



New Zealand  
Health Practitioners  
Disciplinary Tribunal

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**DECISION NO** 583/Dtech13/255P

**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 of the Act against **MR  
ADAM VITALI** registered dental  
technician and clinical dental  
technician of Auckland

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HEARING** held at Auckland on 15 November 2013

**TRIBUNAL:** Ms M Dew (Chairperson)  
Ms T Burke, Mr J Batchelor, Mr G Byrne, Mr J Lee (Members)  
Ms K Davies (Executive Officer)  
Ms H Hoffman (Stenographer)

**APPEARANCES:** Ms A Miller for the Professional Conduct Committee  
Mr A Vitali appeared in person

## **Introduction**

1. On 16 August 2013, the Professional Conduct Committee (PCC) laid a charge against Mr Adam Vitali, a registered dental technician of Auckland.
2. Mr Vitali practises in his own business, North Shore Ortho Lab Ltd at 27b Rosedale Road, Pinehill, Auckland. Mr Vitali has practised in Auckland since 1988 and remains in practice at the date of hearing.
3. The charge laid against Mr Vitali is as follows:

### **Particulars of Charge**

*Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Mr Vitali, a registered dental technician and clinical dental technician, practised the profession of dental technology between on or around 1 April 2011 and 30 November 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.*

4. The hearing proceeded on the basis of an Agreed Statement of Facts dated 21 October 2013 and an Agreed Bundle of Documents dated 18 October 2013. The PPC also filed an Affidavit by Mr Mark Rodgers, Registrar of the Dental Council dated 16 October 2013. Mr Vitali gave sworn oral evidence to the Tribunal.

### **Legal principles**

5. There are three elements of the charge that must first be established under s100(1)(d) of the Health Practitioners Competence Assurance Act 2003 (the HPCA Act) namely that:
  - (a) Mr Vitali was a registered dental technician and clinical dental technician during the dates set out in the charge; and
  - (b) Mr Vitali practised as a dental technician and/or a clinical dental technician during those same dates; and

- (c) Mr Vitali did not hold a current practising certificate during those dates.
6. The charge must be established on the balance of probabilities and the onus of proof rests on the PCC to establish the charge.
  7. It has been well recognised by the Tribunal that a charge under s100(1)(d) of the HPCA Act does not require any element of knowledge or intention on the part of the practitioner. The offence of practising without a current practising certificate is an absolute offence. It does not require any deliberate intention to flout professional obligations or even that the practitioner knew or ought to have known that he did not have a current annual practising certificate.<sup>1</sup>

### The facts

8. The Agreed Summary of Facts dated 21 October 2013, set out the relevant facts as follows<sup>2</sup>:

*“(1) Adam Vitali has been a registered dental technician since 10 June 1988 and a clinical dental technician since 21 July 2000, initially under the Dental Act 1988 and then under the Health Practitioners Competence Assurance Act 2003. From the date of his registration Mr Vitali has been required to hold a current annual practising certificate (APC) in order to practise the profession of dental technology and clinical dental technology.*

#### *Background*

- (2) The Dental Council’s annual practising certificate (“APC”) cycle for dental technicians and clinical dental technicians runs from 1 April to 31 March each year.*
- (3) The Dental Council sends APC renewal forms to all registered technicians on or around 1 March each year. These forms are sent to the postal address recorded against the technician’s name on the Dental Council’s register.*

#### *Mr Vitali*

- (4) On 11 March 2011 the Dental Council posted out APC renewal application forms for the 2011/2012 practicing year to all registered technicians. On 8 March 2011 an APC reminder was issued on the Dental Council website.*

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<sup>1</sup> *Dr E* (503/Den12/219P), *White* (366/Opt10/168P) at [9], *Henderson* (477/Phar12/210P) at [36], *Ms H* (Psy256/09/128P) at [6] and [7] and *Bhatia* (344/Med10/151P) at [74]

