



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 633/Dtech 13/268P

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
MARC EMILE ADAMS of
Auckland, Registered Dental
Technician and Clinical Dental
Technician

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

Hearing in Auckland on 1 and 2 May 2014

TRIBUNAL: Mr D M Carden (Chair)
Mr K Lock, Mr J Batchelor, Ms T Burke (Members) and
Mr H O'Rourke (Lay member)

Miss D Gainey (Executive Officer)
Ms H Hoffman (Stenographer)

APPEARANCES: Ms A Miller for the Professional Conduct Committee
Mr M Adams in person

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Introduction

1. Mr Marc Emile Adams has been a registered dental technician since July 2000 and a registered clinical dental technician since 8 October 2012. In March 2009 he saw a patient at his clinic. He did some work for the patient. This is said to have included taking an impression of his teeth for clinical dental technology work.
2. Mr Adams did not renew his Practising Certificate as a dental technician from 1 April 2009.
3. Mr Adams then in May 2009 did certain fitting work for another patient for a partial plate.
4. Because a complaint had been made to the Dental Council of New Zealand (DCNZ) Mr Adams was interviewed and admitted in May 2009 having treated patients by taking impressions and fitting prostheses. The DCNZ decided to defer referral of the complaint until such time as Mr Adams applied for an Annual Practising Certificate (APC).
5. During 2012 Mr Adams described himself in written articles as a clinical dental technician and advertised his services for the making and fitting of dentures direct to members of the public.
6. Although Mr Adams applied for a Practising Certificate on 2 April 2012, this was not approved pending an investigation by the Professional Conduct Committee (PCC) of the earlier complaint.
7. In May 2012 Mr Adams graduated with a postgraduate diploma in clinical dental technology and on 27 July 2012 applied for registration as a clinical dental technician. He was registered as such on 8 October 2012.

8. Mr Adams had been issued with an APC as a dental technician on 17 September 2012 and on 8 October 2012 Mr Adams was advised that he could commence practice as a clinical dental technician.
9. Mr Adams has admitted to practising the profession of dental technology between 1 April 2009 and 17 September 2012 when he did not hold a current Practising Certificate.
10. These matters were investigated by a PCC of the DCNZ and Charges have been brought against him under the Health Practitioners Competence Assurance Act 2003 (“**the HPCA Act**”) by the PCC appointed by the DCNZ. The Charges were heard by the Tribunal.

The Charges

11. The Charges brought 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 Marc Emile Adams 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 THE CHARGES

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays the following charges:

Particulars of Charge One:

1. *Between on around March 2009 and 8 October 2012 Mr Adams promoted his services in making and fitting dentures directly to members of the public and/or provided such services directly to members of the public, when he knew or ought to have known that such services were outside his scope of practice as a dental technician and/or were restricted activities under the Act that he was not permitted to perform under his scope of practice as a dental technician. In particular:*

- a. *In or around March 2009 Mr Adams' operated a laboratory at 137A Kolmar Road, Papatoetoe. In or around March 2009 Mr Mark Gotty attended an appointment with Mr Adams for a replacement plate. Mr Adams took a mould of Mr Gotty's upper teeth;*
- b. *In or around May 2009 Mrs Alison Onodera attended appointments with Mr Adams for a partial plate. Mr Adams did the fitting work in Mrs Onodera's mouth for the partial plate;*
- c. *On or around 19 May 2009, during an interview with a Professional Advisor to the Dental Council, Mr Adams agreed that he had been treating patients by taking impressions and fitting prostheses;*
- d. *On 5 March 2010 a company called "All Dentures Limited": was incorporated with Mr Adams' wife, Charmain Adams, the sole director. On or around 7 March 2012 a senior enforcement officer with the Ministry of Health telephoned All Dentures Limited on (09) 277 2233 posing as a potential customer. The officer spoke to a man who identified himself as "Mark Adams". The officer was advised, in response to her question about a full set of dentures, that it would take four visits and cost \$950 as an opening special. "Mark Adams" confirmed that he would take the fittings and that he would be doing the work;*
- e. *On or around 22 March 2012 an advertising feature article appeared in the Manukau Courier that promoted "All Dentures", and Mr Adams' services in making and fitting dentures directly to members of the public. Among other things, the article stated "Marc, as a clinical dental technician, works directly with members of the public – you do not need any appointment or referral from a dentist";*
- f. *On or around 22 March 2012 and 29 March 2012 an advertisement for All Dentures, at 3/208 Great South Road, Papatoetoe, appeared in the Manukau Courier promoting services in making and fitting dentures directly to members of the public. The telephone number for All Dentures was recorded as (09) 277 2233;*
- g. *On or around 27 March 2012 an advertisement for All Dentures Limited appeared in the Yellow Pages online. The products and services listed were "Dentures, Implant Retained Dentures, Mouthguards, Partial, Prosthetics". The trade was listed as "Clinical Technicians, Dental Consultants". The telephone number for All Dentures was recorded as (09) 277 2233;*
- h. *On or around 30 March 2012 a senior investigator employed by the Ministry of Health visited the premises advertised by "All*

Dentures” at 3/208 Great South Road, Papatoetoe, and obtained a business card from the reception counter that read: “Marc Adams, Clinical Dental Technician”;

- i. *At various times between on or around April 2009 and October 2012 Mr Adams ordered, and was supplied with, dental materials for clinical and/or dental laboratory use; and*
- j. *Mr Adams was registered as a clinical dental technician on 8 October 2012. Before that time, from 21 July 2000, Mr Adams was registered solely as a dental technician.*

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

Particulars of charge two:

2. *Between on or around 1 April 2009 and 17 September 2012 Mr Adams practised the profession of dental technology when he did not hold a current practising certificate.*

The conduct alleged in paragraph 2 is a ground on which a health practitioner may be disciplined under section 100(1)(d) of the Act.”

12. The Charge was heard by the Tribunal in Auckland. Mr Adams appeared on his own account and the PCC was represented by counsel. Presented by the PCC with the consent of Mr Adams was an Agreed Summary of Facts. This was amended at the hearing in paragraph 2 as shown with a supporting affidavit to confirm the reference to the three dental technicians referred to and with the consent of Mr Adams. The amended Agreed Summary of Facts read as follows:

1. *Marc Emile Adams has been a registered Dental Technician since 21 July 2000, initially under the Dental Act 1988 and then under the Health Practitioners Competence Assurance Act 2003. Mr Adams has been registered as a Clinical Dental Technician since 8 October 2012.*
2. *In or around March 2009 Mr Adams’ was a shareholder of a company called “Dentures for You” (sometimes referred to as “Dentures 4 You”). Dentures for You operated a laboratory at 137A Kolmar Road, Papatoetoe, and employed Mr Adams and [three – amended at hearing] other Dental Technicians. Dentures for You was located adjacent to a dental practice called Dental World. Mr Adams had sold the Dental World practice to Dr Kamalpreet Pannu in 2008.*

3. *In or around March 2009 Mr Mark Gotty attended an appointment with Mr Adams at Dentures for You.*
4. *In March 2009 Dr Pannu made a complaint to the Dental Council about Mr Adams seeing and treating patients directly, including Mr Gotty.*
5. *Mr Adams did not apply to renew his Annual Practising Certificate (APC) for the 2009/2010 practising year, which commenced on 1 April 2009. On 7 May 2009 and 26 June 2009 the Registrar of the Dental Council wrote to Mr Adams noting that he had not yet advised the Dental Council of his practising intentions.*
6. *In April 2009 Dentures for You placed an advertisement in the Samoa Times, advertising “Dental technicians and Clinical dental technicians to serve you”, and making a limited offer of \$800 for a full set of dentures.*
7. *In or around May 2009 Mrs Alison Onodera attended appointments with Mr Adams for a partial plate. Mr Adams did the fitting work in Mrs Onodera’s mouth for the partial plate. Mr Adams accepts that he made Mrs Onodera a partial.*
8. *On 19 May 2009, as a result of Dr Pannu’s complaint, a professional advisor to the Dental Council, Dr Dexter Bambery, met with and interviewed Mr Adams. During that interview Mr Adams:*
 - (a) *agreed that he had been treating patients by taking impressions and fitting prostheses, but said that this was usually as an emergency for those with urgent requirements as well as for family and friends;*
 - (b) *said that there were no records for the patients who were the subject of the notification, and that there were no records for other patients he treated directly;*
 - (c) *advised that he no longer treated patients directly but would refer them to specific dentists; and*
 - (d) *advised that he intended to study to qualify as a Clinical Dental Technician.*
9. *Mr Adams accepts that he made these admissions to Dr Bambery. Mr Adams admits that he saw 4 to 5 patients for clinical dental technology work between March 2009 and May 2009. In particular, Mr Adams admits that he took impressions for about five patients. Dr Bambery concluded that Mr Adams was practising outside his scope of practice as a dental technician.*
10. *On 29 May 2009 Dentures for You was placed into liquidation. The liquidators retained Mr Adams’ services to complete the work in progress.*

The liquidators' first report records that all work in progress was completed by 10 June 2009.

