



New Zealand  
Health Practitioners  
Disciplinary Tribunal

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**DECISION NO:** 544/Dth12/229P

**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  
**Cherie Ann Raewyn Griffen**,  
registered dental therapist of  
Paihia.

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**TRIBUNAL:** Mr D M Carden (Chair)  
Ms P Brennan, Ms C Caddie, Ms J Lowry and Mr H O'Rourke  
(Members)

Miss D Gainey (Executive Officer)  
Ms J Kennedy (Stenographer)

Hearing held at Whangarei on 17 April 2013

**APPEARANCES:** Ms A Miller for the Professional Conduct Committee  
The practitioner, Cherie Ann Raewyn Griffen in person

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## Introduction

1. Mrs Cherie Ann Raewyn Griffen is a dental therapist who practises on Motukiekie Island near Paihia in the Bay of Islands. Before her Annual Practising Certificate (“APC”) expired on 31 March 2012 she was sent reminders by the Dental Council of New Zealand (“Dental Council”) of the need to renew this. Despite those reminders she did not complete the necessary application or pay the appropriate fee for renewal in time and it was not until 18 April 2012 that she received the renewed APC. Between 1 April 2012 and 18 April 2012 Mrs Griffen did practise the profession of dental therapy. The matter was investigated by a Professional Conduct Committee (“PCC”) of the Dental Council which laid a Charge before the Tribunal.

## The Charge

2. The Charge read as follows:

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

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

### **PARTICULARS OF CHARGE**

*Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that Mrs Griffen, a registered dental therapist, practised the profession of dental therapy between on or around 1 April 2012 and 18 April 2012, when she 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”.*

3. At the hearing Mrs Griffen admitted the Charge. An Agreed Summary of Facts was produced which read as follows:

1. *Cherie Ann Raewyn Griffen has been a registered dental therapist since 18 September 2004. Ms Griffen is registered within the dental therapy scope of practice under the Health Practitioners Competence Assurance Act 2003.*
2. *From the date of her registration Ms Griffen has been required to hold a current annual practising certificate (APC) in order to practise the profession of dental therapy.*

***Background***

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

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

....

***Help us to help you***

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

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

*(emphasis in original)*

5. *On 19 March 2012 the Dental Council sent an email reminder to all dental therapists, including Ms Griffen, advising that:*

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

...

*If you intend to practise at any time during the next APC cycle (1 April 2012 – 31 March 2013) you must hold a current practising certificate. You are advised that under the Health Practitioners Competence Assurance Act 2003 it is unlawful to practise without a current APC.*

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

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

...

*If you intend to practise at any time during the next APC cycle (1 April 2012 – 31 March 2013) you must hold a current practising certificate. You are advised that under the Health Practitioners Competence Assurance Act 2003 it is unlawful to practise without a current APC.*

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

*We note that you have not yet submitted to the Dental Council ("Council") your completed application to renew your Annual Practising Certificate (APC) for the practising period 1 April 2012 – 31 March 2013, and we are accordingly unaware of your practising intentions for this period. If you intend to practise at any time during this period you are required by law to hold a current practising certificate.*

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

***If you are practising at the moment without a current practising certificate, you are doing so unlawfully and you must cease immediately; complete your APC application form, including the Workforce Survey, and return it to the Dental Council together with your practising fee. Only when you have received a current practising certificate may you resume practise.***

...

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

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

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

*(emphasis in original)*

9. *On 16 April 2012 a Dental Council staff member rang Ms Griffen's home number and recorded the following file note:*

*Called home number, a man answered and said that she wasn't there and would have left work 20 minutes ago and would not get home until about 5.15pm, I asked what she was working as and he said a therapist. I asked if I could leave a message for he[r] to call us first thing tomorrow morning and said that we opened at 8am. I explained that she doesn't currently hold a practising certificate and so is not entitled to practise at the moment. I said it would be best if she call first thing tomorrow so we can get this sorted out before she starts work tomorrow or else she won't be able to practise. He said he would get her to call first thing.*

10. *On 17 April 2012 Ms Griffen called the Dental Council. A Dental Council staff member recorded the following file note:*

*Cherie called me and said that she had sent her form a week and a half ago. I said that it had not arrived and we need to get something from her today as she doesn't currently hold a practising certificate and can't practice, she said that's ok as she's not working at the moment and won't be until after the holidays. She said that she would print out another form and I said that in the interest of time she could scan and email or fax it to us so that we get it the same day. She asked us to let her know if we get her form in today as she thinks it was probably just delayed in the post due to easter.*