<sup>2</sup> The Agreed Bundle of Documents references are omitted

- (5) *Mr Vitali's APC expired at midnight on 31 March 2011.*
- (6) *On 18 April 2011 the Dental Council emailed those practitioners who had not yet submitted an application for an APC, including Mr Vitali, to advise that the Dental Council was unaware of their practising intentions for the 2011/2012 practising year. The email advised:*
- “If you are practising at the moment without a current practising certificate, you must cease immediately; complete your APC application form, including the Workforce Survey, and return it to the Dental Council together with your practising fee. Only when you have received a current practising certificate may you resume practice”.*
- (7) *Mr Vitali did not inform the Dental Council of his practising intentions for the 2011/2012 practising year, and he did not hold a current practising certificate for the 2011/2012 practising year.*
- (8) *On 1 March 2012 the Dental Council posted out APC application forms for the 2012/2013 practising year to all registered technicians. On 2 March, 19 March and 27 March 2012 the Dental Council sent an email to all registered technicians, including Mr Vitali, advising among other things:*
- “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 an APC.”*
- (9) *On 3 April 2012 the Deputy Registrar of the Dental Council wrote to Mr Vitali because he had not submitted a completed application for an APC. Mr Vitali was expressly advised that if he was practising without current practising certificate he was doing so unlawfully and must cease immediately.*
- (10) *On 17 April 2012 the Registrar of the Dental Council wrote to the Dental Protection Limited, ACC, and the Ministry of Health to give notice that, among others, the registered technicians recorded in an attached schedule, including Mr Vitali, did not hold current practising certificates.*
- (11) *On 20 November 2012 the Registrar of the Dental Council wrote to Mr Vitali to advise that the Dental Council had not heard from him about his practising intentions for the current practising year, ending 31 March 2013, or the previous practising year 1 April 2011 to 31 March 2012. Mr Vitali was provided with an application form “to be retained on the register as non-practising”. Mr Vitali was also advised that the Dental Council had tried unsuccessfully to contact him at his listed postal and email address, and he was reminded that section 140 HPCA Act requires all practitioners to keep the Dental Council informed of current addresses. Mr Vitali was informed that if there was no response to the letter within 6 months, or if the letter was returned undelivered, his entry in the register may be cancelled.*

- (12) *On 26 November 2012 Mr Vitali sent an email to the Dental Council attaching a completed application form for an APC. The email stated:*

*“Sorry I thought that this registration had been sent long ago. Please find attached my registration. I hope it is OK....”*

- (13) *A copy of Mr Vitali’s completed APC application form, and workforce survey, ... recorded his hours of work in the Workforce survey as at 31 March 2012 at 40 hours per week dental technician work and 20 hours per week clinical dental technician work.*

- (14) *On 30 November 2013 a Dental Council staff member rang and spoke to Mr Vitali about his application for an APC. The file note of that conversation states:*

*“I called Mr Vitali to ask what happened to his form. He said that it had just been lying around at work under some other papers and he thought that he had sent it in earlier. I asked Mr Vitali if he had been practising during this period since April 2012 and he advised that he had been as he thought that it was ok to practise as he thought that he had sent in his form”.*

- (15) *On 30 November 2012 the Registrar of the Dental Council wrote to Mr Vitali enclosing his APC for the 2012/2013 practising year. The Register advised:*

*“The Council draws your attention to the fact that practising without a current APC is a disciplinary offence under section 100(1)(d) of the Health Practitioners Competence Assurance Act 2003...In this instance, the Council will consider at their next scheduled meeting whether or not to refer you to a Professional Conduct Committee to investigate whether you have been practising unlawfully.... “*

- (16) *A Professional Conduct Committee (PCC) was subsequently appointed to investigate whether Mr Vitali had practised the profession at a time when he did not hold a current practising certificate.*

- (17) *On 9 April 2013 the Chair of the PCC wrote to Mr Vitali asking for evidence of the work he had performed between 1 April 2011 and 30 November 2012.*

- (18) *On 30 June 2013 Mr Vitali wrote to the PCC and provided his sales records for the period 1 April 2011 to 30 November 2012. The sales records provided by Mr Vitali for the period 1 April 2011 to 30 November 2012 show multiple client sales, and total sales of a little over \$200,000 (excluding GST).”*

