



**NEW ZEALAND
HEALTH PRACTITIONERS
DISCIPLINARY TRIBUNAL**
TARAIPUINARA WHAKATIKA KAIMAHI HAUORA

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BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HPDT NO: 1074/Med19/451P

UNDER the Health Practitioners Competence Assurance Act
2003 (“the Act”)

IN THE MATTER of a disciplinary charge laid against a health practitioner
under Section 91 of the Act.

BETWEEN **A PROFESSIONAL CONDUCT COMMITTEE
appointed by the MEDICAL COUNCIL OF NEW
ZEALAND**

Applicant

AND **DR E** of X, registered medical practitioner
Practitioner

HEARING held at Napier on 12 and 13 December 2019

TRIBUNAL Ms A Douglass (Chair)

Ms A Kinzett, Dr B Bond, Dr I Stewart and Dr V Beavis
(Members)

Ms D Gainey (Executive Officer)

Ms H Hoffman (Stenographer)

APPEARANCES Mr S J M Mount QC and Ms E Kennedy counsel for the Professional
Conduct Committee (PCC)

Mr M McClelland QC for the practitioner

CONTENTS

Introduction.....	3
Facts	4
Evidence	7
Relevant law under the HPCA Act.....	8
Tribunal’s consideration of the Charge.....	10
Penalty.....	14
Costs	22
Permanent Name Suppression.....	23
Result and Orders	25
SCHEDULE.....	27

Introduction

- [1] Dr E, a registered medical practitioner, faces one Charge of professional misconduct (the Charge) under s 100(1)(b) of the Health Practitioners Competence Assurance Act 2003 (the Act), laid by the Professional Conduct Committee (PCC).
- [2] The Charge alleges that between 21 August 2017 and 7 September 2017 Dr E falsified a letter about a Diploma of Surgical Anatomy for the purposes of applying for full registration with the General Medical Council in the United Kingdom.
- [3] The particulars of the Charge are set out in the Schedule to this decision.¹
- [4] In summary, the three particulars of the Charge are that firstly, Dr E intentionally altered a letter dated 29 April 2014 from Kathryn McClea, an administrator at the Department of Anatomy, University of Otago, (the Falsified Letter) stating that Dr E had “completed all four of the papers required for the Diploma”, when the original letter stated she had “completed three of the four papers required for the Diploma”; secondly, that Dr E provided the Falsified Letter to the General Medical Council in the United Kingdom (the GMC) when applying for registration; and thirdly; that Dr E provided her CV to the GMC knowing that it incorrectly stated that she had a Post Graduate Diploma in Surgical Anatomy (PGDip Surg Anat) when she did not.
- [5] Dr E admitted the particulars of the Charge and the underlying facts as set out in the Agreed Summary of Facts (ASOF).²

The hearing

- [6] At the hearing held on 12 and 13 December 2019 the Tribunal found that the Charge had been established and that Dr E’s conduct amounts to professional misconduct in that, separately and cumulatively, such conduct has brought or is likely to bring discredit to the profession pursuant to s 100(1)(b) of the Act.
- [7] At the conclusion of the hearing, the Tribunal indicated that it would find the Charge established and delivered an Oral Decision on Penalty,³ including an order for permanent name suppression prohibiting the publication of the practitioner’s name, practice and the town where she practises.
- [8] The Tribunal delivered its penalty decision in order to impose the least restrictive order on the practitioner so that the period of her suspension from practise would take effect immediately. It also enabled the practitioner’s counsel to send the Oral Decision on

¹ Agreed Bundle of Documents (ABOD), p 2.

² ABOD, pages 4-8.

³ Oral Decision on Penalty, Med 19/451P dated 13 December 2019.

Penalty to the Medical Practitioners Tribunal Service (MPTS) in the United Kingdom (UK).

[9] We set out below the reasons for our decision and the orders so made.

Facts

[10] The evidence relied upon by the PCC to establish the Charge against Dr E is set out in detail in the ASOF.⁴ For completeness we set out the ASOF in full:

AGREED STATEMENT OF FACTS

Background

1. In [] Dr E graduated from the University of East Anglia, England, with a Bachelor of Medicine, Bachelor of Surgery (BM BS) and relocated to New Zealand to continue her training.
2. In August [] she gained provisional scope registration in New Zealand and was granted registration in the general scope of practice in March [].
3. In [] Dr E also enrolled in the Postgraduate Diploma in Surgical Anatomy (the Diploma) at the University of Otago (the University). Dr E did not complete the Diploma, completing only three of the four papers required.
4. On 29 April 2014 Kathryn McClea, who provides administrative support in the Department of Anatomy at the University provided Dr E with a letter (Appendix “A”) on University letterhead which stated:

Dr E was enrolled in the Postgraduate Diploma in Surgical Anatomy (PGDip Surg Anat) in []. Dr E completed three of the four papers required for the Diploma.

Application for Registration with the General Medical Council

5. On about 21 August 2017 Dr E applied to the General Medical Council (the GMC) in England for registration as a medical practitioner.
6. Dr E provided a CV (Appendix “B”) where, under the heading Qualifications and Certificates, she listed “Postgraduate Diploma in Surgical Anatomy, University of Otago, []”.

⁴ ABOD, pages 4-8.

7. The GMC subsequently asked Dr E to provide documents in support of her application including a copy of the postgraduate diploma as it was included in her CV.
8. In response to this request Dr E altered Kathryn McClea's letter (in Appendix "A") so that it now stated:

Dr E was enrolled in the Postgraduate Diploma in Surgical Anatomy (PGDip Surg Anat) in []. Dr E completed all four papers required for the Diploma.