11. *At its meeting on 5 June 2009 the Dental Technicians Board considered the complaint that Mr Adams had been practising as a Clinical Dental Technician at a time when he was registered as a Dental Technician. The Board agreed to recommend to the Dental Council that Mr Adams be referred to a Professional Conduct Committee to investigate the complaint.*
12. *On 10 July 2009 Mr Adams emailed the Dental Council to advise that he had been unemployed for some time but that he would like to "remain registered". On 15 July 2009 the Deputy Registrar of the Dental Council emailed Mr Adams about the fee for retention on the register. Following this, Mr Adams completed an application for an APC for the 2009/2010 practising year and indicated (by ticking the appropriate box) that he was not intending to practise in New Zealand during the period ending 31 March 2010. Mr Adams' application was received by the Dental Council on 27 July 2009.*
13. *As a result, the Dental Council decided to defer referral of the complaint made by Dr Pannu until such time as Mr Adams applied for an APC.*
14. *On 28 August 2009 the Dental Council wrote to Mr Adams to advise that his name would be retained on the register until the year ended 31 March 2010 as non-practising.*
15. *From early 2010 to the end of 2011 Mr Adams undertook studies with the University of Otago for a post qualification diploma in clinical dental technology. Mr Adams lived in Auckland throughout this period and travelled to Dunedin as required for course work.*
16. *On 5 March 2010 a company called "All Dentures Limited" was incorporated. Mr Adams' wife, Charmain Adams, was the sole director.*
17. *In mid to late 2010 a price list for All Dentures Limited was circulated to dentists in South Auckland promoting prices for dentures, partials, valplast, and metal frames. The price list included Mr Adams' home address in Manukau and Mr Adams' xtra email address. The prices were listed as being valid until 31 December 2010.*
18. *Mr Adams accepts that:*
 - (a) *On or around 22 March 2012 an advertising feature article appeared in the Manukau Courier that promoted "All Dentures", and Mr Adams' services in making and fitting dentures directly to members of the public. Mr Adams was the author of the article, and he described himself as a*

Clinical Dental Technician who works directly with members of the public;

- (b) *On or around 22 March 2012 and 29 March 2012 an advertisement for All Dentures, at 3/208 Great South Road, Papatoetoe, appeared in the Manukau Courier promoting services in making and fitting dentures directly to members of the public. The telephone number for All Dentures was recorded as (09) 277 2233. Mr Adams accepts that the advertisement promoted services that were to be provided by him personally;*
- (c) *On or around 27 March 2012 an advertisement for All Dentures Limited appeared in the Yellow Pages online. The products and services listed were “Dentures, Implant Retained Dentures, Mouthguards, Partial, Prosthetics”. The trade was listed as “Clinical Technicians, Dental Consultants”. The telephone number for All Dentures was recorded as (09) 277 2233. Mr Adams accepts that the Yellow Pages advertisement promoted services that were to be provided by him personally;*
- (d) *Business cards for “All Dentures” reading “Marc Adams, Clinical Dental Technician” were available at All Dentures’ premises at 3/208 Great South Road, Papatoetoe from on or around 30 March 2012.*
19. *On 2 April 2012 the Dental Council received Mr Adams’ application for an APC for the 1 April 2012 to 31 March 2013 practising year. Mr Adams’ application was referred to the Dental Council in light of its 2009 decision to refer him to a PCC.*
20. *The Dental Council resolved to refer the complaint about Mr Adams’ practice to a PCC. A PCC was appointed on 11 June 2012 to investigate the allegation that Mr Adams had practised outside of his scope of practice as a Dental Technician by undertaking Clinical Dental Technology practice. Mr Adams’ application for an APC was unable to be progressed as he was unable to make payment of the required fee. His application was returned to him.*
21. *In May 2012 Mr Adams graduated with a post graduate diploma in Clinical Dental Technology from the University of Otago. On 27 July 2012 Mr Adams applied to the Dental Council for registration as a Clinical Dental Technician. Mr Adams’ application was incomplete and it was returned to him for completion.*
22. *In July 2012 Mr Adams returned his application for an APC to the Dental Council. The application was incomplete, and could not be progressed, as it did not include a valid medical emergencies certificate.*

23. *On 12 August 2012 the Dental Council received information that Mr Adams may have been practising as a Dental Technician and/or Clinical Dental Technician while not holding a current Practising Certificate. On 21 August 2012 the PCC wrote to the Dental Council to advise that it had received information suggesting that Mr Adams may have practised as a Dental Technician or Clinical Dental Technician when he did not hold a current Practising Certificate, and that this matter was outside the ambit of its current investigation. At its meeting on 3 September 2012 the Dental Council resolved to refer this further matter to the PCC under section 68(4) HPCA Act.*
24. *On 17 September 2012 Mr Adams was issued with an APC as a Dental Technician. On 8 October 2012 Mr Adams was registered by the Dental Council as a Clinical Dental Technician. The Dental Council advised that the APC issued for his practice as a Dental Technician would enable Mr Adams to now commence practice as a Clinical Dental Technician.*
25. *Between on or around April 2009 and October 2012 Mr Adams ordered and was supplied with dental materials for clinical and dental laboratory use. The dental materials were ordered by Dentures for You, All Dentures Limited, and Marc Adams, and were delivered variously to: 137A Kolmar Road, Papatoetoe, Mr Adams' home address at Manukau, and 3/208 Great South Road, Papatoetoe.*
26. *Mr Adams admits the facts set out in the Agreed Summary of Facts. Mr Adams also says that he could have spoken with the Ministry of Health senior enforcement officer as described at particular (d) of the notice of charge, but that he does not specifically recall the conversation.*

Mr Adams admits that he practised the profession of Dental Technology between on or around 1 April 2009 and 17 September 2012 when he did not hold a current Practising Certificate.

13. Also produced at the hearing were two volumes of an “Agreed Bundle of Documents” and an Addendum to the Bundle (being certain photographs). There had been a direction at an earlier pre-hearing conference that:

“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.”*

14. Mr Adams was questioned several times about the Bundle and that he agreed to each document being in it on that basis and he confirmed that there were only two pages in the Bundle that he did not agree to, namely pages 214 and 215, the copy of an apparent statement from Mr M T Gotty, referred to in the Charge No 1 and the Agreed Summary of Facts. The Bundle was accordingly accepted with that reservation and that matter is referred to below. Despite that statement from Mr Adams, there were further occasions during the hearing when he disputed some of the detail in the Bundle of Documents; and the Tribunal has taken that into account.
15. Other than that the PCC did not call evidence.

The case for the PCC

16. The PCC accepted that the onus of proof lay on it. It referred to the contrasting scopes of practice for dental technology and clinical dental technology. It referred to the fact that activities of clinical dental technology are “*restricted activities*” under the Health Practitioners Competence Assurance (Restricted Activities) Order 2005 (HPCA Order).
17. The PCC submitted that there was sufficient evidence to establish Particular 1 (a) of Charge No 1, which was denied by Mr Adams. The PCC submitted that Particular 1 (b) of Charge No 1 was admitted to in the Agreed Summary of Facts and therefore made out. It further submitted that the subsequent Particulars of Charge No 1 were established on the basis of the Agreed Summary of Facts and documents in the bundle.
18. The PCC emphasised the distinction between dental technology and clinical dental technology and how these are described in the respective scopes of practise. It emphasised the concern that not only was Mr Adams treating patients directly but

also he was not keeping any records of those appointments. Reference was made to extracts from the transcript of the PCC interview with Mr Adams with the submission that it was evident from the transcript that Mr Adams did not carry out appropriate examinations of the patients whom he treated and indeed was wholly unqualified to be providing clinical dental technology services at the time he did. It was submitted that Mr Adams “*could not possibly have obtained fully informed consent...*” It was acknowledged that some of these matters did not form specific allegations in the Charge. The Tribunal does consider, however, that they go to severity in considering penalty.

