



**NEW ZEALAND HEALTH
PRACTITIONERS
DISCIPLINARY TRIBUNAL**

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BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HPDT NO 1123/Phar20/481P

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

IN THE MATTER of a disciplinary charge laid against a health practitioner under Part 4 of the Act

BETWEEN **A PROFESSIONAL CONDUCT COMMITTEE** appointed by the **Pharmacy Council of New Zealand** under s 71 of the Health Practitioners Competence Assurance Act

Applicant

AND **RACHEL MIRIAM KNIGHT**, of Auckland, registered pharmacist

Practitioner

HEARING held at Wellington on 3 and 4 September 2020

TRIBUNAL Ms A J Douglass (Chair),
Dr B McCulloch, Ms J Dawson, Mr K Govind and Ms M O’Rourke
(Members)

IN ATTENDANCE Ms G Fraser, Executive Officer

APPEARANCES Ms B Mathers for the Proceedings Conduct Committee (PCC)
Mr A Darroch and Ms B Sinclair for the Practitioner

DECISION OF THE TRIBUNAL

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Introduction

[1] Mrs Knight is a registered pharmacist, practising in Auckland. In July 2020, a Professional Conduct Committee (PCC) appointed by the Pharmacy Council of New Zealand (Pharmacy Council) laid two disciplinary charges against Mrs Knight under the Health Practitioners Competence Assurance Act 2003 (the Act).

[2] The particulars of the amended Charges dated 15 July 2020 are set out in the Schedule to this decision.

[3] In respect of Charge 1, the PCC alleges Mrs Knight was practising pharmacy between 1 April 2018 and 21 November 2018 while she did not hold a current Annual Practising Certificate (APC). Mrs Knight admits that her conduct as particularised in Charge 1 amounts to a ground of discipline.¹

[4] In respect of Charge 2, the PCC alleges Mrs Knight failed to act with integrity, openness, and honesty on two occasions. Firstly, it is alleged that Mrs Knight provided incorrect information to the Pharmacy Council when she submitted a “Return to Practice” application through the Pharmacy Council website. Secondly, the PCC alleges that Mrs Knight provided a misleading explanation for her actions to the Pharmacy Council where she knew or ought to have known that her explanation was misleading and in breach of the Pharmacy Council Code of Ethics.

[5] The PCC says that the practitioner’s actions amount to professional misconduct in that it separately or cumulatively is malpractice or negligence in relation to her scope of practice² and has brought or was likely to bring discredit to the pharmacy profession.³

[6] While Mrs Knight admits that she provided incorrect information to the Pharmacy Council, she denies that she intended to mislead the Pharmacy Council or that her actions are in breach of the Pharmacy Council’s Code of Ethics.

¹ Health Practitioners Competence Assurance Act 2003, s 100(1)(d).

² Health Practitioners Competence Assurance Act 2003, s 100(1)(a).

³ Health Practitioners Competence Assurance Act 2003, s 100(1)(b).

[7] Irrespective of Mrs Knight's admissions it remains for the Tribunal to determine whether both Charges and the particulars of each Charge are established and if so what, if any, penalty should apply.

Evidence

[8] The hearing proceeded on the basis of an Agreed Statement of Facts dated 29 May 2020 and an Agreed Bundle of Documents (ABOD).⁴

[9] Mrs Knight attended the hearing and gave evidence.

[10] Ms Leane Steel the owner of Crawford House Pharmacy in Howick, Auckland where Mrs Knight works gave evidence by telephone in the course of the hearing. The Tribunal also received a written statement of evidence from Basma Hikmet, the manager of Crawford House Pharmacy.

Background facts

[11] The factual background as set out below is based on the Agreed Statement of Facts.

Background

1. Mrs Rachel Knight is a registered pharmacist.
2. Mrs Knight graduated with a Diploma in Pharmacy in 1990 and was first registered as a pharmacist in December 1990.
3. In October 2013, Mrs Knight started working at Crawford House Pharmacy in Howick, Auckland as a community pharmacist.
4. Mrs Knight has worked for 28 years as a registered pharmacist and, except for the period of time set out in this agreed statement of facts, has held an annual practising certificate.

⁴ Document 1, Agreed Bundle of Documents (ABOD),pp5-11, Agreed Statement of Facts dated 29 May 2020.

Practising without a practising certificate

5. On 1 March 2018, the Pharmacy Council of New Zealand (the '**Pharmacy Council**') sent an email to all practising pharmacists, including Mrs Knight, to advise them that the online application form for annual practising certificate ('**APC**') renewal was open and that applications were due by 31 March 2018.
6. During March 2018, the Pharmacy Council sent Mrs Knight two further email reminders that she was required to apply online to renew her APC. The emails were diverted to the junk folder in Mrs Knight's email system and were not seen by Mrs Knight.
7. Mrs Knight did not apply to renew her APC on or before 31 March 2018.
8. On 1 April 2018, Mrs Knight's APC expired.
9. Mrs Knight continued to work as a pharmacist at Crawford House Pharmacy from 1 April 2018 until 21 November 2018. During this time Mrs Knight practised pharmacy without a practising certificate.
10. On 20 April 2018, the [sic] Dr Owain George, the Registrar of the Pharmacy Council, sent Mrs Knight a letter. The letter was sent via post to Mrs Knight's residential address. The letter informed Mrs Knight that her current status was '*Registered, inactive*' and she did not hold a current practising certificate. Mrs Knight accepts that the letter was delivered to her house. Mrs Knight says that she was not aware of the letter until in mid-2019 when she found it while clearing some papers in her bedroom.

