



New Zealand  
Health Practitioners  
Disciplinary Tribunal

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**DECISION NO. :** 392/Opt11/177P

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

**AND**

**IN THE MATTER** of **FORUM PATEL** of  
Wellington, Optometrist

**BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HEARING** in Wellington on 21 June 2011

**TRIBUNAL:** Mr Bruce A Corkill QC (Chairperson)  
Ms Annette Morgan, Ms Amanda Kinzett; Associate Professor  
Robert Jacobs and Mr Andrew Sare (Members)

Ms Kim Davies (Executive Officer)

**APPEARANCES:** Ms Gaeline Phipps, for the Professional Conduct Committee

Mr John Morrison, for Mr F Patel

**Introduction:**

1. Mr Patel is a registered optometrist of Wellington.
2. On 2 March 2011 a Professional Conduct Committee (PCC) laid a disciplinary charge against him under the Health Practitioners Competence Assurance Act 2003 (the Act).

**The Charge:**

3. The form of the charge as it proceeded in the hearing was as follows:

*“Particulars of the charges:*

*Section 100(1)(d) – practising while not the holder of a practising certificate.*

*The Professional Conduct Committee charges that:*

1. *On or about 7 April 2010 to on or about 26 May 2010, the Respondent practised as an optometrist while not the holder of a current annual practising certificate.*

*AND/OR*

2. *On or about 30 August 2010 to on or about 23 September 2010, the Respondent practised as an optometrist while not the holder of a current annual practising certificate.*

*AND/OR*

*Section 100(1)(a)(b) – Professional Misconduct.*

3. *On or about 22 September 2010, the Respondent made a declaration on the form entitled “Application for a Practising Certificate” in circumstances where he incorrectly and carelessly declared his employment over the last three years and in particular that his only employment since 31 March 2010 was 01/01/10 to 01/04/10 at Specsavers, Porirua.*

*The conduct alleged in paragraphs 1 and 2 above separately and/or cumulatively warrants a finding under section 100(1)(d) of the Act.*

*The conduct alleged in 1 to 3 above either separately or cumulatively amounts to professional misconduct under section 100(1)(a) and/or section 100(1)(b) of the Act.*

*All of the conduct set out above entitling the Tribunal to exercise its powers under section 101 of the Act.”*

**Facts:**

4. The charge was able to be heard on the basis of an agreed statement of facts, which stated:

“1. *Forum Patel is a registered optometrist, and has been since 1 April 2006. He is also registered with the Optometrists Registration Board of Victoria (Australia).*

2. *At all relevant times, Mr Patel practised at Specsavers. A copy of his employment history is set out in his application for a practising certificate.*

...

***Practising Certificates***

3. *To practise in New Zealand, all optometrists must be registered in New Zealand by the Optometrists and Dispensing Opticians Board (“The Board”). All registered optometrists who wish to practise are required to hold a current practising certificate. Practising certificates are renewed annually in March of each year.*

4. *A reminder is sent out to all practitioners in advance of the renewal date accompanied by a form that must be completed and submitted along with payment for the practising certificate.*

5. *On 7 February 2006 Mr Patel was registered to practise in New Zealand. He was also approved membership of the New Zealand Association of Optometrists by letter dated 25 November 2008, ... As a member of the New Zealand Association of Optometrists he agreed to maintain professional standards and abide by its rules and code of ethics.*

***Applications for Practising Certificates***

6. *On 21 September 2009 Mr Patel was issued with a new practising certificate which recorded his change in scope of practice. The certificate was sent under cover of a letter of the same date. ... In the third to last paragraph of that letter the Board stated:*

*“When processing your application the Board noted on your file, a history of late applications for your annual practising certificate (APC). You should be aware that if you do not apply for a renewal before your existing APC expires each year it is illegal for you to practise until you apply for your replacement. Under the Health Practitioners Competence Assurance Act s.100(1)(d) it is grounds for disciplinary action if a practitioner is found to have practised without an APC.*

*If you intend to practise next year please ensure you send a renewal to the Board before 31 March 2010.”*

7. *In the e-newsletter of December 2009 the Optometrists and Dispensing Opticians Board practitioners were advised that:*

*“APC renewal forms will be sent out in early February. If you have not received your renewal form by 1 March 2010 please contact the Board.*

*If your application is submitted before 12 March, then you can expect to have your physical APC before 1 April. Please note, if you do not apply for an APC before your existing one expires, it is illegal to practise from 1 April. You MUST submit your complete application, including a fee, on time.”*

...