19. It was said that the Charge of professional misconduct was made out as amounting to malpractice and that Mr Adams’ conduct had crossed the clear boundary between what a dental technician and what a clinical dental technician can do.
20. As to Charge No 2 the PCC submitted that the necessary elements that Mr Adams was a registered dental technician, that he practised as a dental technician, and that he did not hold a current Practising Certificate were made out on the basis of the Agreed Summary of Facts and the relevant documents in the bundle.
21. Again reliance was placed on what Mr Adams had told the PCC and its investigation.

Mr Adams’ Position

22. In reply Mr Adams said that there were some aspects of the matters as presented for the PCC which were not accepted but generally he accepted the Charges were made out except as noted below.
23. Specifically he said that he did not accept parts of Particular 1(a) of Charge No 1, relating to Mr Gotty. This was in respect of the allegation that Mr Adams had the appointment for a replacement plate or that he took a mould of upper teeth. It is the matter in the apparent statement from Mr Gotty to which Mr Adams objected.

24. Mr Adams gave evidence about his practice history and aspects where he had been, he said, let down by others leading to the liquidation of his company as mentioned in paragraph 10 of the Agreed Summary of Facts. He referred to his graduation in clinical dental technology in May 2012¹ and the relevance of this to the advertisements and promotions to which the Charge refers. These matters are mentioned in detail below.

Charges – General Principles

25. The Tribunal has emphasised in its decisions that the onus of proving a charge lies on the prosecution, in this case the PCC, and that the standard of proof is that of the balance of probabilities, the more serious the charge, the higher the standard².
26. The HPCA Act provides that the Tribunal may impose the penalties anticipated by section 101 of the HPCA Act if, after conducting a hearing, it finds that a practitioner:
- 26.1. Has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time that the conduct occurred; or
 - 26.2. Has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred.
 - 26.3. Has practised his or her profession while not holding a current Practising Certificate.

¹ Agreed Summary of Facts Paragraph 21

² *Z v Dental Complaints Assessment Committee*, [2009] 1 NZLR 1

27. Charge No 1 has been brought under both of the first two limbs of that section and the Tribunal must consider each Particular in the context of whether there is evidence of malpractice and/or negligence on the one hand or conduct which brought or was likely to bring discredit to the dental technology profession. In respect of this Charge No 1 this a two-stage process such that, if allegations are found to be made out, the Tribunal must then decide whether the acts or omissions warrant disciplinary sanction for protection of the public, maintenance of standards or punishing the practitioner³. Charge No 2 has been brought under the third limb of that section. Such a charge does not require the second stage of warranting disciplinary sanction.

28. “Malpractice” has been defined⁴ as :

“The immoral, illegal or unethical conduct or neglect of professional duties. Any instance of improper professional conduct.”

but, although malpractice is often equated with negligence it is perhaps better considered as a broader concept, capable of encompassing neglect, but also of extending to trespassory conduct in the process of caring for patients in relation to consent, breaches of patient confidence and fiduciary obligations, and certain other forms of conduct.⁵

29. There are these statements of principle from *Collie v Nursing Council of New Zealand*:⁶

“Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness. That sort of test must still apply to the malpractice/negligence definition in s. 2(a) of the Act.”

³ *PCC v Nutall*; 8/Med04/03P

⁴ Collins English Dictionary (2nd ed)

⁵ Medical Law in New Zealand, 2006 at para 23.65

⁶ [2000] NZAR 74; paragraphs 21, 23 and 28

“Clearly it envisages conduct in the performance of the nurse’s usual professional duties if it amounts to “malpractice or negligence”. That requires, in line with authorities and the accepted view, that the negligence or malpractice be of a serious degree and such as to be substantially below the standards expected of a nurse.”

“To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard for the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned.”

30. Each Particular must be considered individually and each proven Particular cumulatively in the context of the overall Charge.⁷

Charge No 1 - discussion

31. Some of the Particulars of Charge No 1 are simply statements of fact and not allegations of any malpractice or negligence or matters bringing discredit as such but the context in which other allegations are addressed. This is the case with Particular 1(c) and 1(j) and neither of those matters are denied by Mr Adams as is apparent from the Agreed Summary of Facts.⁸

Particular 1(a)

32. In relation to Particular 1(a) Mr Adams has admitted the factual allegations other than the reason for the appointment having been for a replacement plate or that a mould was taken of the upper teeth. In support of the allegations the PCC relied on:

- 32.1. A handwritten statement from Mr Mark D Gotty dated 28 May 2013⁹ in which he referred to having visited Mr Adams *“who took a mould of my upper teeth for a replacement plate”* and that he *“fitted me for a new plate, approximately a week later.”* He also referred to having had a phone call

⁷ *Duncan v Medical Practitioners Disciplinary Tribunal* [1986] 1 NZLR 513; *Chan v Medical Practitioners Disciplinary Committee* (Court of Appeal CA70/96; 8/8/96; Richardson P, Keith and Neazor JJ)

⁸ Paragraphs 8(a) and 24

⁹ Bundle pages 214 and 215

from Mr Adams “*asking I return for another fitting as the first was unsuccessful.*”

32.2. A complaint from Dr Kamal Pannu who had bought her practice from Mr Adams in 2008 and who referred, in an email dated 25 March 2009 to the DCNZ, to her patient, Mr Mark Gotty, having come in on 18 March 2009. Her email said that Mr Gotty said that she “*did not need to take impressions as Mark Adams had already done the impressions.*”

32.3. Also produced were what was said to be records from Dr Pannu’s practice including a note which included: “*Patient already got impression done by Mark who’s not a clinical technician.*”¹⁰

33. As noted above, the Bundle was assembled as an agreed Bundle and there were specific items to which Mr Adams took exception, including the handwritten letter from Mr Gotty. Mr Adams did not expressly take exception to the content of the email from Dr Pannu or the documents claimed to be extracts from her records; but it follows that his denial of events with Mr Gotty as outlined in that handwritten letter includes a denial of the accuracy of Dr Pannu’s records and email complaint. The Tribunal was advised that the PCC had sought to call Mr Gotty as a witness but unsuccessfully.

34. In his evidence Mr Adams said that he did not treat Mr Gotty because that was an ACC case and, because he would not get paid for such a case, he declined to do the work.¹¹ It was put to him by the PCC that he should have mentioned this in his discussion with Mr Bambery when he made the admissions which are now part of the Agreed Summary of Facts;¹² but Mr Adams’ response was that was a casual

¹⁰ Bundle page 12

¹¹ Transcript page 97

¹² Paragraph 8

discussion and he did not want to go into specifics with Mr Bambery. He said he did not see it was necessary to go into the details.¹³

35. The PCC asked that the Tribunal take the documents in the Bundle at their face value despite the objections from Mr Adams, relying on the power of the Tribunal to receive evidence even if not admissible in the court of law.¹⁴
36. When considering questions of credibility of witnesses, the Tribunal has taken into account the following considerations as established by the authorities:¹⁵
- 36.1. The manner and demeanour of the witness when giving evidence.
 - 36.2. Issues of potential bias, that is, to what extent was evidence given from a position of self interest.
 - 36.3. Internal consistency or, in other words, whether the evidence of the witness was consistent throughout, either during the hearing itself, or with regard to previous statements.
 - 36.4. External consistency or, in other words, was the evidence of the witness consistent with that given by other witnesses.
 - 36.5. Whether non-advantageous concessions were freely tendered.
37. The Tribunal has considered the position carefully and is prepared to accept the evidence provided by the copy handwritten statement of Mr Gotty and the records from Dr Pannu's practice and in her complaint. Mr Gotty had no reason to invent a story or to write in the way that he did. Dr Pannu may have had some reason to complain about Mr Adams and his practice, given that she had bought a practice from him and he appeared to her to have been practising illegally (without the appropriate qualifications or Practising Certificate as a clinical dental technician) and in competition with her.