11. *On 17 April 2012 the Registrar of the Dental Council wrote to Dental Protection Limited, ACC, and the Ministry of Health to give notice that, among others, the registered dental therapists recorded in an attached schedule, including Ms Griffen, did not hold current practising certificates: "The Annual Practising Certificates for these practitioners expired on 31 March 2012 and to date; applications for renewal of their Annual Practising Certificates have not been received by the Dental Council".*

12. On 18 April 2012 the Dental Council received Ms Griffen's completed application form by facsimile. The application was undated, and noted that her employer, Ngati Hine Health Trust, had already paid the fee. Ms Griffen was issued with an APC for the period 18 April 2012 to 31 March 2013.
13. On 19 April 2012 a Dental Council staff member rang Ms Griffen's employer and recorded the following file note:
- Phoned Cherie's practice to establish if she had been working. I spoke to the receptionist who said that she had been working this week but for more detail put me through to the Dental unit...The Practice Manager advised me that Cherie had worked clinically on Friday the 13<sup>th</sup> of April and Monday the 16<sup>th</sup> of April. Other than that she had not been practising clinically because it was school holidays...*
14. On 19 April 2012 another Dental Council staff member recorded the following file note:
- ...I rang Ms Griffen at her work and on her cellphone and left messages for her to ring me back to advise of a postal address where I can courier her a package including her APC as her current postal address is a Private Bag and we cannot courier to Private Bag addresses. Awaiting Ms Griffen to ring me back.*
15. On 20 April 2012 a Dental Council staff member recorded the following file note:
- I rang Ms Griffen again today as she had not responded to the messages that I left yesterday.*
- Ms Griffen advised me to use her practice address, I confirmed the details of her practice address with her and have arranged for the courier to pick up the letter and the APC which I prepared yesterday.*
16. The letter, dated 19 April 2012, was signed by the Registrar of the Dental Council and enclosed Ms Griffen's APC for the 2012/2013 practising year. The letter stated that: "As you are aware, your previous APC expired on 31 March 2012. Your application for a further APC was received by the Dental Council after that expiry date. If you continued to practise after 31 March 2012, you were doing so unlawfully". Ms Griffen was also advised that her case had been referred to the Dental Council for consideration of referral to a PCC.
17. A PCC was subsequently appointed to investigate whether Ms Griffen had practised the profession at a time when she did not hold a current practising certificate.

18. On 26 June 2012 the PCC wrote to Ms Griffen requesting a copy of her appointment book or information from her employer relating to her practice between 1 April 2012 and 18 April 2012, and offering Ms Griffen an opportunity to furnish an explanation as to why she did not submit her application for an APC by 31 March 2012.

19. On 29 June 2012 Ms Griffen wrote to the PCC stating that:

*...I say in my defence that I did send my forms back for my APC but the Dental Council has said they did not arrive, but was told two weeks after I had sent them, I also have a copy of my fax that was sent by Ngati-Hine which I was also told did not come through, so I fell [sic] it was an error at the councils end. lucky it was school holidays at the time of April and i had dental students that i was overseeing instead of working.*

20. On 21 July 2012 Ms Griffen wrote to the PCC and advised that:

*When I received by application for the renewal of my APC certificate I was at a slight disadvantage, because our mail arrives via a contract boat once a week to the Island, and with the weather we had at that time my mail was delayed. However once I received it I completed the registration forms and placed them on my manager's desk for her to clear for payment, because unlike a DHB we have to apply for funding, but unfortunately due to my manager being away at a tangi they sat on her desk for a week. Once she returned to work all the necessary clearances were gained and it was forwarded onto our accounts manager to arrange for payment, a week later all the paperwork was given back to myself to mail off to the Dental Council, I placed all relevant documentation into a prepaid envelope and put it with the outgoing mail on the 29<sup>th</sup> of March.*

*The following week I was contacted by the Dental Council stating that they had not received my registration forms, I explained that I had sent them on the 29<sup>th</sup> and that they should have them, and could they please check to make sure they were not there, and I would double check that they were sent. I was then contacted by the Dental Council and informed that they had definitely not arrived and could I please obtain another copy off the website, fill it out and fax it straight away, this I did and had the dental receptionist Christine fax them off. It was not until days after this that I was phoned again and told they did not get, or could not find the fax, by this stage I was wondering what was going on and felling [sic] very frustrated, but I sent yet another copy which was received on the morning of the 18<sup>th</sup> of April.*

