



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 366/Opt10/168P

IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003

AND

IN THE MATTER of a charge by a Professional
Conduct Committee laid against
TIMOTHY WILLIAM WHITE
registered optometrist of Masterton

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING at Wellington on 30 March 2011

TRIBUNAL: Mr Bruce A Corkill QC (Chairperson)

Ms Annette Morgan, Ms Angela Hauk-Willis, Ms Vivian Edgar
and Mr Ross Gordon (Members)

Ms Gay J Fraser (Executive Officer)

Ms Helen Hoffman (stenographer)

APPEARANCES: Ms A Miller, for the Professional Conduct Committee

Mr T W White, in person

Introduction:

1. Mr White is a registered optometrist of Masterton.
2. On 23 November 2010 a Professional Conduct Committee (PCC) laid a disciplinary charge against him under the Health Practitioners Competence Assurance Act 2003 (the Act). The form of the charge as it proceeded at the hearing alleged that Mr White, as a registered optometrist, has practised the profession of optometry between on or around:
 - 2.1. 1 April 2010 and 3 May 2010; and/or
 - 2.2. 13 May 2010 and 1 July 2010
 when he did not hold a current practising certificate.

Facts:

3. The charge was able to be heard on the basis of an agreed statement of facts, which stated:
 - “1. *Mr Timothy William White has been a registered optometrist since 19 May 1980. He holds a Diploma in Optometry from the University of Auckland (1979).*
 2. *Mr White has owned his own optometry practices in both Upper Hutt and Masterton since 1980. He has been in practice as an optometrist for over 30 years.*

The DPA recertification programme

3. *In August 2004 the Optometrists and Dispensing Opticians Board ("the Board") advised optometrists of a recertification programme established under section 41 Health Practitioners Competence Assurance Act 2003 (HPCA Act) to address the need for competence in the use of the following diagnostic pharmaceutical agents:*
 - 3.1.1. *binocular indirect ophthalmoscopy; and*
 - 3.1.2. *slit-lamp funduscopy with both non-contact and contact lenses; and*
 - 3.1.3. *Gonioscopy.**(the DPA recertification programme)*
4. *The Board advised optometrists that it would be satisfied that an optometrist was competent in these areas if they held one of five*

identified qualifications or an endorsement from the Department of Optometry and Vision Science, University of Auckland ("DOVS"). All other optometrists were required to complete the DPA recertification programme to demonstrate competence in those areas of practice.

5. *The Board's reason for implementing the DPA recertification programme was because DPA techniques were required for the competent practice of optometry. The Board considered that if an optometrist was not using, or was not able to use, these techniques then the optometrist was not able to properly examine the patient and investigate certain symptoms and exclude certain relatively common conditions to the standard required by the Board, and the patient was at risk of having pathology missed.*
6. *In its February 2005 newsletter the Board provided further information to optometrists about the DPA recertification programme, including information on the availability of a course offered by DOVS, the completion of which would satisfy the recertification requirement. Optometrists were advised that the DOVS course would be available twice yearly from early 2005 until there was no further demand. The Board also outlined the didactic and practical components of the course.*
7. *Further reference was made to the requirements of the DPA recertification programme in the Board's June 2005 newsletter. In the Board's July 2006 newsletter optometrists were advised of a further process implemented by the Board to assist them to meet the requirements of the DPA recertification programme.*
8. *In November 2006 the Board provided an update on the first DOVS endorsement in DPA course, advised of the dates of upcoming courses, and reminded optometrists of the need to complete the DPA recertification course requirements before 2010.*
9. *In August 2007 the Board wrote to optometrists who had not completed the practical requirements of the DPA recertification programme and gave advice on the options available. Also during 2007 the Board conducted a survey of optometrists who were yet to complete the DPA recertification programme. On the basis of responses received, the Board advised, in its November 2007 newsletter, that the didactic component of the DPA recertification programme had been reviewed to allow the choice of a written or oral examination. Optometrists were reminded that there were only four more opportunities to complete didactic requirements, and they were encouraged to enrol in the remaining courses.*
10. *In its December 2008 newsletter the Board reminded optometrists that the completion date for the DPA recertification programme was just over a year away, and advised that DPA conditions on scopes of practice would be removed to make clear that the DPA requirements were being managed as part of the Board's DPA recertification programme.*