¹³ Transcript pages 104 - 106

¹⁴ Clause 6 Schedule 1 HPCA Act

¹⁵ *May 197/Phar08/99P, Vatsyayann 355/Med10/152P, Dawson 300/Nur09/139P and Katamat 378/Phar10/162P*

38. Despite that, however, the Tribunal is prepared to accept that the allegations made by Mr Gotty are supported by the records and detail from Dr Pannu. The documentary evidence provided, although it is to a degree hearsay, is entirely consistent in the allegations made concerning Mr Adams having treat treated Mr Gotty in the way that the Charge is worded.
39. The Tribunal has taken into account Mr Adams' manner and demeanour in giving evidence; along with the position of self-interest that he has in denying the facts of the matter and, in particular, the content of Mr Gotty's own handwritten note and the records from Dr Pannu. Mr Adams was unconvincing in his statement of some distinction between part time practice and the word "practising"; which simply is illogical¹⁶. Another unconvincing distinction he tried to make was in the context of his awareness of the scope of clinical dental technology. He sought to say¹⁷ that it was only an inquiry he had made in 2007 rather than something more formal and that this created some distinction in his mind about knowledge of the requirements. That was unconvincing.
40. There was no express denial of this matter in Mr Adams' discussion with Mr Bambery, despite the name of Mr Gotty having been mentioned.¹⁸ Additionally there is the acknowledgement¹⁹ that Mr Adams agreed he had been treating patients by taking impressions and fitting prostheses (the matter to which Particular 1(c) of the Charge is addressed).
41. The Tribunal accepts that Particular 1(a) of Charge No 1 is proven on the evidence.

¹⁶ Transcript page 107

¹⁷ Transcript page 108

¹⁸ Transcript pages 104 and 105

¹⁹ Paragraph 8 Agreed Summary of Facts

Particular 1 (b)

42. This Particular concerns Mr Adams' having had in May 2009 appointments with another patient for a partial plate for whom he did the fitting work.
43. Those facts are agreed by Mr Adams in the Agreed Summary of Facts and there is produced without objection from Mr Adams the copy of a letter from the patient dated 11 April 2013²⁰ in which she expressly refers to Mr Adams' having done the fitting and the work in her mouth. She said that she was told by a "*dentist next door (an Indian woman)*" that Mr Adams should not be doing the work at all and "*that he was not legitimate*". She decided to get her money back which met with the response from Mr Adams "*she is not very happy with me*" (referring to the "dentist next door") and dismissed the patient's concerns.
44. There is no evidence to the contrary in respect of the allegations in this Particular which are admitted by Mr Adams.
45. The Tribunal accepts that Particular 1(b) of Charge No 1 is proven on the evidence.

Particular 1 (c)

46. As noted above, this allegation is simply one of fact which is not disputed by Mr Adams.²¹
47. The Tribunal finds that the factual matters stated are proven and, to the extent that the concessions made by Mr Adams in that interview are relevant to the Charge against Mr Adams, they are proven on the evidence.

²⁰ Bundle page 164

²¹ Agreed Summary of Facts paragraph 8(a)

Particular 1 (d) – (h)

48. The first allegation in Particular 1(d) refers to the incorporation of the company All Dentures Limited in March 2010 and that is accepted by Mr Adams as having occurred and is found by the Tribunal to be correct.
49. The remaining allegations in Particulars 1(d) – (h) refer to events during March 2012. First there is the telephone call by the Ministry of Health Senior Enforcement Officer on 7 March 2012 when Mr Adams gave information about the detail and cost of the supply of a full set of dentures with confirmation that Mr Adams would take the fittings and be doing the work.
50. Secondly there was the promotion on 22 March 2012 in the Manukau Courier by an advertising feature article. The article was produced to the Tribunal and it refers to Mr Adams as being “*a clinical dental technician with a qualification from Otago University.*” It refers to dentures in a “*fully operational dental laboratory*” being “*made and fixed on site by [Mr Adams] himself*” with no work being outsourced to any off site laboratory. There is reference to Mr Adams as the clinical dental technician working directly with the public and there being no need for an appointment or referral from a dentist. The telephone number given in the article is that of All Dentures Limited which appears in an accompanying advertisement.
51. Thirdly, there were the two advertisements on 22 and 29 March 2012 in the Manukau Courier. These refer to All Dentures Limited expressly making, fitting and fixing dentures, with repairs and relines and there being no need for dentist referral or appointment. The same promotion appeared on the two days.
52. To similar effect was the insertion on 27 March 2012 in the Yellow Pages referring, as the Charge is laid and the Agreed Summary of Facts confirms, to “Dentures, Implant Retained Dentures, Mouthguards, Partial, Prosthetics” with there being

reference to there being no dentist appointment or referral required and the mailing address being that of Mr Adams and the company All Dentures Limited.

53. The business card obtained by the senior investigator about 30 March 2012 from the premises at 3/208 Great South Road, Papatoetoe, was on the counter and referred to Mr Adams as “*clinical dental technician*.”²²
54. There is no dispute from Mr Adams that the factual matters contained in these Particulars are correct. The Tribunal so finds. It also finds that these factual matters were incorrect in that Mr Adams did not at that time have the necessary qualifications or Practising Certificate to practise as a clinical dental technician or hold himself out as such.
55. As the sequence of events makes clear from the Agreed Summary of Facts it was not until May 2012 that Mr Adams graduated with his Postgraduate Diploma in Clinical Dental Technology; on 17 September 2012 he was issued with an APC as a dental technician only; on 8 October 2012 he was registered as a clinical dental technician; and from that date he was confirmed as then able to commence practice as such.
56. Mr Adams’ explanation given under oath was that he had significant difficulties between 2009 and 2011 which he described as “*the most darkest years of my life and the most exciting as well*.”²³ He said that he “*could have gone into a deep depression*”²⁴ but decided to do the clinical dental technicians course because he had been doing that work when in South Africa.²⁵
57. Mr Adams enrolled at the Otago University for the appropriate clinical dental technician course and referred to there being three clients for whom he did work

²² Bundle page 147

²³ Transcript page 98

²⁴ Transcript page 98

²⁵ Transcript page 99

during that time.²⁶ Mr Adams tried to play down the amount of work that he was doing as being minimal and to make ends meet.

58. As the completion of his course drew near he was, Mr Adams said, excited about the prospect and looking forward to commencing doing that work. He said²⁷ that he was not aware that he needed to be registered or to have an Annual Practising Certificate. When this was drawn to his attention, Mr Adams said, he stopped work and stopped promoting this work.

59. Mr Adams said that he did not do clinical dental technology work from 2001 to 2009 but he did admit to doing that work from then in that context.

60. What Mr Adams did further concede in cross-examination, however, was that in 2007 he inquired about practising as a clinical dental technician and that as a result of those enquiries became aware that further qualification was needed.²⁸ Mr Adams said that he did not understand the distinction between qualification and registration.²⁹ He also sought to distinguish practising from part time practice.³⁰

61. Mr Adams presented that it was in that context that he made a promotions to which Particulars 1(d) to (h) refer.

Particular 1(i)

62. This Particular refers to the ordering and supplying of dental materials for clinical and/or dental laboratory use between April 2009 and October 2012. This is expressly admitted by Mr Adams in the Agreed Summary of Facts.³¹

63. The Tribunal was provided with copies of purchasing history for various accounts Mr Adams held with Henry Schein Shalfoon. The covering letter said that “*there is*

²⁶ Transcript page 99

²⁷ Transcript page 100

²⁸ Transcript page 108

²⁹ Transcript page 109

³⁰ Transcript page 107

³¹ Paragraph 25

a high probability the products we supplied were for either clinical or dental laboratory use.” Those purchasing histories cover various periods from 1 May to 3 June 2009, 3 May 2011 to 14 February 2012 and 24 August 2009 to 19 September 2011.

