and 2012/2013 APC application forms. The letter stated:*

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 below which need to be completed before you can be issued with an APC for the 2012/13 practising year.

...

You do not hold an APC, and therefore you cannot practice until a new APC has been issued (section 7 of the Health Practitioners Competence Assurance Act 2003 ("the Act"))

...

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)

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 Wolmarans, 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 telephoned Mr Wolmarans. The staff member recorded the following file note:*

I asked if he had received [the returned Application form]. He had just cleared the mail and went through it while I was on the phone and found his returned form...

I asked him to complete [the form]... and fast post the form back to us as he currently doesn't hold and [sic] APC and so is not allowed to work.

...

13. *On 23 April 2012 a Dental Council staff member called Mr Wolmarans, and recorded the following file note:*

I rang and spoke to Christiaan about his APC that arrived in the post today

...

I went on to ask if he had been practising since the 1st of April. He advised that he had done so apart from a week where he was on

holiday over Easter. Christiaan said that he felt that it was ok for him to practise as he had sent his form into the Council previously, which had arrived on 2 April 2012, which also meant that it was late....

- 14. An APC was issued to Mr Wolmarans on 23 April 2012. The APC was sent to him under cover of letter of the same date. The letter stated: "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. If you continued to practise after 31 March you were doing so unlawfully". Mr Wolmarans was also advised that his case had been referred to the Dental Council for consideration of referral to a PCC. He was invited to provide any supporting documentation.*
- 15. On 30 April 2012 Mr Wolmarans wrote a letter to the Dental Council, stating:*

On Friday, 30 March 2012, I mailed my completed application form in the post, addressed to the Dental Council.

On Monday, 2 April 2012, I was notified by the Dental Council that my application form was received, however, without the proof of registration for the first aid certificate. In an oversight, I accidentally omitted the proof of registration letter for the first aid course which I was booked in to attend on Monday, 16 April 2012.

The lab then closed two days later, from Wednesday, 4 April 2012 to Monday, 16 April, 2012, resulting in a delay of posting the proof of registration for the for [sic] first aid course.

After attending the first aid course on Monday, 16 April 2012, I was contacted by the Dental Council again on Tuesday, 17 April 2012, reminding me that no documentation relating to the first aid course has been received.

I posted a copy of the first aid certificate via fast post on Tuesday, 17 April 2012

- 16. On 30 April the Dental Council wrote to Mr Wolmarans stating that there had been an error in its letter of 23 April 2012 and reissuing the letter.*
- 17. A PCC was subsequently appointed to investigate whether Mr Wolmarans had practised the profession at a time when he did not hold a current practising certificate.*

18. By letter dated 31 October 2012 Mr Wolmarans wrote to the PCC. His letter stated:

[P]lease find herewith my recollection of details relating to my APC for the period 1 April 2012 – 23 April 2012:

<i>31 March 2012</i>	<i>APC form was posted to the Dental Council</i>
<i>3 April 2012</i>	<i>Worked until late at night to get everything finished before the lab closed for a few days</i>
<i>3 April 2012</i>	<i>According to Council a letter was posted to the lab on this date. We have no record of this letter ...</i>
<i>4 April 2012</i>	<i>The work finished the night before (3 April) was invoiced and dispatched before closing. No new work was started.</i>
<i>4-16 April 2012</i>	<i>The lab was closed.</i>
<i>16 April 2012</i>	<i>Attended a full day First Aid course</i>
	<i>...</i>
<i>23 April 2012</i>	<i>Received a call from the Council and got advised to stop work immediately until the APC was issued. Stopped immediately. (This was the first time I was notified by the Council not to work until the new APC was issued).</i>

The reason for closing the lab, was to take time out to spend with close family (my two sisters) who came to visit us for the first time in NZ.

...

Please note at no time was it my deliberate attempt to mislead anybody. I apologise for any negligence on my part.