9. On about 7 September 2017, Dr E provided the altered letter (Appendix "C") to the GMC.
10. On 9 November 2017 Dr E's application for registration was allowed to proceed and she was asked to attend an identity check. An identity check is undertaken to verify a doctor's identity and to check the originals of all the core documents. Dr E booked an identity check for 24 January 2018 at the GMC's London office.
11. On 15 January 2018 Dr E telephoned the GMC and asked if she could provide an electronic copy of her post graduate diploma. She was advised that if she provided an electronic copy, the GMC would need to verify it by emailing the University.
12. On 19 January 2018, as part of the primary source verification process, the GMC emailed the University. On 21 January 2018 the GMC received an initial response from the University advising that Dr E had passed three of the four papers required for the Postgraduate Diploma and, as she had not completed all the requirements for the qualification, it had not been awarded.
13. The GMC considered it had insufficient information to conclude that the discrepancy in information received could be attributed to Dr E. It decided to proceed with Dr E's identity check on 24 January as planned while further information was sought from the University. The GMC granted Dr E's registration as she met all the requirements.
14. The GMC subsequently received confirmation from Kathryn McClea that the letter submitted to the GMC by Dr E was not the same that University had issued to her.
15. On 15 February 2018 the GMC emailed Dr E and asked her to comment on the discrepancy between the documents. Dr E responded by email on 16 February 2018 where she advised "*I made the tremendously poor choice to change the 'three of the four papers' to 'all of the four papers' to imply I had completed the Diploma. ... I realise there is no excusing my behaviour, but by way of explanation, at the time I did this I was under a great deal of stress with my father's illness and the need to support my family financially while visiting the UK for three months*".

16. On 23 February 2018 Dr E wrote to the University of Otago noting that she had *“Made the tremendously poor choice to alter a letter to me by Kathryn McClea and the surgical anatomy department. In which I changed the ‘completed three of the four papers’ to ‘completed all of the four papers’ to imply I had completed the Postgraduate Diploma of Surgical Anatomy. Firstly, I would like to offer my heartfelt apology for my lapse in judgment and irresponsible action in changing this letter, I am so ashamed of my behaviour ...”*
17. The GMC referred the matter to its Fitness to Practice Directorate to further investigate. A charge of misconduct was laid in the Medical Practitioners Tribunal Service (the MPTS) in England. The MPTS heard the charge taking into account written material from Dr E’s legal counsel, but in her absence, over the period 11 – 15 February 2019.
18. The MPTS found that the admitted facts amounted to serious misconduct, and determined that her fitness to practise was impaired by reason of her misconduct. The MPTS imposed a six-month suspension on Dr E’s registration, effective from 2 April 2019.

Notification to the Medical Council of New Zealand

19. On 15 March 2018 the Manager of Policy and Compliance, Academic Services at the University of Otago contacted the Medical Council of New Zealand (the “Council”) and advised it of Dr E’s conduct. The University had decided to take no further action as Dr E was no longer a student at the University. Council referred the matter to the Professional Conduct Committee (the PCC) to investigate.
20. During her interview with the PCC on 15 March 2019, Dr E admitted that she had included the Diploma on her CV, knowing she had not completed it in order to improve her chance of getting registration with the GMC. Dr E also admitted she altered the letter from the University. She stated she did this as she was concerned that her failure to complete the Diploma would impact on her ability to get registration with the GMC.

Admission of charge

21. Dr E confirms and admits as true and accurate the facts in this Agreed Summary of Facts.
22. Dr E admits each particular of the Disciplinary Charge.
23. Dr E accepts that her conduct as particularised in paragraphs 1-2 of the Disciplinary Charge amounts to professional misconduct in that, either separately or cumulatively,

it brought or is likely to bring discredit to the profession, pursuant to section 100(1)(b) of the Act.

Evidence

- [11] In addition to the ASOF, the Agreed Bundle of Documents (ABOD or the Bundle) provided the details of Dr E's registration with the Medical Council of New Zealand (MCNZ) and with the GMC. The Bundle included the notification letter from the University of Otago and the Falsified Letter.
- [12] The Tribunal was also provided with the decisions (Record of Determinations) by the Medical Practitioners Tribunal (UK) dated 15 February 2019 and 6 September 2019, together with associated correspondence between the MPTS in the UK and Dr E.⁵
- [13] At the penalty stage of the hearing, Dr E produced a written statement and gave evidence to the Tribunal.⁶
- [14] When the verification process for Dr E's registration came to a head in the UK the GMC commenced an investigation into Dr E's fitness to practise to investigate the concerns about her conduct. As a result of that investigation a Charge was laid by the Medical Practitioner Tribunal Service (MPTS) in England. Under that jurisdiction, the Medical Practitioners Tribunal (UK) found Dr E's fitness to practice was impaired (as at the time of the hearing) by reason of misconduct under the Medical Act 1983 (UK).⁷ The Medical Practitioners Tribunal (UK) initially determined a period of six months suspension from practice extended by a further three months (a total of nine months suspension), as appropriate in that it would mark the seriousness of Dr E's misconduct, and allow her sufficient time to reflect and remediate.⁸
- [15] The suspension took effect from 2 April 2019 until 1 October 2019. The Medical Practitioners Tribunal (UK) also ordered a review hearing to convene before the end of the period of suspension for Dr E to demonstrate that she had developed insight and fully remediated her conduct.⁹ Dr E was notified of the decision of the Medical Practitioners Tribunal (UK) on 18 February 2019, as was the MCNZ.¹⁰ Despite being suspended from practice in the UK, Dr E continued to work in New Zealand without restriction.
- [16] This Tribunal determines that the decisions of the Medical Practitioners Tribunal (UK) are relevant only to the extent that they provide a context in which the Charge before this

⁵ Record of Determinations by the Medical Practitioners Tribunal dated 15 February 2019 and 6 September 2019, ABOD pages 64 – 99.

⁶ Document 3, Brief of Evidence of Dr E.

⁷ In this decision the Medical Practitioners Tribunal *Service* in the United Kingdom is referred to as MPTS and the judicial body is referred to as the Medical Practitioners Tribunal (UK).

⁸ Determination of Medical Practitioners Tribunal dated 6 September 2019, ABOD, p 97.

⁹ Ibid at [18].

¹⁰ Letter from the MPTS to the MCNZ dated 18 February 2019, ABOD p 84.

Tribunal in the New Zealand jurisdiction proceeded. This Tribunal is not bound by the UK Tribunal and we do not substitute the views of the Medical Practitioners Tribunal (UK) as our own.

