New Zealand Health Practitioners Disciplinary Tribunal

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**DECISION NO:** 327/Med10/153P

**IN THE MATTER** of Section 92 the Health Practitioners Competence Assurance Act 2003

-AND-

**IN THE MATTER** of disciplinary proceedings against **DR VIKRAM JAYAPRAKASH,** Medical Practitioner of Auckland

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HEARING:** Held in Auckland on Monday 23 August 2010

**TRIBUNAL:** Ms Kathryn G Davenport (Chair)
Dr Adriana Gunder, Dr Ron Jones, Dr Paul Malpass, Dr Katharine Wallis (Members)

Ms Karen Crosby (Executive Officer)
Ms Helen Hoffman (Stenographer)

**APPEARANCES:** Mr Michael Heron and Michael Thomas for the Professional Conduct Committee
Mr Harry Waalkens QC and Ms Aimee Credin for Dr Jayaprakash

## Introduction

1. Dr Jayaprakash is a medical practitioner in practice in Auckland. He faces two charges which are set out below.

2. The charge provides:

> *"TAKE NOTICE that a Professional Conduct Committee ("the Committee") appointed by the Medical Council of New Zealand pursuant to section 71 of the Health Practitioners Competence Assurance Act 2003 ("the Act") has determined in accordance with section 80(3)(b) of the Act that a charge of professional misconduct should be brought against Dr Vikram Jayaprakash before the Health Practitioners Disciplinary Tribunal.*
>
> *The Committee has reason to believe that grounds exist entitling the Tribunal to exercise its powers under section 100 of the Act.*
>
> *Particulars of charge*
>
> *The Professional Conduct Committee charges that Dr Vikram Jayaprakash, Medical Practitioner of Auckland:*
>
> *(1) In or before December 2008, falsely claimed in his Curriculum Vitae which was submitted in support of his application to the Auckland District Health Board for a position as a trainee in Anaesthesia, that he had completed his Membership of the Royal Colleges of Physicians of the United Kingdom ("MRCP") Part 1 & 2 Examinations in the United Kingdom in 2002, and Primary Examination for the Fellowship of the Royal College of Anaesthetists ("FRCA") in the United Kingdom in 2004, when in fact he knew that he had not successfully completed any of those examinations.*
>
> *AND/OR*
>
> *(2) In or about June 2009, falsely stated to Dr Sarah Nicholson, Supervisor of Training in Anaesthesia at the Auckland District Health Board, that he had successfully completed Part 1 of the Fellow [sic] of the Australian and New Zealand College of Anaesthetists ("ANZCA") Examination, when he knew that he had not in fact successfully completed the Examination, and subsequently provided Dr Nicholson with a forged letter addressed to Dr W Jayawardene, dated 7 June 2009, purporting to be signed by the Chairman of the Primary Examination Sub-Committee of ANZCA, as confirmation of his successful completion of the Primary Fellowship Examination of ANZCA.*
>
> *The conduct alleged in 1 to 2 above either separately or cumulatively amounts to professional misconduct under section 100 of the Act."*

3. The parties signed an Agreed Statement of Facts which is **annexed** to this decision.

4. Dr Jayaprakash signed the Agreed Statement of Facts and confirmed that it amounted to professional misconduct. The Tribunal of course has the ultimate decision to make on this point. The Tribunal considered the evidence contained in the Agreed Statement of Facts and agreed that it did constitute professional misconduct. The Tribunal's reasons are set out at paragraph 17 and following. Fraudulently representing one's qualifications and lying to a training officer is undeniably professional misconduct.

## The Law

5. The legislation provides that a practitioner may be disciplined if the conduct complained of falls within one of the categories set out in section 100. The sections which are relevant to this case are section 100(1)(a) and section 100(1)(b). They are set out below.

> *"Section 100: Grounds on which a practitioner may be disciplined*
>
> *1. The Tribunal may make one or more of the orders authorised by section 101 if, after conducting a hearing on the charge laid under section 91 against a health practitioner it makes one or more findings that:*
>
> *(a) The practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time that the conduct occurred;*
>
> *(b) The practitioner has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal has brought or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred;" ……"*

6. As set out above, a health practitioner is guilty of professional misconduct in terms of section 100(1) if the conduct:

   (a) Amounts to malpractice or negligence in the way that they discharge their professional responsibilities; or

(b) The acts or omissions will or are likely to bring discredit to the practitioner's profession regardless of whether or not they occur within a practitioner's scope of practice.