64. Also produced were a bundle of invoices of product purchased to which that purchasing history detail referred and the Tribunal is quite satisfied that this product includes not only product for dental laboratory use but also product for clinical dental laboratory use.
65. The factual content of this Particular is found to be made out.
66. The Tribunal understands that the response from Mr Adams on this Particular is the same as is referred to above, namely that while he was doing his work for his clinical dental technology qualification he needed to do some work to make ends meet and these purchases were for that purpose.
67. The Tribunal has considered such detail as has been supplied of the products that were purchased by Mr Adams and is satisfied that there was a significant amount of work being done by him using those products; and this was both dental work and clinical dental work. This is supported by his own admission on oath that he was working for some three clients doing this work.

Particular 1(j)

68. This Particular is, as noted above, simply a statement of matters of fact which are not disputed by Mr Adams.

Charge No 1 – malpractice or negligence – profession into disrepute

69. Charge No 1 is addressed to promotion of services on the one hand and/or provision of services on the other, when Mr Adams is alleged to have known or ought to have known that these were outside his scope of practice or were restricted activities that he was not permitted to perform under his scope of practice. The Tribunal must

address the individual Particulars to ascertain if they support the Charge in one or other of those ways or both or not.

70. The Tribunal is satisfied that in respect of each of the aspects of Charge No 1 to which the Particulars refer there has been malpractice on the part of Mr Adams as that term is defined by the authorities mentioned and further is conduct on his part that has brought or was likely to bring the dental technology profession into disrepute.
71. The various Particulars fall into three main categories:
- 71.1. First the two events in 2009 referred to in Particulars 1(a) and (b) when Mr Adams had expressly carried out clinical dental technology work for the two patients in question. Although Mr Adams denied doing the work for Mr Mark Gotty, the Tribunal has found on the evidence provided that he did do so. These two Particulars of Charge No 1 address the issue of provision of services. The consultation in May 2009 was in the context that Mr Adams had not renewed his Annual Practising Certificate.
- 71.2. The five aspects of promotions of services in March 2012 to which Particular 1 (d) to (h) refer.
- 71.3. The ordering by, and supply to, Mr Adams between April 2009 and October 2012 of dental materials for clinical and/or dental laboratory Particular 1(i).
72. Each and every one of the first two categories of these Particulars are found to be malpractice and bring discredit to the dental technology profession. That is separately and cumulatively. As to the Particulars in the third category, ordering and supply, the Tribunal finds that that is not of itself malpractice but it is evidence to support those aspects of the Charges which relate to the use of those products, particularly in relation to Charge No 2, that of practising without a current Practising Certificate.

73. Additionally there are the factual allegations in Particular 1(c) and in Particular 1(j).

Charge No 1 – warranting disciplinary sanction

74. The Tribunal is satisfied that those aspects of Charge No 1 which have been found to be made out, with Particulars both separately and cumulatively, are sufficient to warrant disciplinary sanction for the purpose of maintaining standards, protecting the public and punishing the practitioner.

75. The public need protection from dental technicians carrying out clinical dental technology work for which they are not properly qualified or for which they do not have a current Practising Certificate. There are such significant risks involved in the work of a clinical dental technician that this is recognized by the HPCA Order. The public further needs protection from persons holding themselves out as, or otherwise promoting services for, clinical dental technology work when at the time they do not have the appropriate qualifications and Practising Certificate.

76. The standards of the profession must be maintained by disciplinary sanction against a practitioner, such as Mr Adams, who carries out work for which he does not have the appropriate qualifications or Practising Certificate or who promotes the provisions of those services when he does not have the necessary qualifications or Practising Certificate.

77. The extent of any penalty is considered below but it is certainly a case where a penalty against Mr Adams is justified on this Charge and each of its respective Particulars.

Charge No 2 - practising without a current Practising Certificate

78. The facts of this Charge are admitted by Mr Adams and are found by the Tribunal on the basis of the evidence that has been submitted. The period covers some 3 1/2 years between April 2009 and September 2012. The Charge expressly refers to the profession of dental technology not clinical dental technology.

79. There are three elements needed to be proved, namely:
- 79.1. That Mr Adams was a registered dental technician.
 - 79.2. That Mr Adams practised as a dental technician.
 - 79.3. That Mr Adams did not hold a current Practising Certificate.
80. Those matters are established by the documents that were included in the Bundle without objection and a consented to by Mr Adams in the Agreed Summary of Facts.
81. The Tribunal accepts that PCC submission that there is no need to establish an intention to flout obligations (*White*³² and *Henderson*³³); that the breach was deliberate (*Ms H*³⁴); or that Mr Adams knew or ought to have known of the absence of the Annual Practising Certificate (*Bhatia*³⁵); and that disciplinary sanction as being warranted is not a factor in relation to this offence (*Dr E*³⁶).
82. The facts relied on by the PCC (in addition to the admission of the Charge itself by Mr Adams) are essentially:
- 82.1. Mr Adams' admission that he saw patients for clinical dental technology work between March and May 2009 and this involves the scope of practice for dental technology.
 - 82.2. That bank records for the company that between 3 April and 27 May 2009 show Mr Adams was being paid for "*Lab work.*"
 - 82.3. The inclusion in a report from the liquidators of Dentures for You Limited in May 2009 that the services of one employee were retained for 6 days to complete work in progress; combined with Mr Adams' statement to the PCC that when the shop was closed he "*finished a few patients.*"

³² 366/Opt10/168P
³³ 477/Phar12/210P
³⁴ 256/Psy09/128P
³⁵ 344/Med10/151P
³⁶ 503/Den12/219P

- 82.4. The documentary evidence behind the facts referred to in relation to Particular 1(i) above, the ordering by, and supply to, Mr Adams of dental materials for clinical and/or dental laboratory use. (The period is slightly different in terminating on 17 September 2012, because this is the day on which Mr Adams did receive the appropriate current Annual Practising Certificate). The Tribunal has already found that there is adequate evidence of purchase of those materials during that period and draws the inference that these were being used by Mr Adams for dental technology work. This is further affirmed by the delivery of those goods to Mr Adams' home address and his company's business address.
- 82.5. The circulation of a price list by the company which included Mr Adams' home and email addresses in late 2010 for dentures, partials, valplast, and metal frames.
- 82.6. The advice to a DCNZ staff member in June 2012 in a telephone conversation with Mr Adams' practice that he was "*with a patient*", not denied by Mr Adams in a subsequent telephone discussion.
83. The PCC referred to express advice given to Mr Adams in July 2009 that it was illegal for him to practise unless he held an APC; and further in June 2012 that, because he did not hold a current APC, he could not practise until this had been issued. While proof of those facts is not necessary to establish the Charge, they are relevant in relation to penalty.
84. The Tribunal is satisfied that this Charge is made out in all respects. Mr Adams has admitted the facts behind it and that the Charge is made out. The Tribunal accepts the PCC submissions on the extent of the practising and the period in question based on the documentary evidence of materials ordered and supplied and Mr Adams' own

admission on oath at the hearing that he was working during the period of his completion of the Otago qualification.

85. As stated above, this offence is not one where the Tribunal need address the question of whether disciplinary sanction is warranted for maintenance of standards, protection of the public or penalising the practitioner. As stated in *Dr E*³⁷

“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. As was said in Henderson³⁸ referred to in paragraph 42.

“40. There was some discussion at the hearing as to whether section 100(1)(d) requires a threshold of seriousness before a charge can be established. Counsel for the PCC conceded that there was such a threshold; however the matter was not fully argued. In this case there could be no doubt on this issue. The holding of an APC ensures that practitioners are safe to practise and ultimately that the public is protected. The process of applying for an APC involves – as is clear on the facts of this case – a process by which it can be confirmed to the regulatory authority that there is continuing competency and/or compliance with recertification requirements. Once issued it is notice to the world that the practitioner is fit and competent to practise.

41. Having regard to the circumstances in which the continuing breach occurred in this case where there was a longrunning failure to meet recertification requirements, the Tribunal concludes the circumstances are sufficiently serious as to warrant discipline.”

³⁷ Supra at paragraph 76

³⁸ Supra

86. Accordingly, the Tribunal finds this Charge is made out.
87. This decision was made known to the hearing which then proceeded to the question of penalty.