- [17] The Tribunal observes that there are differences under the UK legislation. Importantly, under the UK jurisdiction, Dr E has a persuasive burden to satisfy to the Medical Practitioners Tribunal (UK) that she is fit to practise. As accepted by Mr Mount QC, counsel for the PCC, Dr E bears no burden of proof in these proceedings, rather it is for the PCC to satisfy the Tribunal that the conduct constitutes professional misconduct warranting discipline.¹¹ Moreover, Mr McClelland QC, counsel for the practitioner, confirmed that Dr E was not present and was not represented at that hearing. The Tribunal therefore proceeds on the basis that the UK Tribunal's decisions are relevant only for the purpose of providing the background context as to how the PCC carried out its investigation in New Zealand resulting in the Charge before the Tribunal.
- [18] Dr E provided a signed admission to the Agreed Summary of Facts dated 21 August 2019. She admitted each particular of the Charge. Nonetheless, the Tribunal is required to make its own findings in establishing whether the PCC has discharged the onus of proof to the requisite standard. The Tribunal must determine whether her conduct amounts to professional misconduct, and that it is sufficiently serious to warrant discipline.
- [19] Before we turn to consider the evidence in support of the three particulars of the Charge, we consider the relevant law that applies.

Relevant law under the HPCA Act

- [20] The primary purpose of the Tribunal's disciplinary powers is the protection of the public and the maintenance of professional standards.
- [21] A further purpose is to maintain the integrity of the profession. In *B v Medical Council of New Zealand* a case decided under the previous legislation Elias J observed:¹²

The structure of the disciplinary processes set up by the Act, which rely in large part upon judgement by 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

¹¹ Transcript of evidence, Mr Mount QC at p 73.

¹² [2005] 3 NZLR 810.

of setting standards.

[22] Under s 100(1)(b) of the Act, the Tribunal must also consider whether the alleged conduct has or is likely to bring discredit on the medical profession. In *Collie*,¹³ Gendall J stated:

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 the 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.

[23] The burden of proof is on the PCC.

[24] The appropriate standard of proof is the civil standard, that is, to the satisfaction of the Tribunal on the balance of probabilities, on the evidence that the events alleged by the PCC are more likely than not to have occurred. The degree of satisfaction called for will vary according to the gravity of the allegations. The greater the gravity of the allegations, the stronger the evidence required to satisfy the burden.¹⁴

[25] There is a well-established two-stage test for determining professional misconduct and the threshold is “inevitably one of degree”.¹⁵ These two steps are:

- (a) First, did the proven conduct fall short of the conduct expected of a reasonably competent health practitioner operating in that vocational area? This requires an objective analysis of whether the practitioner’s acts or omissions can reasonably be regarded by the Tribunal as constituting malpractice; negligence; or otherwise bringing or likely to bring, discredit to the profession; and
- (b) Secondly, if so, whether the departure from acceptable standards has been significant enough to warrant a disciplinary sanction for the purposes of protecting the public by maintaining professional standards and/or punishing the health practitioner.

[26] The threshold for justifying a sanction has been described as “not unduly high”, as the measure of seriousness beyond the mere fact that the conduct warrants sanction is a matter to be reflected on in penalty.¹⁶ As Moore J observed in *Johns v Director of Proceedings*¹⁷

¹³ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28].

¹⁴ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

¹⁵ *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA), where the Court of Appeal endorsed the earlier statement of Elias J in *B v Medical Council* (High Court, Auckland 11/96, 8 July 1996) noted at [2005] 3 NZLR 810, as applied for example, in *Johns v Director of Proceedings* [2017] NZHC 2843.

¹⁶ *Martin v Director of Proceedings* [2010] NZAR 33, Courtenay J at [32].

¹⁷ [2017] NZHC 2843, Moore J at [82]–[83]. Concurring with Courtney J in *Martin v Director of Proceedings* [2010] NZAR 333 (HC).

... given the wider range of conduct which might attract sanction in this jurisdiction the threshold should not set [sic] unduly high. It is a threshold to be reached with care having regard to the purposes of the Act and the implications for the practitioner.

Tribunal's consideration of the Charge

[27] The Tribunal accepts the PCC submission that there can be no doubt that Dr E's conduct involved a serious breach of trust of her position as a medical practitioner. The public places medical practitioners in high moral standing in the community, and expects them to act honestly and ethically, both in their professional and personal capacities. In Dr E's own words:

I am under no illusion that the severity of my poor choice harms the integrity that our profession depends on.¹⁸

[28] Mr McClelland QC, counsel for the practitioner submitted that right from the outset Dr E has accepted her conduct is wrong, and that it amounts to professional misconduct. It was also accepted on Dr E's behalf that the threshold had been met for disciplinary sanction.

[29] The Tribunal accepts the submission on behalf of the practitioner based on the ASOF, Dr E's own evidence and based on its own assessment of the evidence.

[30] The Tribunal turns to consider the three particulars of the Charge.

Sending false information in CV to GMC.

[31] As set out in the ASOF and by way of background, Dr E had obtained a Bachelor of Medicine, Bachelor of Surgery in the UK and after graduation relocated to New Zealand. In [] she obtained provisional registration with the MCNZ. In March [], she was granted registration in the general scope of practice.¹⁹ At the time of these events, she was practising as an orthopaedic registrar at [] and was part of a training programme to become an orthopaedic surgeon.

[32] On 21 August 2017, Dr E applied for registration with the GMC.²⁰ She was eventually granted full registration on 25 January 2018.²¹

[33] Dr E was enrolled in a postgraduate diploma course – the PGDip Surg Anat course in 2011. At that time she completed three out of the four papers required but did not

¹⁸ ABOD, p 45.

¹⁹ ABOD, p 15.

²⁰ ABOD, pages 18-32.

²¹ ABOD, p 17.

complete the course. When making an application for full registration with the licence to practise with the GMC she signed and dated this on 21 August 2017.²²

- [34] In signing that final page of the GMC application, Dr E was required to sign the form in a box titled “final declaration”. This declaration included statements to the effect that Dr E would agree to the GMC (and its agents) making any inquiries that it would consider appropriate to establish her fitness to practise, including making checks on her qualifications and verifying the information she had given, and checking academic references.