7. Malpractice has been described in the *Collins English Dictionary 2nd Edition* as being:

> *"The immoral, illegal or unethical conduct or neglect of professional duty. Any incidence of improper professional conduct."*

8. The 1993 edition of the *New Shorter Oxford Dictionary* describes malpractice as:

> *"Improper treatment or culpable negligence of a patient by a physician or of a client by a lawyer…..a criminal or illegal action: common misconduct".*

9. Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amounts to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a registered medical practitioner in the same circumstances as Dr Jayaprakash. This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers.

10. As Justice Elias said in <u>*B v The Medical Council*</u> (HC, Auckland, HC 11/96, 8 July 1996, Elias J):

> *"The structure of the disciplinary processes set up by the Act, which rely in large part upon judgment by a practitioner's peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical, and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that usual professional practice, whilst 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 practice but also patient interests and community expectations, including the expectation that professional standards are not to be permitted to lag. The disciplinary process in part is one of setting standards".*

11. Section 100(1)(b) requires the Tribunal to determine whether or not the act or omission has brought or is likely to bring discredit to the medical profession. The Nurses Act 1977 contained a similar clause and this was considered by the Gendall J in *Collie v Nursing Council of New Zealand* (HC Wellington AP 300/99, 5 September 2000). He said:

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

12. Gendall J also made comment on the definition of negligence and malpractice [section 100(1)(a)]. He said at paragraph 21**:**

> *"Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness. …"*

13. The provisions contained in section 100 sit within the body of earlier well established case law on professional discipline. The statements made by Judges such as Gendall J in *Collie (supra)* and those set out below, still apply when considering the definition of malpractice and negligence.

14. Justice Venning in *McKenzie v The MPDT* (HC Auckland, CIV 2002-404-153-02;12/06/03) described the test of professional misconduct as follows:

> (Paragraph 71)
>
> *"In summary, the test for whether a disciplinary finding is merited is a two-stage test based on first, an objective assessment of whether the practitioner departed from acceptable professional standards and secondly, whether the departure was significant enough to attract sanction for the purposes of protecting the public. However, even at that second stage it is not for the Disciplinary Tribunal or the Court to become engaged in the consideration of or to take into account subjective consideration of the personal*

*circumstances or knowledge of the particular practitioner. The purpose of the disciplinary procedure is the protection of the public by the maintenance of professional standards. That object could not be met if in every case the Tribunal and the Court was required to take into account subjective considerations relating to the practitioner."*

15. Decisions such as these and other cases under the Medical Practitioners Act 1995 and its predecessor the Medical Practitioners Act 1968 established a two stage test for determining professional misconduct. The test provides:

    1. Was the conduct complained of such that a medical practitioner in the same vocational area as the doctor charged think that the conduct fell (significantly) short of the conduct that was to be expected of a reasonably competent medical practitioner? and;

    2. If the answer to 1. above is "yes"; then does this finding warrant the imposition of a disciplinary sanction for the purpose of protecting the public and or maintaining standards and or punishing the medical practitioner?

16. A commentary on the second part of this test can be found at paragraph 68 and 70 of this Tribunal's decision in *PCC v Nuttall* [decision 8/Med04/03P] and in cases such as *Pillai v Messiter* (1989) 16 NSWLR 197.

**Reasons**

17. Having considered all of this evidence, the Tribunal makes the following findings on the charge.

***Particular 1***

***In or before December 2008, falsely claimed in his Curriculum Vitae, which was submitted in support of his application to the Auckland District Health Board for a position as a trainee in Anaesthesia, that he had completed his Membership of the Royal Colleges of Physicians of the United Kingdom ("MRCP") Part 1 & 2 Examinations in the United Kingdom in 2002, and Primary Examination for the Fellowship of the Royal College of Anaesthetists ("FRCA") in the United***