Mrs Knight's return to practice application

11. On 9 November 2018, Dr George sent Mrs Knight a letter. The letter was sent via post to Mrs Knight's residential address. The letter informed Mrs Knight that she had not held a current practising certificate since 1 April 2018 and that if the Pharmacy Council did not receive a response from Mrs Knight by 26 November 2018 her name would be removed from the register of pharmacists.
12. On Saturday 17 November 2018, Mrs Knight received Dr George's letter dated 9 November 2018.
13. After reading the letter, on the same day, Mrs Knight logged on to the Pharmacy Council website to apply for a practising certificate. As Mrs Knight did not have a current annual practising certificate, the online applications available to her were:
 - a A return to practice application. This application is for pharmacists who have not been practicing for a period of time and who now wish to apply for practising status and an annual practising certificate.
 - b An application to request removal from the register of pharmacists.

14. Mrs Knight filled in and submitted a return to practice application.
15. The application to return to practice asks the applicant to select a date they intend to start work. The applicant's answer must be inserted in the format: 'dd/mm/yyyy'. The application does not allow a date in the past to be selected because a practising certificate cannot be backdated. The application does not allow a date to be selected within the next 7 days because the Pharmacy Council usually requires a minimum of 7 days to process an application to return to practice.
16. In response to this question, Mrs Knight tried to input '1/04/2018', being the date her practising certificate had expired, however the form would not allow her to enter this date. Mrs Knight therefore answered that she intended to start work on '24/11/2018' (the first available date the application allowed). This was incorrect.
17. The application form then asks applicants to provide details of their work history. The following details are required:
- a Place and location of employment.
 - b Average hours worked per week.
 - c Start date and end date; the form will accept any dates entered by the applicant in the 'mm/yyyy' format.
 - d Description of pharmacist duties undertaken; the form provides a free text box in which the applicant can enter any text.
18. Mrs Knight recorded her start date at Crawford House Pharmacy as '10/2013'.
19. Mrs Knight recorded her end date at Crawford House Pharmacy as '04/2018'. This was incorrect as Mrs Knight worked as a pharmacist at Crawford House Pharmacy between 1 April 2018 and the date on which Mrs Knight filled out the form.
20. As part of submitting the application form, Mrs Knight completed the following tick-box declaration:
- I certify that I am the named applicant and I personally completed this form and declaration.
- I certify that the information provided (including current and correct contact details), is to the best of my knowledge, true and correct. I am aware that if I provide false or misleading information, further action may be taken by the Pharmacy Council.
1. I understand that it is illegal to practise pharmacy in New Zealand without a current APC. I will not practise unless I hold a valid APC.

2. I understand that if I am registered with other health regulatory authorities in New Zealand or overseas and I am the subject of a formal investigation or Council action, the Council may share information with these authorities.

21. Mrs Knight paid the application fee and submitted the application.

Correspondence with the Pharmacy Council

22. On Tuesday 20 November 2018, Dr George sent a letter to Mrs Knight proposing to decline her application for an [sic] practising certificate. Dr George wrote:

In your application, you declared that you worked an average of 31 hours per week at Crawford House Pharmacy between 10/2013 and 04/2018. However, I have been advised by the pharmacy's owner that you have continued to practise as a pharmacist at this pharmacy whilst not holding a practising certificate.

I am concerned that you have both:

3.1 Practised pharmacy without a practising certificate for over six months; and

3.2 Included false information in your application.

23. On Wednesday 21 November 2018, Mrs Knight sent a letter to Dr George. In the letter Mrs Knight wrote:

I have what I feel is a valid reasons [sic] for entering the dates 10/2013 to 4/2018 on my application form.

The online application form only gave provision for filling in work up to April 2018, and not beyond. There was also no provision given for any explanation beyond this. I search [sic] around the website and application forms to see if I could find a way to change this, to no avail. Today I have received an email from Bel Perez stating this exact same problem. The false information was certainly not intentional and I did try to find another way.

24. During an interview with the Professional Conduct Committee Mrs Knight told the Professional Conduct Committee that she wrote the letter in a hurry and acknowledged that her explanation was incorrect.

25. On Thursday 22 November 2018, Dr George sent an email to Mrs Knight. In that email Dr George wrote:

- In your response you state that the application form only gave provision for filling in work up to April 2018.

- However, this is not the case, as I was able to ascertain yesterday by making a return to practice application myself. There is no restriction on the end date and you could have entered 11/18 (see screen shots 1 & 2 in attachment).
- You indicate that there was no provision for any explanation beyond this, and that despite searching, you could not find a way of providing an explanation.
 - The text box below the Start Date and End Date boxes for “Description of pharmacist duties undertaken” was an obvious opportunity to explain the circumstances relevant to the dates entered.
 - You had opportunities to contact the Council. (Image 3 shows the banner, which is present at the bottom of each page of the form. This included an email address and a phone number. You first contacted the Council on Tuesday afternoon at 4.30pm.

26. Three screen shots of the Return to Practice application form were attached to Dr George’s letter.

27. On 6 December 2018, Mrs Knight’s then counsel wrote a letter to Dr George. The letter explained that Mrs Knight had been ‘under considerable stress and in that state of anxiety, completed the online form for registration incorrectly’. The letter enclosed the following documents:

- a A letter from Leane Steel, the owner of Crawford Pharmacy;
- b A letter from Basma Hikmet, the manager of Crawford House Pharmacy;
- c A letter from Jeanette Dick, Mrs Knight’s mother; and
- d A letter from Dr Pier Anderson, Mrs Knight’s GP.

28. On 10 December 2018, the Pharmacy Council issued Mrs Knight with a new practising certificate and Mrs Knight returned to practise pharmacy at Crawford House Pharmacy.

29. On 9 January 2019, Dr George sent Mrs Knight a letter inviting Mrs Knight to provide written submissions to the Pharmacy Council Complaints Screening Committee.

