New Zealand Health Practitioners Disciplinary Tribunal

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DECISION NO 510/Opt12/217P

IN THE MATTER of the Health Practitioners Competence Assurance Act 2003

AND

IN THE MATTER of a charge laid by a Professional Conduct Committee against **MS ANDREA NANCYE BUCKINGHAM** Registered Optometrist of Auckland

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr B A Corkill QC (Chair)

Ms V Edgar, Ms A Morgan, Mr R Gordon and Mr H O'Rourke (Members)

Ms G Fraser (Executive Officer)

APPEARANCES: Ms J Hughson, for the Professional Conduct Committee

No appearance for Ms A N Buckingham

HEARING: As to liability on 20, 21 November 2012; as to penalty, on the papers

Introduction:

1. A charge has been laid against registered optometrist Ms Buckingham. In summary it alleges that in the period before 20 May 2011 when Eyezone Ltd (a company which Ms Buckingham is alleged at all material times to have been the sole director and shareholder) was placed into liquidation, until the date when the charge was laid – 5 July 2012 - she failed to make appropriate arrangements to ensure the continuity of Eyezone's patients' optometric care and/or ensure that the patients' care would not be compromised after her business went into liquidation.

The Charge:

2. The charge as laid on 5 July 2012 states:

> *"**Particulars of Charge of Professional Misconduct***
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> *Pursuant to section 81 (2) of the Act the Committee charges that Andrea Nancye Buckingham ("Ms Buckingham"), registered optometrist of Auckland:*
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> *Since on or in the period before 20 May 2011 when Eyezone Limited ("Eyezone"), a company in which Ms Buckingham was at all material times the sole director and shareholder, was put into liquidation, Ms Buckingham failed to make appropriate arrangements to ensure the continuity of Eyezone's patients' optometric care and/or to ensure that the patients' care would not be compromised after her business went into liquidation.*
>
> *Further Particulars*
>
> *(a) Ms Buckingham failed to inform Eyezone's patients and/or their health care providers that Eyezone would no longer be providing its patients with optometric care; and/or*
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> *(b) Ms Buckingham failed to provide Eyezone's patients with the names and contact details of alternative providers from whom they could obtain optometric care; and/or*
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> *(c) Ms Buckingham failed to take appropriate statutory and/or professional steps for the retention and/or storage of Eyezone's patients' notes; and/or*
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> *(d) Ms Buckingham failed to make appropriate arrangements to allow the transfer of Eyezone's patients' notes and/or medical information on the request of Eyezone's patients; and/or*

(e) Ms Buckingham failed to notify the Registrar of the Optometrists and Dispensing Opticians Board of her change in postal address and/or current postal address, current residential address and/or current work address so that when the Board received requests from Eyezone's patients relating to the whereabouts of their patient notes, the Board was compromised in its ability to respond to those patient requests due to the unknown whereabouts of Ms Buckingham at the relevant times."

Procedural issues:

3. At the hearing evidence was led to the effect that attempts had been made by a process server to have the notice of hearing served on Ms Buckingham at her last known address; it transpired that a current address had not been supplied to the Optometrists and Dispensing Opticians Board (the Board). On 1 August 2012, a notice of hearing was emailed to Ms Buckingham. On 3 August 2012, she responded to this advising that she would not be attending the hearing nor would she be represented.

4. Notice of the hearing date and the venue for hearing was given to Ms Buckingham by email. She responded on 30 October 2012, confirming again she would not be attending the hearing, as she could not travel to New Zealand.

5. The Tribunal was advised by Counsel for the PCC that the evidence to be placed before the Tribunal had been made available to Ms Buckingham; indeed she emailed to the Tribunal a number of written responses to some of that evidence, which will be referred to in more detail below.

6. The Tribunal ruled at the commencement of the hearing that proper service had occurred, and that Ms Buckingham was well aware the hearing which would proceed.

7. Although Ms Buckingham elected not to take part in the hearing, the Tribunal directed that two rulings be emailed to her – the first was a ruling relating to name

suppression;[1] the second was the Tribunal's liability decision.[2] As a result of the second ruling being sent to Ms Buckingham, she forwarded an email and information for penalty purposes, at the penalty stage.

8. In its decision of 23 October 2012[3] the Tribunal granted an interim order of non-publication of Ms Buckingham's name, indicating it would review that order at the commencement of the hearing. It did so by convening in private prior to the commencement of the substantive hearing. It considered submissions from the PCC and information which had been conveyed on that aspect of the matter by Ms Buckingham. For reasons set out in the ruling, the Tribunal was not satisfied that the interim order should be continued. It accordingly indicated the order would be discharged with effect from 20 November 2012.[4]

9. Counsel for the PCC confirmed there were no name suppression issues in respect of the patients who were to be called to give evidence.[5]

Legal principles:

Onus and standard of proof

10. The burden of proof was on the PCC.

11. As to standard of proof, the appropriate standard is the civil standard, that is proof to the satisfaction of the Tribunal on the balance of probabilities, rather than the criminal standard. The degree of satisfaction called for will vary according to the gravity of the allegations. The greater the gravity of the allegations the higher the standard of proof.

12. In the decision of *Z v Complaints Assessment Committee* [2009] 1 NZLR 1, a majority of the Supreme Court stated that in civil proceedings in New Zealand (including

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[1] Ruling No 1, sent by email to Ms Buckingham on 19 November 2012.
[2] Ruling No 2, sent by email to Ms Buckingham on 20 November 2012.
[3] Decision No 485/Opt12/217P.
[4] Ruling No 1, supra.
[5] T107.

disciplinary proceedings) there is a civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them. The Court endorsed the classic passage of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362 to the effect that the affirmative of an allegation must be made out to the reasonable satisfaction of the fact finder. Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal.

Professional Misconduct:

13. Section 100 of the HPCA Act defines the grounds on which a health practitioner may be disciplined. The Tribunal has now had ample opportunity to consider the test for professional misconduct under the section, and the approach to it is well settled – examples of the correct approach are found in *Nuttall* (8/Med04/03); *Aladdin* (12/Den05/04 and 13/Den04/02D) and *Dale* (20/Nur05/09D).

14. The section provides that malpractice and/or negligence and/or conduct likely to bring discredit to the profession can constitute professional misconduct.