***Kingdom in 2004, when in fact he knew that he had not successfully completed any of those examinations.***

18. Dr Jayaprakash confessed that he had sat Part 1 of the MRCP exams and failed and attempted on three occasions the FRCA exam but also had not passed this exam. His claim that he had successfully completed these examinations were false and for the purpose of assisting him to further his career and to obtain work in New Zealand. His conduct in making this claim when seeking employment shows that he intended the Auckland District Health Board (ADHB) to rely upon this information. He gained employment at the ADHB on the basis of this false information. He knew it was false and had known this since his Curriculum Vitae (CV) was prepared in about 2005. The false information also had the potential to cause harm to patients if Dr Jayaprakash had been given work or responsibilities he was supposedly qualified to do – when in fact he was not. The Tribunal finds this particular established on the balance of probabilities; warranting disciplinary sanction.and amounting to professional misconduct under section 100(1)(a) and (b)

***Particular 2***

***In or about June 2009, falsely stated to Dr Sarah Nicholson, Supervisor of Training in Anaesthesia at the Auckland District Health Board, that he had successfully completed Part 1 of the Fellow [sic] of the Australian and New Zealand College of Anaesthetists ("ANZCA") Examination, when he knew that he had not in fact successfully completed the Examination, and subsequently provided Dr Nicholson with a forged letter addressed to Dr W Jayawardene, dated 7 June 2009, purporting to be signed by the Chairman of the Primary Examination Sub-Committee of ANZCA, as confirmation of his successful completion of the Primary Fellowship Examination of ANZCA.***

19. Dr Jayaprakash admitted this particular. The Tribunal finds that such conduct - lying about the passing of examinations and then providing "proof" of this claim with a forged letter - is repugnant to the concept of a professional responsibility. It is also important to public safety. The profession needs to ensure that medical practitioners are properly qualified to carry out the jobs entrusted to them by the public and their employers. Lying about qualifications can have serious potential consequences for public safety. The risks of an unqualified doctor performing anaesthetics on patients are of significant concern. This conduct falls completely

short of the conduct to be expected of a professional such as Dr Jayaprakash. The Tribunal finds this particular established, warranting a disciplinary sanction and amounting to professional misconduct under section 100(1)(a) and (b).

20. The Tribunal now turns to the question of penalty.

**Principles of Sentencing**

21. A penalty must fulfil the following functions. They are:

**(a) Protecting the public.**

Section 3 of the Health Practitioners Competence Assurance Act sets out the purposes of the legislation. The principal purpose of the Act is "to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions."

**(b) Maintenance of professional standards**

This was emphasised in *Taylor v The General Medical Council*[1] and *Dentice v The Valuers Registration Board*[2].

**(c) Punishment**

While most cases stress that a penalty in a professional discipline case is about the maintenance of standards and protection of the public there is also an element of punishment – such as in the imposition of a fine, see section 101(2), or censure. See for example the discussion by Dowsett J in *Clyne v NSW Bar Association*[3] and Lang J in *Patel v Dentists Disciplinary Tribunal*[4].

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[1] [1990] 2 All ER 263
[2] [1992] 1 NZLR 720
[3] (1960) 104 CLR 186 at 201-202
[4] HC Auckland CIV 2007-404-1818; Lang J; 13/8/07

**(d) Where appropriate, rehabilitation of the practitioner must be considered –** see *B v B*[5].

**Other Issues**

22. In *PCC v Martin*[6] Gendall J said:

> *[24] Removal from the Register or striking-off may have the consequences of a punishment but has been made clear in many cases the order is not made by way of punishment but because the person was not a proper and fit person to remain registered as a professional person. If the conviction and the actions of the practitioner lead to the conclusion that he/she is not fit to be registered as a nurse, or to practise in a particular profession, then de-registration or suspension is inevitable…*
>
> *[26] The appropriate starting point seems to me to ask: "What orders will protect the public, through advancing the proper responsible standards and practise of nursing?" rather than to ask: "Should the professional be punished again?".*

23. Also relevant to the Tribunal's deliberations are the comments of Lang J in *Patel v PCC*[7]. Lang J stressed that the Tribunal had to consider the "alternatives available to it short of removal and to explain why lesser options have not been adopted in the circumstances of the case"[8].