Penalty - the PCC submissions

88. Having outlined general principles and given the detail of a number of other decisions of the Tribunal said to be relevant, The PCC submitted
- 88.1. That since his registration as a dental technician in July 2000 Mr Adams should have been aware that dental technicians do not work directly on or with patients.
- 88.2. That the clinical services provided and promoted by him were a restricted activity that he was not permitted to perform.
- 88.3. That his practice of clinical dental technology posed a significant risk to members of the public.
- 88.4. That Mr Adams knew, and chose to ignore, the law preventing him from providing the clinical services that he did.
- 88.5. That he continued to promote his willingness to provide clinical services after having been put on notice that these were being investigated.
- 88.6. That there was dishonesty in the circumstances and Mr Adams ought clearly to have been aware that his Practising Certificate had expired.
- 88.7. That some statements made by Mr Adams to the PCC were not borne out by the evidence and he, Mr Adams, was not as forthcoming as he should have been.
89. It was acknowledged in mitigation that Mr Adams had co-operated with the PCC and in his agreement to the Agreed Summary of Facts and Bundle of documents; along with his attendance at the Tribunal hearing.

90. The PCC sought suspension of Mr Adams' registration as a **clinical** dental technician for a minimum of 3 months noting that this would prevent him from practising as such during that period but he could continue to practise as a **dental technician**.
91. Conditions would not, it was submitted, be adequate or appropriate; and that that short period of suspension would send a clear and unequivocal message to all concerned.
92. The PCC sought an order for payment of a fine, censure, and contribution to costs.

Penalty – Mr Adams' Position

93. In reply Mr Adams gave evidence and addressed some submissions. The main thrust of his response on penalty was that he had struggled for a long time to become qualified and registered as a clinical dental technician and obtain a Practising Certificate and, to be suspended from that after all that period of time, would be a significant disappointment and loss to him. He referred to the financial consequences for himself and his family.
94. Mr Adams sought to distinguish company affairs from his own personal position. He acknowledged that his wife was the shareholder in the company and that effectively all control of the company and its affairs, including payments made to Mr Adams as its employee, were in her control.
95. Although the Tribunal accepts that factually that is the correct position, at the same time the close proximity of family members is a factor that can be taken into account in determining penalty.
96. Mr Adams said that he was being paid (which could be read as drawing) \$500.00 per week initially from company earnings which was reduced to \$250.00 per week late 2013; and that his current expectations were earnings in the vicinity of \$15,000.00

for a 12 month period. He said he had no assets, no car, no other bank account deposits, and no beneficial expectation from any Family Trust.

97. Mr Adams said it would not be practicable for him to practise only as a dental technician during the period of suspension as a clinical dental technician because the sources of work that he had earlier had were now past and also there were difficulties in re-entry into the dental technology profession.

Penalty - principles

98. The penalties that the Tribunal can impose on a practitioner under section 101 of the Health Practitioners Competence Assurance Act 2003 are:
- 98.1. That registration be cancelled.
 - 98.2. That registration be suspended for a period not exceeding 3 years.
 - 98.3. That the health practitioner be required, after commencing practice following the date of the order, for a period not exceeding 3 years, to practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise specified.
 - 98.4. Censure.
 - 98.5. A fine of up to \$30,000.00 (but not if he or she has been convicted of a relevant offence or damages have been awarded against him (which does not apply here)).
 - 98.6. Costs.
99. 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.³⁹ In determining penalty the Tribunal is required to take into account the following factors:⁴⁰

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

“The principal purpose of this 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.”

99.2. The important role of setting professional standards.

99.3. 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.”

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

99.5. 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. The emphasis was that the Tribunal should try to ensure a degree of equity

³⁹ [2012] NZHC 3354; Wellington HC; CIV -2012-404-3916; 12/12/12; Collins J; also affirmed in *Katamat v PCC* CIV 2011-404-6069; [2012] NZHC 1633 at paragraph 49 and *Joseph v PCC*; [2013] NZHC 1131; CIV 2013-485-47 at paragraph 65 - 66

⁴⁰ *Roberts* supra at Paragraphs 44 - 51

between health professionals who appear before the Tribunal and stressed that, in cases involving sexual misconduct,

“there is no logical reason why different categories of health professional should be treated differently.”

99.6. 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.

99.7. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.

99.8. Whether the penalty proposed is:

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

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

101. In *A v Professional Conduct Committee*⁴¹ the High Court, having considered the range of sanctions available to the Tribunal, cited with approval the decision in *Taylor v The General Medical Council*⁴² and said that four points could be expressly and a fifth impliedly derived from the authorities namely:

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

102. The Court went on⁴³:

⁴¹ [2008] NZHC 1387; Auckland HC; CIV 2008 - 404 -2927; 5/9/08; Keane J para 81

⁴² [1990] 2 All ER 263

⁴³ Para 82

“Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v B (HC Auckland, HC 4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele v The General Medical Council [2005] EWHC 2143, though ‘... the maintenance of public confidence ... must outweigh the interests of the individual doctor’, that is not absolute – ‘the existence of the public interest in not ending the career of a competent doctor will play a part’.”

103. The Tribunal also takes account of the remarks of Randerson J in *Patel v Dentists Disciplinary Tribunal*.⁴⁴ That case involved an appeal by a dentist whose name had been removed from the register by the Dentists Disciplinary Tribunal in relation to Charges arising from his treatment of an elderly couple for whom he carried out crown and bridge work, accepted by the Court as being “...*grossly incompetent and completely unacceptable*”.⁴⁵

104. In discussing the purpose of disciplinary proceedings the Court said:

“[28] The Dentist Act does not provide any guidance on this subject but I am satisfied that the following statement of principle by Eichelbaum CJ in Dentice v Valuers Registration Board [1992] 1 NZLR 720, 724-725 is apposite in this case:

Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them; see, generally, Re A Medical Practitioner [1959] NZLR 784 at pp 800, 802, 805 and 814. In New Zealand, such provisions exist in respect of medical practitioners, barristers and solicitors, dentists, architects, pharmacists, real estate agents and a number of other professions and callings, as well as valuers; ...

[29] In the light of those general purposes, it is also relevant to consider the purpose of the removal of a practitioner’s name from a professional register. There is authority for the proposition that removal from a professional register has a protective purpose and is not designed

⁴⁴ Auckland HC; AP77/02; 8/10/02;

⁴⁵ Paragraph 32

to punish the professional concerned; Re A Medical Practitioner [1995] 2 QBR 154, 164. Plainly, removal from the register does serve to protect the public but it also serves the function identified in Dentice of maintaining professional standards and maintaining public confidence in the standing of the profession. It also acts as a deterrent to the individual concerned and others in the profession.

[30] The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist's fitness to practice against the need for removal and its consequences to the individual: Dad v General Dental Council at 1543. As the Privy Council further observed:

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

[31] I respectfully adopt the observations of the Privy Council and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case. As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large."

Penalty - discussion

105. In relation to Charge No 1, as mentioned above, there are three categories of facts to which the Charge refers namely:

105.1. The two incidents in March and May 2009 respectively where there was clinical dental technology work done when Mr Adams was not only without a Practising Certificate to do these but was not even qualified to do so.

105.2. The promotions in March 2012 by Mr Adams of his services as a clinical dental technician when he did not have the necessary Annual Practising Certificate and indeed had not as yet even been registered as such. This aspect of the Charge relates to promotion only. It does not, as found above

and for the reasons stated, refer to the provisions of such services directly to the members of the public because there was no evidence of this.

- 105.3. The order by, and supply to, Mr Adams of dental materials for clinical and/or dental laboratory use.
106. The Tribunal has not only found that that did occur but that did also occur in the context of Charge No 2, namely that Mr Adams was practising his profession of dental technology without a current Practising Certificate.
107. The Tribunal has decided that all aspects of both Charges Nos 1 and 2 should be dealt with in a composite way by one penalty. Both Charges involve practising in a particular specialty without a Practising Certificate. The Particulars of Charge No 1 that relate to promotion during March 2012 and the ordering and supply of dental materials are all in the context of Mr Adams' overall breach of the appropriate standards and requirements.
108. The aggravating features are:
 - 108.1. That, despite Mr Adams having come from South Africa, where the position is apparently different, when he was registered as a dental technician in New Zealand in July 2000 the difference between work which dental technicians were authorised to do and that which clinical dental technicians were authorised to do was different. He knew, or ought to have known, of that difference.
 - 108.2. That in the interview with the professional adviser to the DCNZ on 19 May 2009 Mr Adams agreed that he had been treating patients by taking impressions and fitting prostheses. He also admitted that he saw 4 - 5 patients for clinical dental technology work between March 2009 and May

2009 and took impressions for about 5 patients.⁴⁶ This in turn indicates that he knew that even at that stage what he had been doing was contrary to professional requirements.