19. Enclosed with Mr Wolmaran's letter of 31 October 2012 were:

- (a) *flight details for Miss Suzette Stolt recording her arrival in New Zealand on 31 March 2012 and departure on 15 April 2012;*
- (b) *a Hibiscus Dental Laboratory Limited Sales Register recording no sales between 5 and 16 April 2012 (inclusive); and*
- (c) *a St John training certificate for Chris Wolmarans dated 16 April 2016.*

20. *The Hibiscus Dental Laboratory Sales Register records the following entries for April 2012:*

<i>2 April 2012</i>	<i>5 entries</i>
<i>3 April</i>	<i>4 entries</i>
<i>4 April</i>	<i>17 entries</i>
<i>17 April</i>	<i>5 entries</i>
<i>20 April</i>	<i>28 entries</i>
<i>26 April</i>	<i>2 entries</i>
<i>27 April</i>	<i>11 entries</i>

21. *In response to a query from the PCC Mr Wolmarans wrote on 26 November 2012 stating:*

The work performed on the Sales Register was performed by me.

I always invoice completed work when the work gets dispatched. I have a two week turn around. Plaster models are poured as soon as possible and most of the work is usually done between one/three days before dispatch completed [sic]. Sometimes work is completed on the day of despatch.

22. *On 11 December 2012 the PCC made a determination to lay a charge. A charge was duly laid before the Health Practitioners Disciplinary Tribunal alleging that Mr Wolmarans had practised his profession at a time when he did not hold a current practising certificate.*

23. *Mr Wolmarans admits that he practised his profession between on or around 1 April 2012 and 23 April 2012 when he did not hold a current practising certificate."*

- 3. The Agreed Summary of Facts was signed by counsel for the PCC and by Mr Wolmarans.
- 4. There was also an Agreed Bundle of Documents produced by consent on the basis that had been canvassed at a preliminary conference namely:

“.. each document in the Bundle:

- (a) is what it purports to be on its face;*
- (b) was signed by any purported signatory shown on its face;*
- (c) was sent by any purported author to, and was received by, any purported addressee on its face;*
- (d) was produced from the custody of the party indicated in the index;*
- (e) is admissible evidence; and*
- (f) is received into evidence as soon as referred to by a witness in evidence, or by counsel in submissions, but not otherwise.”*

5. For the PCC it was submitted that there were the three elements to be proven, namely that during the relevant period:
 - 5.1. Mr Wolmarans was a registered dental technician;
 - 5.2. Mr Wolmarans practised as a dental technician; and
 - 5.3. Mr Wolmarans did not hold a current practising certificate.

6. As to the first element, the PCC referred to the Dental Council records confirming registration at the relevant time. As to the third element, the PCC also referred to records that the APC for the period from 1 April 2012 had not been issued until 23 April 2012. As to the second element, practising during the period as a dental technician the PCC referred to the acknowledgement in paragraph 23 of the Agreed Summary of Facts referred to above. It also noted first that in a telephone conversation with Dental Council staff Mr Wolmarans acknowledged that he had been practising since 1 April 2012 apart from a week where he was on holiday over the Easter period; and secondly that in the correspondence referred to in paragraphs 15 and 18 of the Agreed Summary of Facts there is acknowledgement of having worked during the relevant period. It was submitted that the PCC did not need to establish an intent to flout professional obligations, that the breach was deliberate, that the practitioner knew or ought to have known of the absence of the APC; or that disciplinary sanction was required for the purpose of protecting the public,

maintaining professional standards or punishing the health practitioner. Authorities were referred to.

Deeming provision – section 30(3)

7. The PCC also made express reference to section 30(3) of the Health Practitioners Competence Assurance Act 2003 (HPCA Act) which states:

“Every health practitioner who has submitted an application, accompanied by the fee (if any) set by the authority, for a renewal of an annual practising certificate under section 26(1) is to be treated as the holder of that certificate from the date when the authority receives the application until the date it is issued or he or she is sooner notified by the Registrar that it will not be issued.”