24. To the cases set out above must be also added the decision of Justice Keane in (HC Auckland, CIV-2008-404-2927, *A v. The Professional Conduct Committee)*. In that decision at paragraphs 80 and following, His Honour cited with approval a decision of *Taylor v. The General Medical Council* [1990] 2 All ER 263-266, House of Lords and took from that decision four explicit and one implied points about sentencing:

*(a) The primary purpose of cancelling or suspending registration is to protect the public, but that inevitably imports some punitive element.*

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[5] HC Auckland, HC 4/92 6/4/93; [1993] BCL 1093
[6] Supra
[7] Supra
[8] at para 30 from *Patel v Dentists Disciplinary Tribunal* [HC Auckland AP 77/02; 8/10/02]

*(b) Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate.*

*(c) Thirdly, to suspend implies a conclusion that cancellation would have been disproportionate.*

*(d) Fourthly, suspension is most apt where there is "some condition affecting the practitioner's fitness to practise which may or may or may not be amenable to cure";*

*(e) Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish".*

25. His Honour also said (at paragraph 82) that the Tribunal cannot ignore the rehabilitation of a practitioner, see *B v. B* (Supra).

26. From these cases comes the clear principle that penalties must be proportionate to the offence and the range of available penalties.

**Submissions**

27. The Professional Conduct Committee (PCC) submitted that the appropriate penalty for Dr Jayaprakash was a penalty of suspension. The PCC also sought censure, costs and publication of Dr Jayaprakash's name.

28. The PCC referred to a number of cases including *PCC v Keshvara* 53/Med06/29P. Dr Keshvara was a general practitioner with a drug addiction problem. He appeared before the Tribunal for the second time for obtaining prescription medication from a pharmacy by means of forging a signature of another practitioner. He was suspended for 12 months. Conditions were imposed upon his practice and he had to pay 33% of the costs of and incidental to the charge.

29. In *PCC v Anderson* 164/Med08/87P. Dr Anderson forged the signature of another doctor on Land Transport Safety Authority medical examination form to

which he then gave to the Authority to obtain a heavy vehicle drivers license. However, before this could be acted upon, the practitioner whose name had been forged alerted the Authority. No one relied upon the medical certificate. Dr Anderson also had other health issues. He was fined, censured and ordered to pay 25% of the costs of and incidental to the charge.

30. In *PCC v Ranchhod* 273/Med09/129P. Dr Ranchhod faced a charge of professional misconduct for practising medicine while not holding an Annual Practising Certificate (APC), and also altering his expired APC and giving it to an Auckland resthome. Dr Ranchhod was a sole practitioner carrying on work as an after hours home visit doctor. He was endeavouring to pass the Primex Examination. Dr Ranchhod was suspended from practice for two months with significant conditions imposed upon his recommencement of practice. He was censured and fined $7,500 and ordered to pay costs of $20,000 being approximately 30% of the costs of the investigation and hearing.

31. And finally *PCC v Marchant* 280/MED09/133P. Dr Marchant had a conviction for three counts of using documents to obtain a pecuniary advantage with intent to defraud and one count of dishonestly using a document. He had been sentenced to eight months home detention. The PCC brought a charge against him. Dr Marchant was apparently suffering from a brain injury and there were a number of other unusual circumstances surrounding his conduct. The Tribunal in that case was satisfied that primary consideration should be given to rehabilitation of the practitioner. Dr Marchant was ordered to undergo a competence review and conditions were imposed upon his practice. He was censured and ordered to pay $20,000 towards costs. The Tribunal noted that had it not been for the unusual circumstances of the case, it would have not hesitated to impose a 9 month suspension of registration on him.

**Submissions of Dr Jayaprakash**

32. Mr Waalkens relied upon essentially the same cases but submitted that the case law did not require Dr Jayaprakash to be suspended, rather he submitted that he should be fined and asked to pay costs.

33. Mr Waalkens said that Dr Jayaprakash had provided his CV details to a consulting agency who adopted the CV details that he had falsely provided and then, having started the lie, he felt committed to continue it. His explanation for the false information was that it was a reflection of his acute embarrassment in having failed to pass his exams, coupled with the keenness that he had for immigrating to New Zealand or Australia. Once the fraudulent behaviour was known he has faced considerable humiliation in having to explain this behaviour to his wife and to his family, most of whom work as medical practitioners. He also felt strongly that he had nothing to show by way of qualifications after seven years of working in the National Health Service in the United Kingdom. In December 2005 Dr Jayaprakash was accepted for the training programme in New Zealand as an anaesthetist, spent six months working at Middlemore Hospital, a further six months at North Shore Intensive Care Unit and then went back to Middlemore for a further year. Whilst in that Department he sat part 1 of the ANZCA exam where he passed the written section but failed the oral.