- [35] It was the GMC’s verification process that brought Dr E’s falsified letter to light.

Falsified Letter

- [36] On 29 April 2014 Dr E was sent a letter (by way of a PDF), signed by Kathryn McClea on behalf of the University of Otago stating that: ²³

Dr E was enrolled in a post graduate diploma in surgical anatomy (PG Dip Surg Anat) in [].

Dr E completed three of the four papers required for the diploma.

- [37] As accepted by Dr E, prior to 7 September 2017, she digitally altered that letter to read the following:

Dr E was enrolled in a post graduate diploma in surgical anatomy (PG Dip Surg Anat) in [].

Dr E completed all four papers required for the diploma.

Sending Falsified Letter to GMC in support of application

- [38] Dr E’s application by email was duly acknowledged by the GMC on 31 August 2018.²⁴ A GMC letter acknowledged the fact that graduates of UK medical schools are entitled to full registration under the relevant legislation, as long as their fitness to practise is not impaired and they have completed an acceptable programme for provisionally registered doctors (the UK Foundation Programme) (FY1).

- [39] Because Dr E had completed her provisional training in New Zealand, and had *not* completed the FY1, she was required to submit a list of documents of evidence of her experience, in order to proceed with her application. One of the pieces of evidence requested was “a copy of your post graduate diploma in surgical anatomy from the University of Otago”.²⁵

²² ABOD, pages 18-32.

²³ ABOD, p 9.

²⁴ ABOD, p 34.

²⁵ ABOD, p 34 at [3].

- [40] Dr E was also advised that she may be required to submit originals of certain documents. On 7 September 2017, Dr E responded via email to the GMC attaching “as much of this information as I can” including the falsified version of Ms McClea’s letter dated 29 April 2014. As a result Dr E’s application for registration was allowed to proceed.

Verification process and investigation

- [41] As part of the verification process, Dr E was required to undergo an identity check at the GMC London office. She did this to verify her identity and check the originals of documentation submitted as part of her application. On 15 January 2018 she also asked if she could provide an electronic copy of her diploma. She was advised that if she provided an electronic copy, the GMC would need to verify it by emailing the University. It was the subsequent process of verifying the electronic copy with the University of Otago that revealed that the letter of 29 April 2014 as submitted by Dr E was falsified.

- [42] In a letter from the University of Otago Ms McClea advised the GMC on 21 January 2018:

Ms E enrolled in a postgraduate diploma in surgical anatomy in []. She passed three of the four papers required for the diploma.

As she has not completed all the requirements for the qualification she has not been awarded the postgraduate diploma in surgical anatomy.

- [43] On 16 February 2018, Dr E subsequently admitted to making the “tremendously poor choice to change ‘three of the four papers’ to ‘all of the four papers’ to imply that I had completed the diploma”.²⁶ She also stated “when you advised me to supply the copy of the letter I became very concerned that only managing to fulfil three out of the four papers of the diploma would impact the GMC’s decision to grant me full registration.
- [44] Subsequently the University of Otago notified the Registrar of the MCNZ separately on 15 March 2018. And as set out in the background above as a result of an investigation, the Charge was laid in the MPTS in England and in a notification of the findings of that Tribunal to the MCNZ.
- [45] In assessing whether Dr E’s conduct amounts to professional misconduct, and that it is sufficiently serious to warrant discipline, the Tribunal has considered the accepted professional standards that apply, as well as relevant standards that apply. These include, for example, the MCNZ’s statement on *Good Medical Practice*. This guidance for assessing the minimal ethical conduct expected of doctors states:²⁷

²⁶ ABOD, p 45.

²⁷ ABOD, p 109.

Be honest and open when working with patients; act ethically and with integrity by

...

- never abusing your patients' trust in you or the public's trust in the profession.

Work co-operatively with, and be honest, open and constructive in your dealings with managers, employers, the Medical Council and other authorities.

[46] Specifically when making any written declarations, this statement expects that

If you have agreed or are required to write reports, complete or sign documents or give evidence, you should do so promptly, honestly, accurately, objectively and based on clear and relevant evidence.²⁸

[47] The NZMA Code of Ethics also provides that accepted moral framework for medical practice and guidelines of professional behaviour. The Code provides that all medical practitioners:

- (a) Accept a responsibility for maintaining and improving the standards of profession;²⁹ and
- (b) Ensure that their professional conduct does not risk adversely affecting their reputation or that of the profession.³⁰

[48] The Tribunal finds that Dr E's conduct fell well short of the ethical and professional standards set for the profession. The Tribunal observes that the GMC's own version of Good Medical Practice (2013) specifically makes reference to the standards of probity and in particular at [66] states:³¹

[66] You must always be honest about your experience, qualifications and current role.

[49] By comparison, the equivalent New Zealand professional standards have no specific standard or guidance that refers directly to honesty in relation to the practitioner's own qualifications and experience.

[50] The Tribunal is satisfied that Dr E's conduct did not comply with accepted professional standards, including the NZMA Code of Ethics. These are principles of probity, including: trust, honesty and for a practitioner to act with integrity, not only in relation to the doctor/patient relationship but also in a practitioner's dealings with others, including

²⁸ ABOD, p 129 at [55].

²⁹ ABOD, p 146 at [12].

³⁰ ABOD, p 150 at [33].

³¹ As referred to by the Medical Practitioners Tribunal (UK) in its decision, ABOD, p 68.

their own professional body. There is a responsibility on practitioners to adhere to, and maintain these core ethical values as part of maintaining public confidence in the medical profession. Not only did Dr E falsely represent that she had completed the Postgraduate Diploma in her CV, she made changes to the original letter rather than respond that her CV was incorrect when she had not in fact completed all four papers required for the Diploma.

[51] The Charge is established. The particulars of the Charge separately and cumulatively amount to professional misconduct in that it has brought or is likely to bring discredit to the medical profession. The Tribunal finds that this conduct is of such seriousness to warrant disciplinary sanction.