30. On 24 January 2019, Mrs Knight’s counsel provided submissions to the Pharmacy Council for consideration. The submissions included a letter from Mrs Knight to Dr George.

Response to charges

31. Mrs Knight confirms and admits the facts in this agreed statement of facts are true and accurate and admits that the facts establish each particular of Charge 1 to the required standard.

32. Mrs Knight admits that her conduct, as particularised in Charge 1 of the Notice of Charge dated 1 April 2020, amounts to a ground of discipline under section 100(1)(d) of the Act.

33. Mrs Knight does not admit that her conduct, as particularised in Charge 2 of the Notice of Charge dated 1 April 2020, was in breach of the Pharmacy Council Code of Ethics 2018.

34. Mrs Knight does not admit that her conduct, as particularised in Charge 2 of the Notice of Charge dated 1 April 2020, amount to professional misconduct in that it separately or cumulatively:

- a amounts to malpractice or negligence in relation to her scope of practice pursuant to section 100(1)(a) of the Act; and
- b is likely to bring discredit to the pharmacy profession pursuant to section 100(1)(b) of the Act.

34.2 Mrs Knight does not admit that admitted facts and charge 2 disclose conduct which warrants disciplinary sanction.

[12] We turn to consider the law that applies to the Charges of practising while not holding a current practising certificate and professional misconduct.

Relevant law

Burden and Standard of Proof

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

[14] The standard of proof is the civil standard of proof; that is proof which satisfies the Tribunal and on the balance of probabilities the particulars of each Charge are more likely than not. The Tribunal must apply a degree of flexibility to the balance of

probabilities considering the seriousness of the allegation, and the gravity of the consequences flowing from a particular finding.⁵

Practising without a current Practising Certificate

[15] 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 profession; and the holding of an APC is a cornerstone requirement of the accountability regime of the Act.

[16] Section 100 of the Act provides the grounds on which a health practitioner may be disciplined, including s 100 (1)(d) of the Act where:

- (d) the practitioner has practised his or her profession while not holding a current practising certificate.

[17] Under s 100(1)(d) of the Act, the following three elements must be established:

- (a) The practitioner was a registered pharmacist during the dates set out in the Charge;
- (b) The practitioner practised as a pharmacist during that period; and
- (c) The practitioner did not hold an Annual Practising Certificate (APC) during the period in question.

[18] A charge under s 100(1)(d) of the Act does not require any intention to breach professional obligations or even that the practitioner knew or ought to have known that they did not have an APC. The offence of practising without a current APC is an absolute offence in this sense. 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.⁶

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [112].

⁶ See for example, *Henderson Phar12/210P* and *Phar12/213P* at [35]-[36].

[19] There have been some differing views expressed as to whether a defence of total absence of fault is available to the practitioner under s 100(1)(d). An example of a situation where the defence might be available, suggested by the Tribunal in *Harris*,⁷ is where a practitioner did everything required of them to renew their APC but by reason of administrative error on the part of the issuing authority, the APC was not issued. In any event, this defence was not advanced by Mrs Knight as she did not take steps to apply to renew her APC before it expired.

Professional misconduct

[20] Further grounds for discipline include malpractice and/or negligence (s 100(1)(a)), and conduct likely to bring discredit to the profession can constitute professional misconduct (s 100(1)(b)).⁸

[21] The Tribunal and the Courts have considered the term “professional misconduct” under s 100(1)(a) and (b) of the Act on numerous occasions. In relation to establishing malpractice and/or negligence under s 100(1)(a), malpractice is a broader concept than negligence.

[22] The Tribunal had adopted the following common usage definitions of “malpractice”:

Immoral, illegal or unethical conduct or neglect of professional duties. Any instance of improper professional conduct⁹ and, “Law Improper treatment or culpable neglect of a patient by a physician or of a client by a lawyer ... 2 gen criminal or illegal action: wrongdoing, misconduct.”¹⁰

[23] Negligence is conduct which, in the circumstances, falls below the standard of care reasonably expected of a practitioner as judged against the standards applied by competent, ethical and responsible colleagues.¹¹

⁷ OT15/331P at [33].

⁸ Health Practitioners Competence Assurance Act 2003, ss 100(1)(a) and 100(1)(b).

⁹ Collins English Dictionary, 12th edition.

¹⁰ New Shorter Oxford Dictionary, 1993 edition.

¹¹ *Collie v Nursing Council of New Zealand* [2000] NZAR 74 Gendall J at [21] and [23].

[24] Under s 100(1)(b) of the Act, the Tribunal must consider whether the alleged conduct has or is likely to bring discredit on the medical profession. In *Collie*,¹² 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.

[25] There is a well-established two stage test for determining professional misconduct. The two steps are:¹³

(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 practitioners' acts or omissions can reasonably be regarded by the Tribunal as constituting malpractice, negligence or otherwise bringing, or likely to bring, discredit on the profession; and

(b) Secondly, if so, whether the departure from acceptable standards has been significant enough to warrant disciplinary sanction for the purposes of protection of the public and/or maintaining professional standards?

Tribunal's findings on liability – Charge 1

Charge 1: Practising pharmacy without a current Practising Certificate

[26] Mrs Knight has admitted that she practised pharmacy between 1 April 2018 and 21 November 2018 and that she did not hold a current APC during this time.

[27] The first element of the test is whether Mrs Knight was a registered pharmacist during the dates set out in the Charge. Mrs Knight has been a registered pharmacist since December 1990 and was a registered pharmacist at the material time.

¹² *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28].

¹³ *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA), as applied in *Johns v Director of Proceedings* [2017] NZHC 2843.

[28] The second element of the test is whether Mrs Knight practised pharmacy during the dates set out in the Charge.