11. *The timeframe for completing the DPA recertification programme was by 31 March 2010.*

Mr White – DPA recertification programme

12. *Mr White did not hold one of the five identified qualifications or a DOVS endorsement and was therefore required to complete the DPA recertification programme by 31 March 2010. Mr White completed the didactic component of the DOVS DPA endorsement course in or about 2006.*
13. *On 20 March 2009 the Board wrote to those optometrists, including Mr White, who had not met the practical requirements of the DPA recertification programme. The Board set out the steps taken to notify optometrists of the DPA recertification programme, the manner in which the requirements could be met, and the consequences of non-compliance. In particular, the Board advised that it was likely to consider using section 43 HPCA Act to suspend the registration of optometrists who had not completed the requirements of the DPA recertification programme by 31 March 2010. Mr White was urged to take immediate steps to meet the outstanding requirements of the DPA recertification programme.*
14. *On 5 October 2009 the Board wrote to Mr White to advise that there were only six months left to complete the requirements of the DPA recertification programme. Mr White was advised that on 1 April 2010 the Board intended to follow the provisions of section 43 HPCA Act and was likely to propose to suspend the registration of optometrists who had not demonstrated competence in the use of DPAs. The Board also advised that:*

If you have a current practising certificate you will, as usual, receive an application form to renew your practising certificate in early 2010. However, the Board trusts that you understand that if you have not met the requirements of the DPA recertification programme by 31 March 2010, it is unlikely that you will be authorised to practise after that date.

The consideration of an application for an annual practising certificate from a optometrist who has not complied with the recertification programme would likely run concurrently with the Board's consideration of what, if any, action it may take under section 43 of the Act, including whether it may suspend the optometrist's registration. Quite clearly, an annual practising certificate will not be issued to a practitioner whose registration is suspended.

15. *Mr White did not undertake the practical component of the DPA recertification programme before 31 March 2010.*

Application for annual practising certificate

16. *The Board's annual practising certificate year runs from 31 March to 1 April each year. The Board issued its renewal notices for the 2010/2011 APC year on 1 February 2010.*

17. *Mr White's annual practising certificate expired on 31 March 2010. On 1 April 2010 Mr White completed an application to renew his annual practising certificate. His application was received by the Board on 7 April 2010, by which time his annual practising certificate had been expired for a little over a week.*
18. *On 12 April 2010 the Board wrote to Mr White, referring to its letters of March and October 2009, to advise that he had not satisfied the requirements of the DPA recertification programme. The Board noted that Mr White had had over five years to meet the requirements of the programme, and that all optometrists had been advised that the use of DPAs was a critical function in the practice of optometry. In light of this, and mindful of the reasoning behind the decision to implement the DPA recertification programme, the Board proposed to suspend Mr White's registration under section 43(1)(b) of the HPCA Act.*
19. *In the same letter the Board also advised that it had considered Mr White's application for an annual practising certificate ("APC"), which had been referred to the Board under section 27(1)(a) HPCA Act. Having considered this application, the Board proposed to decline Mr White's application for an APC under section 29(5)(b) HPCA Act on the grounds that his failure to comply with the DPA recertification programme meant that Mr White was unable to demonstrate competence in the use of DPAs, and that he had failed to meet the required standard of competence in this regard.*
20. *Mr White was given the opportunity to make submissions and to be heard on the Board's proposed decisions. Mr White was advised that submissions were to be with the Board by 30 April 2010. The letter stated that if the Board had not heard from Mr White by 30 April 2010 it would assume that no submissions would be made and it would make a final decision based on the information available to the Board at that time. Mr White did not make any submissions in response to the Board's proposed decisions, and nor did he indicate to the Board that he wished to be heard in relation to the proposed decisions.*
21. *By letter dated 3 May 2010 Mr White was advised that the Board had resolved to adopt both of its proposed decisions. Mr White was advised that the suspension of his registration would take effect from 12 May 2010. Mr White was advised that:*

"...the suspension of your registration will remain in effect until you have satisfied all the requirements of the DPA recertification programme by demonstrating competence in the use of DPAs through one of the existing methods of assessment or examination. Upon meeting requirements, you will need to reapply for a practising certificate."

Mr White was also advised of the options available to him to meet the requirements of the DPA recertification programme. An order pursuant to section 43 HPCA Act suspending Mr White's registration accompanied the letter.