15. "Malpractice" is defined in the Collins English Dictionary (2nd ed) as:

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

16. In the new shorter Oxford English Dictionary (1993 edition) the word is defined as:

> "*Law.* Improper treatment or culpable neglect of a patient by a physician or of a client by a lawyer … 2 *gen* criminal or illegal action: wrongdoing, misconduct."

17. Malpractice, although often equated with negligence, is perhaps better considered a broader concept, capable of encompassing neglect, but also of extending to trespassory conduct in the process of caring for patients in relation to consent, breaches of patient confidence and fiduciary obligations, and other forms of conduct reaching the necessary level of gravity, such as assaulting a patient, swearing at or threatening a patient, a deliberate failure to obey an instruction or sexual misconduct. (See para 23.65, "Medical Law in New Zealand", 2006).

18. Negligence and malpractice were discussed by Gendall J in *Collie v Nursing Council of New Zealand* [2000] NZAR 74. His Honour said:

> "*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, or oversight or for that matter carelessness.*"

19. Similarly, it is for the Tribunal to decide whether the conduct, if established, would be likely to bring discredit on the optimetrical profession. In the same case Gendall J stated:

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

20. There are two steps involved in assessing what constitutes professional misconduct:

    20.1. The first step involves an objective analysis of whether or not the health practitioner's acts or omissions can be reasonable regarded by the Tribunal as constituting:

    - malpractice; or
    - negligence; or
    - otherwise meets the standard of having brought, or was likely to bring

discredit to the practitioner's profession;

20.2. The second step requires the Tribunal to be satisfied that the health practitioner's acts or omissions require a disciplinary sanction for the purposes of protecting the public and/or warrant maintaining professional standards and/or punishing the health practitioner.

21. This approach to the assessment of professional misconduct under the statute is well established under previous decisions of the Tribunal, and in authorities such as *McKenzie v MPDT & Anor* [2004] NZAR 47.

The hearing:

22. The PCC called evidence from nine witnesses. Six of those were patients, two were witnesses of fact providing evidence as to the chronology, particularly the adequacy of any transitional arrangements in relation to patient notes made by Ms Buckingham; an expert witness gave evidence as to applicable standards. Evidence from two further patients was admitted without the necessity of the witnesses being questioned. They were unavailable at the time their evidence was required to be given. The Tribunal admitted that evidence on the basis that the PCC had made all reasonable efforts to have the witnesses present; they were not central witnesses; their evidence was consistent with the evidence of other patients; and that evidence was not understood to be contested by Ms Buckingham (even although she was not taking an active part in the hearing). The Tribunal admitted the evidence, but taking into account the fact that the witnesses had not been available for questioning.[6]

23. Extensive documentation was also placed before the Tribunal.

24. The Tribunal refers to relevant evidence in this decision where appropriate.

25. At the conclusion of the evidence, detailed submissions as to liability were made for

[6] T145: evidence of Mr L J Sweetman; T153: evidence of Ms P M Turner.

the PCC. Those submissions were considered, and the Tribunal reached a decision on liability which it announced. It then issued the ruling as to liability and adjourned, giving a timetable for the filing of submissions as to penalty. Both parties filed such submissions. Penalty was dealt with on the papers.

Core chronology:

26. The Tribunal finds the key dates relating to this matter are:

26.1. 1975: Ms Buckingham acquired a Diploma in Optometry.[7]

26.2. 1976-7: The period for which Ms Buckingham obtained her first APC with her registration date being 20 January 1976; she obtained APCs each year which had effect from then until 31 March 2010.

26.3. 18 September 2004: the Health Practitioners Competence Assurance Act (the Act) came into force. All optometrists who were not trained in the use of diagnostic pharmaceutical agents (DPA)[8] had a condition imposed on their scope of practice requiring them to upskill in that area by the end of March 2010, as part of the Board's recertification programme. Practitioners were informed that if they had not so upskilled by that time, they would not be issued with an APC from 1 April 2010. Ms Buckingham was one of the registered optometrists who was subject to such a condition.

26.4. Reminder letters as to the need to upskill on the use of DPAs was sent to Ms Buckingham on 9 September 2008, 20 March 2009, and 5 October 2009; Ms Buckingham did not meet the DPA requirements, and did not apply to renew her APC before her then current APC expired on 31 March 2010. Accordingly on 8 April 2010 the Board sent Ms Buckingham a letter which

[7] Exhibit 11.

[8] Full diagnosis requires the use of DPAs to dilate the pupils to detect and identify anomalies or pathology. DPA use is now a core and compulsory part of training, and is a pre-requisite for registration.

recorded her failure to renew her APC and her failure to fulfil the requirements of the Recertification Programme relating to upskilling for the use of DPAs. No response was received from Ms Buckingham.

26.5. Ms Buckingham has alleged that in December 2009 she sent a letter to the Board indicating that she no longer wished to be registered as an optometrist. Whether that letter was ever received is dealt with more fully below.

26.6. On 17 May 2010, the Board sent Ms Buckingham a further letter placing a condition on her scope of practice, to the effect that she would not be issued with an APC and was not entitled to practise optometry until she had demonstrated competence in the use of DPAs by completing Board approved training, assessment or examination in this area. This condition took effect from 3 June 2010. The Board heard nothing further from Ms Buckingham at this time.

26.7. Ms Buckingham was the sole director and shareholder of Eyezone Ltd (Eyezone). Until mid May 2011 Eyezone carried on the business of providing optometry services to patients in Auckland; at that time there were several branches of the business in operation across Auckland, including Devonport, Birkenhead and Apollo Drive, as well as Waiheke Island.

26.8. On 15 May 2011, the offices of Eyezone were, according to Ms Buckingham, closed. She said the landlord "*locked the doors to Devonport*" and notice had been given at the Birkenhead and Waiheke Island offices to vacate the premises.[9]

26.9. On 18 May 2011, Ms Buckingham was adjudicated bankrupt; she said she left the Birkenhead practice on that day.

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[9] Exhibit 18, document 8.

26.10. On 20 May 2011, the High Court placed Eyezone in liquidation.[10] Mr H Davis (who the PCC understood was Ms Buckingham's partner) said he "*was in a position of having to arrange the secure private storage of Eyezone Ltd records and to make sure the patient record cards for any patients who requested them either by email or phone were sent to them*".[11] Ms Buckingham asserted that the documents were placed in security with a finance company which had a charge over the company's assets.[12]

26.11. The liquidator, Mr G B Reynolds, advised the Tribunal that following his appointment his agent went to each of the retail outlets and found the assets had been "*ripped out of each of the premises*"; no records were discovered by the agent.[13] He subsequently requested company records from the sole director, Ms Buckingham. These were never supplied.