### **Consideration of the Charge**

9. The Tribunal heard and considered the submissions from both the PCC and Mr Vitali as to the elements of the charge.

10. In relation to the three elements of the charge, the Tribunal has found as set out below.
11. **First element:** That Mr Vitali was a registered dental technician from 1 April 2011 to 30 November 2012. This was clearly established on the basis of the Agreed Summary of Facts and was not in dispute between the parties.
12. **Second element:** That Mr Vitali did practise as a dental technician during the period of the charge being 1 April 2011 to 30 November 2012. The evidence shows that Mr Vitali completed considerable dental technician work over this 19 month period, as described in the North Shore Ortho Lab Ltd Sales Records for the period 1 April 2011 to 30 November 2012. These records show that Mr Vitali, through his business, acted for a large number of clients and completed sales of dental technician services totaling just over \$200,000 plus GST for the relevant period.
13. The parties also produced to the Tribunal, Mr Vitali's Applications for Annual Practising Certificate's (APC) for both the April 2012 to March 2013 year and the April 2013 to March 2014 year. The APC's each annexed a Workforce Survey completed by Mr Vitali which confirm the following information;
  - i. That he was practising as a dental technician in New Zealand in the period 1 April 2011 to 31 March 2012;
  - ii. That he was practising as a dental technician in New Zealand in the period 1 April 2012 to 31 March 2013;
  - iii. That during both periods he usually practised for 35 hours per week or more per week; and
  - iv. That the average number of hours worked in a typical week included 40 hours dental technician work per week.
14. The Tribunal notes that Mr Vitali was concerned that the Workforce Survey information was being used for the purposes of the Tribunal hearing. He

referred the Tribunal to the note at the heading of the Workforce Survey which states “*the information from this form will only be used to monitor workforce trends and plan workforce development, and will not be published in a form that could identify individuals*”. Ms Miller for the PCC submitted that there was nothing improper about the use of this material before the Tribunal as the PCC had wide powers to call for relevant information from the practitioner under s77 HPCA Act.

15. Mr Vitali confirmed to the Tribunal at the hearing that the contents of the two Workforce Surveys were accurate except that the reference to 20 hours per week “*clinical dental technician*” work was not accurate as he had stopped doing such work in 2008. The Tribunal considers it is entitled to take into account the Workforce Survey forms completed by Mr Vitali as relevant information. However, the Tribunal would have been satisfied that Mr Vitali practised during the relevant period based solely on the Sales Records produced for April 2011 to 30 November 2012, in any event. The fact that Mr Vitali was not doing “clinical” work does not alter the fact that he was doing dental technician work which is well within the scope of dental technology practice for which he was registered and was therefore required to hold a current practising certificate.
16. **Third Element:** It is clear that Mr Vitali’s APC expired on 31 March 2011 and a new practising certificate was not issued to him until 30 November 2012. All APC’s expire on 31 March of each year. The Dental Council records produced show that Mr Vitali’s APC expired on 31 March 2011 and that he did not send in any completed APC form until 26 November 2012.
17. Therefore, the charge is established. It is unnecessary to establish that Mr Vitali had an intention to ignore his professional obligation to maintain a current practising certificate. However, Mr Vitali did submit that he had not intentionally ignored his obligation to complete his APC. He thought it had been kept up to date but discovered it had been overlooked in his administration.

18. Mr Vitali did not dispute that he had received the email reminders sent by the Dental Council direct to his email address and the written correspondence posted to his work address. This correspondence requesting renewal of the APC, sent direct to Mr Vitali from the Dental Council, had been sent in April 2011 and then again three times in March 2012, April 2012 and November 2012. The Tribunal is willing to accept that Mr Vitali did not intentionally ignore his obligation to renew his APC but that he was seriously remiss in failing to attend to the renewal for 19 months.

### **Consideration of Penalty**

19. Given that the Tribunal is satisfied the Charge is established, it must go on to consider the appropriate penalty under s101 of the HPCA Act. The penalties may include:
- (a) Cancellation of registration;
  - (b) Suspension of registration for a period not exceeding 3 years;
  - (c) An order that the practitioner may only practise with conditions imposed on employment or supervision or otherwise;
  - (d) Censure;
  - (e) A fine of up to \$30,000;
  - (f) An order as to costs of the Tribunal and/or the PCC to be met in part or in whole by the practitioner.
20. The Tribunal accepts as the appropriate sentencing principles those contained in *Roberts v Professional Conduct Committee*<sup>3</sup> where Collins J identified the following eight factors as relevant whenever the Tribunal is determining an appropriate penalty. In particular the Tribunal is bound to consider what penalty:

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<sup>3</sup> [2012] NZHC 3354 at [44]-[51]



- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the health practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is "*fair, reasonable and proportionate in the circumstances*".