22. *Mr White told the PCC that he ceased practising on receipt of the Board's letter of 3 May 2010. Between 1 April 2010 and 3 May 2010 Mr White practised as an optometrist in both Upper Hutt and Masterton. In particular, during this time Mr White saw 130 patients for, among other things, eye examinations and prescribing of optical appliances.*
23. *On 7 May 2010 Mr White wrote to the Board in response to its letter of 3 May 2010. Mr White advised that he had met the didactic requirements of the programme and:

"I have arranged to meet John Grylls on Thursday 13 May 2010 to be assessed as to my ability to perform dilated fundus examinations and will advise you of the outcome immediately thereafter."*
24. *On 11 May 2010 the Board's Acting Registrar called Mr White to acknowledge receipt of his letter. The Acting Registrar sought to confirm that Mr White was not practising as he did not hold a current APC. She advised him that he was unable to practise until the DPA recertification programme requirements had been met and he had been issued with an APC. The Acting Registrar believes that Mr White understood the conversation, and that he understood that he could not practise until he had been issued with an APC. Mr White's recollection was that he had been advised that if he passed the assessment with Mr Grylls he could resume practice.*
25. *Mr White underwent the examination with Mr Grylls on 13 May 2010. Mr White advised the PCC that at the conclusion of his meeting with Mr Grylls he was told that he had satisfied the requirements of the assessment. On the basis of Mr Grylls' advice that he had passed the assessment, Mr White immediately resumed practice as an optometrist. Mr White took no steps to inform the Board of the outcome of his examination with Mr Grylls; nor did he seek confirmation from the Board that the suspension of his registration had been lifted. In addition, Mr White did not take any steps to reapply for an APC, despite the Board's letter of 3 May 2010 clearly stating that he would need to do so.*
26. *On 2 June 2010 the Registrar emailed DOVS about recent DPA test results. In particular, the Registrar asked for a timeframe for confirmation of Mr White's completion of the practical requirements of the DPA recertification programme. DOVS administration staff responded on the same date and advised that Mr Grylls had informed DOVS that Mr White was examined by him, and had been passed by him. The Registrar was told that Mr Grylls had been asked to provide the examination papers to DOVS so that official confirmation could be sent out by the University of Auckland.*
27. *On 30 June 2010 Mr White emailed the Registrar in the following terms:*

“I looked at the Register of Optometrists this morning and found that my status is listed as 'suspended'. Can you please let me know why?”

28. *The Registrar responded by email on the same date, referring to Mr White's suspension of registration and to the fact that the Board had not received official confirmation that he had met the practical requirements of the DPA recertification programme. The Registrar also noted that Mr White did not hold a current APC as his application (received 7 April) had been declined. Mr White was advised that he would need to apply for an APC once the suspension was lifted, and he was asked to confirm that he had not been practising, and that he would not practise until he had been issued with an APC.*

29. *Mr White responded to this email stating that he had spoken with the Acting Registrar the day before he saw Mr Grylls and that she had advised him that if Mr Grylls "passed" him, he could resume practice:*

I was assessed by John Grylls, and he passed me, and said he would write directly to Auckland University and advise them of this.

30. *The Registrar replied, stating that this was a very serious situation. Mr White was advised that he must stop practising immediately as his registration was suspended and he did not hold a current APC. The Registrar also stated that:*

“... given the formal nature of the process the Board has gone through in imposing your suspension, you must understand that you need to provide the Board with evidence that you have completed requirements before the Board can lift that suspension.”

At this time the Board has no documentation to confirm that you have met DPA recertification requirements and therefore cannot lift the suspension of your registration. I will follow this up with DOVS immediately, however if you have already received confirmation from DOVS that you have met requirements, please send me a copy of that letter.

31. *On 30 June 2010 the Registrar emailed DOVS to again ask for confirmation of Mr White's official results in the practical component of the DPA recertification programme. DOVS advised that they were yet to receive the required paperwork from Mr Grylls, however a copy of a modified letter to Mr White, dated 30 June 2010, which was based on "email assurances from John Grylls that the techniques were passed", was supplied to the Board. That letter confirmed that Mr White had met the practical requirements of the DPA recertification programme. This was the first official confirmation that Mr White had satisfied the requirements of the DPA recertification programme.*

32. *On the morning of 1 July 2010 the Registrar of the Board lifted the suspension of Mr White's registration. The Registrar emailed Mr White to inform him of this. In this email, the Registrar also*

followed up on her request of the previous day asking that Mr White confirm that he had stopped practising; he was requested to supply this confirmation immediately. The Registrar also advised Mr White that he was still not authorised to practise as an optometrist and that he must not do so:

“You first need to complete an application form for a new annual practising certificate...Please note that you may not practise until you have been advised by the Board that your practising certificate has been issued. The Board has agreed not to charge you the APC fee for this application.”