26.12. An optometrist, Mr S Khayami, who stated he had known Ms Buckingham for some 10 years, said he was approached to take Eyezone patient records, but due to the size of the files he did not want to do this (some 20-30,000 patient records).[14] The Tribunal was not informed as to who made this approach.

26.13. Ms Buckingham filed a statutory declaration from a Mr K D Algie;[15] that declaration stated that Mr Algie was CEO of CFS Money Ltd, which occupied premises in Ellerslie, and which he said had a safe storage area at the rear of its business premises, used to "*… hold vehicles and client financial records*". Two photographs were produced one of which showed a large warehouse containing some vehicles, a pallet of boxes in one position, and some other

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[10] Bundle p15.
[11] Exhibit 11, document 20.
[12] Exhibit 18, document 26, p2.
[13] Reynolds' brief para 9 following.
[14] Exhibit 18, document 21.
[15] Exhibit 11, document 19.

boxes in another position. Mr Algie stated in his declaration that Mr Davis had asked him to hold these records in the building and he agreed; he said that they were kept in a "*safe secure alarmed and locked storage area with only the authorised access*". It was stated that no one else could retrieve the records.

26.14. Mr Davis said he checked phone messages and emails every few days, so as to provide records to patients who requested them, and that he did this until the end of March 2012.

26.15. Ms Buckingham stated in one of her communications to the Tribunal that from approximately May to October, "*… around 460 records were sent out to people on request*".[16]

26.16. On 18 October 2011, an Eyezone patient Dr C Kenny wrote to the Board stating that Eyezone had suddenly closed several months previously "*… with no advice to patients/customers as to alternative providers or the handling of the existing optometry records*". In his evidence he confirmed he was "*deeply concerned*" about the situation.

26.17. A second query was also received by the Board at the same time from two further patients, Pat and Julie Sutherland. Mrs Sutherland said she expected to receive advice as to what had happened to her optometrist, which had "*simply disappeared overnight*". (Subsequently her records were received, via the Board, in late June 2012).

26.18. The then Registrar contacted the New Zealand Association of Optometrists (NZAO) for information regarding the Eyezone closure, and was informed that the company had been placed in liquidation; details of the liquidator were

[16] Exhibit 18, document 26.

provided. The Registrar spoke to the liquidator Mr Reynolds, who told her that Ms Buckingham had no current fixed address, and that the liquidator was attempting with difficulty to reach her to acquire patient records. The patients who had raised concerns with the Board were informed that the best means of obtaining their patient records would be to contact the "*receiver (sic)*", details of which were provided.

26.19. On 19 October 2011, the Board wrote to Ms Buckingham recording that she was not holding a current APC, and providing options as to what she might do with regard to her registration.[17] Options included remaining on the Register or requesting cancellation of registration.

26.20. In the course of the letter, it was stated that the law required a practitioner to promptly inform the Board of any change of address. The letter was posted to the last known postal address held by the Board for Ms Buckingham, but it was returned to sender, the Board receiving the letter back on 1 November 2011 with the advice that the P O Box number to which the letter had been sent had been closed.

26.21. On 21 October 2011, the Board referred the issue of access and transfer of records to a PCC to investigate.

26.22. On 2 November 2011, the Board received a complaint from Ms C Edmonds, whose evidence was that in May 2011 she had walked passed Eyezone premises in Devonport, and noticed all the glasses from the window display had gone; she took down a number written on a handwritten note on the door, which turned out to be the number for the Birkenhead branch of Eyezone. She

[17] Bundle 37.

eventually ascertained the business had closed down permanently and was in liquidation. Her contact with the Board was to seek its assistance with access her patient records.[18] She was anxious as to the whereabouts of her patient notes. She thought it was extraordinary that a practitioner could "*shut up shop and disappear taking everyone's records*".

26.23. On 17 November 2011, Mrs L Joicey, an Eyezone patient for many years, contacted the Board regarding her prescription history, which she said was important to her as she had a complex eye prescription and wished to find another optician and pass her prescription history on to them.

26.24. On 12 December 2011, the NZAO forwarded to the Board an email inquiry it had received from a longstanding Eyezone patient, Mrs A Rimmer. Mrs Rimmer expressed "*deep concern*" at the loss of her records as she was being tested for glaucoma. It was her evidence that in October 2011 there were no signs on the door at the Apollo Drive branch advising patients of a phone number to call or of a replacement optometrist. When she tried to call the branch she got an automated message advising that the number she had dialed was not in service. She spoke to staff at a neighbouring pharmacy who told her that Eyezone "*seemed to have gone*." An optometrist in Browns Bay who she phoned for advice, told her they had seen several "*very upset Eyezone patients who had told them the same story about Eyezone @ Apollo just shutting up with no notice to patients*". This had occurred in October 2011.

26.25. Subsequently, other patients requested their records through the Board (Mr M Watts, 20 December 2011; Ms D Wichtel, 17 January 2012; Ms H McNaughton, 13 February 2012; Mr L Sweetman, 25 February 2012;

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[18] Bundle 41-42.

Mrs B Borthwick, 8 April 2012; and Mrs P Turner, 1 May 2012). The Tribunal received a considerable body of evidence from patients who confirmed significant concerns, including:

26.25.1. Upset that records seem to have disappeared or could not be obtained when inquiries were made (Mrs Hughes). She was very relieved when her notes turned up – though not until June 2012.

26.25.2. Concern that records could not be obtained, with no warning that Eyezone was closing down, fruitless requests being made to the liquidator, no response from Ms Buckingham's address as specified on the Companies Office register, and concern that these records were unattainable given a history of glaucoma and correspondence from a specialist (Mr Sweetman). He felt the situation was "*grossly irresponsible*".

26.25.3. Concern as to fruitless inquiries via the internet, and other inquiries through NZAO and the Board, by a patient who had attended Eyezone "*for decades*" (Mrs Borthwick).[19] Her new optometrist was unable to refer to relevant records.