34. Mr Waalkens said that Dr Jayaprakash was then offered an advanced position at ADHB. In March/April 2009 he sat and failed his re-sit of the ANZCA part 1 exams (this time failing the written section). In a state of panic, Mr Waalkens submitted, he misled the training co-ordinator at the ADHB advising that he had passed. Mr Waalkens said that Dr Jayaprakash made no excuse that his conduct was unacceptable and accepts it was a serious breach of appropriate professional standards.

35. Mr Waalkens then referred to the steps that Dr Jayaprakash had taken since that time in finding employment with The Peoples Centre in August 2009. This is a general practice that operates in Auckland's Central City, Manurewa and

Manukau. Dr Jayaprakash has now enrolled himself on the training scheme for the Royal New Zealand College of General Practitioners (RNZGP). Mr Waalkens submitted that while Dr Jayaprakash is "criticised for separate steps in the misleading conduct, the subject to this matter, the Tribunal is respectfully invited to treat them as inter-related and (as commonly is found in cases of this type) to reflect on something of a cascade of actions following what was clearly an initial act of stupidity where he misrepresented his qualifications on his CV".

36. Mr Waalkens submitted that Mr Jayaprakash does have insight into his behaviour. He submitted that he was well respected by those with whom he currently works. He produced a number of references from his current work colleagues, medical and nursing staff and four patients. He submitted that Dr Jayaprakash is anxious to be able to continue his work with the doctors and staff at The People Centre and with their patients. Dr Jayaprakash has not sought name suppression and Mr Waalkens submits that the Tribunal must take this into account as part of the proportionality of the penalty on Dr Jayaprakash.

37. He submitted that the Tribunal must also take into account the fact that his hitherto good reputation has now been irreparably harmed by his loss of employment at the ADHB, the inevitable consequence that he has lost any prospect of specialising and the inevitable censure by the Tribunal will ever remain against his professional name and reputation. Finally Mr Waalkens submitted that the Tribunal should be aware of the stress that he and his family have been placed under throughout this entire matter. Mr Waalkens also reminded the Tribunal that Dr Jayaprakesh has pleaded guilty to the charge at the earliest stage and must be given credit for this.

38. Mr Waalkens then turned to the factors that the Tribunal must consider when imposing a penalty.

a) **Protection of the Public**

Mr Waalkens submitted that this was not a case which raises serious or significant concerns in this regard. The offending had not resulted in any

patient harm and was unlikely ever to do so. Further, he submitted there would be no suggestion that there would ever be a repeat of the conduct in question. He noted that the Medical Council had not placed any conditions upon his practice despite being aware since September 2009 of this offending. He further submitted that the offending in question does not deem him unfit to practise medicine.

b) **Maintenance of professional standards**

Mr Waalkens submitted that a finding of professional misconduct, with a fine, censure and costs, as well as the absence of any suppression order would achieve the aim of maintaining professional standards.

He submitted that there was no need for the Tribunal to impose a penalty of suspension in order to maintain the appropriate standards or for deterrence. He submitted that the law recognises suspension as primarily for the purposes of protecting the public and not to penalise the practitioner. He further submitted this is not a case where the Tribunal needs to send a signal to the profession that it is not permitted to mislead on one's CV or to make false claims as to one's qualifications by the imposition of an order of suspension. The profession, he submitted, could be taken to be well aware of this.

**Rehabilitation**

39. Mr Waalkens submitted that rehabilitation should be the paramount object of the Tribunal in this case. He advised the Tribunal that Dr Jayaprakash had attended counselling over the last four months and had also embarked on the general practitioner training scheme. Any aspect of punishment he submitted could be met by the penalty orders commended on behalf of Dr Jayaprakash.