8. With written reference to authority,¹ it was submitted that this provision only applies when an application is submitted prior to the expiry of the current APC. It was further submitted that the “*submission*” to which section 30(3) refers, must occur at the point that the Dental Council receives the application not when it is posted or otherwise sent and the provision can only apply where a completed and signed application form (including supporting documentation) is received. Under section 26 of the HPCA Act (referred to in section 30(3)) the application for an APC is required to be in the form and include information that is specified by (in this case) the Dental Council and accompanied by the set fee.
9. In this case, the facts were that by 31 March 2012 when the previous practising certificate expired the Dental Council had not received the application form and the appropriate fee. The application form as subsequently received from Mr Wolmarans on Monday 2 April 2012 included the following notation: “*Attending the first Aid course on 16-4-2012 (see confirmation attached)*” in response to an entry in the form which required that, if the applicant did not hold a valid Emergency Care Training First Aid Certificate, the applicant attach to the form a copy of enrolment into an

¹ White 366/Opt10/168P

appropriate Emergency Care Training First Aid course. There was in fact no confirmation of registration attached to the application form.

10. The first working day after 31 March 2012 was Monday 2 April 2012. It was the evidence from Mr Wolmarans that he posted the application form (but without the Confirmation of Enrolment at the Emergency Care Training First Aid course) on either Friday 30 March or Saturday 31 March 2012. It was his case that the Dental Council would have received the application form by 31 March 2012 and the fact that its mail was not opened until Monday 2 April 2012 is not a factor which should count against Mr Wolmarans and it should be taken that he had submitted the forms by the appropriate date. The PCC submitted that the application form was not complete as at 2 April 2012 in that it did not have, although noted to include, the copy enrolment in the Emergency Training Care Training First aid course and therefore was not a complete application.
11. The PCC further submitted that, because the application fee had not been received on time, there was payable pursuant to its rules a late application fee of \$45.00 which had not been included with the form. The appropriate fees had not therefore, it was submitted, been paid.
12. As stated in the Agreed Summary of Facts² the records of the Dental Council show that on 2 April 2012 a staff member telephoned Mr Wolmarans. The full text of the note made at the time reads:

“Phoned Christiann [sic], advised that we had received his form in this morning and that a late fee would now apply. In addition confirmation of his Emergency Care Training Course was not attached.

I asked how he would like this handled, would he like the form returned? He said no.

I asked whether we would be able to obtain credit card details for the

² At paragraph 8

late fee, he said yes. I said I would email the details and if he could respond to that email. He said he would prefer to give me the card details over the phone. I explained that we required authorisation [sic] in writing. He agreed.”

13. The email sent by the Dental Council to Mr Wolmarans on 2 April 2012 is timed at 9.52 a.m.
14. The full text reads as follows:

“Further to my telephone call to you this morning, we have received your Application for Annual Practising Certificate this morning.

Accordingly, an Additional Processing APC Fee applies. This 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 as your form was not received in our office by 31 March 2012 you will be charged a late fee of \$45.00 (GST inclusive), in addition to your APC fee and the Disciplinary Levy.

You do not hold an APC, and therefore you cannot practise until a new APC has been issued (section 7 of the Health Practitioners Competence Assurance Act 2003 (the “Act”).

Please send authorisation by return email to deduct \$45.00 from your credit card. Please include the following details

I (Card Holder Name) authorise the Dental Council to deduct \$45.00 being the Additional Processing Fee for Application for Annual Practising Certificate

***Card Holder name –
Card number –
Expiry date –***

If you do not wish to send your credit card details by email, please fax written authorisation to (04) 499 1668.

Please also forward confirmation of your Emergency Training Care course.”

15. Mr Wolmarans made submissions. Essentially, he accepted that the facts must speak for themselves. He effectively acknowledged that on the facts as agreed the Charge was made out.

16. He did emphasise, however, that he posted the application for renewal of his APC and the appropriate cheque payment in time for it to have reached the Dental Council mailbox by 31 March 2012; and it should not be held against him that that was not a working day or that the Dental Council did not physically open the mail containing his application and cheque until 2 April 2012.
17. Because the email acknowledging receipt of the application referred to was timed at 9.52 a.m. and referred to the earlier conversation that morning, the telephone call must have been made on opening the mail containing the application.
18. Mr Wolmarans challenged that there had been an appropriate application made in time such that the deeming provisions in section 30(3) should apply. His case was essentially that as at 31 March 2012 the Dental Council had under its control both the application for APC and the appropriate fee in payment and that he should be deemed under section 30(3) to be entitled to continue practising until the certificate was in fact received.