26.25.4. Concern and disappointment that a patient and her family members had at no time been contacted by Eyezone about any branches being closed (Mrs Turner). At the date of the hearing she still had not received her notes.

26.25.5. Concern that Eyezone had not contacted long-term customers to advise what was happening; the situation was "*very unsatisfactory*" (Ms Wichtel).

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[19] Bundle 70-72/Exhibit 9 Affidavit of B E Borthwick

26.26. On 12 April 2012, the PCC was able to obtain a current email address for Ms Buckingham, from her daughter.

26.27. As a result in late April 2012 Ms Buckingham advised the PCC, by email (without disclosing her own address) that the PCC should contact "kevinda@xtra" (sic), claiming that the person involved had "… *security over the company*".[20] The email did not disclose the location of the records.

26.28. On 1 May 2012, the PCC advised Ms Buckingham that such a response was inadequate, pointing out that under the Privacy Act she had obligations to ensure the security and storage of health information. Once again, a request to provide a full name, physical address and contact details of the person holding the notes was made.[21] At the same time, an email was sent to the email address provided by Ms Buckingham, asking the recipient to send all patient notes to the PCC's Legal Assessor.[22] A Mr Kevin Algie responded on 2 May 2012, stating "*all will be couriered later this week*". The PCC convenor then requested a contact address and phone number for Ms Buckingham. Mr Algie said that he did not know her contact details. The PCC believed Mr Algie had a family connection with Ms Buckingham.[23]

26.29. On 2 May 2012, the PCC's legal advisor received a phone call from a person who named himself as "*Billie Penman*", and who said there was a "*pallet load*" of material.

26.30. The PCC conferred urgently; it then advised Mr Algie that it now understood there was a pallet of files and so it would not be appropriate to send this to the

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[20] Exhibit PMH3, to affidavit of P M Huitema.
[21] Exhibit PMH4.
[22] PMH5.
[23] Huitema affidavit, para 1.20.

PCC's legal advisor.[24] On the same day a detailed letter was sent to Ms Buckingham with regard to an intended hearing which the PCC wished to convene. It also requested that files relating to 19 patients be provided within 24 hours.

26.31. On 5 May 2012, Ms Buckingham wrote to the Registrar of the Board.[25] Ms Buckingham included the following comments in her email:

26.31.1. The previous email had been replied to "… *by a friend to let you know a contact for the records*".

26.31.2. She had been "*in a Retreat and out of contact in NZ",* and had not been on the internet until 5 May.

26.31.3. She did not have any money to attend meetings, nor take part by phone.

26.31.4. She was not registered, having sent a letter of notification in approximately December 2009 that she did not intend to stay registered.

26.31.5. Contact had always been possible through Mr Reynolds (the liquidator) and via NZ Optics (a publication for optometrists).

26.31.6. "*Information for records*" had been sent to people who had made contact via addresses left at various Eyezone branches, "*as well as landlords and neighbouring shops*".

26.31.7. All assets and "*hard records which were the property of the compan*y" were taken by a finance company who had a charge over the company; and they were in a safe and secure and confidential place.

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[24] PMH8 and PMH9.
[25] PMH11.

26.31.8. She also became bankrupt, and had no house or place to store records.

26.31.9. Any patient could go to another optometrist and have an eye exam; records show a previous history and any health issues; any competent optometrist would pick up any abnormalities. Records such as visual fields would obviously be helpful but considering many optometrists still do not have this equipment "… *it is hardly a threat to a persons' sight*".

26.31.10. There was a possibility that records listed could be accessed in approximately two weeks' time "… *by a reliable person and information sent to these people and any other request could be acted on*".

26.31.11. The company owned the records, and not her.

26.32. On 9 May 2012 the PCC responded, reiterating its requests and expectations. It sought clarification as to the person who was holding the patient records, advice as to what security measures had been put in place, what arrangements had been put in place to ensure patients had the benefit of accessing their health information for the purposes of present treatment, and what steps had been taken to ensure people could get their records.

26.33. By email apparently dated 23 May 2012, but not received until 29 May 2012[26] Ms Buckingham replied. No address as to the whereabouts of the records was given. She stated she had been "*assured that the records are in a sealed/locked room*"; and that a contact had been given to the PCC for this.

[26] PMH13.

26.34. On about 20 June 2012, a selection of patient records from Eyezone Ltd was delivered by courier to the Board's offices in Wellington. These were accompanied by a brief unsigned handwritten note, which appeared to refer to requests for records in respect of a small number of patients in the PCC letter of 2 May 2012,[27] because the note referred to the names of some persons referred to in that letter.

26.35. The Registrar responded to Ms Buckingham by email of 22 June 2012. Included in that response was a request for advice as to what arrangements were being made for other patients to acquire their records in the event of further inquiries being received, it not being practical or appropriate for the Board to act as a go between on an ongoing basis. A request was also made for an up to date residential and postal address as soon as possible, since that was a requirement under the Act.[28]

26.36. On 5 July 2012, the PCC laid the present charge with the Tribunal. Accordingly, the period to which the charge relates must be regarded as being from "*the period prior to 20 May 2011*", and up to 5 July 2012. For the sake of completeness, reference is made to key developments which occurred after the laying of the charge.

26.37. In July and August 2012, email correspondence passed between the Board's Registrar and Ms Buckingham, by way of further requests for patient records.

26.38. On 14 August 2012, Ms Buckingham emailed the Registrar advising that the Eyezone records had been in the possession of "*an optometrist for some time now*". It appears that in August 2012, Mr S Khayami was approached to take

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[27] PMH10.
[28] Bundle 80.

possession of the records; according to a letter from him he did so.

26.39. On 22 August 2012, the Office Manager for Luxottica Retail (which owns OPSM Optometrists) received an email inquiry from Ms Buckingham, wanting to discuss the possibility of that company taking possession of Eyezone patient files. Eventually arrangements were made to collect the records from two addresses, both of which related to Mr Khayami. Approximately 40 boxes of records, containing some 20,000-30,000 records were uplifted by OPSM on 25 and 27 September 2012. Approximately half of the boxes of record cards were catalogued and in alphabetical order; however the remaining boxes and filing cabinets were not catalogued or in any order at all, and were very mixed up. OPSM therefore had the task of ordering this material so that they could respond appropriately to patient requests.[29]

Professional guidelines:

27. The Tribunal was assisted on the topic of professional guidelines and statutory provisions by the expert evidence of Mr G A Watters, an experienced registered optometrist who is an adjunct senior lecturer and examiner at the Department of Optometry and Vision Science, University of Auckland.