[29] Mrs Knight has admitted that she continued to work as a pharmacist at Crawford House Pharmacy from 1 April 2018 until 21 November 2018 without an APC. As noted in her brief of evidence she said:¹⁴

I did not realise I'd missed the renewal. I continued to work as usual. I completed my CPD requirements during June, July and August 2018.

[30] Mrs Knight confirmed to the Pharmacy Council and the PCC on several occasions that this was the case and therefore the second element is made out.

[31] Mrs Knight admitted that her APC expired on 1 April 2018 and therefore the third element is made out as she did not have a valid APC.

[32] The Tribunal is satisfied that the three elements of the Charge set out in s 100(1)(d) of the Act are established.

Charge 2: Failing to act with integrity, openness, and honesty on two occasions

[33] Mrs Knight has admitted the majority of the underlying facts of the particulars of Charge 2, but denies that her conduct was in breach of the Pharmacy Council Code of Ethics, that it warrants professional discipline or amounts to professional misconduct either separately or cumulatively.

[34] Despite Mrs Knight's admission of these facts, it is for the Tribunal to determine whether the particulars of the Charge are made out and amount to professional misconduct.

¹⁴ Agreed Statement of Facts at [9] and Brief of Evidence of Rachel Knight at [9].

Charge 2 – professional misconduct

Charge 2, particular 1(a): Providing incorrect information to the Pharmacy Council

[35] On Saturday 17 November 2018, Mrs Knight received the letter from Dr George, Registrar of the Pharmacy Council advising her that she had not held a current practising certificate since 1 April 2018 and that if the Pharmacy Council did not receive a response from Mrs Knight by 26 November 2018 her name would be removed from the register of pharmacists.

[36] Mrs Knight has admitted that immediately upon receiving the letter from the Pharmacy Council she went online and filled in and submitted a “Return to Practice” application form. This form is for pharmacists who have not been practising for a period of time and who now wish to apply for practising status and an APC.

[37] Mrs Knight tried to complete the form but found that “it was difficult because it did not fit my situation”.¹⁵ She could not select 1 April 2018 as the start of the period for renewal. As Mrs Knight explained:¹⁶

I got to the end of the form, and ended up deleting the content – it was a return to work form, and I didn’t believe that to be the correct one.

[38] As Mrs Knight stated:

I knew that the form was not correct in all parts. But I thought it was better to register straight away. I should have taken a big breath and given it more time – but I panicked.

[39] As a result, the declaration on the application form showed that she intended to start work on 24 November 2018 (being the earliest date the form would let her input) and this was incorrect.

[40] The application form then asked applicants to provide details of their work history with fields requiring: place and location of employment; average hours worked per week; start date and end date and description of pharmacist duties undertaken

¹⁵ Document 4, Statement of Rachel Miriam Knight, paragraphs [13]-[14].

¹⁶ Mrs Knight’s letter to the PCC, ABOD 102.

including a free text box. Mrs Knight recorded her end date at Crawford House Pharmacy as “04/2018”. This was incorrect as Mrs Knight worked as a pharmacist at Crawford House Pharmacy between 1 April 2018 and the date on which she filled out the form.

[41] The declaration form completed includes the following statement:¹⁷

I certify that the information provided (including current and correct contact details), is to the best of my knowledge, true and correct. I am aware that if I provide false or misleading information, further action may be taken by the Pharmacy Council.

[42] The Tribunal is satisfied that particular 1(a) of Charge 2 is established. Mrs Knight provided incorrect information in her declaration to the Pharmacy Council when she submitted her application for an APC on 17 November 2018. As admitted by Mrs Knight, she gave a false declaration in relation to her work history on the “Return to Practice” form.

Charge 2 particular 1(b): Providing misleading explanation for actions

[43] In respect of particular 1(b) of Charge 2, the PCC allege that Mrs Knight’s explanation in her letter dated 21 November 2018 to Dr George, the Registrar of the Pharmacy Council was misleading.

[44] In Mrs Knight’s letter she advised that her earlier provision of false information was not intentional. She had tried to find another way to provide the information and explained that the application only provided for filling in work up to April 2018 and not beyond. She stated that the application form did not provide for any explanation beyond that date.

[45] Mrs Knight explained that when she could not fill in the form beyond April 2018 she searched around the website and application forms to see if she could find a way to change this but to no avail.¹⁸

¹⁷ As shown in the Agreed Statement of Facts at [20].

¹⁸ Letter to Dr George dated 21 November, ABOD p 49.

[46] Mrs Knight later accepted in correspondence that she could have changed the end date from 04/18 to 11/18. Her explanation was that she was trying to be charged the right fee to be calculated.¹⁹

[47] Mrs Knight also accepted that she could have provided an explanation in the free text box provided on the form.

[48] The application form contains contact details for the Council. Mrs Knight acknowledged she acted impetuously as she continued to persevere completing the form on the Saturday evening rather than waiting until the following Monday to contact the Council. She hastily sent off the form knowing that it was incorrect.

[49] On the Monday morning 19 November 2018 Mrs Knight contacted the Pharmacy Defence Association and let her employer know of the situation. It was not until Tuesday 20 November 2018 that she contacted the Pharmacy Council.

[50] The PCC submitted that it was misleading for Mrs Knight to tell the Pharmacy Council that the application form did not provide for any explanation beyond the dates. The application form contains contact details for the Pharmacy Council.

[51] Ms Mathers, counsel for the PCC put to Mrs Knight in cross -examination that she tried to give the Pharmacy Council the impression on the online form that she hadn't been working during the time she did not hold a practising certificate:²⁰

... (by) entering the end date of April 2018 in this form, you were trying to cover up that you'd been practising without an Annual Practising Certificate? When you filled out the online form, you did this to cover up the fact that you had been working?

[52] Mrs Knight emphatically responded:²¹

No, I was not trying to cover it up. I was trying to get the correct costing to pay....