33. *In the early afternoon on 1 July 2010 the Registrar spoke with Mr White by telephone. Mr White confirmed to the Registrar that he was not seeing patients. He reiterated that he had understood from the Acting Registrar that he would be able to practise after he saw Mr Grylls. He was told that the Board had seen nothing to prove that he had completed the assessment.*
34. *On 1 July 2010 Mr White completed a new application for an APC. The application was referred to the Board, and an APC was ultimately issued to Mr White on 7 July 2010. The Registrar emailed Mr White and advised that an APC had been issued and that he was now authorised to practise.*
35. *Although Mr White did cease practising for a week prior to his appointment with Mr Grylls on 13 May 2010, at all other times he had been practising as an optometrist as normal throughout this 14 week period (April to July). Between 13 May and 1 July 2010 Mr White practised as an optometrist from both his Upper Hutt and Masterton practices. In particular, during this period Mr White saw 180 patients for, among other things, eye examinations and prescribing optical appliances.”*

Chronology:

4. The Tribunal finds that the key dates are:
 - 4.1. The Optometrist and Dispensing Opticians Board (the Board) sent Mr White a renewal notice for an annual practising certificate (APC) for the 2010/2011 practising year on 1 February 2010.
 - 4.2. His APC for the 2009/2010 practising year expired on 31 March 2010.
 - 4.3. Mr White completed an application to renew his APC on 1 April 2010. That application was not received by the Board until 7 April 2010, nearly a week after his APC had expired.

- 4.4. Mr White was informed by letter dated 12 April 2010 that the Board proposed to decline his application for a practising certificate. This was because Mr White had not met the requirements of the Board's diagnostic pharmaceutical agents (DPA) recertification programme. This required practitioners to be able to demonstrate competence in the use of:
 - 4.4.1. binocular indirect ophthalmoscopy;
 - 4.4.2. slit-lamp fundoscopy with both non contact and contact lenses;
 - 4.4.3. gonioscopy.
- 4.5. The Board had advised practitioners in August 2004 and on multiple occasions thereafter that the didactic and practical requirements of the DPA certification programme would need to be met by 31 March 2010.
- 4.6. Also in its letter of 12 April 2010, the Board indicated it was considering whether to suspend Mr White's registration. It gave him until 30 April 2010 to make any submissions in that regard. Such a step would be taken because the Board would consider that the practitioner did not meet the required standard of competence through failure to comply with the DPA recertification programme.
- 4.7. Mr White did not respond to the Board's letter.
- 4.8. Mr White was informed by letter dated 3 May 2010 that his application for an APC had been declined by the Board and that his registration would be suspended with effect from 12 May 2010.
- 4.9. Mr White had completed the didactic requirements of the DPA recertification programme, but needed to complete the practical requirements. He arranged to do this with an examiner (who was credentialed to act as such for the University of Auckland Department of Optometry and Vision Science (DOVS)) on 13 May 2010.

- 4.10. On 7 May 2010, Mr White advised the Board that having arranged to meet with the examiner he would advise the Board of the outcome immediately thereafter.
- 4.11. On 11 May 2010, the Acting Registrar of the Board spoke to Mr White by telephone, acknowledging receipt of his letter of 7 May 2010, and advised him that he was unable to practise until the DPA recertification requirements had been met and he had been issued with an APC. The Acting Registrar believed Mr White understood the conversation; Mr White's recollection was that he had been advised that if he passed the assessment he could resume practice.
- 4.12. On 13 May 2010, the examiner was satisfied that Mr White was able to demonstrate skills in the following procedures:
- 4.12.1. gonioscopy
 - 4.12.2. binocular indirect ophthalmoscopy
 - 4.12.3. fundus examination at the slit-lamp biomicroscope
- to the level required by the Board. In that way, he had met the practical skills required for the DPA recertification programme.
- 4.13. On 2 June 2010, the Board inquired of DOVS as to whether the examination had been passed. Formal notification to that effect was not given until 30 June 2010.
- 4.14. On 30 June 2010, Mr White emailed the Registrar, recording that he had looked at the register of optometrists that morning, and had found that his status was "suspended".
- 4.15. On 1 July 2010, Mr White completed a new application for an APC, which was referred to the Board and was ultimately issued to him on 7 July 2010.
5. The Tribunal also finds that Mr White undertook optometry work during the periods pleaded in the charge, namely:

- 5.1. Between 1 April and 3 May 2010, when Mr White saw 130 patients for, among other things, eye examinations and prescribing optical appliances; and
- 5.2. between 13 May and 1 July 2010, when Mr White saw 180 patients for, among other things, eye examinations and prescribing optical appliances.

Discussion:

6. Mr White accepted the charge was made out, but it is necessary for the Tribunal to be independently satisfied that it is.
7. The charge was laid under section 101(d) of the Act. It states:

“(d) the practitioner has practised his or her profession while not holding a current practising certificate;”
8. In the decision of *Bhatia*,¹ the Tribunal stated:

“... the use of the words “not holding” would suggest that it is the fact of being without an APC which constitutes the charge, rather than the “knowing” of the absence of the APC. The Tribunal determines that the test is objective not subjective.”
9. Thus, what has to be established in this case is that the practitioner practised the profession of optometry whilst not holding the current practising certificate. It is not an element of the offence that the practitioner intended to flout professional obligations.
10. On the basis of the facts summarised above, those components are clearly established. That is:
 - 10.1. Mr White was during the periods referred to in the charge, a registered optometrist.
 - 10.2. He practised the profession of optometry – that is he was carrying out activities which were within the scope of practice for optometrists.
 - 10.3. At these times, he was not holding an APC.

¹ 334/Med10/151P.

11. Counsel for the PCC responsibly referred the Tribunal to section 30(3) of the Act. She did so in fairness to Mr White given he was unrepresented.
12. The subsection provides:

“Every health practitioner who has submitted an application, accompanied by the fee (if any) set by the authority, for a renewal of an annual practising certificate under section 26(1) is to be treated as the holder of that certificate from the date when the authority receives the application until the date it is issued or he or she is sooner notified by the Registrar that it will not be issued.”
13. It was submitted for the PCC that the section did not apply, because once a practising certificate has expired there is nothing to renew, and so the deeming provisions could not apply. Any other interpretation of the subsection would allow, for example, a practitioner who had not held a practising certificate for any length of time, no matter how long, and for any reason (including for reasons relating to health, competent conduct or otherwise) to commence practice on the basis of a deemed practising certificate before the Board was able to determine whether the required standard of competence was assessed. It was submitted that cannot have been the intent of the provision. It was also submitted that such a construction is consistent with the objects of the Act.
14. The Tribunal accepts this submission; such a sensible construction must be placed on the words used in light of the context and objects of the statute.
15. It also notes, however, that even if a contrary view were to be taken, so that the “deeming” was capable of being applied to the facts of this case, then the relevant period would only have been from 7 April 2010 (when the application for APC was received by the Board) to 12 April (when the Board notified Mr White that it would not be renewing the APC). That was a matter of only five days, two of which (10 and 11 April) were weekend days when it is unlikely Mr White was working. In reality,

even were the subsection to apply, it would have made very little difference to the seriousness of the charge.

16. In short, Mr White did practise as an optometrist when he did not hold an APC.
17. The onus to ensure compliance with APC requirements must be on the practitioner. Mr White failed to meet his obligations, and practised, or returned to practice when he knew or ought to have known that he did not hold a current APC.
18. The charge is established.

Penalty:

19. As is apparent from many previous decisions of the Tribunal, in considering penalty it needs to take into account the functions of the disciplinary process in:
 - 19.1. Protecting the public.
 - 19.2. Maintaining professional standards.
 - 19.3. Punishment.
 - 19.4. Rehabilitation.
20. In *G v New Zealand Psychologists Board*² general sentencing principles such as denunciation and deterrence may also be relevant, and can properly be considered.
21. The Tribunal is required to balance relevant aggravating and mitigating factors, in fixing a reasonable and proportionate penalty.
22. The PCC referred to a number of previous cases, and in particular:
 - 22.1. *Ms H*:³ this case involved a registered psychologist who practised between 1 April 2005 and 20 June 2008 when not holding a current APC. She asserted there had been a misunderstanding. The Tribunal stated that there was “*a failure to maintain an important professional obligation*”; and the breach was “*... of sufficient significance as to justify the imposition of penalties – as*

² 5 April 2004, Gendall J, High Court, Wellington CIV-2003-485-2175.