28. The context within which relevant provisions must be considered is the applicable scope of practice for registered optometrists, which is as follows:

> "*The practice for optometry provides evidence-based comprehensive eye health and vision care in a professional and ethical manner, delivered by university-qualified optometrists.*"[30]

29. The following professional guidelines are relevant:

29.1. On 28 January 2011 the Board issued "Statement on Release on Receipt of Patient Information" pursuant to its obligation to set ethical standards under

[29] Butcher brief, paras 2-6.
[30] New Zealand Gazette, 17 May 2012, No 55, p1616.

section 118(i) of the Act. The document states that the purpose of the statement is to ensure that practitioners are aware of their legal obligations to patients with particular regard to release of patient information, pursuant to the Privacy Act 1993, the Health Information Privacy Code 1994 and the Health Act 1956.

29.2. The statement includes the following:

> "*Practitioners are expected to promptly and cooperatively comply with patient requests for release of their personal information. In order to minimise risk of misunderstanding between patient and practitioner about the release of patient information, all practitioners must ensure that they communicate clearly with the patient about the information held, the intended recipients, the process for releasing, and any other matters that the patient should be aware of*" (emphasis added)

29.3. The statement goes on to refer to statutory provisions which can be relevant to the issue of release of information, contained in a number of enactments. These are referred to more fully below.

29.4. Underpinning the obligation in the statement are the general obligations provided by other ethical standards and statements issued by the Board. In August 2004, "Ethical Standards for Optometrists" was issued, these being developed in conjunction with the NZAO. These made it clear that a practitioner should comply with all relevant laws and regulations that govern the practice of optometry in New Zealand. So an optometrist should:

29.4.1. Always respect their patients' rights, dignity, autonomy and requirement for continuity of care;

29.4.2. Understand the concept of duty of care and associated responsibilities.[31]

[31] Bundle 147. In June 2012, which is towards the very end of the period covered by the charge, the Board issued a further document "Ethical Standards for Optometrists", which reinforced these principles, and in some respects expanded upon the statements which had been issued previously.

30. Turning to the statutory provisions, the following are relevant:

30.1. Section 22F of the Health Act 1956 states:

> "*Every person who holds health information of any kind shall, at the request of the individual about whom the information is held, or a representative of that individual, or any other person that is providing, or is to provide, services to that individual, disclose that information to that individual, as the case requires, to that representative or to that other person*" (emphasis added)

This obligation has existed since 1 July 1993.

30.2. The Health (Retention of Health Information) Regulations 1996 requires providers, to whom the Regulations relate, to hold health information for the minimum retention period (which is a period of 10 years beginning on the day after the date shown in the health information as the most recent date on which a provider provided services to that individual).[32] These obligations relate not only to the notes of the practitioner but also any medical notes obtained from other sources.[33]

30.3. The Health Information Privacy Code 1994 is relevant. Rule 5 of the Code provides for storage and security of health information. A relevant health agency (which includes a health practitioner who provides health services) is required to ensure that any health information held is protected by such security safeguards as is reasonable in the circumstances. The commentary in respect of Rule 5 as published by the Privacy Commissioner states:

> "*Health information held by individual health practitioners (or agencies who are natural persons) retiring from practice may still be required for lawful purposes. Retiring practitioners should take proper steps to ensure that relevant records are left with another competent practitioner, the individuals concerned, or an appropriate statutory or professional body.*" (emphasis added)

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[32] Regulations 5 & 6.

[33] Regulation 7. Regulation 4 includes a health practitioner as being a provider for the purposes of the Regulations.

30.4. The Code of Health and Disability Consumer Rights specifies basic patient rights, which include the right to be treated with respect (Right 1), the right to services of an appropriate standard (Right 4), the right to effective communication (Right 5), the right to be fully informed (Right 6), and the right to support (Right 8).

31. The core obligations set out in the Board's guidance of January 2011, then, are consistent with and reflect the various statutory provisions.

32. In many respects, those obligations are common sense, and consistent with what a competent registered health practitioner would naturally expect to do, if a patient asked for patient records and or if the practitioner retired. Common sense would dictate that a retiring practitioner would keep his or her patients informed of that fact, and provide a practical way of ensuring that patients or any substitute optometrist could access and obtain relevant records.

33. This was the general thrust of Mr Watters' evidence, who also confirmed that this was generally understood. He said:

> "*It is generally accepted that health practitioners must ensure there is adequate information provided to any person taking over the care of a patient so that there is quality of care and continuity of service. The above Rights contemplate that every consumer has the right to cooperation among providers to ensure quality and continuity of services.*"[34]

34. The Tribunal accepts that this is a correct summary of the position; it is also a fair reflection of what members of the community would expect in relation to the maintenance and accessibility of records, as was evident from the evidence given by patients.

35. Finally, it is appropriate to refer to section 140 of the Act, which requires that registered health practitioners must notify the Registrar of the relevant regulatory

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[34] Watters' brief para 56.

authority the current postal address, current residential address, and where applicable, current work address. The section requires that the health practitioner must give prompt notice to the Registrar of any change and postal address, residential address and (if applicable) work address. Mr Watters also confirmed that the Board's APC application form reminds practitioners of the need to provide up to date contact details under section 140.

36. It was confirmed that the statement from the Board, and the above expectations, reflect what registered persons were taught and reminded about from time to time over many years. Mr Watters said that those acquiring diploma qualifications at Optometry School would have been instructed in those registration responsibilities.

37. This would have included proper recordkeeping, and the importance of maintaining a patient history, so that there is a record of the patient's general health and medical background, such as diabetes, vascular disease, family history of relevant conditions such as glaucoma and previous eye prescriptions, along with previous photographs of the eye and so on.[35] It is important for a practitioner to record these matters so that there is an accurate record, bearing in mind that sometimes patients have difficulty recalling health history.

Ms Buckingham's registration:

38. As already recorded, Ms Buckingham asserted that she sent a letter to the Board in approximately December 2009 to the effect that she was not going to undertake diagnostic qualifications, and that she would therefore not be registered after March 2010.[36]

39. Ms Buckingham did not produce a copy of this letter, and the Board has no record of it. The Registrar confirmed that the only persons in the Board's office were the

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[35] T140/19-23.
[36] Exhibit 18, document 4.