8. *On 1 February 2010 the renewal notice for annual practising certificates was sent to all optometrists*
9. *On 22 March 2010 a letter was sent to Mr Patel reminding him the Board had not received his self-audit. ...*
10. *On 7 April 2010 a letter was sent to Mr Patel noting that it had not received an application from him to renew his annual practising certificate. The letter stated:*

*“It is a legal requirement that to practise as an optometrist you must be both registered and hold a current APC.”*

...

11. *On 27 May 2010 Mr Patel was written to regarding his practising certificate status. ... The letter began with the statement “you are recorded in the Board's Register as not holding a current practising certificate which is required to lawfully practice in New Zealand within all scope of practice of optometry”*
12. *On 27 September 2010 the Board received a phone call from Mr Patel. In the call he advised that he had been back in the country for three weeks and had been practising as an optometrist. On questioning, he confirmed that he had already commenced practice. He was told that it was unlawful to practise and he was to stop immediately. He was also informed that he was required to complete a deficits of audit and that conditions might be imposed in regard to that deficit ....*
13. *On 29 September 2010 Mr Patel attended at the Board.*
14. *At the same time he submitted his application for renewal of his practising certificate dated 22 September 2010. ...*

15. *An e-mail was sent to Mr Patel following that meeting. That e-mail recorded the following:*

*“Thank you for bringing your APC application into our office today. Further to our phone conversation on 27 September 2010 it was my understanding that you have been practising at Specsavers for the past three weeks since you returned to New Zealand. At the time, I advised you would need to include evidence of this period of practice with your application. However having now had the chance to properly go through your application it appears that you have not included this evidence. I also note that that you have stated in your application form that your most recent period of practice at Specsavers was from 1 January 2010 to 1 April 2010. Under the declaration made on your application, you have declared that all of the information provided with your application was true and correct in every particular detail. Given that you had said you have practised for the last few weeks it appears that you have made a false declaration. I draw your attention to section 172 of the Act which sets out the offences of false declaration.*

*As you have not held an APC since 1 April 2010 and it appears that you have practised without an APC, you will need to write to the Board advising of what you have been doing since this date. Please ensure you include all dates of practice. Once this information has been received your application will go to the Board for consideration.*

16. *Under section 3 of the form headed “Practise History” Mr Patel advised that he had practised from 16 November 2009 to 31 December 2009 at Lower Hutt Specsavers and from 1 January 2010 to 1 April 2010 at Porirua Specsavers. In the form, applicants are required to:*

*“Please list ALL places and periods of practise (either in New Zealand or overseas) in the last three years prior to the date of this application. With the most recent position first. Include any further details on a separate page if required.”*

17. *Section 5 of the form of contains a self declaration in which Mr Patel declared:*

*“All of the information supplied with this application is true and correct in every particular and detail... I know of no information that could cause the Optometrists and Dispensing Opticians Board not to be satisfied that I am a fit and competent person to hold a practising certificate”*

18. *A further letter was received from Specsavers dated 30 September 2010. ... It confirmed that Mr Patel was not practising until his practising certificate had been issued.*

19. *On 12 October 2010 a letter was sent to Mr Patel setting out concerns that it appeared he had practised without an APC from 30 August 2010 to 23 September 2010. ...*
20. *By letter dated 18 October 2010, the Board received information from Specsavers that Mr Patel had been employed from 1 January 2010 to 31 March 2010, then from 7 April 2010 to 26 May 2010. .... the matter was referred to a Professional Conduct Committee.*
21. *During his meeting with the Professional Conduct Committee respondent advised*
- 21.1 *In March there was a lot going on in his life and he just forgot about applying for his APC. He got engaged and had bought a house. He also got his own practice and was told about that on Christmas Eve 2009. He had to “drop everything all of a sudden” and make arrangements for taking over his own practice. The APC was the last thing on his mind.*
- 21.2 *When they relocated his practice in April 2010 the practice had to close down for about one and a half weeks. It then opened in the new site. Prior to being advised that he was getting his own practice, Mr Patel had already booked and paid for a holiday to Europe. He was not able to cancel this holiday without incurring costs and so decided to take the holiday. He obtained a locum to cover for half the time he was away. He also had a full-time optometrist who had started in the practice. Mr Patel got back from his holiday at the end of August and began working at the practice again.*
- 21.3 *When Mr Patel got back from his holiday he went through the mail that had built up at his parents’ address while he had been away. Mr Patel told the PCC it was then he realised that he did not have a current APC and he called Brooke Matthews and asked how they could sort it out. He was advised that he had to stop practising straight away.*
- 21.4 *He got a locum in until he could get the matter sorted.”*