*I am employed by Ngati-Hine as a therapist on a part time basis only working 3 days per week, usually being a Monday, Tuesday and Wednesday, and as I did only work 3 of the 18 days in question as a practising clinician, and as stated in numerous conversations with the*



*Dental Council was under the impression, as I had no reason to think otherwise, doing so as a registered clinician. As my first contact with the council was after the 4<sup>th</sup>, so those first three days I had no idea I was not registered.*

*Work Schedule from 1<sup>st</sup> to 18<sup>th</sup> April 2012:*

- *1<sup>st</sup> April 2012 was a Sunday so I was not working on that day.*
- *2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> of April (being the 3 days) I worked in-house at Ngati-Hine as a clinician doing examinations on Pre-School children.*
- *5<sup>th</sup> of April we had a new graduate start so I was supervising her, I was not working in a clinic.*
- *6<sup>th</sup> of April was school holidays and I was filling [sic] all day and had no patients.*
- *7<sup>th</sup> and 8<sup>th</sup> was another weekend and I was working at my second job as a care taker on the Island.*
- *9<sup>th</sup> 10<sup>th</sup> and 11<sup>th</sup> I was filling in-house as it was still school holidays and had no clinics*
- *12<sup>th</sup> and 13<sup>th</sup> I worked at Otehei Bay (Café on Island in the BOI) not a dental clinic.*
- *16<sup>th</sup> 17<sup>th</sup> 18<sup>th</sup> once again, filling in-house as it was still the school holidays.*

*I hope that you will be able to see from my response that any breach of protocol was accidental and most definitely unintentional, once I was aware that my letter had not arrived (that being after the 3<sup>rd</sup>), and I was not in fact registered I ceased working as a clinician.*

21. *On 3 August 2012 and the Chair of the PCC contacted Ms Griffen by email to arrange a meeting. Ms Griffen replied on 8 August 2012 to advise that September would be better for her.*
22. *On 4 September 2012 the PCC wrote to Ms Griffen to advise that it required further information from her, and required her to provide it with a copy of her appointment book(s) for the period 1 April 2012 through to 18 April 2012. The PCC noted that "For the avoidance of doubt, this requested material includes any entries in appointment book(s) showing that you were on leave or not otherwise seeing patients, or providing supervision to other staff". The PCC advised Ms Griffen that this information would also be requested from her employer.*

23. *On 4 September 2012 the PCC wrote to Ms Griffen’s employer, Ngati Hine Health Trust, and requested a copy of the relevant appointment book or other similar records for Ms Griffen for the period 1 April 2012 to 18 April 2012 and stated “this material would include any records showing that Ms Griffen was not working, or seeing patients on any particular day”.*
24. *On 6 September 2012 Ngati Hine Health Trust wrote to the PCC and provided the requested information. In particular, Ms Griffen’s employer advised:*

*I would like to advise that Ngati Hine Health Trust and Cherie believed that Cherie’s annual practising certificate had been renewed as at the 1<sup>st</sup> April 2012.*

*Below is a detailed breakdown, and attached is the appointment book. Unfortunately I cannot produce evidence of the “filings and preparation”...That took place in-house.*

*Monday 2<sup>nd</sup> April Patients*

*Tuesday 3<sup>rd</sup> April Patients*

*Wednesday 4<sup>th</sup> April Patients*

*Thursday 5<sup>th</sup> April No Patients*

*Friday 6<sup>th</sup> April No Patients*

*Monday 9<sup>th</sup> April Public Holiday, Easter Friday*

*Tuesday 10<sup>th</sup> April No Patients*

*Wednesday 11<sup>th</sup> April No Patient*

*Thursday 12<sup>th</sup> April No Patients*

*Friday 13<sup>th</sup> April Patients*

*Monday 16<sup>th</sup> April No Patients*

*Tuesday 17<sup>th</sup> April sick, away from work*

*Wednesday 18<sup>th</sup> April Set up clinic*

25. *The appointment records and information provided by Ngati Hine Health Trust show, among other things, that:*
- (a) *On 2, 3, and 4 April 2012 Ms Griffen saw 28, 31, and 9 pre-school patients respectively;*

- (b) *On 10 April 2012 Ms Griffen was “In with Dental Students Working”;*
- (c) *On 13 April 2012 Ms Griffen saw 6 patients;*
- (d) *[deleted by agreement at the hearing]; and*
- (e) *On 17 April 2012 Ms Griffen was away sick.*