Penalty

Penalty principles

[52] The available penalties under s 101 of the Act are: cancellation of registration; suspension for a period not exceeding three years; a fine not exceeding \$30,000, imposition of conditions on practise for a period not exceeding three years; and censure.³²

[53] The Tribunal's role is to determine the appropriate penalty, given the nature of the conduct, to ensure that both the public interest and the integrity of the profession are maintained. The principles for imposition of a penalty are well established. In *Roberts v PCC*, Collins J set out the relevant principles and a summary is as follows:³³

- (a) The first consideration requires the Tribunal to assess the penalty that most appropriately protects the public.
- (b) The Tribunal must be mindful of the fact that it plays an important role in setting professional standards.
- (c) The penalties imposed by the Tribunal may have a punitive function, although protection of the public and setting professional standards are the most important factors.
- (d) Where appropriate, the Tribunal must give consideration to rehabilitating health professionals.
- (e) The Tribunal should strive to ensure that any penalty it imposes is comparable to other penalties imposed in similar circumstances.

³² Health Practitioners Competence Assurance Act 2003, s 101(1).

³³ [2012] NZHC 3354 per Collins J at [44]-[51].

- (f) The Tribunal must assess the health professional's behaviour against the spectrum of the sentencing options available.
- (g) The Tribunal should endeavour to impose the penalty that is the least restrictive that can reasonably be imposed in the circumstances.
- (h) The Tribunal must assess whether the penalty imposed is fair, reasonable and proportionate in the circumstances.

[54] In *A v Professional Conduct Committee*,³⁴ the Court discussed carefully the range of sanctions available to the Tribunal, particularly cancellation and suspension. The Court observed that four points could be expressly, and a fifth impliedly, derived from the authorities:³⁵

[81] 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 amendable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.

[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.'

[55] In *Katamat v Professional Conduct Committee*,³⁶ the High Court confirmed that the primary factor in determining a penalty will be what penalty is required to protect the public and to deter similar conduct. The overall decision is ultimately one involving an exercise of discretion.

Penalty submissions

[56] Counsel for the PCC submitted that the penalty imposed by the Tribunal should maintain professional standards by denouncing Dr E's conduct and deterring others from similar conduct, and to protect the public. A further objective should be rehabilitation of the

³⁴ *A v Professional Conduct Committee* [2008] NZHC 1387 and HC Auckland, CIV-2008-404-2927, 5 September 2008.

³⁵ [2008] NZHC 1387 and (HC Auckland, CIV-2008-404-2927), 5 September 2008, per Keane J at [81]-[82].

³⁶ [2012] NZHC 1633 at [53].

practitioner, should the Tribunal deem it appropriate. Taking into account these objectives, the PCC submitted that these objectives could be met by a brief suspension of Dr E's registration (2-4 months), a fine, censure and imposition of conditions on her return to practice. This submission was based on an analysis of previous cases discussed below involving offences or actions by the practitioner that amount to dishonesty where there has been an order for suspension of registration.

[57] The PCC submitted the following aggravating factors present in this case and relevant to the Tribunal's consideration of penalty:

- (a) *Compounding acts of dishonesty*: After falsely stating on her CV that she had the PG Dip Surg Anat qualification, Dr E further compounded this dishonesty by digitally altering the letter from Kathryn McClea.
- (b) *Opportunity to rectify situation*: Over the five month period between the submission of her application to the GMC and being confronted by Ms Bretherick, there were multiple opportunities in which Dr E could have corrected her error, instead she continued to act dishonestly.
- (c) *Misled for personal gain*: Dr E altered the letter for her personal gain. She believed that without this qualification she would be unable to gain registration.
- (d) *Significant breach of trust*: A significant level of trust is placed on medical professionals to behave honestly and ethically. Dr E chose to be dishonest in the context of her application for registration when the GMC is tasked with ensuring doctors have appropriate qualifications and experience to be granted registration.

[58] The PCC acknowledges the following mitigating factors are also relevant in this case:

- (a) *Stress and personal circumstances*: Dr E was experiencing significant personal stress at the time of her application to the GMC. She was seeking registration in order to support her family whilst relocating to the UK to care for an ill parent.
- (b) *Steps taken to rehabilitate*: Dr E took significant steps to change her lifestyle (including her vocational training scheme) to prevent the stressors again.
- (c) *Remorse*: Dr E appears to have reflected on her actions and accepts that they were inconsistent with her professional obligations and has expressed remorse.
- (d) *Admission of wrongdoing*: Once confronted with the discrepancy, Dr E admitted the conduct and cooperated with the PCC investigation.

- [59] It was further accepted by the PCC that Dr E has never been the subject of any complaint, or adverse finding prior to the conduct at issue in this proceeding. Additionally, no concerns have been raised about her clinical competence.
- [60] Counsel for the practitioner submitted that as was evident from the ASOF, on 21 January 2018 the GMC was alerted to the fact that there was a discrepancy with the documents relevant to the post graduate diploma, however it proceeded to grant Dr E's registration as she met the relevant requirements. Dr E would have been granted registration by the GMC irrespective of whether she had a post graduate diploma in surgical anatomy. The fact that she altered or falsified the letter did not in any way impact on public safety.
- [61] Counsel for the practitioner submitted that an overriding feature was that Dr E has cooperated throughout the investigation with the GMC and indeed the MCNZ. Dr E has continued to practise medicine and is now attending the GP training course and she has collegial support who are aware of her situation.
- [62] In counsel's submission, and as stated by Dr E in her evidence, she had always prided herself on her honesty and integrity. Altering her application documents was totally out of character for her. The Tribunal was entitled to find that at the relevant time Dr E was suffering from "burnout" – recognised by the World Health Organisation as a medical condition.
- [63] Counsel for the practitioner submitted that Dr E has admitted the evidence of dishonesty on her part with the UK registration authority. The fact that she altered the University's letter rather than acknowledging that the CV was wrong must be viewed as an aggravating factor and is acknowledged by Dr E as such.
- [64] Counsel for the practitioner then listed a large number of relevant and important mitigating factors, some of which are acknowledged in the PCC's submissions noted above. In addition to those matters listed above, Mr McClelland QC submitted the following mitigating factors must be taken into account:
- (a) Up until this offence Dr E has practised in an exemplary manner and has continued to do so throughout the investigations and disciplinary processes.
 - (b) That the remorse for her actions expressed by Dr E is undoubtedly genuine and ongoing.
 - (c) She has been totally open and frank about her misconduct with all of her employers and those on the GP training course. Her actions were a one-off occurrence and not representative of a broader pattern of behaviour.