### **Charges 1 and 2:**

5. There was no factual dispute with regard to the first two charges.
6. It was clear that Mr Patel did not hold a current annual practising certificate (APC) as from 1 April 2010.
7. It was also clear that he practised as an optometrist:
- 7.1. From 7 April to 26 May 2010; and
- 7.2. from 30 August to 23 September 2010.

8. Accordingly the first two charges were established.

**Charge 3: professional misconduct:**

9. For the purposes of third particular, the chronology is:

9.1. Numerous reminders were sent to Mr Patel concerning his obligation to apply in a timely way for his APC. These reminders consisted of:

9.1.1. A general reminder contained in the Board's E-Newsletter of December 2009.

9.1.2. On 1 February 2010, a renewal notice for APCs was sent to all optometrists.

9.1.3. On 22 March 2010, a reminder letter was sent to Mr Patel.

9.1.4. On 7 April 2010, a further letter was sent to Mr Patel by the Board noting it had not received an application to renew his APC, and pointing out this was a legal requirement.

9.1.5. On 27 May 2010, Mr Patel was again written to; it was stipulated that it was a legal requirement to hold such a certificate if a practitioner was to lawfully practise in New Zealand within the scope of practice of optometry.

9.1.6. On 23 September 2010, Mr Patel completed the declaration.

9.1.7. On 27 September 2010, Mr Patel phoned the Board; he was informed that without an APC he could not practise, and that he should stop doing so immediately.

9.1.8. On 29 September 2010, Mr Patel attended the Board, and submitted his application for renewal of APC.

9.1.9. On 29 September 2010, an email was sent to Mr Patel pointing out that the declaration he had signed was incorrect, in that he had indeed been practising optometry when he did not hold an APC, most particularly in

the previous three weeks.

10. Further information was then requested by the Board both from Mr Patel and from the company with which he was associated. The latter confirmed that he had practised optometry in the two periods which are the basis of charges 1 and 2.

11. Section 3 of the declaration clearly indicated that all places and periods of practice in the three years prior to the date of the application needed to be recorded; and this requirement was repeated in section 7 of the form, which contained a checklist that stated:

*“Evidence of all employment in the relevant profession in the past three years attached (originals or certified copies).”*

12. The form of the declaration was specific. In summary it stated that the Applicant “solemnly and sincerely declared”:

- That all the information provided was true and correct and every particular in detail.
- That any further information the Board required would be given.
- That consent was given to the Board to share practicing status information with the New Zealand Association of Optometrists.
- That the Applicant believed to the best of his knowledge that he was competent to practise in accordance with the scope of practice, and there was no mental or physical impediment to doing so.
- That the Applicant knew of no information that could cause the Board not to be satisfied that he was fit and competent to hold a practising certificate.
- Below the position where the Applicant was required to sign, it was noted that:

*“Section 172 of the Health Practitioners Competence Assurance Act 2003 provides for a fine not exceeding \$10,000.00 and penalties for a person who knowingly makes a false declaration or representation to the Board.”*

13. There can be no doubt that there was not disclosure of the two periods when Mr Patel



had worked without holding an APC. These periods should have been declared and were not. That element of the charge was not contested and is obviously established.