26. *On 14 September 2012 Ms Griffen advised the PCC by email that:*

*I contacted pay roll on the Tuesday after the letter was sent to you about my hours, and they have confirmed to me that I did work a 80 hours over the holidays which was in the two week period. The first I had done as I am only employed 3 days per week. I was working at Otehai the following week sorry, as I could not remember that far back and I forgot as I normally work on the Island every Thursday and Friday and that was the first time I had [d]one a full 80 hours over the holidays so sorry about the muck up but I did only have patients on the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and with our student on the 13<sup>th</sup>.*

27. *On 3 October 2012 the PCC met with Ms Griffen. Ms Griffen was advised by the PCC that she could have a support person present, and she was encouraged to take legal advice.*

28. *During the meeting with the PCC Ms Griffen:*

- (a) *Provided the PCC with a copy of the letter from the Dental Council dated 3 April 2012, on which she had noted: “received on the 7.4.12. This is the 1<sup>st</sup> I knew of it being late”;*
- (b) *Provided the PCC with facsimile transmission records for the period 18-20 April 2012 which showed that a facsimile was sent to the Dental Council’s number at 2.46pm on 18 April 2012; and*
- (c) *Admitted that she had practised without an APC during the period in question. In particular, Ms Griffen admitted that she had practised by way of overseeing, supervising, and assisting dental students treating patients although, at that time, she had been notified by the Dental Council that she did not hold an APC by way of the Dental Council’s letter dated 3 April 2012.*

29. *On 6 October 2012 Ms Griffen provided the PCC with:*

- (a) *A copy of the ASB record of payment for her APC fee (paid by Ngati Hine Health Trust). The payment was made to the Dental Council on 10 April 2012. Ms Griffen noted “This is when Ngati-Hine made payment. I was surprised it was made so late”;* and

- (b) *A copy of one page of an application for an APC signed and dated by Ms Griffen on 20 March 2012, on which she noted: “This is my first application form that was handed in for payment dated the 20<sup>th</sup> it took 9 days to get back to me”.*

30. *On 15 October 2012 Ms Griffen advised the PCC by email that:*

*It was two dentist students that were with me on the 13<sup>th</sup> of April Sam and Abdule. Jesse was with me but...not working. Sam and Abdule took turns with the patients and it was a half day in the clinic. I was observing and helping them.*

31. *Ms Griffen says that:*

- (a) *Her email of 15 October 2012 actually relates to her practice on 10 April 2012, when she assisted two dental students with patients (recorded in information from Ngati Hine Health Trust “In with Dental Students Working”); and*
- (b) *She saw [amended at the hearing – 6] pre-school patients on 13 April 2012 because the dentist did not want to see them.*

32. *In November 2012 the PCC laid a charge before the Health Practitioners Disciplinary Tribunal alleging that Ms Griffen had practised her profession at a time when she did not hold a current annual practising certificate.”*

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

*“.. each document in the Bundle:*

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

6. For the PCC it was submitted that there were three elements to be proven, namely that during the relevant period:

- 6.1. Mrs Griffen was a registered dental therapist.
  - 6.2. Mrs Griffen practised as a dental therapist; and
  - 6.3. Mrs Griffen did not hold a current practising certificate.
7. Reference was made to various items acknowledged by Mrs Griffen and the content of certain records provided by her employer, Ngati Hine Health Trust. It was submitted that it was sufficient to establish a charge under section 100(1)(d) of the HPCA Act, to show those three elements and that there was no need to establish an intention to flout professional obligations, that the breach was deliberate, or that the practitioner knew or ought to have known of the absence of the APC. It was submitted that in a charge of this nature it is not necessary to establish that disciplinary sanction is required for the purpose of protecting the public, maintaining professional standards or punishing the health practitioner as is required in the case of a charge of professional misconduct.
  8. Mrs Griffen made submissions and gave evidence on oath. The matters to which she referred related not only to the Charge as brought but also to penalty matters. She had also written a letter to the PCC dated 21 July 2012 to which reference was made. There were some inconsistencies in the evidence she gave to the hearing with what she had said in her letter to the PCC.
  9. Essentially her position was that she completed her application for renewal of her APC and placed this on her manager's desk but she was told that the manager was at a tangi for a week at the time. When the manager returned she said in her letter the clearances were gained, the application was forwarded to the accounts manager to arrange for payment, and that she, Mrs Griffen, placed all relevant documentation in the outgoing mail on 29 March 2012.
  10. Mrs Griffen said in her letter that she was contacted by the Dental Council with advice that the application form had not been received and she said that she

explained that the form had been sent on 29 March 2012 and should have arrived by then. When later told by the Dental Council that the form had not arrived she was asked to complete another form and to fax this which she said she did. She said that “*days after this*” the Dental Council telephoned her again and told her that the forms had not arrived and she then sent another copy which was received on 18 April 2012.