40. He referred to the comments by Justice Keane in *A v Professional Conduct Committee* (referred to at paragraph 23 above) and submitted that on the basis of this analysis an order of suspension for Dr Jayaprakash would be harsh and

excessive and would jeopardise Dr Jayaprakash's ability to support his family. Mr Waalkens also submitted that Dr Jayaprakash is currently undertaking the RCNZGP training scheme and to do this he must be in practice. If he is suspended then he will not be able to complete the course and will also entirely lose the three quarters of a year which he has invested in the course. If however, the Tribunal was determined to suspend Dr Jayaprakash then Dr Jayaprakash sought a month before such an order took effect to enable him to protect his position and to enable his employer and he to make arrangements to minimise the impact to the patients.

41. He submitted that Dr Jayaprakash could pay a fine.

42. He submitted that censure would be a serious black mark against Dr Jayaprakash and would be of significance to him.

43. Costs. He submitted that an order for costs would be appropriate but that it should be approximately 20% of the approximately $50,000 that this hearing has cost.

44. Mr Waalkens also went through the cases referred to by Mr Heron and submitted to the Tribunal that on the scale of offending referred to in each of these cases the conduct of Dr Jayaprakash was significantly less serious than that of Dr Keshvara, Dr Ranchhod and Dr Marchant.

**Discussion**

45. It is trite law to say that a penalty must be proportionate to the offence committed by the practitioner and also to other practitioners who have appeared before the Tribunal. Consistency across all health registration bodies is important. It is also trite to say that each case turns on its facts but it is worth emphasising this point in this case. The Tribunal has carefully considered Dr Jayaprakash's conduct and

each of the cases referred to by counsel and where Dr Jayaprakash's conduct sits within the scope of conduct outlined in these cases.

46. Dr Jayaprakash had or caused his CV to be prepared in about 2005. He is charged with conduct from the time that the CV was presented to the ADHB, namely in December 2008 but, the false information contained on his CV had been on there since about 2005. Dr Jayaprakash obtained employment in the Anaesthetic Training Scheme in 2008 on the basis of this. He knew the information in his CV was false but he took no steps to update it or correct it when it would have been very easy for him to have done so. The Tribunal can only assume that in having crafted a CV which showed these qualifications, Dr Jayaprakash saw some continued advantage in allowing the CV to remain with this false information. The Tribunal does not agree with Mr Waalkens' assessment that the first charge was a part of the cascade of events linking it to the second charge. When Dr Jayaprakash failed the Part 1 ANZCA examination in June 2009, as far as the Tribunal can see, there was nothing to stop him from honestly admitting this to Dr Nicholson and simply re-sitting the examination. There is no link between this and his CV charge except for the pattern of false information. There is no suggestion that the failure in the exam would mean that he was thrown off the training scheme. Indeed on the basis of a reference received from Dr Charles Bradfield, Clinical Director at Auckland City Hospital's Department of Anaesthesia, he seemed to have been regarded as clinically competent. To compound this fault, he then produced a forged letter addressed to another person (Dr Jayawardene) but used his own Candidate Number confirming that he had passed the Primary Fellowship Examination. This is a very serious matter requiring planning and forgery of that document. If Dr Nicholson had not pursued this matter, there was a real risk that Dr Jayaprakash could have been given more significant anaesthetic jobs and duties and thus pose a risk to the safety of the anaesthetic patients that he saw by passing himself off as having qualifications that he did not have. In this respect, the Tribunal thinks that the conduct is significantly more serious than that displayed by Dr Ranchhod.

47. The Tribunal also does not place as much emphasis as Mr Waalkens on the rehabilitative effect of sitting his Primex examination. Dr Jayaprakash is 34 years of age and has been qualified for 12 years. He has sat and failed a number of part 1 examinations in anaesthetics and physician training. A further delay in sitting the Primex exam will not affect his employment, as his current employers appear keen to continue employing him irrespective of when he passes this exam, and will therefore not affect his income.

48. As a statement of policy this Tribunal considers that any doctor who misleads any employer or the Medical Council of New Zealand about their qualifications poses a real threat to public safety. A doctor's qualifications and the passing of specialist examinations gives them the right to treat patients and the public confidence in the safety of these treatments. If the medical profession was to accept with any degree of complacency a doctor who misrepresents their qualifications then there would be a significant risk to the public safety. While Mr Waalkens has submitted that there was no harm to the public, in the Tribunal's opinion that was simply fortuitous. The Tribunal does not know exactly what Dr Jayaprakash was doing between 2005 ( as Mr Waalkens' summary only seems to take the Tribunal in time up until 2007) and the commencement of his employment with ADHB in 2008 but it is entirely possible that he was using the qualifications to obtain other work. The Tribunal simply does not know. He is not charged with that and the Tribunal cannot and does not penalise him with that. The Tribunal can, however, recognise that public safety in this area is a real risk.