14. What was contested was whether the threshold for discipline was met, since the charge was brought under section 100(1)(a) and (b) of the Act.
15. The onus and burden and proof was on the PCC for establishing this; the requirements before such a charge have been summarised in many previous Tribunal decisions.
16. The correct approach to threshold is that described in the Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774, which endorsed the earlier statement of Elias J in *B v Medical Council* (noted at [2005] 3 NZLR 810). She made the important point that threshold is “inevitably one of degree”. The Court of Appeal expressed the issue in this way:

*“In cases of both professional misconduct and conduct unbecoming it will be necessary to decide if there has been a departure from acceptable standards and then to decide whether the departure is significant enough to warrant sanction.”*

17. Thus, in determining whether the departure is significant enough there must be positive reasons to justify such a conclusion.
18. For the PCC it was submitted:
  - 18.1. Professional persons are expected to take significant care when completing documentation, particularly those that contain a statutory declaration such as is the case with an APC application.
  - 18.2. Optometrists are expected to be careful in all aspects of documentation, there being frequent examples where agencies such as the Police need to be able to trust the reliability of what is stated by an optometrist.
  - 18.3. The failure to declare his most recent employment, particularly when Mr Patel knew or ought to have known there were issues about whether he had been practising lawfully in recent times (ie following the telephone call to the Board), was conduct that departed significantly from professional standards

and warranted disciplinary sanction.

- 18.4. Where professional conduct was being called into question, the practitioner needed to be very open and clear about his recent periods of employment both in writing when completing a declaration and in communications with the Board.
19. For Mr Patel it was submitted:
  - 19.1. The established facts, relating as they did to an allegation of an incorrect and carelessly prepared declaration, were not such as would support a prosecution under section 172 of the Act.
  - 19.2. At the time the document was submitted to the Board, Mr Patel had already informed the Board that he had been in employment in a period when he did not hold an APC. Thus, there was an inconsistency but it was obviously a careless step but not a deliberate one.
  - 19.3. There was a communication breakdown between himself and persons who were asked to supply him information for the purposes of preparing the application.
  - 19.4. The submission of the document did not involve an issue of public safety; it was an issue of administration only.
  - 19.5. One isolated lapse should not suffice for discipline.

**Discussion:**

20. The Tribunal was satisfied that there was a serious error of judgment. The information contained in the declaration was for the important purpose of applying for an APC, which is a cornerstone requirement of the Act. It can for example be used to ensure a practitioner is competent. The importance of the APC regime is also emphasised by the fact that a registered person who practises without an APC can be the subject of a disciplinary charge (as in fact has occurred in this case).

21. The format of the declaration in this case was such as to underscore the fact that the document was intended to be taken very seriously; the specific reference to section 172 of the Act makes it clear that the information in the document needed to be accurate.
22. The established carelessness in this case has to be assessed in light of the fact there was a sequence of reminders to Mr Patel that he needed to apply for his APC.
23. Although the allegation was not the result of a complaint by (for example) a patient, the document was sufficiently important in the Tribunal's view for it to be crystal clear to any practitioner that the provision of accurate information was an essential part of his professional obligations as a registered optometrist. The error could not be regarded as an administrative slip.
24. Given the importance of the document, a failure to provide information accurately, and to have done so notwithstanding multiple reminders, there was a serious breach of such significance that discipline is warranted.
25. In the Tribunal's view this breach brings discredit to the profession.
26. The third charge was accordingly established as one of professional misconduct.

**Penalty:**

27. The Tribunal announced its conclusion as above at the hearing, and received submissions on penalty.
28. For the PCC it was submitted:
  - 28.1. Principles relating to the objects of discipline, as set out below, were referred to.
  - 28.2. Reference was made to the guidance as to fines which could be obtained from previous decisions:
    - *GS v Professional Conduct Committee* (Venning J, 1 April 2010, High

Court Auckland, CIV-2009-404-007080), a case involving a psychologist who practised for three years without holding a practising certificate who was ultimately fined \$2,000.00.

- *White* (366/Opt10/168P), where an optometrist practised for two periods whilst not holding a practising certificate (in the latter case after being suspended) and where, a fine of \$1,250.00 was imposed given some impecuniosity.
- *O* (274/OT09/132P), where an occupational therapist practised for nearly four years; a fine of \$1,400.00 (being one year of practising certificate fees of \$400.00 and two years of \$500.00); again there was evidence of impecuniosity.

28.3. An aggravating factor was the considerable lengths the Board had gone in reminding practitioners including Mr Patel of the obligation to maintain a current APC.

28.4. Another aggravating factor was the fact that Mr Patel practised without an APC for a period of at least 65 days, despite the written reminders; this in spite of the fact that he was also affiliated with a large national practice and should have been aware of what others were doing.