11. In her statement to the Tribunal at the hearing Mrs Griffen acknowledged that because of delays she did not expect an APC to be received by her by 1 April 2012. She said that she had told her employer that the employer would need to pay the “*penalty fee*” for late application. (Counsel for the PCC explained that this was not a penalty fee but rather the fee for further work required in processing a late application). Mrs Griffen gave further detailed evidence to the hearing about the sequence of events so far as completion of the application form and payment of the fee was concerned. To a degree her statement disagreed with the record kept by the Dental Council and to a degree her evidence was inconsistent with her earlier letter. The Tribunal concludes that there were certainly steps taken by Mrs Griffen to renew her APC by completion of the appropriate form and steps taken by her to ensure that the fee was paid by her employer. The fact remains, however, that she had not received her APC by 1 April 2012 and was not entitled to, and knew she was not entitled to, practise until she had received it.
12. In her letter Mrs Griffen said that she was employed as a therapist on a part time basis, working three days per week and in the 18 days in question in this Charge she had worked only three of these. She elaborated with a schedule of each day between 1 and 18 April 2012. At the hearing she explained certain aspects of the entries in the letter and particularly the extent to which she was working on 13 and 16 April 2012.

13. Mrs Griffen was asked about the appointment book records for the school she had worked at, especially those pertaining to 13 April 2012 where there were six entries. She said that of these six entries three were patients in her patient group who were for examinations only and seen by others and the other three had been seen by fifth year dental students. She said she showed those dental students how to open the mouth for two and a half year olds for whom dental assistance was being given. She said that she did not think that she was supervising these students who were under the supervision of a dentist in an adjoining room but rather giving them practical assistance. This evidence is inconsistent with what is agreed at paragraphs 25(c) and 31(b) of the Agreed Summary of Facts and Mrs Griffen could not explain why she agreed to that in that Summary.
14. As to the reference in her letter to having supervised a new graduate on 5 April 2012, Mrs Griffen said in her evidence that this was wrong and that she did not supervise the graduate until 19 April 2012. The record for 5 April 2012 was not produced to the Tribunal and the advice from the employer dated 6 September 2012 also confirms there having been “*No Patients*” on that date. The Tribunal is prepared to accept that the entry in Mrs Griffen’s letter was wrong.
15. The Tribunal must consider the Charge in light of the Agreed Summary of Facts and the evidence as given to the hearing.

**Charge – General Principles**

16. The burden of proving the Charge is on the PCC.
17. The standard of proof is the balance of probabilities, the standard that applies in civil litigation. The gravity of the allegation is an important factor. The more serious the allegation, the greater must be the degree of satisfaction on the balance of

probabilities<sup>1</sup>. The balance of probabilities standard is to be applied flexibly, dependent on the seriousness of the matters to be proved and the consequences of proof. The standard in disciplinary proceedings is that of the civil standard of balance of probabilities.

18. In *B v Medical Council of New Zealand*.<sup>2</sup> Elias J (as she then was) said:<sup>3</sup>

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

19. Orders can be made under section 100(1)(d) of the Health Practitioners Competence Assurance Act 2003 if the Tribunal, after conducting a hearing on a Charge laid, finds that the practitioner has practised his or her profession while not holding a current practising certificate.
20. A charge under section 100(1)(d) of the HPCA Act is absolute in its terms and, once the three elements are established that the practitioner was registered, that he or she had not renewed an APC, and that he or she was practising in the profession during the period of non-renewal, the Charge is made out.