Registrar and Deputy Registrar. There was little opportunity for difficulties with regard to the receipt of correspondence occurring, and there was no evidence that there had ever been difficulties with receipt of mail.[37]

40. Furthermore, the Board kept writing letters to Ms Buckingham after December 2009, as summarised above. It will be recalled Ms Buckingham continued to practise until May 2011. There is no evidence that upon receiving further letters from the Board after December 2009 she responded by stating she did not consider herself to be registered; nor did she clarify her position in any other way. Nor is there any evidence of letters to her having been returned GNA (as happened after the liquidation).

41. There are also references in the evidence to suggest that what Ms Buckingham really intended was that she did not wish to renew her APC. It may well be the case that she had confused the holding of an APC with the fact of registration.

42. In all those circumstances, the Tribunal is satisfied that, at all material times, Ms Buckingham was a registered optometrist. A registered health practitioner still has ongoing professional obligations even if an APC is not held authorizing that person to practise as such.

The circumstances of the liquidation of Eyezone Ltd:

43. The evidence established that Eyezone had operated, over time, at least 10 practices.[38]

44. At the time of the liquidation, the operative branches were Birkenhead, Waiheke, Devonport, and Apollo Drive.

45. Mr Reynolds confirmed that what led to the failure of Eyezone ultimately was the financier for a property development project calling up Ms Buckingham's personal obligations and loans in relation to those projects, and at the same time calling up the

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[37] T58.
[38] Exhibit 18, document 26.

cross guarantee which Eyezone had given, guaranteeing her personal obligations.[39] The secured creditors included a bank, Medical Securities Ltd, S H Lock (NZ) Ltd, and Image Optical Group (NZ) Ltd. The liquidator stated that there was no finance company having security over the assets of the company, contrary to the assertions of Ms Buckingham. The financiers were the ASB Bank and Lock Finance.[40] The liquidator believed that the financiers never had control of the physical assets or tangible assets of the company, and that these were retained by Ms Buckingham, Mr Davis or Mr Algie.[41]

46. In August 2011, certain assets were assigned by Lock Finance to Mr Algie, namely stock, plant and equipment; patient records, however, were not so transferred.[42] The actual purchaser of these assets was Eyezone Auckland Ltd, a company set up by Mr Algie.[43] That company was incorporated prior to the liquidation.[44]

47. The creditors' petition in respect of Eyezone was filed in November 2010.[45] There was thus advance warning that the situation was moving towards liquidation if not otherwise resolved. As already recorded, the liquidator's agent found at the company's premises that fixtures and fittings had been removed in advance of the appointment of the liquidator.

48. It appears that in anticipation of the liquidation, steps were taken to clear the contents of the leased premises; and that records were also removed before the liquidator could access them. It may have been intended that an alternate optometrist's operation using the plant, equipment and records would be commenced.

49. A further contextual matter relates to Ms Buckingham's health. In several documents

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[39] Reynolds' brief para 8, and liquidator's report of 8 December 2011, Exhibit B to Mr Watters' brief.
[40] T19/11.
[41] T24/16.
[42] T24.
[43] T25/5.
[44] T28.
[45] T29.

placed by Ms Buckingham before the Tribunal, she stated that due to ill health following the bankruptcy and liquidation, her affairs had been managed by support people.[46] Mr Davis described her as being "*seriously unwell and … unable to attend to any work matters. Due to past associations with Eyezone, I had the background and authority to ensure no security or privacy was breached*".[47]

50. A further document (apparently prepared by a medical practitioner) was placed before the Tribunal by Ms Buckingham. It was a report prepared as a result of interviews in June and July 2011, and confirmed the nature of Ms Buckingham's reactions to the significant events which occurred in May 2011, as described above. Without having had the advantage of any direct evidence from Ms Buckingham other than these summaries, it appears Ms Buckingham found the circumstances described above as being traumatic, and causing her some stress.

51. Mr Watters advised the Tribunal that he thought a reasonable window for getting organised and recovering from such a trauma – especially one in respect of which there had been a lead up - would be three months.[48]

52. The Tribunal agrees that in the circumstances of this case, three months is the most that could be expected for a registered optometrist to put in place appropriate arrangements.

53. There were a number of fairly straight forward steps that could have been taken, within that timeframe, which will be referred to more fully below.

Particulars (a) and (b): failing to inform Eyezone patients and/or healthcare providers that Eyezone would no longer provide care; failing to provide patients with names and contact details of alternate providers from whom they could obtain care:

54. The clear evidence from the numerous patients who gave evidence to the Tribunal is

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[46] Exhibit 18, document 18.
[47] Exhibit 18, Document 20.
[48] T126.

that no letter or other personalised communication was sent to patients before or after the Eyezone liquidation.

55. Ms Buckingham[49] asserted that it was "*logistically not possible*" stating that would have been too costly. Without having the opportunity of receiving direct evidence from her on this and other related matters, the Tribunal considers that at the very least the following steps could have been undertaken:

55.1. A formal public notice could have been published – this could have informed patients and practitioners of the circumstances, and advised them of a reliable point of contact for obtaining records, and the agencies who could provide details of a substitute optometrist.

55.2. A notice could have been placed in NZ Optics (a publication which was referred to by both parties in the evidence as having circulation within the profession) advising of the cessation of Eyezone's business and providing details of a reliable point or points of contact. This would have informed practitioners of the situation so that when/if patients came to them, those practitioners would have been able to take appropriate steps to obtain relevant patient records and be advised as to an alternate practitioner.

55.3. The NZAO could have been informed promptly of Ms Buckingham's cessation of practice and asked for its assistance. It is reasonable to conclude that as a membership organisation it would have notified its members of its circumstances in one of its regular publications, so they could obtain records if appropriate.

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[49] Exhibit 11, document 26.

55.4. The Board could have been informed promptly of the cessation of practice by Ms Buckingham. The Board communicates with members of the profession regularly. Under sections 118(f), (h) and (m) of the Act, it would have been appropriate for the Board to consider providing advice to members of the profession of a reliable point of contact for the records.