Deeming provision – discussion

19. The Tribunal accepts the submission of the PCC that there was not an application submitted to it sufficient to comply with the deeming provisions of section 30(3). Any application must, under section 26(2)(a) of the HPCA Act, be in the form and include the information that is determined by the Dental Council. The form prescribed by the Dental Council and provided to Mr Wolmarans includes on the last page a checklist of relevant documentation requiring to be enclosed and there are six categories of documents listed, one of which includes confirmation of enrolment in an Emergency Care Training First Aid course.
20. The Tribunal finds that an application is not complete unless it includes all of the relevant attachments to which it refers.

21. In this case as at 2 April 2012 the form did not include the attachment required concerning the Emergency Care Training First Aid course and was therefore incomplete. The Tribunal accepts the PCC submission that Mr Wolmarans had not submitted an application in sufficiently adequate form that section 30(3) of the HPCA Act applied and Mr Wolmarans could not therefore be treated as the holder of an APC between that date and the date when the confirmation of the course was received by the Dental Council and the APC was in fact issued.
22. Accordingly, it is not necessary for the Tribunal to decide the further question of whether the submission of an application to which section 30(3) refers is complete at the time an application in proper form (not the case in this case) was received at the mailbox for the Dental Council or the day when it was in fact opened as mail by the Dental Council's staff. That is a matter that can await another case directly on point.
- The reality in this case is that the reminders to Mr Wolmarans had been sent significantly earlier and he had adequate time to complete and send the form (with proper accompanying documents) but he left it until the last moment to do so.

Charge – General Principles

23. The burden of proving the Charge is on the PCC.
24. The standard of proof is the balance of probabilities, the standard that applies in civil litigation. The gravity of the allegation is an important factor. The more serious the allegation, the greater must be the degree of satisfaction on the balance of probabilities³. The balance of probabilities standard is to be applied flexibly, dependent on the seriousness of the matters to be proved and the consequences of proof. The standard in disciplinary proceedings is that of the civil standard of balance of probabilities.

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

25. In *B v Medical Council of New Zealand*.⁴ Elias J (as she then was) said:⁵

“The structure of the disciplinary processes as set up by the Act, which rely in large part upon judgment by a practitioner’s peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners. But the inclusion of lay representatives in a disciplinary process and the right of appeal to this court indicates that usual professional practice, while significant, may not always be determinative: the reasonableness of the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only usual practice but also patient interests and community expectations, including the expectation that professional standards are not permitted to lag. The disciplinary process in part is one of setting standards.”

26. Orders can be made under section 100(1)(d) of the Health Practitioners Competence Assurance Act 2003 if the Tribunal, after conducting a hearing on a Charge laid, finds that the practitioner has practised his or her profession while not holding a current practising certificate.
27. A Charge under section 100(1)(d) of the HPCA Act is absolute in its terms and, once the three elements are established that the practitioner was registered, that he or she had not renewed an APC, and that he or she was practising in the profession during the period of non-renewal, the Charge is made out.
28. In *Henderson*⁶ Mr Henderson, a pharmacist, faced certain charges which included practising without a practising certificate. In relation to a submission based on the facts that any practising without a certificate was inadvertent the Tribunal said:

*“35. The establishing of a charge under section 100(1)(d) of the HPCA Act does not require the PCC to establish that the practitioner intended to practise the profession of pharmacy without a current APC. Previous decisions of the Tribunal have clearly established that there is a failure to comply with an important professional obligation even if the breach is inadvertent or innocent. In *H*⁷ notwithstanding that the fact there had been an inadvertent lapse by a practitioner continuing to practise when she did not hold an APC,*

⁴ Noted in [2005] 3 NZLR 810

⁵ at page 15

⁶ 477/Phar12/210P & Phar12/213P

⁷ 256/Psy09/128P

the elements of the charge were accepted by the Tribunal as being made out.