- (d) The Medical Practitioners Tribunal (UK) has suspended her and although she has been able to continue to practise in New Zealand, the very fact of that suspension is a black mark against her name which cannot be removed, ever.
- (e) Dr E has continued to practise without conditions from July 2018 without any issues or concerns.
- (f) Her misconduct, whilst dishonest, did not prejudice public health or safety.

[65] Counsel for the practitioner submitted that the appropriate penalty for Dr E is censure, conditions on practise and based on her financial circumstances, a fine would not be appropriate. Mr McClelland QC submitted that suspension would be contrary to the objective of rehabilitation in this case and could only be viewed as a punishment, which is not the focus of the Act.

Comparable cases

[66] Each case that comes before the Tribunal must be considered on its own facts. Both counsel provided the Tribunal with cases involving dishonesty by the practitioner that had come before the Tribunal and we consider these below.

[67] In *Kaur*,³⁷ a nurse was charged with professional misconduct for falsifying a copy of her Annual Practising Certificate (APC) for the purposes of obtaining employment. The APC was altered so that it did not alert her prospective employer to the conditions that her practice was subject to. The nurse also failed to observe the conditions on her scope of practice, in particular, she failed to advise the prospective employer that they were required to contact the Nursing Council to be approved as an employer. That the nurse's deception was deliberate was considered an aggravating factor and her actions put the public at risk as she was misleading about her entitlement to practise. The Tribunal ordered censure, cancellation of the nurse's registration and payment of 50% of the Tribunal's costs and 25% of the PCC's costs totalling \$9,824.

[68] In *Santos*,³⁸ a nurse was charged with creating email accounts purporting to be the Charge Nurse and Associate Charge Nurse, and using these accounts to provide references in support of applications for employment in Australia. Mr Santos also created an email address purporting to be his prospective employer. Using these accounts he obtained referee reports, altered them, and submitted them. The Tribunal considered that the facts warranted suspension and would have imposed a suspension of 12 months if not for the fact that Mr Santos had already removed himself from the nursing work force following the termination of his employment. The Tribunal censured the nurse, and imposed a

³⁷ 926/Nur 17/381P.

³⁸ 761/Nur 15/332P.

\$1,000 fine, ordered the nurse to pay 25% of costs totalling \$5,386 and imposed conditions on the resumption of the nurse's practice.

- [69] *Dr Jayaprakash*³⁹ was charged with professional misconduct for falsely claiming he had completed his membership for the Royal College of Physicians in the UK. The practitioner had not successfully completed the required examinations. He later provided a forged letter purporting to have been signed by the Chairman of the Primary Examination Subcommittee of the College as confirmation of his successful completion of this exam. The Tribunal emphasised the fact that the practitioner's misrepresentations as to his qualifications continued for a sustained period, without any effort from the practitioner to correct them. The Tribunal suspended Dr Jayaprakash from practice for six months, fined him \$5,000, censured him, and ordered him to pay 20% of the costs of the prosecution, investigation and Tribunal hearing.
- [70] *Dr McCaig*⁴⁰ was charged with professional misconduct for forging and or falsifying documents provided to the MCNZ for the purposes of gaining registration. This included forging a letter in another practitioner's name and forging a signature attesting to an assessment that the practitioner had failed to complete. The Tribunal found the practitioner guilty of professional misconduct and ordered a suspension for four months, a fine of \$2,000, censure and imposed conditions on her scope of practice. These conditions included on resumption of practice notifying her employer of the decision and any future employers for a period of three years, and to attend an ethics course approved by the MCNZ within 12 months of the Tribunal's decision. In imposing four months' suspension the Tribunal took into account the work circumstances in previous periods which reflected the equivalent of a suspension for three months and in effect a further one month's suspension was imposed from the date of the decision.
- [71] On appeal to the High Court the four months' suspension imposed by the Tribunal was considered appropriate, but the High Court disagreed with the Tribunal's decision to only credit the practitioner with three months for the nine month period the practitioner had refrained from practising. Accordingly, the High Court held that the full suspension period had already been served and also reduced the order for costs.⁴¹
- [72] In *Ranchhod*,⁴² the Tribunal considered a practitioner who altered his Annual Practising Certificate (APC) and subsequently altered his expired APC and presented it to his employer. The Tribunal found the charge to be established. Dr Ranchhod was suspended for two months having noted that he had been out of work for 10 months, was fined \$7500, censured and ordered to pay 30% of the costs of the investigation and hearing. Conditions

³⁹ 327/Med 10/153P.

⁴⁰ 704/Med 14/299P.

⁴¹ *McCaig v Professional Conduct Committee* [2015] NZHC 3063; *McCaig v A Professional Conduct Committee* [2016] NZHC 306 (Costs).

⁴² 273/Med09/129P.

were imposed on Dr Ranchhod's return to practices requiring him to practice only in a group general practice.