³ 256/Psy/09/128P.

distinct from not imposing any penalty at all”;⁴ and that, as had been submitted, was appropriate.

The Tribunal went on to emphasise the importance of the APC regime, with the associated professional obligations that fall on an individual practitioner. It ordered the practitioner to pay a fine of \$4,000.00, although this was reduced to \$2,000.00 in the High Court on appeal.⁵

22.2. *Ms O*:⁶ *Ms O* was a registered occupational therapist, who practised her professional between 1 April 2005 and 30 March 2009, when she did not hold a current APC. There were a number of relevant personal circumstances, including gambling, bankruptcy, surgical procedures and complications, the sudden death of her partner, significant depression, a heart attack, and the burglary of her home during this period. The Tribunal emphasised however:

“... professional discipline exists for the provision of protecting the public by ensuring that practitioners who hold themselves out to be health practitioners continue to be registered and have current practising certificates. This is a means of ensuring that they are ... safe to practise and for the maintenance of public standards.”

The Tribunal censured *Ms O* and ordered her to pay a fine of \$1,400.00, and costs of \$2,000.00.

23. There were a number of other cases referred to for the PCC,⁷ although there were also other particulars in the charges considered in those cases, so they are less helpful in the present context.

24. Counsel for the PCC went on to submit that there had been a significant breach of an important professional obligation. The breach was aggravated by the necessity to suspend Mr White’s registration. It submitted that an appropriate outcome would be:

24.1. An order of censure.

⁴ Paras 20 & 21.

⁵ *GS v A Professional Conduct Committee*, Venning J, 1 April 2010, CIV-2009-404-007080.

⁶ 274/0209/132P.

- 24.2. A fine of between \$2,000.00 and \$3,000.00.
- 24.3. A contribution to costs. The PCC's costs were \$20,000.00 to \$25,000.00 (exclusive of GST); and the Tribunal's costs were approximately \$6,000.00 (exclusive of GST).
25. Mr White told the Tribunal:
- 25.1. He did not recall some of the letters from the Board, and thought he could have missed some of the matters that were being referred to.
- 25.2. He thought that after he had undertaken the examination on the practical skills he could go back to work.
- 25.3. As to the importance of the APC, he had been in practice for some 30 years, and an APC was "something in the background". He no longer held that view.
- 25.4. He was unable to explain to the Tribunal how he could have ignored the letter of 12 April from the Board, which put him on notice of an intention to suspend because he had not met the recertification requirements.
- 25.5. He agreed that he had allowed a serious situation to be escalated. He said a concern he had was the cost of going to Auckland for the practical examination; although it was pointed out that the correspondence made it clear there was a local examiner.
- 25.6. He was asked as to the extent to which he maintained currency in respect of ongoing issues in the profession; he said he undertook CPD requirements; information was subsequently placed before the Tribunal which indicated that:
- 25.6.1. In 2008-2009, Mr White did not undertake any CPD, but had at the commencement of the period a credit of two points.
- 25.6.2. In 2009-2010, Mr White did not carry out any CPD, but he was given a full pro rata credit for the period 1 April 2010 to 7 July 2010.

⁷ *Ranchhod 273/Med09/129P; Ranchhod 337/Med10/161P; Plasmeyer Nur07/52P; Fogarty 141/Nur07/55P.*