¹⁹ Letter to Dr George dated 23 November 2018, ABOD p 58.

²⁰ Transcript of evidence, p 31 lines 10-20.

²¹ Transcript of Evidence, p 31, lines 21-22.

[53] Counsel for the practitioner submitted that after completing the online application form Mrs Knight's actions were not consistent with a cover up. Instead, on the Monday she went to work and told her manager and they discussed the issue. She disclosed what had happened on the next working day. The reason the Council became aware of the issue that she had been working without an APC was because Mrs Knight had initiated those conversations with her colleagues and her employer.

[54] Mr Darroch submitted that the online application form was not necessarily the most straight forward and easiest process. This was the first time that she had tried to fill out the form and she made some clumsy errors. Mrs Knight accepts that she could have added a note in the box where she filled out the duties she was doing and put in a different date for the date she had worked at Crawford House Pharmacy. Her explanation for putting the date as April 2018 was that it allowed her to pay for a full year's APC fee.

[55] The Tribunal finds that Mrs Knight did not renew her APC in March 2018. She did not realise this error until Saturday 17 November 2018. This is accepted by the PCC. As set out in the Agreed Statement of Facts, Mrs Knight continued to complete courses for her CPD requirements in June, July and August of that year.

[56] When Mrs Knight found that she had not renewed her APC she immediately went online and tried to complete the "Return to Practice" form. This was the only option available to her.

[57] The Tribunal accepts that Mrs Knight was not trying to hide or mislead the Council when she completed the form online. Mrs Knight gave an honest and credible account to the Tribunal of the muddle she found herself in and the steps she took to explain the inaccurate form to the Pharmacy Council.

[58] She knew more was required of her. This was demonstrated by the actions she took from this point. When she went to work on Monday 19 November 2018, she told her manager Basmat Hikmet. She then rang the Pharmacy Defence Association. She also called the owner of the pharmacy to tell her about the problem and it was then decided that Mrs Knight could not work until this was sorted out.

[59] On the following day, Tuesday, after further advice Mrs Knight rang the Pharmacy Council. During this time Mrs Knight prepared her written explanation. The sequence of her drafting and interaction with the Pharmacy Defence Association was shown in the documents, including some correspondence where she has waived legal privilege in providing the draft letters to the Tribunal.²² We accept Mrs Knight's evidence that she prepared her first response without checking the online form and that draft was not sent after feedback received from PDA.

[60] The Tribunal's attention was drawn to the specific provisions in the Act regarding APC applications. Under s 26 of the Act:²³

- (1) Every health practitioner who wishes to obtain an annual practising certificate must apply to the Registrar of the responsible authority in accordance with the requirements set out in the section.
- (2) Every application for an annual practising certificate must
 - (a) be in the form, and include the information, that is determined by the authority, **including a statement specifying whether or not the applicant is, at the date of the application, practising the profession in respect of which the authority is appointed;** and
 - (b) be accompanied by the fee (if any) set by the authority.

[Emphasis added]

[61] Section 172(a) of the Act makes it an offence punishable by a fine of up to \$10,000 for any person who, for any purposes relating to the Act make any declaration or representation that, to his or her knowledge is false or misleading in any material particular.

[62] A complicating factor in this case is that although Mrs Knight went online to complete the application for her APC, that application did not specifically ask her to declare that she was currently practising the profession as required under s 26(2)(a) of the Act. The "Return to Practice" form does not strictly meet these requirements.

²² ABOD [35]-[39].

²³ Health Practitioners Competence Assurance Act 2003, s 26(2)(a) and (b).

[63] Although these provisions do not excuse Mrs Knight from her actions of submitting inaccurate information on the “Return to Practice” form, they do in part demonstrate the difficulty she had in reflecting her circumstances at that time when completing the form online.

Charge 2 particular 2(a): Breach of obligations under the Pharmacy Council’s Code of Ethics

[64] Principle 4 of the Pharmacy Council’s Code of Ethics 2018 states:²⁴

A pharmacist acts with honesty and integrity and maintains public trust and confidence in the profession.

[65] This principle is elaborated at paragraph [C] which requires pharmacists to [provide]:

accurate, truthful, relevant, and independent information in an appropriate form that is not misleading to patients, the public and/or other healthcare professionals.

[66] Paragraph [E] also requires pharmacists to respond honestly, openly, courteously and promptly to complaints and criticism.

[67] Counsel for the PCC submitted that as a registered pharmacist, Mrs Knight was required to comply with these standards set by the Pharmacy Council and that her conduct must be measured against these standards.

[68] In respect of Charge 2 sub-particular 2(a) in relation to breach of the obligations under the Pharmacy Council Code of Ethics 2018, the Tribunal finds that this particular has been established, especially as it relates to providing a false declaration. The Tribunal is satisfied that there has been a departure and a breach of the standards in relation to Principle 4 of the Code of Ethics.

²⁴ Pharmacy Council Code of Ethics 2018 dated 12 March 2018.

Comparable case law – misleading conduct

[69] Counsel for the PCC submitted that there were a number of cases to assist the Tribunal when assessing whether Mrs Knight’s conduct in respect of Charge 2 should be considered to amount to professional misconduct.

[70] In *Forum Patel*,²⁵ Mr Patel, an optician, was charged with practising without an APC and for making false declarations when applying for an APC. Mr Patel failed to disclose all of his employment history, including failing to declare two periods when he had worked as an optician without holding an APC. He was found guilty of professional misconduct by bringing discredit to the profession and that he had displayed a “serious error of judgement” in failing to be honest in his application.