21. The PCC referred to recent cases including, but not limited to:

- (a) Mr Devine – (555/Dtech13/232P): Mr Devine, a registered dental technician who practised his profession between 1 April 2012 and 20 April 2012 when he did not hold a current practising certificate. The Tribunal found that Mr Devine had practised for only three days in respect of two clients. The Tribunal fined him \$500, ordered him to contribute \$1,750 costs (in light of his co-operation and impecuniosity), and censured him to mark the Tribunal's disapproval of conduct.
- (b) Dr E – (503/Den12/219P): Dr E, a registered dentist, practised his profession between 1 October 2011 and 4 November 2011 when he did not hold a current practising certificate. Dr E acknowledged that he had practised for a three day period. Dr E was fined \$500 in light of a number of mitigating factors relating to Dr E's personal life, and the fact that "*there were only the three days of actual practise as a dentist*". Dr E was ordered to pay a \$5,000 contribution to costs.

- (c) Dr S – (445/Den11/198P): Dr S, a registered dentist, practised his profession between 1 October 2010 and 30 April 2011 when he did not hold a current practising certificate. The Tribunal censured Dr S and ordered him to pay a fine of \$2,000 (noting that there were no submissions as to his financial circumstances) and costs of \$12,000 divided equally between the Tribunal and the PCC.
- (d) Mr Henderson – (477/Phar12/210P): Mr Henderson, a registered pharmacist, practised his profession between 14 May 2010 and October 2010 when he did not hold a current practising certificate. Mr Henderson was ordered to pay a fine of \$2,000 and to contribute \$8,275 to the Tribunal's costs and \$12,250 to the PCC's costs.
- (e) Ms H – (256/Psy09/128P): Ms H, a registered psychologist, practised her profession between 1 April 2005 and 20 June 2008 when she did not hold a current practising certificate. The failure was accepted as due to a misunderstanding on her part (she believed that payment of membership fees to the College of Clinical Psychologists, which she joined in 2005, was an alternative to a practising certificate). Ms H was censured, ordered to pay a fine of \$4,000 and costs of \$4,000. It is noted that the fine of \$4,000 was reduced on appeal to the High Court to a fine of \$2,000.<sup>4</sup>
- (f) Ms O – (274/OT09/132P): Ms O, a registered occupational therapist, practised her profession between 1 April 2005 and 11 February 2009 when she did not hold a current practising certificate. A host of personal circumstances were behind her failure to obtain a practising certificate, including gambling, bankruptcy, surgical procedures and complications, sudden death of her partner and significant depression. Ms O was censured and ordered to pay a fine of \$1,400 and costs of \$2,000 divided equally between the Tribunal and the PCC (having regard to Ms O's financial impecuniosity).

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<sup>4</sup> *GS v A Professional Conduct Committee*, (HC, Auckland CIV2009-404-007080, 1 April 2010.)

- (g) Mr White – (366/Opt10/168P): Mr White, a registered optometrist, practised his profession between 1 April 2010 and 3 May 2010, and 13 May 2010 and 1 July 2012, when he did not hold a current practising certificate (during the second period his APC had been suspended following a failure to complete a recertification programme). Mr White was censured and fined \$1,250 and ordered to contribute \$3,500 towards costs taking into account his difficult financial circumstances.
22. The PCC submitted that taking into account previous cases, Mr Vitali should be subject to a censure and that he be ordered to pay a fine of at least \$2,000 to \$3,000. The PCC also submitted that Mr Vitali should be ordered to make a contribution towards the total costs of the PCC investigation and prosecution estimated to be \$10,500 plus GST. The Tribunal notes that the estimated costs of the Tribunal in relation to this disciplinary hearing are \$15,400. The written estimates of these costs were produced at the hearing and Mr Vitali was provided with the opportunity to consider and respond to them.
23. Mr Vitali gave sworn evidence and made submissions as to penalty. He stated that he did not believe that he had been a danger to the public as he dealt mostly with specialist dental practitioners and provided them with his services and products. He stated that it was the specialist dental practitioners who ultimately dealt with the patients and that he had not performed clinical dental technician work since 2008. Mr Vitali also queried whether there was any set date he had to apply for a practising certificate.
24. He referred to his difficult personal circumstances and that he had started to have problems in meeting payments to the Inland Revenue Department as from April 2011. Mr Vitali produced to the Tribunal an email dated 15 November 2013 from Inland Revenue Collections which appeared to show that he had a number of tax returns for the period May 2011 to September 2013 under consideration with Inland Revenue. Mr Vitali stated that if the

penalty imposed by the Tribunal was too large then he may have to consider liquidation of his company or even personal bankruptcy. Mr Vitali stated that he had a considerable tax liability to the Inland Revenue department.