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<sup>1</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

<sup>2</sup> Noted in [2005] 3 NZLR 810

<sup>3</sup> at page 15



21. In *Henderson*<sup>4</sup> Mr Henderson, a pharmacist, was charged with certain charges which included practising without a practising certificate. In relation to a submission based on the facts that any practising without a certificate was inadvertent the Tribunal said:

“35. *The establishing of a charge under section 100(1)(d) of the HPCA Act does not require the PCC to establish that the practitioner intended to practise the profession of pharmacy without a current APC. Previous decisions of the Tribunal have clearly established that there is a failure to comply with an important professional obligation even if the breach is inadvertent or innocent. In H*<sup>5</sup> *notwithstanding that the fact there had been an inadvertent lapse by a practitioner continuing to practise when she did not hold an APC, the elements of the charge were accepted by the Tribunal as being made out.*

36. *The principal purpose of the Act is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions; and the holding of an APC is a cornerstone requirement of the accountability regime of the Act. Having regard to these factors the Tribunal is satisfied that it cannot have been intended by Parliament that intention is an element of the disciplinary offence under section 100(1)(d)”.*

22. It is clear from the Agreed Summary of Facts, even discounting those matters which may be disputed by Mrs Griffen, that the three elements are made out. Mrs Griffen was at the time registered as a dental therapist as she acknowledges; she did not have renewal of her APC until 18 April 2012; and she did practise her profession as a dental therapist between 1 and 18 April 2012. The extent of the practising and the extent to which this may be disputed goes to penalty but does not go to whether the Charge is made out. Those matters will be referred to later.

23. Accordingly the decision of the Tribunal is that the Charge is made out.

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<sup>4</sup> 477/Phar12/210P & Phar12/213P

<sup>5</sup> 256/Psy09/128P

24. The Tribunal announced the decision to the hearing and the matter proceeded to consider penalty.

**Penalty: submissions for the PCC**

25. The submissions for the PCC referred first to the functions of disciplinary process and the relevant penalty factors as enunciated in the cases. Reference was made to what was said to be comparable cases which the Tribunal has taken into account.
26. It was submitted that since her registration in September 2004 Mrs Griffen has practised in a regulatory environment and ought to have known the legal requirement to obtain an APC in order lawfully to practise her profession. It was submitted that registration brings privileges and responsibilities and the onus is on the individual practitioner to comply with requirements for renewal. Reference was made to Tribunal decisions that inadvertent or unintentional lapses are nevertheless deserving of the imposition of a penalty.
27. The Tribunal's attention was drawn to the three email reminders that had been sent by the Dental Council to Mrs Griffen about the pending expiry of her APC, the need to renew it and the consequences of her failure to do so. The PCC acknowledged that Mrs Griffen had co-operated with its investigation.
28. It was submitted that the key purpose to be achieved was to send a clear message to the profession that practising without a current practising certificate for any length of time is unacceptable in any circumstances and will not be tolerated. The PCC submitted that a fine was the most appropriate penalty to punish Mrs Griffen and to deter other practitioners; and that this would reinforce the high standards expected within the profession and reiterate personal responsibility. It was submitted that a "*small*" fine would be proportionate to comparable cases and there were no significant mitigating factors telling against the imposition of a fine. Costs were sought which were estimated to be in the range of approximately \$12,000.00

excluding GST; and there are also the Tribunal's costs estimated to be about \$15,419.46 to which reference will be made.

**Penalty: Mrs Griffen**

29. Mrs Griffen relied substantially on the submissions and evidence she had given to which reference has been made. Her primary concern was in relation to the costs order sought as she had no idea that costs of this nature would be sought against her. She said that she was married and that there were two incomes for her partner and herself but that hers would be ceasing as she was not going to continue practising as a dental therapist in the short term. She said she has a mortgage and supports her nephew. Her only asset is a section of vacant land on which she is paying the mortgage and she does not have savings.

**Penalty - principles**

30. The Tribunal does not consider that penalties of cancellation of registration, suspension of re-registration, or conditions on practice need be considered. The Tribunal is authorised under section 101 of the HPCA Act to impose a fine up to \$30,000.00 and to order costs.
31. 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*.<sup>6</sup> In that case the practitioner, Mr Roberts, had had his registration as a nurse suspended by the Tribunal for a period of three years, the maximum provided. The charge against him had included having had an “*inappropriate and/or sexual relationship*” between him and a patient.
32. The Court referred to the following factors which the Tribunal is required to take into account in determining penalty.<sup>7</sup>

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<sup>6</sup> [2012] HC 3354, Wellington HC, CIV -2012-404-3916, 12/12/12; Collins J

<sup>7</sup> *Roberts, supra*, paragraph 44

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

*“... [T]o protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.”*

32.2. The important role of setting professional standards.

32.3. 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”<sup>8</sup>.*

32.4. 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”<sup>9</sup>.*

32.5. 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.

32.6. 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.