28.5. Mitigating factors included the admission of the charges and the minimising of cost.

28.6. Finally, a reference was made to the fact that Mr Patel is relatively junior in the profession.

28.7. It was submitted that balancing all factors, an appropriate outcome would be censure, a fine for the APC offences of not less than \$1,250.00, and for the incorrect and careless declaration, a fine of \$7,000.00.

28.8. It was also suggested that the Tribunal might consider imposing a condition

that Mr Patel have a relationship with a mentor approved by the Board, such mentor to report to the Board frequently for a period of two years. It was submitted this would be helpful, particularly in Mr Patel's circumstances where he had just taken over ownership of a practice; it would ensure he was supported to avoid difficulties of the kind which arose here.

29. For the practitioner it was submitted:

29.1. Mr Patel had a lot going on in his life from late 2009; he took over a practice; some staff left; he worked very long hours; he purchased a house; he was engaged to be married; he became ill and was off work for a week at the end of March 2009; in the first week in April 2009, he had to relocate the practice to alternate premises. He was away overseas from June to August, and it was only following his return that he "caught up" on his mail and the problems in relation to the APC were confronted.

29.2. He was cooperative and compliant throughout. He acknowledged he had not paid sufficient attention to the issues, and apologised. He had done everything to minimise inconvenience and cost during the process of the charges being laid.

29.3. He was young, having just turned 30; but he had good experience, which included work overseas.

29.4. When considering penalty, there should be no underlying concern as to incompetence, which distinguished this case from others. There was no deliberate or dishonest conduct; there had simply been a careless mistake.

29.5. The offence was at the lower end of any offence of professional misconduct. It was suggested that the charge had been laid because his conduct appeared to have "irritated someone". In fact, he had been cordial in an interview to the PCC, and had not stood in the way of the prosecution.

- 29.6. The costs which had been incurred in the process were extremely high, which was surprising given there was no issue as to health and safety or competence.
- 29.7. It was submitted that an appropriate outcome would simply be an order of censure to mark the Tribunal's disapproval. The Tribunal could impose a fine, but not at the levels submitted by the PCC.
- 29.8. Counsel challenged the concept of mentorship, submitting that the disciplinary process had in and of itself been a sufficient wake up call.
- 29.9. Mr Patel recognised that his name would be published and that in itself would be a penalty.
- 29.10. Mr Patel should be given "the fullest discount" when considering costs; it was submitted that the costs were high in the circumstances.

**Legal principles – penalty:**

30. In determining penalty, the Tribunal recognised the following functions of disciplinary proceedings:
- 30.1. Protecting the public – this object is reinforced by section 3 of the HPCA Act;
- 30.2. to maintain professional standards – this object is emphasised in *Taylor v General Medical Council* [1990] 2 All ER 263; *Ziderman v General Dental Council* [1976] 2 All ER 344 and *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720;
- 30.3. to punish the practitioner in question, as referred to in *Dentice v The Valuers Registration Board* (supra) and *Patel v Complaints Assessment Committee* (CIV-2007-404-1818, 10 August 2007, Lang J);
- 30.4. where appropriate, to rehabilitate the practitioner, as referred to in *J v Director of Proceedings* (CIV-2006-404-2188, 17 October 2006, Baragwanath J), and *Patel* (supra).

31. The Tribunal is required to balance relevant aggravating and mitigating factors, in fixing a reasonable and proportionate penalty.
32. In *A v PCC* (5 September 2008, Keane J, CIV-2008-404-2927), the Court discussed carefully the range of sanctions available to the Tribunal, particularly cancellation and suspension.<sup>1</sup> The Court stated that four points could expressly be derived from the authorities, and implicitly a fifth:

*“[81] First, the primary purpose of cancelling or suspending registration is to protect the public, but that “inevitably imports some punitive element”. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is “some condition affecting the practitioner’s fitness to practise which may or may not be amenable to cure”. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.*

*[82] Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v B (HC Auckland, HC4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele v the General Medical Council [2005] EWHC 2143, though “... the maintenance of public confidence ... must outweigh the interest of the individual doctor”, that is not absolute – “the existence of the public interest in not ending the career of a competent doctor will play a part.” ”*

33. In numerous cases, the need to consider and explain why lesser options have not been adopted is emphasised. But the Tribunal has to proceed on the basis of what is appropriate having regard to the public interest, and the need to maintain public confidence in the profession.<sup>2</sup> Randerson J put the matter in this way:

*“[30] The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist’s fitness to practise against the need for removal and its consequences to the individual: Dad v General Dental Council [2002] 1 WLR 1538. As the Privy Council further observed at 1543:*

*Such consequences can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to*

<sup>1</sup> Paras 77-82.