55.5. The liquidator should have been informed where the records were, particularly when he was making it clear that he wished to recover them. Obviously some members of the public through the means of an online search and the gazetted advice of the appointment of a liquidator would contact him (as happened). He should have been placed in a position to advise where the records were. If he did not hold them, he would have been able to advise patients of a reliable point of contact for the records.

55.6. To the extent that Eyezone had a contact email list, patients could have been informed of the circumstances by mail. The Tribunal has no reliable evidence as to the extent that this in fact existed.

55.7. Finally, there could and should have been prompt efforts to explore the transfer of records to another optometrist – as happened, it seems, some 18 months after the liquidation. The witness from OPSM confirmed they would have uplifted records in 2011 if requested to do so at that stage.

56. It is likely that had there been proper communication from Ms Buckingham by any one of the above means, the situation of patients, the Board, and the profession simply having no idea as to the location of the records could have been avoided; and proper arrangements to assist patients to obtain continuity of care could have been made. The difficulties were significantly compounded by the evasive responses Ms Buckingham

gave – to the point that during the period of the charge she never once disclosed the physical location of the records, or indicated that she was willing to cooperate properly with relevant authorities such as the liquidator and/or the Board/PCC; nor did she reveal her whereabouts, which could have facilitated better communication.

57. Ms Buckingham asserted[50] that initiatives were undertaken and included:

57.1. Placing notices on premises: according to the evidence from patients, however:

57.1.1. In many instances, there were no notices at all.

57.1.2. Premises were taken over by other lessees and unsurprisingly no notices were maintained.

57.1.3. The notices that did exist were ineffective, because for example there was a referral to a phone number, where the phone line had been disconnected.

57.1.4. There was no evidence of any notice which would assist a patient in obtaining continuity of care.

57.2. That relevant information was given to "*neighbouring businesses*": however the evidence of patients was that the neighbouring premises did not have this information – for example the Apollo operation and the Birkenhead operation.[51] In any event this was hardly a reliable mechanism. It presumed that patients would go to the trouble of attending the premises from which Eyezone had formerly operated, discover that this was no longer the case, and then go to the trouble of making inquiries of nearby persons on the off chance that they might know what the situation was. Nor could a neighbouring business be expected to advise as to an alternate optometrist.

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[50] Exhibit 18, document 26.
[51] Evidence of Ms Rimmer and Ms Sutherland.

57.3. Ms Buckingham suggested that NZ Optics were appraised of the circumstances: but the June 2011 edition of that publication simply recorded the "*sudden closure of practices*", and went on to state that the freephone and other numbers were not being answered; that the editor had tried to make contact with Ms Buckingham by cellphone and "… *like others was greeted with an old message stating that the phone was lost on the Waiheke ferry the day previous*". In the July 2011 publication the circumstances relating to the liquidation were referred to, but again nothing was said as to what patients or other practitioners were supposed to do in respect of existing records. The Tribunal does not accept that Ms Buckingham caused this publication to provide information as to what patients/practitioners were supposed to do.[52]

57.4. Ms Buckingham also indicated "the receiver" (presumably the liquidator) was another point of contact. But as has already been made clear, he was no better informed as to the whereabouts of the records than anyone else, because Ms Buckingham had not provided relevant information to him. Nor could he be expected to advise as to options for an alternate optometrist.

57.5. Ms Buckingham on several occasions in the various documents she submitted suggested that the documents were in a "*secure unit of a finance company having security over the company assets*". As already determined, this was not correct; Mr Algie's company did not have a security interest registered over the assets of Eyezone and on the evidence provided to the Tribunal (by Ms Buckingham) as to the unit in question, it is not accepted that it was an appropriate and secure lockup. Nor was its whereabouts known. The unit was

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[52] Exhibit 21.

apparently a large warehouse in which there were also a number of vehicles in respect of which it is reasonable to infer that persons would be entering the warehouse to access the vehicles involved, and would thereby have access to the patient records. Nor was this a suitable means for advising patients as to an appropriate referral.

58. In summary, the Tribunal does not regard the "*initiatives*" referred to by Ms Buckingham as being anything like adequate. Ms Buckingham was secretive as to where the records were throughout the period of the charge; and oblique to the point of obstruction when she finally communicated with the Board/PCC in May 2012.

59. No proper explanation has been given as to why. Any health issues could no longer have been an excuse. It appears there had been some thought given to establishing another business.

60. Mr Watters concluded that the failure to take adequate steps demonstrated a complete disregard for the rights of Eyezone patients to the continuity of optometric care and/or to care that would not be compromised by the closure of her business. He was of the opinion that there was a significant departure from acceptable professional standards for a registered optometrist.

61. The Tribunal agrees, and has reached the same conclusion. It is satisfied that each of the first two particulars are established.

Particular (c): failure to take appropriate statutory and/or professional steps for the retention and/or storage of Eyezone patient notes:

62. The Tribunal has summarised above such information as the PCC has as to the whereabouts of the patient records over the period of the charge.

63. The warehouse, the address for which was never revealed, was inadequate in terms of the statutory obligations, for the reasons already indicated.[53]

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[53] Paragraph 57.5. above.

64. The person "*Billie Penman*" stated that he owned a warehouse which contained the documents.[54] It is unclear whether this is a further warehouse, or a reference to the warehouse of which photographs were provided by Ms Buckingham; or indeed who Mr Penman actually was.

65. Later, after the period of the charge, it appears the records were held in two locations by a registered optometrist; why the records were transferred from a warehouse to that optometrist was not explained.

66. In summary, such information as has been provided to the Tribunal as to where the records were over the period of the charge has not satisfied the Tribunal that the records were stored in a secure location where appropriate arrangements could be made for ready release to patients/other health professionals if required.

67. Ms Buckingham stated that the Board refused to take the files. This seems to be a reference to the indication given by the Registrar in her email of 22 June 2012, in which it was stated that it was not "*practical or appropriate for the Board to act as a go between on an ongoing basis*". It was only then that it was becoming apparent that there was a very substantial volume of patient records (40 boxes containing 20,000-30,000 records many of which were not in proper order) and that completely inappropriate arrangements had been made, notwithstanding the lapse of 12 months from the date of liquidation. The Board's response and its stance were entirely appropriate.