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)."*

29. It is clear from the Agreed Summary of Facts that the three elements are made out. Mr Wolmarans was at the time registered as a dental technician as he acknowledges; he did not have renewal of his APC until 23 April 2012; and he did practise his profession as a dental technician between 1 and 23 April 2012. There are mitigating factors in that the form and appropriate fee had been posted before the expiry of the previous APC and it was an oversight that these did not include a copy of the registration for the Emergency Care Training First Aid course. There are the further mitigating factors as to the reasons behind the delay in completion of the appropriate documentation and receipt of these by the Dental Council and consequential receipt of the APC by Mr Wolmarans. Those go to penalty but do not affect the fact that the Charge as brought has been made out.
30. Accordingly the decision of the Tribunal is that the Charge is made out.
31. The Tribunal announced the decision at the hearing and the Tribunal proceeded to consider penalty.

Penalty: submissions for the PCC

32. The submissions for the PCC referred first to the functions of disciplinary process and the relevant penalty factors as enunciated in the cases. Reference was made to what were said to be comparable cases which the Tribunal has taken into account.

33. It was submitted that Mr Wolmarans had practised as a registered health practitioner since 2002 and knew, or ought to have known, of the legal requirement to obtain a current APC in order to lawfully practise his profession; that the onus was on him to comply with the requirements imposed; and that previous decisions of the Tribunal found that even inadvertent or unintentional lapses in meeting these obligations deserved the imposition of penalties.
34. The submissions were that the aggravating factors included
- 34.1. That a renewal form for his APC and three reminder emails had been sent to Mr Wolmarans, despite the Dental Council being under no obligation to do so.
- 34.2. That Mr Wolmarans had been reminded on several occasions that he did not have an APC and was not entitled to practise but did so nevertheless.
35. It was said that a clear message had to be sent to the profession that practising without a current practising certificate for any length of time is unacceptable and will not be tolerated by the profession. Emphasis was placed on the important aspect of protecting the health and safety of the public, the principal purpose of the HPCA Act. A practising certificate is, it was said, effectively notice to the world that a practitioner is fit and competent to practise; and the process of considering and issuing practising certificates allows for a degree of scrutiny where there may be concerns of competence or fitness to practise or a requirement for conditions on a practitioner's scope of practice. It was said that the holding of a current APC "*is a cornerstone of the HPCA Act's regulatory regime.*"
36. The penalty that the PCC submitted was appropriate was first that Mr Wolmarans be censured and secondly that he be fined between \$500.00 and \$1,000.00. It was said that these penalties would express disapproval for failure to have regard to the communications from the Dental Council, that the fine would reinforce the high standards expected within the profession, and that these penalties were proportionate

to comparable cases. A contribution to costs was sought and this is referred to below.

Penalty: Mr Wolmarans

37. Mr Wolmarans made oral submissions. He spoke to a letter that he had written to the Tribunal. In that letter he referred to the fact that *“During all the telephone conversations between [him] and the Dental Council staff member, there was no indication given to [him] of just exactly how massive the implications are if the APC is not renewed on time.”* He said he was told more than once that *“it shouldn’t be a problem”* if he just completed the form and posted it back fast post. Mr Wolmarans said the expression *“it shouldn’t be a problem”* meant to him that it is not a serious, disciplinary offence if he continued working while completing the form and fast posted it back. He said that had he been told from the outset that he could not continue working until everything was sorted out, he would definitely have stopped everything he was working on and made a serious urgent effort to send the form off immediately. He said that the first time he was told he should not be working was on 23 April 2012 during a telephone conversation with a Dental Council staff member; and that he then stopped all work immediately. He said he believed that the urgency and importance of renewal of an APC is not apparent from the reminder emails sent by the Dental Council and that people tend to respond better to a one on one conversation rather than another email which *“can easily get lost between the hundreds of other emails every day.”*
38. Mr Wolmarans gave brief details of financial commitments he had to upgrading equipment at his business and referred briefly to his personal family circumstances.

Penalty - principles

39. The Tribunal does not consider that penalties of cancellation of registration, suspension of re-registration, or conditions following practice need be considered.

The Tribunal is authorised under section 101 of the HPCA Act to censure, impose a fine up to \$30,000.00 and to order costs.

40. The functions of disciplinary proceedings have been canvassed by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*.⁸

In that case the practitioner, Mr Roberts, had had his registration as a nurse suspended by the Tribunal for a period of three years, the maximum provided. The Charge against him had included having had an “*inappropriate and/or sexual relationship*” between him and a patient.