<sup>2</sup> *Patel*, supra, para 30 per Lang J; *L v The Director of Proceedings*, Woodhouse J, 25 March 2009, CIV-2008-404-2268 [47-48].

*practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.*

[31] *I respectfully adopt the observations of the Privy Counsel and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case. As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.”<sup>3</sup>*

34. In *Professional Conduct Committee v Martin* (Gendall J, High Court Wellington, 27 February 2007, CIV-2006-485-1461) the Court stated:

*“The appropriate starting point seems to me to ask “What orders will protect the public, through advancing the proper responsible standards and practising of nursing ...”*

35. The Tribunal has also had regard to the various decisions which were placed before it. Whilst consistency is of course a desirable objective on sentencing, inevitably factual differences arise; but these decisions were of general assistance.

### **Discussion:**

36. The Tribunal considered that it was necessary to consider the aggravating and mitigating factors with regard to charges 1 and 2, and then again separately – and in respect of charge 3.

37. The aggravating factors in respect of charges 1 and 2 were:

37.1. The multiple reminders that were sent to Mr Patel – all of them having been sent before he went away in June 2010.

37.2. The fact that he practised for at least 65 days (noting that he had been practising seven days per week at some stage and may have practised for more than the 65 days indicated by Counsel, which was based on weekdays only during the periods when an APC was not held).

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<sup>3</sup> *Patel v The Dentists Disciplinary Tribunal* HC AK AP77/02, 8 October 2002.



38. The mitigating factors on charges 1 and 2 were:
- 38.1. Mr Patel had been entirely cooperative in the process.
- 38.2. He was reasonably junior – although this is not a strong point because so many reminders were sent, and he was not without experience and should have been aware of the APC obligations.
39. In all those circumstances, and having regard to previous decisions where a practitioner has not held an APC whilst practising, the Tribunal considers there should be a fine of \$1,250.00.
40. Turning to charge 3, the aggravating factors were:
- 40.1. The completion of an accurate declaration is an important element of the compliance process as under the Act.
- 40.2. Reference has already been made to section 172, which creates the offence of signing false declarations. It underscores the importance of declarations and representations made to the Board; and the form of the declaration which was signed on this occasion did that as well.
- 40.3. It appeared Mr Patel had a history of being tardy in applying to the Board and this was referred to in a letter sent to him on 21 September 2009 in these terms:
- “In processing your application the Board noted on your file a history of late applications for your Annual Practising Certificate (APC). You should be aware that if you do not apply for a renewal before your existing APC expires each year it is illegal for you to practise until you apply for your replacement. Under the Health Practitioners Competence Assurance Act s100(1)(d) it is grounds for disciplinary action if a practitioner is found to have practised without an APC.”*
- Notwithstanding that statement, the application was very late indeed, and then misleading in its content.

41. Mitigating factors were:
- 41.1. The declaration was careless, but was not deliberately false. Against that, however, is the importance of the document as previously mentioned. Thus, the Tribunal does not accept the submission that the document was a “mere administrative document”.
- 41.2. Mr Patel had been very busy, had staff issues, and for a short period became ill. Whilst these factors go some way to mitigating the seriousness of the offence, they do not excuse the conduct.
- 41.3. The Tribunal accepts that charge 3 is at the lower end of professional misconduct, and for that reason will be imposing a fine, rather than a more significant penalty.
- 41.4. It is accepted Mr Patel was cordial to the PCC, and that he has been entirely cooperative in terms of expediting the prosecution. As to the submission that Mr Patel had “irritated someone”, there is simply no evidence to that effect before the Tribunal.
42. In all the circumstances, the Tribunal considers that a correct amount for a fine in respect of charge 3 is \$5,000.00; this amount will make it clear to Mr Patel and to the profession generally that the provision of information to the Board – particularly when is in the form of a declaration – it is a serious matter. Practitioners need to be completely accurate in the information they provide.
43. As to a censure, it is important that the Tribunal marks its disapproval for the conduct which occurred, and it will be ordering censure accordingly.
44. As to the submission that a condition be imposed that Mr Patel be in a formal mentoring relationship, the Tribunal is not persuaded having regard to the particular charges that are before it that it is appropriate to order such under its general power to impose conditions under section 101(1)(c). However, the Tribunal suggests to

Mr Patel that he may wish to reflect on his practice, in light of these events. He may consider it would be desirable for him to associate with senior colleagues, for example at regional activities of the Association of Optometrists. Whilst the Tribunal raises that possibility in an informal way for Mr Patel to consider, it is in the end a matter for him.