[71] In *Dr U*,²⁶ Dr U was charged under s 100(1)(b) for making false declarations to the Medical Council when applying for her APC on five occasions. She falsely indicated she was complying with CPD requirements when she had in fact not done so. The Tribunal found that it was incumbent on Dr U in completing the application forms to ensure that her response was accurate and that Dr U was seriously negligent when completing the forms that suggested indifference and abuse of the privileges which accompanied her registration as a medical practitioner.

[72] In *Tolland*,²⁷ Ms Tolland was a midwife who was charged with practising without an APC and professional misconduct for acting unprofessionally on a number of occasions, including by misleading her registration authority and advising that she had taken annual leave when she was in fact working as a midwife and failing to engage with the registration competence programme.

[73] Each case must be considered on its own facts. The Tribunal considers that the professional misconduct in the above cases involve far more serious allegations and repeated failures by the practitioner than the circumstances in which Mrs Knight incorrectly completed the “Return to Practice” form for her APC.

²⁵ Opt11/177P

²⁶ Med14/298P.

²⁷ Mid10/146P.

Charge 2 – not professional misconduct warranting disciplinary sanction

[74] In summary, the Tribunal finds that Charge 1 has been established requiring professional discipline.

[75] Having heard the evidence and Mrs Knight’s explanation, there are particulars of the second Charge that have been established (particular 2.1(a) and 2.2) and others that have not (particular 2.1(b)).

[76] The particulars of Charge 2, 1(a) and 2.2 cumulatively amount to negligence under s 100(1)(a) of the Act. We find however that Mrs Knight’s conduct is not conduct that has brought or was likely to bring discredit to the practitioner’s profession under s 100(1)(b) of the Act.

[77] Applying the two-step process to determine professional misconduct,²⁸ the Tribunal is not satisfied that Mrs Knight’s negligence in relation to providing incorrect information to the Pharmacy Council in the “Return to Practice” form is conduct which requires a disciplinary sanction for the purposes of protecting the public or maintaining professional standards or indeed, punishing the health practitioner. In the circumstances of this case, this conduct and breach of the Code of Ethics is not sufficiently serious to warrant disciplinary sanction.

[78] We now turn to consider the appropriate penalty to be imposed in relation to Charge 1 as proved.

Penalty

Penalty principles

[79] As the Tribunal is satisfied that Charge 1 has been established and requires professional discipline, it must go on to consider the appropriate penalty under s 100(1) of the Act. The penalties may include: cancellation of registration; suspension for a

²⁸ *Johns v Director of Proceedings* [2017] cited above.

period not exceeding three years; a fine not exceeding \$30,000; imposition of conditions on for a period not exceeding three years; and censure.²⁹

[80] The established sentencing principles are those set out in *Roberts v Professional Conduct Committee*³⁰ where Collins J identified the following eight factors as relevant whenever the Tribunal is determining an appropriate penalty. In particular, the Tribunal is bound to consider:

- (a) Most appropriately protects the public and deters;
- (b) Facilitates the Tribunal's important role in setting professional standards;
- (c) Punishes the practitioner;
- (d) Allows for the rehabilitation of the practitioner;
- (e) Promotes consistency with penalties in similar cases;
- (f) Reflects the seriousness of the misconduct;
- (g) Is the least restrictive penalty appropriate in the circumstances; and
- (h) Looked at overall, is the penalty "fair, reasonable and proportionate in the circumstances".

PCC submissions on penalty

[81] The PCC submitted that the maintenance of professional standards and protection of the public can be best achieved with a penalty of censure, a fine of \$2,500.00 and an order for costs and expenses.

²⁹ Health Practitioners Competence Assurance Act 2003, s 101(1).

³⁰ 2012 [NZHC] 3354 at [44]-[51].

[82] Practising without an APC is not merely a technical breach of obligations but is a serious matter. Holding an APC has been described as “a cornerstone requirement” of the Act³¹ and a key mechanism for the protection of the public and maintenance of professional standards.

[83] In line with the cases discussed below, the PCC submitted that it would be appropriate to censure Mrs Knight to mark the Tribunal’s disapproval of practising without an APC. A fine is appropriate to meet the purposes of setting and maintaining professional standards, protecting the public, and for deterrence purposes.

[84] The PCC submitted that in light of the length of time that Mrs Knight practised without an APC – seven months and 19 days – and her relative seniority in the profession, it would be appropriate for the Tribunal to order Mrs Knight to pay a fine of \$2,500.00.

Practitioner’s submissions on penalty

[85] Ms Sinclair, counsel for the practitioner submitted that Mrs Knight did not realise that her APC had not been renewed. She did not receive the reminder letters and emails from the Pharmacy Council. Mrs Knight does however accept that this was her responsibility to follow up and deal with.

[86] Counsel for the practitioner submitted that there were a number of personal reasons why Mrs Knight did not follow up with renewal of her APC. These factors do not excuse Mrs Knight’s conduct but serve to explain some of the contributing causes. It was not a deliberate or intentional error – rather the reverse.

[87] While Mrs Knight was eligible to renew her APC and she had completed her CPD requirements it was the administrative task of completing the renewal and making the payment that had not occurred.

³¹ *Henderson Phar12/210P and Phar12/213P* at [36].

[88] Mrs Knight acted as soon as she was aware of the problem. She was, and is, embarrassed by the inaccuracies in her “Return to Practice” application and her attempts to explain what had happened.

[89] The process of investigation and for the hearing had been difficult for Mrs Knight.

[90] Mrs Knight accepts that the absence of an APC for this period is a serious failing. The seriousness can be marked by a censure and imposition of a fine of \$2,000.