- 25.6.3. In the current CPD period of 2010-2012, no CPD had been undertaken.
- 25.7. A summary of Mr White's financial circumstances was placed before the Tribunal, which indicated that he had very substantial debts.
- 25.8. Mr White did not want to make any contrary submission as to outcomes beyond those which were proposed by the PCC.
26. Having received those submissions, the Tribunal retired to consider the matter. In the course of its deliberations, and particularly in light of the evidence that Mr White had been slow to meet the requirements of the DPA recertification programme, was slow in undertaking relevant CPD, and appeared to be suffering financial difficulty, the Tribunal considered it should invite submissions from the parties as to whether it recommend to the Board that it undertake a competence review.
27. When the hearing resumed for that purpose, the Tribunal was informed that Mr White had become unwell and was no longer present. He was therefore unable to make any submission on this issue.
28. Counsel for the PCC submitted that the Tribunal's concerns, which might lead it to recommend a competence review, would be consistent with the PCC's concerns throughout the process.
29. The Tribunal deliberated further. It concluded that the circumstances which it was required to consider were very worrying:
- 29.1. Mr White had practised as an optometrist since 1980, and because under both the former Act (the Optometrists and Dispensing Opticians Act 1976) and the current Act there had always been a requirement for an APC, he must have been aware of his obligation to ensure he held such a certificate. Yet he did not take that obligation and the related obligation of recertification seriously.
- 29.2. There was an elaborate process of the Board informing members of the profession as to the requirements of the DPA recertification programme.

- 29.3. Mr White was lax, to say the least, in meeting the practical requirements of that programme, applying for the APC, and then ensuring that all compliance requirements had been met. As he freely conceded, these issues were “on the back burner”.
- 29.4. Whilst there may have been some element of confusion as to what the position would be following the undertaking of the examination, and there does seem to have been a hiatus during June 2010 in providing confirmation to the Board that he had indeed passed the exam, the primary responsibility for ensuring he held an APC fell on Mr White. That obligation was not met.
- 29.5. As the PCC submitted, a practising certificate is, in effect, notice to the world that a practitioner is fit and competent to practise; further the process of considering and issuing APCs allows for a degree of scrutiny by the Board where, for example, there may be concerns as to competence.
30. The Tribunal considered the various cases which were referred to it. Whilst consistency of outcome is always desirable, it is frequently the case that the individual circumstances of practitioners differ; this case does have features which distinguish it from those described above. An aggravating factor is the fact that the Board got to the point of suspending Mr White; he seems not to have appreciated the very serious position he was in. He should have.
31. In weighing up sentencing options, the Tribunal has recognised the objective of deterrence, and for that reason considers a censure is essential, along with a fine. The amount of the fine has regard to the level of fines in other cases, the dicta in the High Court in *H*, and also takes account of Mr White’s difficult financial circumstances.
32. On the issue of costs, well known case law requires the Tribunal to take 50% of the total costs (exclusive of GST) as a starting point, and allow a discount for such factors as co-operation – which was certainly given here, and enabled the substantive hearing

to proceed in an efficient way. The Tribunal is also, on this aspect, required to take into account the practitioner's financial circumstances. The effect of all these factors is that there can only be a modest order as to costs, as set out below.

33. Acknowledging Mr White's difficult financial circumstances, it may well be that he should make an application, supported by details of his financial circumstances, to the Board as to a suitable arrangement for payment; however, that would be for the Board to determine.
34. Finally, there are the wider issues raised by this case as to whether Mr White is generally maintaining currency on essential aspects of his profession; and whether his financial circumstances are having any impact on his ability to practise safely. The Tribunal considers it desirable to recommend to the Board that consideration be given to the undertaking of a competence review, either generally or in relation to focused areas of Mr White's practice. In the end, whether a competence review should be conducted, and if so the scope of it, is a matter which is entirely for the Board's determination.

Conclusion:

35. The charge is established.
36. The Tribunal imposes the following penalties:
 - 36.1. Censure: the Tribunal must reiterate that all optometrists (and indeed health practitioners) have a significant professional responsibility to apply and obtain a current APC, in order to practise.
 - 36.2. Mr White is ordered to pay a fine of \$1,250.00.
 - 36.3. Mr White is ordered to make a contribution to costs as follows:
 - 36.3.1. In respect of the costs and disbursements of the Tribunal, the sum of \$1,000.00. This does not include GST which is not payable; and
 - 36.3.2. In respect of the costs and disbursements of the PCC, the sum of

\$2,500.00. This does not include GST which is not payable.

37. The Tribunal recommends to the Board that it consider the possibility of conducting a competence review.
38. The Tribunal directs that a copy of this decision and a summary be placed in the Tribunal's website. The Tribunal further directs that a notice stating the effect of the Tribunal's decision be placed on the Board's website, and in its newsletter.

DATED at Wellington this 8th day of April 2011

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B A Corkill QC
Chairperson
Health Practitioners Disciplinary Tribunal