49. The Tribunal also finds the comments of Justice Gendall in *PCC v Martin* (supra) helpful. He said that the Tribunal should consider

> *"what orders will protect the public to advancing the proper responsible standards and practise of nursing rather than to ask should the professional be punished again".*

50. The Tribunal also bears in mind the comments of Justice Keene in *Professional Conduct Committee v A*[9] (supra). The Tribunal in that case had recognised Dr A's efforts to rehabilitate himself but had nonetheless imposed a year's suspension on him. The High Court overturned that penalty saying that suspension was inappropriate given the Tribunal's statement that it wished to rehabilitate Dr A. The Tribunal has taken into account and considered again paragraphs 81 and 82 of that Judgment.

51. It is clear that not only is protection of the public important, but also the maintenance of professional standards, to ensure that that the conduct of members conform with generally expected standards. There can be no suggestion that the purpose of penalty in disciplinary proceedings can only be for the protection of the public. One of the most important functions of the Tribunal as set out in the case law is the maintenance of the appropriate professional standards (see Section 3 of the Health Practitioners Competence Assurance Act 2003). The Tribunal is of the opinion that the penalty in this case must reflect its concerns about both public safety (for the reasons set out above) and of maintenance of public standards.

52. The Tribunal considers that a penalty commensurate with the seriousness and the disapprobation of the profession must be imposed upon Dr Jayaprakash. It considers that as set out in other cases which have dealt with dishonesty by a practitioner that either cancellation of registration or suspension of the practitioner's registration is the appropriate penalty.

53. The Tribunal needs to take into account the rehabilitative efforts made by Dr Jayaprakash. It is hard to know exactly what one can do to rehabilitate oneself from fraud, but the Tribunal notes that Dr Jayaprakash has found another job, he has been open and honest about his offending and he has enrolled himself in the RNZCGP programme to become registered as a specialist general practitioner.

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[9] HC Auckland CIV 2008-404-2927 5/9/08 Keane J

These are all commendable steps. This is not a case where Dr Jayaprakash had any health, drug or alcohol issues or any other addiction issue from which he needed to take steps to address the conduct and ensure that he was properly rehabilitating himself. Instead what he has done, whilst commendable, are steps which are no more than any practitioner who has lost his job would do.

54. Thus, in summary the Tribunal recognises the steps taken by Dr Jayaprakash in terms of rehabilitation but does not consider in this case that rehabilitation ought to be its predominant focus except to the extent that it recognises that Dr Jayaprakash should be entitled to retain his registration.

55. In addition to the cases involving dishonesty in doctors, the Tribunal has considered a number of other allegations of dishonesty over other health professional groups.

56. *Pearson*[10], Mr Pearson was a nurse who was convicted of charges relating to his alteration of his annual practising certificate and charged with excess breath alcohol. His registration was cancelled.

57. *Stewart* [11], Ms Stewart was a nurse found guilty of 22 particulars of dishonestly claiming ACC and sick leave. She was censured, suspended for two months and ordered to pay 30% costs.

58. *Davis* [12] Ms Davis admitted that she had held herself out as being a registered nurse when she was not in fact a registered nurse, but was an enrolled nurse. Ms Davis had falsified an APC and provided it to her Nursing Manager. The Tribunal ordered cancellation of Ms Davis' registration.

[10] HPDT Decision 39/NUR05/23P
[11] HPDT Decision 140/Nur07/64P
[12] HPDT Decision 148/Nur07/77P

59. *Gilgen* [13] Dr Gilgen was found guilty of professional misconduct for forging the signature of another doctor and attempting to order prescription medicines by email. The Tribunal ordered cancellation of Dr Gilgen's registration.

60. *Breeze* [14] Mr Breeze, an occupational therapist, had falsified timesheets to show he was attending work when he was not. The Tribunal ordered cancellation of Mr Breeze' registration.