Comparable cases

[91] The Tribunal has dealt with a number of cases involving pharmacists without an APC. The similar cases referred to the Tribunal include:

- (a) *Samarasinha*³² where the practitioner practised without an APC for three weeks. She was censured, fined \$800, and ordered to contribute to costs.
- (b) *Heath*³³ - where the practitioner practised without an APC for seven weeks. He was censured, fined \$1,250, and ordered to contribute to costs.
- (c) *Yu-Po Lin*³⁴ - where the practitioner practised without an APC for just under six months. Mr Lin was provided warnings that it was unlawful to practise without a current APC. He was censured, fined \$2,000, and ordered to contribute to costs. Aggravating factors included that Mr Lin had been advised that it was unlawful to practise without a current APC and the renewal form, the Pharmacy Council newsletter, and in correspondence, and that Mr Lin initially denied he had worked for a period despite later admitting that he had. Mitigating factors included that Mr Lin stopped practising when he was advised to do so and his

³² Phar16/365P.

³³ Phar16/356P.

³⁴ Phar15/319P.

cooperation at the PCC investigation. The Tribunal censured Mr Lin and imposed a fine of \$2,000.

- (d) *Henderson*³⁵ - where the practitioner was found guilty of practising without an APC for approximately one year and five months. Aggravating factors included the length of time Mr Henderson practised without an APC, his awareness of the consequences of practising without an APC, his lack of insight as to the seriousness of practising without an APC which continued in the hearing, and an element of wilful blindness to his approach. Mitigating factors included Mr Henderson's partial recognition of not being able to practise and that his work was checked by other pharmacists. The Tribunal censured Mr Henderson and imposed a fine of \$2,000.

[92] The review of these comparable cases indicates that the offending under s 100(1)(d) of the Act in this case is at the lower end of the scale. The range of penalties imposed are predominantly a censure and a fine in the range of \$800 - \$2,500.

Tribunal findings on penalty

[93] The Tribunal has considered the aggravating and mitigating factors. The following aggravating factors are relevant:

- (a) Mrs Knight practised pharmacy for approximately seven months and 19 days without an APC;
- (b) Mrs Knight was sent three email reminders to renew her APC and a letter via post on 20 April 2018 informing her that she did not hold an APC. These emails were sent to an old email address and the letter was delivered to her house but was not found until 2019. It was incumbent on Mrs Knight to provide up to date contact information to the

³⁵ Phar12/210P and Phar12/213P.

Pharmacy Council and have systems in place to ensure that correspondence was received and read by her;

- (c) Mrs Knight has been a pharmacist and held an APC for 28 years and would have known that she was required to hold an APC in order to practise pharmacy. In that respect she should not have gone to work on Monday 19 November or at least not waited until later that afternoon to disclose her situation to her manager;
- (d) Mrs Knight continued to work after reminders including the letter dated 17 November 2018 which prompted her to go online to complete the “Return to Practice” form.

[94] The Tribunal acknowledges that the following mitigating factors are also relevant:

- (a) Mrs Knight immediately acknowledged that she had overlooked the renewal of her APC as soon as she was aware;
- (b) Mrs Knight has cooperated with the PCC investigation and admissions to the Tribunal including significant admissions in reaching an Agreed Statement of Facts;
- (c) Mrs Knight completed the CPD requirements during the period that she did not hold an APC. Completion of CPD requirements was considered a mitigating factor in *Heath*,³⁶
- (d) Mrs Knight has no previous history of professional discipline and has been registered as a pharmacist since 1990;
- (e) Mrs Knight’s co-operation with the PCC and the Tribunal when this Charge has been laid;

³⁶ Phar16/356P.

- (f) The fact that Mrs Knight has admitted the Charge at an early stage;
- (g) Mrs Knight is an experienced and competent pharmacist. She has not had any previous disciplinary matters before this Tribunal and there is no suggestion in the evidence that her clinical competence has been an issue; and
- (h) Mrs Knight has expressed insight into her failures at this hearing in a dignified and respectful manner.

[95] As acknowledged by the PCC, there is no evidence before the Tribunal that Mrs Knight's conduct has caused harm to the public. The process of annual renewal of the APC does have an important role in protecting the public from harm and the importance of the provision of accurate information so as to allow the registration authority to ensure a practitioner is fit and competent to practise.

[96] We are satisfied that the appropriate penalty in this case is a censure and for a fine to be imposed.

[97] A censure is important for the Tribunal to mark its formal disapproval for failure to renew the APC. Given the importance of the APC regime of the Act it is the fundamental obligation of all health practitioners. The importance of this obligation is underscored by the separate ground of discipline provided by s 100(1)(d) of the Act .

[98] Although the Tribunal has found that Mrs Knight did not intentionally mislead the Pharmacy Council as to the completion of the form in her haste (which she now regrets) there followed an unfortunate interaction with the Pharmacy Council.

[99] The Tribunal is satisfied that a fine of \$2,000 is proportionate and in line with similar pharmacy cases *Yu-Po Lin*³⁷ and *Henderson*³⁸ cited above.

³⁷ Phar15/319P.

³⁸ Phar12/210P and Phar12/213P.

Costs

[100] When considering the appropriate quantum of costs, the Tribunal must take into account the need for the practitioner to make a proper contribution towards the costs. In doing so, it takes 50% of the total reasonable costs of both the PCC and the Tribunal as a starting point, in accordance with *Cooray v Preliminary Proceedings Committee*.³⁹ Other factors may then be taken into account to reduce or mitigate that proportion.

[101] The Tribunal recognises the co-operation received from Mrs Knight, particularly the indication of an early admission and the fact that the Charge has been able to be dealt with on the basis of an Agreed Statement of Facts.

[102] Mrs Knight also provided an affidavit of her financial means. Counsel for the practitioner submitted that costs should be fixed at \$10,000 in the context of this disclosure.

[103] The Tribunal also acknowledges the process of investigation and the long wait for the hearing has been difficult for Mrs Knight. The absence of an APC has meant she has not been able to access assistance with her legal fees and the cost of dealing with the issue has increased markedly as a result.