- 108.3. The fact that Mr Adams had had that interview on 19 May 2009 should have brought it clearly home to him that there were registration and Practising Certificate requirements which he had been breaching and which he then needed to take care to comply with.
- 108.4. The express provisions of the HPCA Order which provide for the restricted activity of “*clinical procedures involved in the insertion and maintenance of fixed and removable orthodontic oral and maxillofacial prosthetic appliances.*” That express restriction in that Order should have brought home to Mr Adams the importance of not doing work for which he was not properly trained and qualified.
- 108.5. The “second chance” that Mr Adams was given by the decision of the DCNZ to defer in 2009 the referral of the complaint for further consideration by a PCC.
- 108.6. The various promotions in March 2012 to which Charge No 1 refers in the context that, although Mr Adams may have passed the appropriate qualifications, he had not by then graduated (which occurred in May 2012) or applied for registration (which occurred on 27 July 2012) or had the appropriate Practising Certificate issued or endorsed (which occurred on 8 October 2012).
- 108.7. The extent of the work Mr Adams did during the time he did not have an Annual Practising Certificate as a dental technician namely, between 1

⁴⁶ Agreed Summary of Facts Paragraphs 8(a) and 9

April 2009 and 17 September 2012. This is contained in his own evidence and also is indicated by the various invoices which were made available to the Tribunal.

- 108.8. Mr Adams' enquiry about registration as a clinical dental technician is evidence of his awareness that there were some activities that he was restricted from doing until he had that appropriate qualification.
- 108.9. That Mr Adams has not shown significant remorse for his offending. He appeared to the Tribunal to be blaming others rather than taking responsibility himself. An example was when he said that the reason he did the work while studying in Otago was because others appeared to have been offered positions as clinical dental technicians immediately after qualifying.⁴⁷
109. Providing clinical dental technology assistance without appropriate qualification, registration and a Practising Certificate places the public at significant risk. The sensitive nature of this work and the potential for risk is recognised by the restricted activities in the schedule to the HPCA Order.
110. Until Mr Adams had the appropriate qualification he would not have been aware of the risk factors to take into account when entering the mouth (referred to by some as "*the vermilion border*"). The tests include that the mouth was fit for purpose and was free from disease, disorder or abnormality.
111. Mr Adams' awareness of these issues (or his lack of awareness at the time) is emphasised by his statement to the PCC that he "*wouldn't have had a clue*" about oral health pathology in providing clinical dental technology services.⁴⁸ He also

⁴⁷ Transcript page 100

⁴⁸ Bundle page 80

admitted⁴⁹ that in 2009 he did not look at “*pathology insights*” which he described as a “ ... number 1 before you go any further, before you even put a, check the size of your impression tray, you’re going to look if everything is good and healthy.”

112. The failure to keep adequate records, while not part of the Particulars of the Charges, is nevertheless also of concern to the Tribunal. Keeping of records for a patient is always vital so that there is informed on-going treatment, where necessary; and so that, if another practitioner takes over, there is a clear record of what has already transpired.
113. In relation to practising as a dental technician without a current Practising Certificate, Mr Adams knew of the need to have the certification and had been expressly told by the DCNZ that, until he had the required Practising Certificate he was not to practise as such.
114. He had gone through the process of advising the DCNZ that he would not be practising and paying a reduced fee accordingly; and it was incumbent on him, when he wished to do so, to obtain the appropriate Annual Practising Certificate so that he could practise.
115. The mitigating factors are:
- 115.1. That, perhaps fortuitously, there is no evidence that any of the work that Mr Adams did when he did not have the appropriate Annual Practising Certificate has had any adverse consequence for any of his patients.
- 115.2. That there is no evidence that his practise methods or techniques or skills as a dental technician or, now, as a clinical dental technician, are inadequate or requiring improvement.

⁴⁹ Bundle page 82

- 115.3. That Mr Adams has participated in the inquiry by the PCC and has engaged in the Tribunal process. To be noted, however, is that there are some of the responses which Mr Adams has given which do not ring with necessary credibility. These are referred to above in the context of credibility and include the suggestion that part time practice is not “practising” as such; and that he thought it was in order to promote his business as a clinical dental technician even before he had graduated as such or become registered or obtained an Annual Practising Certificate. Mr Adams was not as clear as he might have been about the amount of work that he had been doing as a dental technician during the period he was studying at Otago.
116. A consideration of other cases is helpful, but as always the Tribunal must decide each case on its own individual facts. The Tribunal has taken account of the various cases referred to it by the PCC.⁵⁰
117. In particular the PCC referred to *Sutherland*⁵¹ where a dental technician had been charged with providing clinical dental technology treatment and promoting his services. Mr Sutherland had taken impressions, manufactured dentures without prescription and supplied to the patient. He had placed a number of advertisements promoting his services. An argued factor was that Mr Sutherland had not crossed the “*the vermilion border*” but rather directed the patient to place the moulding material into his own mouth. The Tribunal considered that Mr Sutherland’s control of the process and the insertion of the removable oral appliance amounted to practice as a clinical dental technician and that, combined with the promotion evidence amounted

⁵⁰ *Baker*, 562/Mid12/211P; *Ranchhod*, 273/Med09/129P; *Rodrigues*, 384/Ost11/173P; *Devine*, 555/Dtech13/232P; *Stokes*, 556/Dtech13/233P; *van Vliet*, 234/Dtech13/243P; *Wolmarans*, 554/Dtech13/236P; *Kewene*, 503/Den12/219P; *S*, 445/Den11/198P; *Henderson*, 477/Phar12/210P, *Ms H*, 256/Psy/09/128P, *Ms O*, 274/OT09/132P, *White*, 366/Opt10/168P; and *Vitali*, 538/Dtech13/255P

⁵¹ 481/Dtech11/199P

to malpractice and brought discredit to the profession. Mr Sutherland did not participate in the PCC investigation or attend the Tribunal hearing. The evidence against him suggested to the Tribunal that the patient for whom he did the work was placed at severe compromise of risk. The Tribunal concluded that the appropriate penalty was cancellation of registration.

118. Taking all factors into account, the Tribunal has decided that this is not a case where Mr Adams' name should be removed from the register.

119. It has also concluded, despite the submission for the PCC, that this is not a case which calls for a period of suspension as a clinical dental technician. The reasons for not suspending Mr Adams are:

119.1. That some of the offending is reasonably long and outstanding, namely the two treatments as a clinical dental technician in 2009. Although the reason for not pursuing those matters at the time was because of Mr Adams' stated intentions so far as practising were concerned, the passage of time since then is a factor taken into account.

119.2. That the Tribunal has only found promotion of practice in March 2012 rather than actual practice as such.

119.3. That the suggestion that Mr Adams could continue to practise as a dental technician during any period of suspension as a clinical dental technician is not as practicable as was suggested by the PCC. The Tribunal accepts that Mr Adams' practice as a clinical dental technician has prejudiced any continuation simply as a dental technician now.

119.4. That suspension would be out of proportion in the totality of the circumstances even if Mr Adams could practise as a dental technician.

119.5. That the refusal by the Tribunal below for any order for name suppression, to the extent that this will be a penalty, militates against suspension as well.

Publication of Mr Adams' name can have a penal effect and that needs to be weighed in the balance of the totality of penalty.