Penalty decision

- [73] The Tribunal has carefully considered Dr E's conduct and the comparable cases referred to by counsel, taking into account where Dr E's conduct sits within the spectrum of conduct outlined in these cases, largely involving dishonesty and falsifying documents.
- [74] As conceded by counsel for the practitioner, an aggravating feature in this case has been the compounding acts of dishonesty. Not only did Dr E falsely state on her CV that she had the requisite post graduate diploma, she further compounded this dishonesty by falsifying the letter from Kathryn McClea. This conduct amplified the seriousness of her initial conduct.
- [75] Moreover, Dr E had the opportunity to rectify the situation over a five month period and explain her error but instead she continued to act dishonestly. This was a significant breach of trust. Ironically, Dr E did not need to falsify the documents as in all likelihood she would have met the requirements for qualifications and experience to be registered with the GMC in orthopaedics, the scope of practice for which she was seeking registration.
- [76] Dr E provided considerable background to her qualifications and her experience as being part of the post graduate training programme for orthopaedic registrars, her personal and family circumstances as well as the GMC process. Dr E also provided a reflective statement which had been prepared for the PCC hearing in March 2019 and answered questions from counsel for the PCC and the Tribunal.
- [77] Dr E has been clear about her admission of wrongdoing and been cooperative. Dr E gave a frank account to the Tribunal of the stress and personal and family circumstances she experienced at the time of her application to the GMC. She has since changed vocational programmes and is in the process of completing vocational training in general practice.
- [78] The Tribunal takes into account Dr E's significant efforts to rehabilitate herself and to refocus her career in an area of practice where she feels supported with ongoing peer review and what she feels is in a very different and supportive work environment compared to the stress she experienced at the time of the offending.
- [79] Dr E has demonstrated self-reflection and insight into her conduct. When asked how she thought her conduct brings discredit to the medical profession she responded:⁴³

I think it undermines everything that my colleagues work for. There is a great deal of

⁴³ Transcript of Evidence, p 63 lines24-34.

certificate filling out and other things, obviously medically I've never had a consideration of that but professionally in my doing, making that poor decision, it undermines all my colleagues who have gained these diplomas, who have finished the courses through adversity and other triggers, and it's unacceptable really.

- [80] The Tribunal was also provided with a number of references from her current work place as a GP registrar and her prospective employer at the [] where she is to begin permanent work as a GP utilising her orthopaedic training.
- [81] The Tribunal accepts that she has been open and honest with her employers about the investigation and the proceedings before the Tribunal.
- [82] A penalty commensurate with the seriousness of this Charge and the disapprobation of the profession must be imposed on Dr E. Against this, the Tribunal balances the need to take into account the significant rehabilitative efforts made by Dr E.
- [83] A distinguishing feature of this case compared to other cases of dishonesty is that the dishonesty or falsification in the comparable cases was carried out to enable the practitioner to practice in circumstances where he/she would not otherwise be entitled to practice. While Dr E falsified the details about the post graduate diploma, her registration was not dependent in any way on whether or not she had the diploma. As noted above, registration would have been granted irrespective of whether she had a diploma in surgical anatomy. So whilst the conduct was dishonest it was not a situation where there was risk to the public arising out of that falsification. Against this, there is no doubt that such dishonest conduct is a matter that does bring discredit to the profession.
- [84] The Tribunal is satisfied that suspension is an appropriate penalty in this case together with a censure to mark the strong disapproval by the Tribunal of the dishonest conduct. The Tribunal considers that the period of suspension should be short to take into account that although Dr E has been able to continue to practise in New Zealand, the very fact of the suspension by the GMC in the UK (over a total period of nine months) has had a punitive effect on her medical career. Following contact by the GMC in February 2018 Dr E did not seek work in the UK over a three month period. There is no question as to her competence. Her conduct, while dishonest, did not prejudice public health or safety.
- [85] The period of suspension for one month will take effect immediately and will allow the practitioner to commence in her new employment and to contribute to the primary care needs of the [] community.
- [86] Dr E provided a statement of her financial position, including her predicted income with her new employment.⁴⁴ The Tribunal determines a fine of \$3,000 is appropriate and reflects the short term of suspension to allow Dr E to return to work in the near future. A

⁴⁴ Document 3, Brief of Evidence of Dr E, annexure 4.

short period of suspension combined with censure and a fine is commensurate with similar cases.⁴⁵

- [87] The conditions placed on Dr E's recommencement of practice following suspension will include engaging with a mentor who is vocationally trained and approved by the MCNZ whose role will principally be to ensure that she has appropriate workload management strategies.

Costs

- [88] The starting point is a 50% contribution to costs of the PCC and the Tribunal's costs which can be reduced or increased depending on the circumstances.⁴⁶
- [89] The estimate of costs incurred by the PCC, including counsel's costs of the hearing is \$40,954.54.⁴⁷
- [90] The estimate of the Tribunal's costs is \$29,321.55.⁴⁸ Therefore, there was total of approximately \$70,000.
- [91] The PCC submitted that it was not reasonable to expect the profession to bear the entire cost of this prosecution and that Dr E should contribute to the costs of the hearing, given the nature of her conduct. The PCC submitted that 35% of costs are appropriate in this case which reflects Dr E's cooperation with the PCC investigation, prosecution, and being able to proceed on the basis of an agreed bundle of documents thereby saving on costs.
- [92] In assessing the appropriate contribution by the practitioner, the Tribunal takes into account Dr E's admission to the disciplinary charge and cooperation throughout with the PCC. We also take into account the short term of suspension and that Dr E's financial circumstances are such that she is likely to be in a position to pay a fine and costs.⁴⁹
- [93] Balancing all these factors the Tribunal considers that an order for Dr E to pay 30% of the total costs is appropriate in this case. This recognises the cooperation by the practitioner and her financial means on the basis that she is soon to commence nearly full time work. It is a material reduction on the starting point of 50% contribution to costs and is fair and proportionate to the costs of the hearing.

⁴⁵ *Jayaprakash* 327/Med 10/153P, *McCaig* 704/Med 14/299P, and *Ranchhod* 273/Med09/129P.

⁴⁶ *Cooray v Preliminary Proceedings Committee* (Unreported) AP 23/94 Wellington Registry, 14 September 1995, Doogue J at [9]; *Vatsyayann v PCC* [2012] NZHC 1138, Priestley J at [34].

⁴⁷ Document 5, Appendix A to Submissions of Professional Conduct Committee on Penalty.

⁴⁸ Document 7, HPDT Estimate of Costs Expended in Relation to the Disciplinary Hearing.

⁴⁹ Document 3, Brief of Evidence of Dr E, annexure 4.

Permanent Name Suppression

[94] The practitioner sought orders for permanent suppression of her name, identifying details and town in which she practises.

[95] The PCC were opposed to permanent name suppression. Counsel for the PCC submitted that there is a public interest in publishing the decision of her name, and referred the Tribunal to Pankhurst J's observations in *A v Director of Proceedings*⁵⁰:

Following 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 the public interest consideration will require that the name of the practitioner must be published in the 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 include in favour of the private interests of the practitioner. After the hearing, by which time 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.