41. The Court referred to the following factors which the Tribunal is required to take into account in determining penalty.⁹

41.1. What penalty most appropriately protects the public, a factor identified as the principal purpose of the HPCA Act in section 3, namely:

“... [T]o 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.”

41.2. The important role of setting professional standards.

41.3. A punitive function but this is

“... often viewed as a by-product of the penalties imposed by the Tribunal and that protecting the public and setting professional standards are the most important factors for the Tribunal to bear in mind when setting a penalty.”¹⁰

41.4. Rehabilitation of the health professional. The court recorded that:

“A reason why rehabilitation may be an important consideration is that health professionals and society as a whole make considerable investments in the training and development of health practitioners. Where appropriate, the Tribunal should endeavour to ensure that these investments are not permanently lost, provided of course the practitioner is

⁸ [2012] HC 3354, and HC Wellington, CIV -2012-404-3916, 12 December 2012, Collins J

⁹ *Roberts*, supra, paragraph 44

¹⁰ Paragraph 46

truly capable of being rehabilitated and reintegrated into the profession.”¹¹

41.5. That any penalty imposed is comparable to other penalties imposed upon health professionals in similar circumstances. The court recognised that each case would require a careful assessment of its own facts and circumstances, and that rarely would two cases be identical.

41.6. Assessing the health practitioner’s behaviour against the spectrum of sentencing options that are available and trying to ensure that the maximum penalties are reserved for the worst offenders.

41.7. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances with reference to *Patel v Dentists Disciplinary Tribunal*.¹²

41.8. Whether the penalty proposed is

“... *fair, reasonable and proportionate in the circumstances presented.*”¹³

42. The court referred to the penalty imposition as involving a “*finely balanced judgment*” and not being a “*formulaic exercise.*”

Penalty: discussion

43. It is important that any health practitioner have a current practising certificate; and that that certificate is renewed regularly as required. It is not simply a matter of a fee being paid but the application form requires completion of certain details and the content of the form and the performance of the practitioner need to be assessed before the renewed practising certificate is then issued. That takes time and it must be done in a timely fashion if there is to be continuity of the practising certificate applicable to the individual practitioner.

¹¹ Paragraph 47

¹² HC Auckland, AP 77/02, 8 October 2002; Randerson J;

¹³ Paragraph 51

44. Although it is helpful for a Responsible Authority to send out reminders of the need to renew the certificate, the prime responsibility for this lies with the practitioner. It is the responsibility of every practitioner to ensure that the application is made and the appropriate fees paid in a timely fashion such that the practising certificate is issued before the previous one expires. Otherwise, the responsibility is then on the practitioner not to practise until the renewed certificate is received.
45. It is not a case of the receipt of the form by the Responsible Authority nor of the receipt of the appropriate fee; it is a case that the certificate must have been issued and received by the practitioner.
46. In this case several reminders were sent to Mr Wolmarans in a timely fashion and he had plenty of warning. Regrettably, he left things to the last minute and accidentally omitted a form which should have accompanied the application and that meant that the Dental Council did not open the mail containing his application and fee until after the previous APC had expired. While much of the intervening period until he finally received his renewed APC was spent on vacation with family members, there were the days referred to in the Agreed Summary of Facts when he did practise as a dental technician.
47. The Tribunal has considered other relevant cases. Although these are helpful as a guide and for the purpose of achieving some consistency in the profession and with other health practitioners, each case must be decided on its own facts. These cases are:
- 47.1. *Dr E.*¹⁴ In this case a registered dentist practised his profession between 1 October 2011 and 4 November 2011. There were issues about his receipt of reminders for renewal of his APC and evidence of personal difficulties at the

¹⁴ 503/Den12/219P

time. Dr E practised for a three day period during that time. He was fined \$500.00 and ordered to pay \$5,000.00 contribution to costs.