25. Mr Vitali said that he had also had difficulties in his marriage over the past two years. He told the Tribunal he has two children and that he remains financially responsible for them. He stated that he does not own his own home. He also referred to some loss of earnings since April 2012 when he lost the business of one of his substantial dental clients. Mr Vitali told the Tribunal that he is currently seeking employment as he cannot continue to practise on his own with the reduced level of dental technician work he currently has.
26. The Tribunal considered the following aggravating factors existed when considering penalty:
  - (a) Mr Vitali has been registered as a dental technician from 1988. It appears likely that he well understood his obligation to maintain his annual practising certificate as from 31 March each year. The requirement to maintain registration is a cornerstone of the Act. The benefits of registration include recognition by the public and his profession as a registered professional. This also brings with it the obligation to abide by the standards required of dental professionals including maintaining a current APC.
  - (b) Mr Vitali was reminded by the Dental Council of his obligation to renew his APC in April 2011 and on several more occasions throughout the period March to November 2012. While the Tribunal did not find any intention by Mr Vitali to ignore these reminders, it remains a serious matter that he failed to attend to his APC over a period of 19 months while he remained practising.

- (c) During the period April 2011 to November 2012, Mr Vitali recorded a considerable number of sales as a dental technician with gross sales recorded of just over \$200,000.
- 27. The Tribunal has also given full consideration to the mitigating factors that are present in this case, including that:
  - (a) Mr Vitali has co-operated with the PCC investigation and in the preparation for this Tribunal hearing.
  - (b) Mr Vitali also had a number of personal circumstances as described above which appear to have caused Mr Vitali to be diverted from his administration and caused financial problems for him in the past few years.
  - (c) The Tribunal finally notes that Mr Vitali has not previously appeared before this Tribunal and that he acknowledged some remorse for his failure to attend to his APC registration over the period of the charge.
- 28. The Tribunal has therefore taken account of all of the comparable cases presented, Mr Vitali's co-operation, his financial and personal circumstances and concludes that the appropriate fine is \$2,200. The period of practice without a current practising certificate was 19 months and so this puts the case at the moderately serious end of the comparable cases.
- 29. In relation to costs, the Tribunal records that it has used as a starting point that a practitioner will generally be expected to contribute 50% of the actual and reasonable costs of the Tribunal and PCC. However, in the present case the Tribunal has determined that a further discount is appropriate to reflect the co-operation provided by Mr Vitali by way of an agreed summary of facts and to reflect his difficult financial situation. The Tribunal considers the proper contribution to costs should be \$6,500 in total; being \$4,000 to the Tribunal and \$2,500 in respect of the PCC. (GST is not applicable to any award of costs).

**Orders of the Tribunal**

30. The Orders of the Tribunal are as follows:

- (a) The charge is established;
- (b) Mr Vitali is censured to mark the Tribunal’s disapproval of the conduct the subject of the charge;
- (c) Mr Vitali is ordered to pay a fine of \$2,200;
- (d) Mr Vitali is further ordered to pay a total sum of \$6,500 as a contribution towards the costs and disbursements of the Tribunal and PCC to be paid as follows:
  - i. \$4,000 in respect of the costs and disbursements of the Tribunal; and
  - ii. \$2,500 in respect of the costs and disbursements of the PCC;
- (e) The Tribunal directs the Executive Officer to publish a copy of this decision and a summary of it on the Tribunal 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.

31. The Tribunal wishes to record its appreciation to both Mr Vitali and to the PCC for their helpful presentation of the case.

**DATED** at this 2<sup>nd</sup> day of December 2013

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MJ Dew  
Chairperson  
Health Practitioners Disciplinary Tribunal