32.7. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances with reference to *Patel v Dentists Disciplinary Tribunal*.<sup>10</sup>

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<sup>8</sup> *Roberts, supra, paragraph 46*

<sup>9</sup> *Roberts, supra, paragraph 47*

<sup>10</sup> Auckland HC: AP 77/02; Randerson J; 08/10/02

32.8. Whether the penalty proposed is

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

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

**Penalty: discussion**

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

35. Although it is helpful for a responsible Authority to send out reminders of the need to renew the certificate, the prime responsibility for this lies with the practitioner. It is the responsibility of every practitioner to ensure that the application is made and the appropriate fees paid in a timely fashion such that the practising certificate is issued before the previous one expires. Otherwise, the responsibility is then on the practitioner not to practise until the renewed certificate is received.

36. It is not a case of the receipt of the form by the responsible Authority nor of the receipt of the appropriate fee; it is a case that the certificate must have been issued and received by the practitioner.

37. In this case several reminders were sent to Mrs Griffen in a timely fashion and she had plenty of warning. Certainly there may have been delays because of postal issues for her, but there were reminders sent to her by email. She may have felt aggrieved or let down by her employer and the fact that the employer did not process the application when it was left on her manager’s desk or the payment of fees was

not made or the form processed in a timely fashion by the employer. The Tribunal has taken into account her explanations for why there were delays and the communications issues that there were for her; and has taken into account the issues concerning her requests to the employer for payment.

38. There are some inconsistencies in what Mrs Griffen has told the PCC in her letter and what she has given by way of evidence before the Tribunal and what the records themselves show. The Tribunal does not draw any inference of dishonesty against Mrs Griffen concerning that. The reality does show, however, that there were occasions during the period she did not hold her APC where she did practise as a dental therapist. This includes any supervision or surveillance of other dental therapists or dental students because that type of work is within her scope of practice as a dental therapist<sup>11</sup> and requires that she have a current practising certificate for the purpose.
39. The Tribunal does not consider that the filing tasks which were undertaken by her along with other employed and qualified staff members is within her scope of practice and does not take those matters into account.
40. The Tribunal has considered other relevant cases. Although these are helpful as a guide and for the purpose of achieving some consistency in the profession and with other health practitioners, each case must be decided on its own facts. These cases are:
- 40.1. *Dr E*<sup>12</sup>. In this case a registered dentist practised his profession between 1 October 2011 and 4 November 2011. There were issues about his receipt of reminders for renewal of his APC and evidence of personal difficulties at the

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<sup>11</sup> Dental Council: Notice of Scopes of Practice and Prescribed Qualifications: 25 August 2011 includes: “Dental therapy practice includes teaching, research and management given that such roles influence clinical practice and public safety”.

<sup>12</sup> 503/Den12/219P

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

40.2. *Dr S*<sup>13</sup>. Dr S, a registered dentist, claimed that he had forgotten about the change in the APC cycle and practised his profession between 1 October 2010 and 30 April 2011 without an APC. The Tribunal noted that there had been a pattern of multiple reminders and Dr S was fined \$2,000.00 and ordered to pay costs \$12,000.00. In that case the Tribunal said<sup>14</sup>:

*“It is useful to reiterate the dicta of the High Court in the H case<sup>15</sup> where the Court stated:*

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

40.3. *Ms H*<sup>16</sup>. The charge against Ms H of having practised her profession as a registered psychologist between 1 April 2005 and 20 June, 2008 was found made out. In mitigation she referred to her belief that payment of her fees to the College was an alternative to a practising certificate and her failure to obtain an APC was regarded as innocent and inadvertent. The fine imposed by the Tribunal was reduced by the High Court on appeal to \$2,000.00, the court making the statement referred to in paragraph 40.2 above. Ms H was censured and ordered to pay \$3,900.00 towards costs.

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<sup>13</sup> 445/Den11/198P

<sup>14</sup> At paragraph 16.3

<sup>15</sup> Known as *GS v A Professional Conduct Committee*, 1 April 2010, Venning J, CIV-2009-404-007080

<sup>16</sup> 256/Psy09/128P; referred to above in paragraph 40.2 and footnote 15

40.4. *Mr Henderson*<sup>17</sup>. Mr Henderson faced a charge of practising his profession as a registered pharmacist between 4 May 2010 and at least October 2011 without a current practising certificate. The background to that was that he had not been issued with an APC in May 2010 for failure to comply with a re-certification programme. The charge was found made out and the Tribunal fined Mr Henderson the sum of \$2,000.00 and censured him, also ordering him to contribute \$20,525.00 towards costs.