[96] The starting point in s 95(1) of the Act is that the Tribunal's hearing must be held in public. This is the primary principle and endorses the principle of open justice. Section 95(2) however gives the Tribunal discretion to grant name suppression where it is "desirable". The public interest factors to be considered by the Tribunal have been set out in a number of decisions and are summarised in *Anderson v Professional Conduct Committee of the Medical Council of New Zealand*, as follows:⁵¹

- (a) Openness, transparency and accountability of the disciplinary process;
- (b) Protection of the public;
- (c) Maintenance of professional standards;
- (d) The basic value of freedom to receive and impart information;
- (e) The public interest in knowing the identity of a practitioner found guilty of professional misconduct;
- (f) The risk of other practitioners' reputations being affected by suspicion; and
- (g) The disciplinary element.

⁵⁰ (Unreported), Pankhurst J, High Court, Christchurch, CIV-2005-409-002244, 21 February 2006 (at [42]).

⁵¹ (Unreported), Gendall J, High Court of Wellington, CIV-2008-485-1646, 14 November 2008. See also *Johns v Director of Proceedings* [2017] NZHC 2843, Moore J at [177].

[97] The above factors are to be balanced against the private interests of the practitioner including:

- (a) The health interests of the practitioner;
- (b) Matters that affect the practitioner's family and their wellbeing; and
- (c) Rehabilitation.

[98] In any application under s 95 of the Act for non-publication of the name or identifying details there must first be consideration of whether it is desirable for the order to be made, and secondly, an exercise of discretion as to whether the order should be made. The above public interest factors are to be balanced against the private interests of the practitioner and the interests of her patients and their caregivers.

[99] The Tribunal is satisfied that in the circumstances of this case, the practitioner's private interests outweigh the public interest in knowing the identity of the practitioner. In addressing the public interest factors, publication of the Tribunal's decision, excluding the practitioner's name and identifying details, meets the public interest in accountability of the disciplinary process and the openness and transparency of disciplinary proceedings.

[100] Mr Mount QC submitted for the PCC that Dr E's evidence confirmed that if someone "googled" her name, the information regarding the UK Tribunal decision was already in the public domain. The Tribunal accepts Dr E's evidence that if her name were to be published in New Zealand it would be counter-productive in that it could cut across all of the steps she has taken to fully rehabilitate herself. This is particularly so given that she is about to commence work in a new general practice and in light of already disclosing to some patients that she is/or has been involved in a disciplinary process, both in the UK and in New Zealand.

[101] The Tribunal finds that the public interest in knowing the identity of the practitioner concerned is substantially reduced in this case because of the lack of any patient harm or patient safety concerns. In addition, Dr E has been willing to undertake extensive rehabilitation steps in relation to her personal and professional development, which are ongoing.

[102] One of the conditions to be imposed will be that Dr E must notify any future employers of the Tribunal decision. Her present employer is fully aware of the circumstances of this case. As a result, the persons who need to know of this decision will be informed, namely, her current employer or any future employer.

[103] Having weighed these factors the Tribunal finds that it is desirable for there to be name suppression for the purpose of supporting Dr E in her rehabilitation and to better enable her to deliver primary care services to the community.

Result and Orders

[104] The Tribunal finds that the Charge has been established. The conduct amounts to professional misconduct in that it, separately and cumulatively, has brought or is likely to bring discredit to the profession. This conduct is sufficiently serious to warrant disciplinary sanction.

[105] In respect of the penalty, the Tribunal makes the following orders:

- (i) The registration of Dr E be suspended for one month effective from 13 December 2019, until 13 January 2020 pursuant to s 101(b) of the Act;
- (ii) The following conditions after commencing practice for a period of two years pursuant to s 101(c) of the Act:
 - (a) That the practitioner, Dr E, must notify any employer of this case and its outcome;
 - (b) That the practitioner must engage with a mentor who is vocationally trained and approved by the Medical Council whose role will principally be to ensure that you have appropriate workload management strategies;
- (iii) Censure to mark the Tribunal's disapproval of the practitioner's conduct, its seriousness and that it is dishonest conduct, pursuant to s 101(1)(d) of the Act;
- (iv) A fine of \$3,000 pursuant to s 101(1)(e) of the Act;
- (v) A 30% contribution towards the total reasonable costs of the Tribunal and the PCC;
- (vi) Permanent name suppression prohibiting the publication of the practitioner's name, practice, and the town where Dr E practises.
- (vii) The Tribunal will direct that a copy of this decision on penalty and the final written decision with reasons will be published on the Tribunal's website. A notice stating the effect of the Tribunal's decision is to be published in the New Zealand Medical Journal.

[106] The Tribunal also recommends that in the next 24 months, over the period of supervision that the practitioner talks to her GP peer group on workplace stress and management strategies as part of her ongoing commitment to her rehabilitation.

DATED at this 31st day of March 2020



.....
A Douglass
Chair
Health Practitioners Disciplinary Tribunal

SCHEDULE

PARTICULARS OF CHARGE

Pursuant to section 81(2) and 91 of the Act, the Professional Conduct Committee charges that:

1. Between 22 August 2017 and 7 September 2017, Dr E intentionally altered a letter from Kathryn McClea of the University of Otago of 29 April 2014, (“the falsified letter”), which stated that Dr E had “completed three of the four papers required for the Diploma”, so that it read that Dr E had “completed all four of the papers required for the Diploma”.

And/or

2. Between 22 August and about 7 September 2017, Dr E attempted to mislead the General Medical Council (UK) (the GMC) when applying for registration by:
 - a. providing the falsified letter to the GMC;

And /or

- b. providing her CV to the GMC knowing it incorrectly stated that Dr E had a Postgraduate Diploma in Surgical Anatomy (the Diploma) when she did not.

The conduct alleged above amounts to professional misconduct in that it, either separately or cumulatively, has brought or is likely to bring discredit to the profession, pursuant to section 100(1)(b) of the Act.