**Costs:**

45. The Tribunal was advised that the approximate costs for the PCC were \$15,000.00 excluding GST, and for the Tribunal \$12,200.00 excluding GST.
46. The general principles which need to be taken into account when considering applications for costs in disciplinary proceedings include:
  - 46.1. The fact that professional groups ought not to be expected to fund all the costs of a disciplinary regime; and members of the profession who come before disciplinary bodies must be expected to make a proper contribution towards the costs of the inquiry and hearing: *G v New Zealand Psychologists Board*<sup>4</sup> and *Vasan v Medical Council of New Zealand*.<sup>5</sup>
  - 46.2. Costs are not in the nature of a penalty, or to punish: *Gurusinghe v Medical Council of New Zealand*.<sup>6</sup>
  - 46.3. Means, if known, are to be taken into account: *Kaye v Auckland District Law Society*.<sup>7</sup>
  - 46.4. A practitioner has a right to defend himself: *Vasan v Medical Council of New Zealand*.
  - 46.5. The level of costs should not deter other practitioners from defending a charge: *Gurusinghe v Medical Council of New Zealand* (supra).

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<sup>4</sup> Gendall J, 5 April 2004, HC Wellington, CIV-2003-485-2175.

<sup>5</sup> Eichelbaum CJ, Jeffries J and Greig J, 18 December 1991, AP43/91, at p15.

<sup>6</sup> [1989] 1 NZLR 139, at 195.

<sup>7</sup> [1988] 1 NZLR 151.

- 46.6. It is appropriate in a general way to take 50% of total reasonable costs as a guide to a reasonable order for costs; where in an individual case it is reasonable to impose a higher percentage, it may do so; in other cases, where such an order is not justified because of the circumstances of the case, a downward adjustment may be made: *Cooray v Preliminary Proceedings Committee*.<sup>8</sup>
47. The Tribunal has carefully considered all these statements in considering the application made for costs in this case.
48. Counsel for Mr Patel submitted the costs in this case were excessive. Whilst it is important that costs are not incurred unnecessarily, by the same token it is important that cases are prepared properly so that all relevant issues can be addressed at a disciplinary hearing. As far as the PCC's costs are concerned, these are more modest than many half day cases which come before the Tribunal. As far as the Tribunal's costs are concerned, those are approximately equivalent to a daily average particularly where out of town members are required to attend.
49. That all said, Mr Patel is undoubtedly entitled to credit for his significant cooperation in this process. In accordance with previous decisions, the Tribunal considers that an approximate amount of 30% of the total costs is an appropriate imposition.
50. Accordingly, it is appropriate for Mr Patel to pay costs in the total sum of \$8,000.00.

**Conclusion:**

51. The charges are established.
52. The Tribunal imposes the following penalties:
- 52.1. Censure: the Tribunal must record its disapproval for the fact that Mr Patel practised without an APC for two significant periods, and then made a careless declaration to the Board. Given the importance of the APC to the competence regime of the Act, such conduct cannot be condoned.

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<sup>8</sup> Doogue J, 14 September 1995, Ap23/94, Wellington Registry.

52.2. Mr Patel is ordered to pay total fines in the sum of \$6,250.00.

52.3. Mr Patel is ordered to make a contribution to costs as follows:

52.3.1. In respect of the costs and disbursements of the Tribunal, the sum of

\$4,000.00. This does not include GST which is not payable; and

52.3.2. in respect of the costs and disbursements of the PCC, the sum of

\$4,000.00. This does not include GST which is not payable.

52.4. The Tribunal directs that a copy of this decision and a summary be placed on the Tribunal's website. The Tribunal further directs that a notice of the effect of its decision be placed on the Board's website and in its newsletter.

**DATED** at Wellington this 14<sup>th</sup> day of July 2011

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B A Corkill QC  
Chairperson  
Health Practitioners Disciplinary Tribunal