47.2. *Dr S.*¹⁵ Dr S, a registered dentist, claimed that he had forgotten about the change in the APC cycle and practised his profession between 1 October 2010 and 30 April 2011 without an APC. The Tribunal noted that there had been a pattern of multiple reminders and Dr S was censured, fined \$2,000.00 and ordered to pay costs \$12,000.00. In that case the Tribunal said.¹⁶

“It is useful to reiterate the dicta of the High Court in the H case¹⁷ where the Court stated:

“... an APC is a fundamental and important requirement ... The Tribunal was entitled to take the view that the requirement to obtain an annual practising certificate was an important professional obligation and of sufficient significance to justify the imposition of the fine in addition to censure ...”

47.3. *Ms H.*¹⁸ The Charge against Ms H of having practised her profession as a registered psychologist between 1 April 2005 in 20 June, 2008 was found made out. In mitigation she referred to her belief that payment of her fees to the College was an alternative to a practising certificate and her failure to obtain an APC was regarded as innocent and inadvertent. The fine imposed by the Tribunal was reduced by the High Court on appeal to \$2,000.00, the Court making the statement referred to in paragraph 47.2 above. Ms H was censured and ordered to pay \$3,900.00 towards costs.

47.4. *Mr Henderson.*¹⁹ Mr Henderson faced a Charge of practising his profession as a registered pharmacist between 4 May 2010 and at least October 2011 without a current practising certificate. The background to that was that he

¹⁵ 445/Den11/198P

¹⁶ At paragraph 16.3

¹⁷ Known as *G S v A Professional Conduct Committee*, CIV-2009-404-007080, 1 April 2010, Venning J.

¹⁸ 256/Psy09/128P - appealed; referred to above in paragraph 47.2 and footnote 16

¹⁹ Supra at paragraph 28 and footnote 6

had not been issued with an APC in May 2010 for failure to comply with a re-certification programme. The Charge was found made out and the Tribunal fined Mr Henderson the sum of \$2,000.00 and censured him, also ordering him to contribute \$20,525.00 towards costs.

47.5. *Ms G.*²⁰ In that case a dental therapist, living on an island with relatively delayed communications, had received appropriate reminders from the Dental Council for renewal of her APC and had thought she had left these with the appropriate personnel for completion. In fact that did not occur and she did practise for five days over the 18 day period. She was censured, fined \$500.00 and ordered to pay \$2,000.00 towards the cost of the investigation and prosecution.

47.6. Two previous cases heard by the Tribunal (with different Chairperson) the day before the hearing of this matter where one dental technician had been fined \$500.00, censured and ordered to pay \$1,750.00 towards costs and the other had been fined \$1,500.00, censured and ordered to pay \$9,000.00 towards costs. It was said that there were aggravating factors in that case.

48. There are other cases referred to by counsel for the PCC and referred to in the decisions in the cases mentioned above, which the Tribunal has also taken into account.

49. The aggravating features in this case are these:

49.1. Mr Wolmarans had received repeated and comprehensive advice and warning about the expiry of his then current practising certificate and was given adequate opportunity to renew this in time which he did not do to the extent that the form did not include, in error, the accompanying confirmation form.

²⁰ 544/Dth12/229P

49.2. Although Mr Wolmarans criticises the tenor of the telephone conversation he had on 2 April 2012, in fact emails on 2 and 3 April 2012 made it quite clear in writing that he was not to practise until he had his renewed APC.

50. The mitigating features are:

50.1. Mr Wolmarans has been co-operative with the PCC and the Tribunal in disposal of this manner. He has participated in the process. He has signed the Agreed Summary of Facts and so facilitated the hearing. He has come to the hearing and fronted up and explained his position clearly and this is all helpful.

50.2. It was only the technical absence of the form which Mr Wolmarans had expected to include with his application but in error omitted to do; and the technical delay in receipt of the application form and fee because the office of the Dental Council was not open until 2 April 2012 that lead to a failure of renewal of his APC. All else was done properly.

50.3. Mr Wolmarans apparently stopped work as soon as he was advised orally that he was not entitled to be practising without a current APC.

50.4. This matter does not go at all to reflect on Mr Wolmarans' competence as a dental technician. His competence is not open to any suggestion of criticism.