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

42. The aggravating features in this case are these:

42.1. Mrs Griffen had repeated and comprehensive advice and warning about the expiry of her then current practising certificate and was given adequate opportunity to renew this in time which she did not.

42.2. Mrs Griffen was aware that she needed to renew the certificate and that she could not practise once it expired until she had received a renewed certificate. Despite that, she did practise in the ways referred to above.

43. The mitigating features are:

43.1. Mrs Griffen has been co-operative with the PCC and the Tribunal in the disposal of this manner. She has participated in the process. She has signed the Agreed Summary of Facts and so facilitated the hearing. She has come to the hearing and fronted up and explained her position clearly and this is all helpful.

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<sup>17</sup> Supra at paragraph 21 and footnote 4



43.2. There were communication issues for Mrs Griffen so far as the postal delivery system on the island was concerned.

43.3. Mrs Griffen took steps to renew her certificates but there were difficulties arising because of the absence of the manager for the period of one week and because of further apparent issues concerning delivery and transmission of her application form.

43.4. Mrs Griffen did rely on her employer for payment of the appropriate fees and to an extent left this responsibility to the employer.

43.5. There are aspects of Mrs Griffen's practice during the relevant period without a certificate of a minor nature. These are in fact breaches of her scope of practice but are of the less important kind, namely assistance given to dental students.

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

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

#### **Costs**

46. As is stated above, the PCC has sought costs and estimated its costs at some \$12,000.00. In addition to that the Tribunal must consider its own costs and these have been estimated on a detailed basis at \$15,419.46. That is a total of some \$27,500.00. Mrs Griffen and every other dental therapist must realise that except to the extent that Mrs Griffen contributes to this these costs, they will be born by other practitioners.

47. Under section 101(1)(f) of the HPCA Act the Tribunal can order a health practitioner to pay all or part of the costs and expenses of and incidental to any inquiry made by the PCC in relation to the subject matter, the prosecution of the Charge by the PCC and the hearing by the Tribunal.
48. The principles applicable to costs are these. In *Cooray v Preliminary Proceedings Committee*<sup>18</sup> there is reference to a 50% contribution. That is in the context, however, of a starting point and other factors may be taken into account to reduce or mitigate that proportion. If Mrs Griffen does not pay or contribute to the cost of this proceeding to any extent, those costs must be met by other members of her dental therapists' profession. As was said in *O'Connor v Preliminary Proceedings Committee*<sup>19</sup>
- “It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature empowered the different bodies to impose orders for costs”.*
49. In *Winefield*<sup>20</sup> the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:
- 49.1. The hearing being able to proceed on an Agreed Statement of Facts.
  - 49.2. Co-operation of Mr Winefield.
  - 49.3. The attendance of Mr Winefield at the hearing.
  - 49.4. Consistency with the level of costs in previous decisions.
  - 49.5. Costs not paid by Mr Winefield would fall on the profession as a whole.
50. Normally, therefore, in these circumstances the Tribunal would have considered a contribution of some 20% of total costs involved, that is an order for \$5,500.00.

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<sup>18</sup> Wellington HC: AP 23/94; 14/9/95; Doogue J

<sup>19</sup> Wellington HC; AP 280/89; 23/8/90; Jeffries J

<sup>20</sup> 60/Phar06/30P

Having regard to Mrs Griffen's personal circumstances, however, the Tribunal has decided that the appropriate order for costs should be in the vicinity of some 7% which is \$2,000.00, to be divided equally between the PCC and the Tribunal.

### **Orders**

51. Mrs Griffen is censured pursuant to section 101(1)(d) of the Health Practitioners Competence Assurance Act 2003.
52. The Tribunal orders, pursuant to section 101(1)(e) of the Health Practitioners Competence Assurance Act 2003, that Mrs Griffen pay a fine of \$500.00.
53. The Tribunal orders, pursuant to section 101(1)(f) of the Health Practitioners Competence Assurance Act 2003, that Mrs Griffen pay a contribution of \$2,000.00 towards the cost of this prosecution, to be divided as to \$1,000.00 to the costs of the PCC and as to \$1,000.00 to the Health Practitioners Disciplinary Tribunal costs.
54. The Tribunal directs the Executive Officer to publish a copy of this decision and a summary on the Tribunal's website. The Tribunal further directs the Executive Officer to publish a notice stating the effect of the Tribunal's decision in the Newsletter of the Dental Council of New Zealand.

**DATED** at Auckland this 31 day of May 2013

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 David M Carden  
 Chairperson  
 Health Practitioners Disciplinary Tribunal