61. *Winefield*[15], a pharmacist had fraudulently obtained money from HealthPAC on 898 occasions. He had been overpaid the sum of $10,000. He was convicted at the District Court at Timaru on four representative charges of using a document to obtain pecuniary advantage and 18 charges of forgery and was sentenced to 200 hours of community work and $20,000 in costs. He had paid reparation to the Ministry of Health. His registration was suspended for 9 months and he was ordered to pay 30% of the costs of and incidental to the charge.

62. Ms *Healey*[16] was a nurse convicted of 44 counts of using a document. She was sentenced to imprisonment for 2 years and 3 months. Her registration was cancelled.

63. *Pittwood*[17], Ms Pittwood, an osteopath, was convicted on 12 charges of dishonest use of a document. She was suspended for 6 months and some conditions were imposed upon her practice. She was ordered to pay 30% of the costs.

64. *Palmer*[18], Mr Palmer (a physiotherapist) was convicted of 20 charges under the Injury Prevention and Rehabilitation Act. He was no longer practising and his registration was suspended for 6 months. He was ordered to pay 30% of the costs.

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[13] HPDT Decision 149/Med07/60 & 07/61P
[14] HPDT Decision 196/OT08/97P
[15] HPDT Decision 60/Phar06/30P
[16] HPDT Decision 123/Nur07/70P
[17] HPDT Decision 84/0st06/42P
[18] HPDT Decision Phys 06/43P

65. *Murdoch*[19], Mr Murdoch was a physiotherapist who was convicted of using documents with intent to obtain pecuniary advantage from ACC. He was sentenced to 200 hours of community service. His registration was cancelled. He was ordered to pay 50% of the costs.

66. The conclusion that the Tribunal can draw from this analysis of previous cases is that in most cases the appropriate and frequent penalty for offences of dishonesty has been either suspension or cancellation of registration. Of course each case must be examined on its own facts and taking into account the personal circumstances of each health practitioner. In many circumstances the Tribunal has considered that cancellation is the appropriate penalty for dishonesty.

67. In reaching its decision, all of the facts and the cases and the careful submissions of both counsel have been considered.

68. For all of the reasons set out above, the Tribunal considers that the appropriate penalty is (and this forms the oral decision which was announced at the hearing) as follows.

**Oral Decision**

69. "We have considered carefully the submissions of both counsel, we have read the Agreed Summary of Facts at paragraph 22(b) that you prepared your CV in 2005 using false or misleading information about your qualifications. The date of this is not exactly clear but in December 2005 you began work at Middlemore Hospital as part of the training programme and in December 2008 you were employed by the ADHB in a training position. The false information on the CV had been used in gaining employment at the ADHB. In 2009 you advised the training co-ordinator that you had passed the Part 1 ANZCA exam and then provided a letter supporting this claim despite having failed the exam. When

[19] HPDT Decision 76/Phys06/45P

challenged, you admitted this behaviour and were dismissed from the ADHB. You have since found employment in a general practice. You have co-operated with the PCC, the ADHB and the Tribunal since that time and pleaded guilty to that charge. You must be given credit for that.

70. We have carefully considered the appropriate penalty to impose upon you. We believe there is a significant element of public safety in such behaviour. The public of New Zealand have a legitimate right to expect that doctors are honest and do not falsify their qualifications. The falsification could have had serious public safety ramifications if not discovered. There is also an element of proper maintenance and standards. The falsification went on for some significant time. We have considered all the previous cases in order to maintain consistency within the Tribunal. We consider for reasons set out in a written decision that this decision reflects this consistency. We therefore:

a) Suspend you from practice for a period of six months beginning one calendar month from today's date (i.e. 23 September 2010);

b) We fine you the sum of $5,000;

c) We order that you pay costs of 20% relating to the prosecution, investigation and Tribunal hearing reflecting your early guilty plea;

d) We censure you."

71. Name suppression has not been sought and the Tribunal now orders that a copy of this decision and a summary of it be published on the Tribunal's website. The Tribunal further directs that a notice stating the effect of the Tribunal's decision be published in the New Zealand Medical Journal.

**DATED** at Auckland this 8th day of September 2010

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K G Davenport
Deputy Chair
Health Practitioners Disciplinary Tribunal