50.5. The tenor of the telephone advices to Mr Wolmarans as recorded in the Dental Council Practitioner Notes was not that of urgency or relative importance. The fact that these advices to him were of this nature led Mr Wolmarans into a sense and understanding that the matter did not have the urgency and importance that the Dental Council now places on the requirement for prompt renewal.

51. Having weighed all these issues, the Tribunal is of the view that the appropriate penalty to impose is a fine of \$500.00.

52. Mr Wolmarans is censured. This is not to be treated as a mere formality but is an expression of the concern that the Tribunal has about the breach of standards and of the HPCA Act by Mr Wolmarans.

Costs

53. The PCC has sought an order for costs and estimated its costs at some \$7,500.00 – \$8,500.00. In addition to that the Tribunal must consider its own costs and these have been estimated on a detailed basis at \$8,130.28. In both cases those costs take into account the facts first that there were two Charges heard by the Tribunal on the same day involving the same Tribunal members and counsel and secondly that there had been similar Charges heard by the Tribunal (differently constituted) the previous day. In the case of the Tribunal costs, it was a simple case of dividing total estimated costs of \$32,521.00 by four. The total cost of this hearing is approximately \$16,130.00. Mr Wolmarans and every other dental technician must realise that except to the extent that Mr Wolmarans contributes to this these costs, they will be born by other practitioners.
54. Under section 101(1)(f) of the HPCA Act the Tribunal can order a health practitioner to pay all or part of the costs and expenses of and incidental to any inquiry made by the PCC in relation to the subject matter, the prosecution of the Charge by the PCC and the hearing by the Tribunal.
55. The principles applicable to costs are these. In *Cooray v Preliminary Proceedings Committee*²¹ there is reference to a 50% contribution. That is in the context, however, of a starting point and other factors may be taken into account to reduce or mitigate that proportion. If Mr Wolmarans does not pay or contribute to the cost of this proceeding to any extent, those costs must be met by other members of his

²¹ HC Wellington , AP 23/94, 14 September 1995, Doogue J

dental technicians profession. As was said in *O'Connor v Preliminary Proceedings Committee*:²²

“It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature empowered the different bodies to impose orders for costs.”

56. In *Winefield*²³ the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:
- 56.1. The hearing being able to proceed on an Agreed Statement of Facts.
 - 56.2. Co-operation of Mr Winefield.
 - 56.3. The attendance of Mr. Winefield at the hearing.
 - 56.4. Consistency with the level of costs in previous decisions.
 - 56.5. Costs not paid by Mr Winefield would fall on the profession as a whole.
57. The Tribunal has decided that the appropriate order for costs should be \$500.00, to go towards the costs of the Tribunal. The reason for this is that it is the representatives of the dental technicians profession on the PCC who have chosen to bring this Charge against Mr Wolmarans. Perhaps there were other ways in which the matter could have been dealt with. In the circumstances, the Tribunal does not consider that Mr Wolmarans should bear any greater burden of the cost of this prosecution than \$500.00 and that the balance should be borne by the profession represented by the PCC.

Orders

58. Mr Wolmarans is censured pursuant to section 101(1)(d) of the Health Practitioners Competence Assurance Act 2003.

²² HC Wellington , AP 280/89; 23 August 1990, Jeffries J

²³ 83/Phar06/30P

59. The Tribunal orders, pursuant to section 101(1)(e) of the Health Practitioners Competence Assurance Act 2003, that Mr Wolmarans pay a fine of **\$500.00**.
60. The Tribunal orders, pursuant to section 101(1)(f) of the Health Practitioners Competence Assurance Act 2003, that Mr Wolmarans pay a contribution of **\$500.00** towards the cost of this prosecution, to go to the costs of the Health Practitioners Disciplinary Tribunal.
61. The Tribunal directs pursuant to section 157 of the Health Practitioners Competence Assurance Act 2003 that the Executive Officer publish a copy of this decision and a summary on the Tribunal's website. The Tribunal further directs the Executive Officer to publish a notice stating the effect of the Tribunal's decision on the *Dental Council website and in the Dental Council newsletter*.

DATED at Auckland this 10th day of July 2013.

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David M Carden
Chairperson
Health Practitioners Disciplinary Tribunal