- 119.6. The co-operation that Mr Adams has given, to the extent that he has, taking into account the matters referred to above.
- 119.7. Any message that is required to be sent to Mr Adams, the professions of dental technology and of clinical dental technology, or the public are adequately sent by the other penalties that the Tribunal imposes.
120. This is a case however where there should be in order for censure and the Tribunal censures Mr Adams. This is not an empty exercise but an expression by the Tribunal of the significant disquiet that it has about the level of offending.
121. The Tribunal is also of the view that there should be the imposition of a fine and the appropriate fine, having regard to the other cases referred to and all circumstances, is \$4,500.00 which is ordered below.
122. The Tribunal is also of the view that there should be some conditions imposed on Mr Adams' continuing to practise as a clinical dental technician. These are:
- 122.1. First that there is a satisfactory outcome from such practice audit as is ordered by the DCNZ.
- 122.2. Secondly, that if there are aspects of that audit which are found not to be complying with appropriate standards Mr Adams will attend such courses and take such steps as are fixed to remedy those deficiencies by the DCNZ.

Costs

123. The PCC sought an order for contribution to costs and estimated that its costs for all expenses and legal fees, including disbursements, was some \$45,798.22 excluding GST. In addition the Tribunal must take into account its own costs which were estimated at \$21,899.80 again excluding GST. This gives a total of approximately \$67,000.00 for costs of this prosecution.

124. Mr Adams gave evidence of his financial position.⁵² He said that any financial penalty would “*severely burden*” him.

125. The principles applicable to costs are these. The normal approach for the Tribunal based on the authorities⁵³ is to start with a 50% contribution. That, however, is a starting point and other factors may be taken into account to reduce or mitigate that proportion. The balance of costs of the prosecution after the orders for costs must be met by the profession itself. As was said in *O’Connor v Preliminary Proceedings Committee*.⁵⁴

“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 had empowered the different bodies to impose orders for costs.”

126. In *Winefield*⁵⁵ the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:

126.1. The hearing being able to proceed on an agreed statement of facts.

126.2. Co-operation of Mr Winefield.

126.3. The attendance of Mr Winefield at the hearing.

126.4. Consistency with the level of costs in previous decisions.

126.5. Costs not paid by Mr Winefield would fall on the profession as a whole.

127. Taking account of those principles and facts, the Tribunal’s decision is that credit should be given to Mr Adams in the context of costs because of the assistance he has given, the fact that he appeared before the Tribunal, and his agreement to the Agreed Summary of Facts, all of which have assisted in keeping costs down.

⁵² See paragraph 96 above

⁵³ Including *Cooray v Preliminary Proceedings Committee*; Wellington HC: AP 23/94; 14/9/95; Doogue J

⁵⁴ Wellington HC; AP 280/89; 23/8/90; Jeffries J

⁵⁵ *Supra*

128. The Tribunal considers that the appropriate contribution should be approximately 33% of total, that is the sum of \$22,000.00.

Name suppression

129. Mr Adams made an application orally for suppression of his name and identifying details. The reasons he gave in his oral evidence were that he was struggling to achieve success in his business at Papatoetoe and that publication of his name would prejudice that. He referred to his competition as “*very tough*”; and that he just wanted “*to get a fair crack at the business.*” No other evidence was presented in support of the application.
130. The PCC opposed the application and submitted that there was nothing in support which would justify any order being made on normal criteria.
131. The subject of prohibition on the publication of name or identifying particulars is dealt with by s. 95 of the HPCA Act which includes:

“95 Hearings to be public unless Tribunal otherwise orders

(1) Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section or unless section 97 applies.

(2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:

...

(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person.”

132. The presumption in section 95(1) of the Act that the Tribunal’s hearings shall be in public are the primary principle and endorse the principle of open justice; but section 95(2) does give the Tribunal discretion to grant name suppression.

133. The test is whether it is “*desirable*” to prohibit the publication of the name or any particulars of the affairs of the person in question and the Tribunal must consider both:

133.1. The interest of any person and

133.2. The public interest.

134. There have been many public interest factors identified by other Tribunal decisions. These include:

134.1. Openness and transparency of disciplinary proceedings.⁵⁶

134.2. Accountability of the disciplinary process.⁵⁷

134.3. Public interest in knowing the identity of a health practitioner charged with a disciplinary offence.⁵⁸

134.4. Importance of speech and the right enshrined in section 14 New Zealand Bill of Rights Act 1990.⁵⁹

134.5. Unfairly impugning other practitioners.

135. There are also these statements of principle:

Panckhurst J in *Tonga v Director of Proceedings*⁶⁰

“[F]ollowing an adverse disciplinary finding more weighty factors are necessary before permanent suppression will be desirable. This, I think, follows from the protective nature of the jurisdiction. 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 a preponderance of cases. Thus, the statutory test of what is “desirable” is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may incline in favour of the private interests of the practitioner. After the hearing, by which time

⁵⁶ *M v Police* (1991) 8 CRNZ 14; *R v. Liddell* [1995] 1 NZLR 538; *Lewis v. Wilson & Horton Ltd.* [2000] 3 NZLR 546; *Director of Proceedings v I* [2004] NZAR 635

⁵⁷ *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360

⁵⁸ *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360; *F v Medical Practitioners Disciplinary Tribunal* (Auckland High Court; AP21 – SW01; 5/12/01; Laurenson J

⁵⁹ *R v. Liddell* [1995] 1 NZLR 538; *Lewis v. Wilson & Horton Ltd.* [2000] 3 NZLR 546

⁶⁰ *Tonga v Director of Proceedings* (Christchurch High Court; CIV 2005-409-2244; 21/2/06; Panckhurst J; para 42.

the evidence is out and findings have been made, what is desirable may well be different, the more so where professional misconduct has been established”.

Blanchard J in *B v B*:⁶¹

“In normal course where a professional person appears before a disciplinary Tribunal and is found guilty of offence, that person should expect that an order preventing publication of his or her name will not be made. That will especially be so where the offence found to be proved or admitted, or admitted, is sufficiently serious to justify striking off or suspension from practice”.

Gendall J in *Anderson v PCC*:⁶²

“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.

“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”.

136. The decision of the Tribunal is that the application for name suppression be declined. No adequate evidence was advanced about any real effect on Mr Adams from the publication of his name beyond what would normally be expected from publicity of charges of this nature. There will be consequences for Mr Adams from his name being published. Those consequences are taken into account in the context of penalty referred to above. Any effect that may have (and, as stated, there is no evidence of this particularly) is outweighed by the public interest in having

⁶¹ *Supra B v B*; p 99

⁶² Wellington High Court; CIV 2008 – 485 – 1646; 14/11/08; Gendall J; paras 36 and 37

publication of Mr Adams' name. Consideration must be given to other clinical dental technicians who might be implicated had there been no publication.

Orders

137. Mr Adams is censured pursuant to section 101(1)(d) of the Health Practitioners Competence Assurance Act 2003.
138. Pursuant to section 101(1)(e) of the Health Practitioners Competence Assurance Act 2003 the Tribunal orders Mr Adams to pay a fine of \$4,500.00.
139. The Tribunal orders, pursuant to section 101(1)(c) of the Health Practitioners Competence Assurance Act 2003, that Mr Adams may, after commencing practice following the date of the order, practise his profession for a period of 3 years after re-commencement only in accordance with the following conditions, namely:
 - 139.1. That Mr Adams will have achieved a satisfactory outcome from any practice audit imposed by the DCNZ.
 - 139.2. If there are any aspects from that audit which are found to be non-complying, Mr Adams will attend and complete satisfactorily such appropriate courses or take such other appropriate steps as are fixed by the DCNZ to address the areas of deficiency.
140. Pursuant to section 101(1)(f) of the Health Practitioners Competence Assurance Act 2003 the Tribunal orders Mr Adams to pay a contribution towards the costs and expenses of the investigation, inquiry and prosecution of the Charge and the hearing in the sum of \$22,000.00 to be divided as to the sum of \$14,000.00 to the PCC and the sum of \$8,000.00 to the Tribunal.
141. Mr Adams' application for name suppression is declined.

142. Pursuant to section 157(2) of the Health Practitioners Competence Assurance Act 2003 the Tribunal directs that a copy of this decision and a summary be placed on the Tribunal's website. The Tribunal further directs that a notice as to the effect of its decision be placed in the newsletter of the Dental Council, and its website.

DATED at Auckland this 16th day of June 2014

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David M Carden
Chairperson
Health Practitioners Disciplinary Tribunal