[104] The Tribunal also acknowledges that Mrs Knight was required to defend Charge 2. Although this Charge has been established, the Tribunal has found that the professional misconduct was not sufficiently serious to warrant disciplinary sanction. Therefore the penalty hearing was directed at Charge 1, not Charge 2.

[105] The PCC submitted an appropriate award of costs would be 30% of the total costs.

[106] Counsel for the practitioner submitted that in the circumstances, including the finding in respect of Charge 2 it is appropriate to reduce the costs to 25%.

³⁹ HC Wellington, AP 23/94 Doogue J, 14 September 1995.

[107] The PCC costs are estimated at \$47,180.83.⁴⁰ The Tribunal's costs are estimated at \$22,490.⁴¹ This is an estimated total cost of \$69,670.83. Taking into account the various factors in reaching an award of costs, the Tribunal considers that a 25% contribution of the total cost by the practitioner is fair, just and proportionate to the approximate total costs of \$70,000. This amount will be fixed at \$17,000.

Result and orders

[108] Charge 1 is established under s 100(d) of the Act. Mrs Knight practised the profession of pharmacy without a current practising certificate between 1 April 2018 and 19 November 2018. This conduct amounts to a ground of discipline that warrants disciplinary sanction.

[109] Charge 2 particulars 1(a) and 2 are established. On 17 November 2018 Mrs Knight provided incorrect information to the Pharmacy Council when completing the online "Return to Practice" form. The practitioner acted in breach of her obligations under the Pharmacy Council Code of Ethics 2018 particularly in light of providing a false declaration.

[110] Charge 2 sub-particular 1(b) in respect of providing a misleading explanation of her actions to the Pharmacy Council in a letter dated 21 November 2018 is not established. The Tribunal is not satisfied that Mrs Knight knew or ought to have known that her explanation was misleading.

[111] The Tribunal makes the following orders in relation to penalty made against the practitioner as follows:

- (a) Censure of the practitioner to mark the disapproval of the Tribunal pursuant to s 101(1)(d) of the Act;
- (b) A fine in the sum of \$2,000 pursuant to s 101(1)(e) of the Act; and


⁴⁰ Document 10, Breakdown of Costs for the PCC.

⁴¹ Document 11, Estimated HPDT costs.

- (c) Costs of 25% of the total costs of the PCC and the Tribunal fixed at \$17,000 pursuant to s 101(1)(f) of the Act.

- (d) The Tribunal directs the Executive Officer to publish this decision and a summary on the Tribunal's website. The Tribunal also directs the Executive Officer to request the Pharmacy Council of New Zealand to publish either a summary of, or a reference to, the Tribunal's decision in its principal professional publications to members, in either case including the reference to the Tribunal's website so as to enable interested parties to access the decision.

DATED at Dunedin this 5th day of November 2020



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A J Douglass
Chair
Health Practitioners Disciplinary Tribunal

SCHEDULE

PARTICULARS OF THE CHARGES

TAKE NOTICE that: A Professional Conduct Committee (**Committee**) appointed by the Pharmacy Council of New Zealand (**Pharmacy Council**) pursuant to section 71 of the Health Practitioners Competence Assurance Act 2003 (**Act**) has determined in accordance with section 80(3)(b) of the Act that a disciplinary charge be laid against Rachel Knight, registered pharmacist, before the Health Practitioners Disciplinary Tribunal (the **Tribunal**).

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

Charge 1:

The Professional Conduct Committee charges that:

1. Mrs Knight, a registered pharmacist, practised the profession of pharmacy between on or around 1 April 2018 and on or around 21 November 2018, a period when she did not hold a current practising certificate.
2. Practising the profession of pharmacy while not holding a current practising certificate is a ground on which a health practitioner may be disciplined under section 100(1)(d) of the Act.

Charge 2:

The Professional Conduct Committee charges that:

1. Mrs Knight failed to act with integrity, and/or openness, and/or honesty by:

- a. Providing incorrect information to the Pharmacy Council when she submitted a 'Return to Practice' application through the Pharmacy Council website on or around 17 November 2018; and/or

Particulars

- i. The 'Return to Practice' application form is for pharmacists who have not been practising for a period of time and wish to apply for a practising certificate;
 - ii. Mrs Knight declared on the application form that she intended to start work on 24 November 2018;
 - iii. Mrs Knight declared on the application form that she had started work at Crawford House Pharmacy in October 2013 and had ended work in April 2018;
 - iv. Mrs Knight's practising certificate expired on 1 April 2018;
 - v. Mrs Knight had worked as a pharmacist at Crawford House Pharmacy between on or around 1 April 2018 and on or around 21 November 2018;
- b. Providing a misleading explanation for her actions to the Pharmacy Council on or around 21 November 2018, where she knew or ought to have known, that that explanation was misleading;

Particulars

- i. On or around 21 November 2018 Mrs Knight sent a letter to Owain George, the Registrar of the Pharmacy Council, advising that:
 - A. her earlier provision of false information was not intentional;

- B. she had tried to find another way to provide the information;
 - C. the application form only provided for filling in work up to April 2018 and not beyond;
 - D. the application form did not provide for any explanation beyond the dates;
 - ii. The application form:
 - A. allows for dates to be entered;
 - B. provides a text box in which an explanation could be entered; and
 - C. provides contact details for the Pharmacy Council.
 - iii. Mrs Knight knew, or ought to have known, that the matters set out in subparagraph (ii) above were the case.
- 2. Mrs Knight's conduct, as particularised, above:
 - a. was in breach of her obligations under the Pharmacy Council's Code of Ethics 2018; and
 - b. either separately and/or cumulatively amounts to professional misconduct under section 100(1)(a) and/or section 100(1)(b) of the Act.