68. The Tribunal notes the statement in the commentary to the Health Information Privacy Code[55] to the effect that a professional body might take control of documents in a situation of a practitioner retiring. That might well be appropriate in some situations,

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[54] Affidavit of P M Huitema, para 17.
[55] Bundle p186.

but it cannot apply in all situations and was not an appropriate option in the present instance.

69. Ms Buckingham also asserted that no other optometrist would take the records but:

69.1. Ms Butcher, of OPSM, confirmed that the company would have taken the documents a year earlier, if approached.

69.2. There is no evidence of an adequate effort made to contact other optometrists. The only evidence provided to the Tribunal is of an attempt made to sell them to Mr Khayami, apparently a friend and/or former employee. However, payment for the records, if not achieved within a very short time, should not have been regarded as an objective.

70. Mr Watters expressed the view that failure on the part of Ms Buckingham in relation to patient records, containing as they do confidential medical information belonging to those patients amounted to a significant falling short of accepted standards for registered optometrists. It denied or potentially denied Eyezone patients the right to continuity of care and/or to care that would not be compromised after her business closed down.

71. The Tribunal agrees with this conclusion, and is satisfied that the particular is established.

Particular (d): failure to make appropriate arrangements to allow the transfer of Eyezone's patient notes and/or medical information on the request of patients:

72. According to Ms Buckingham, Mr Davies "*cleared phone messages*" (from what number is not known) until March 2012; and apparently some 460 records had gone out in the period May to October.[56]

73. However, the Tribunal received a significant volume of evidence to the effect that patients, who had a genuine and proper interest in obtaining their records, did not

[56] Exhibit 18, document 26.

know who to contact and could not obtain their records and/or medical information. Even as at the time of the hearing, some patients who gave evidence to the Tribunal had not recovered their records.

74. An aspect of this particular relates to the somewhat cynical statement made by Ms Buckingham in her letter to the Registrar of 5 May 2012 when she said:

> "*Any patient can go to another optometrist to have an eye exam. Records basically show a previous Rx. and any health issues. Any competent optometrist would pick up any abnormalities and health concerns from the past would have been referred by my Optometrist already. Records such as visual fields would obviously be helpful but considering many optometrists (still) do not have the equipment, it is hardly a threat to a person's sight. A majority of people who move to other optometrists never refer to past records.*"

75. This statement demonstrated a significant lack of insight for a registered optometrist. As Mr Watters stated in his evidence, in any optometry practice there are a subgroup of individuals who require more careful monitoring and co-management with Ophthalmology and general practitioners. Some of those individuals also have complicated prescriptions for both spectacles and/or contact lenses.

76. The Tribunal concludes that Ms Buckingham's attitude shows a complete disregard for the proper interests of patients.

77. It is a matter of concern that a registered optometrist would hold such a view, and would thus fail to make proper arrangements for patients/health professionals to uplift the relevant records.

78. Mr Watters considered this breach to amount to a significant departure from acceptable professional standards.

79. The Tribunal agrees with this conclusion.

80. The particular is established.

Particular (e): failure to notify Board of contact details, compromising the ability of Board to record the patient requests:

81. It is clear Ms Buckingham did not provide the Board with contact details or advise of her circumstances, after the liquidation. Ms Buckingham asserted that with some effort the Board could have tracked her down, and that it was the Board's responsibility to do so. Essentially she appeared to be asserting that the Board had not tried hard enough.

82. As to this:

82.1. As has already been made clear, there is a statutory responsibility on a registered health practitioner to advise the regulatory authority of the current whereabouts, under section 140.

82.2. The obligation to update information for the purposes of registration should have been very clear to Ms Buckingham. On multiple occasions up to the 2009/10 year she would have completed APC applications, which routinely referred to the need to ensure that up to date contact information was provided.

82.3. In fact, significant efforts to locate Ms Buckingham were undertaken by the Board. When email contact was established, proper cooperation was not forthcoming. Even now, her physical whereabouts is unknown.

82.4. The liquidator confirmed that Ms Buckingham had been "*notoriously difficult*" to contact; on dates unknown she had apparently been to Rarotonga and was then "*in retreat*"; according to some communications from her to the Tribunal she is now "*… in Australia*".

82.5. Ms Buckingham was the registered health practitioner. It was her obligation to communicate properly with the Board. Her assertion that she was not registered has not been established. The obligation to keep the Board properly informed continued.

83. Accordingly, the Tribunal is satisfied the particular is established.

Conclusion as to liability:

84. As already indicated, at the conclusion of the liability stage, the Tribunal announced its overall conclusion as to the charge and the particulars. It is appropriate to repeat the terms of Ruling 2:

> *"The Tribunal has considered all the evidence and submissions made very carefully. It will issue a full decision as to liability in due course. In summary, the Tribunal is satisfied that the PCC's evidence and submissions are to be preferred over those of Ms Buckingham.*
>
> *At this stage, however it indicates that it is satisfied that each of particulars (a)-(e) of the charge are established. It is further satisfied that the conduct described in each of those paragraphs amounts to gross negligence and malpractice under section 100(1)(a).*
>
> *It is satisfied that the conduct in each particular, if considered individually, is sufficiently serious in each instance as to warrant discipline and therefore constitute professional misconduct.*
>
> *It follows that it is satisfied that if the five particulars are considered cumulatively, then they clearly and obviously also are sufficiently serious as to warrant discipline and therefore constitute professional misconduct.*
>
> *It is appropriate to give a brief summary of the Tribunal's views as to the seriousness of the matter. The reason that it does so is because the factors about to be mentioned will have some implications for penalty.*
>
> *The Tribunal considers that the conduct which it has been required to review carried on for a very long period. A significant number of patients have been prejudiced by that conduct.*
>
> *Ms Buckingham has displayed no insight or understanding of the needs of the patients; that is particularly evident from document 26 of Exhibit 18 where the statement was made that "Any patient can go to another Optometrist to have an eye exam. Records basically show a previous Rx. and any health issues. Any competent Optometrist would pick up any abnormalities and any health concerns from the past would have been referred by my Optometrist already. Records such as visual fields would obviously be helpful, but considering many Optometrists (still) do not have this equipment, it is hardly a threat to a persons' sight. The majority of people who move to other optometrists never refer to past records." As Mr Watters said in his evidence, this statement was most unfortunate and of significant concern. Indeed, in the Tribunal's view, it is a somewhat callous statement and illustrates a serious attitude issue in relation to the matters that the Tribunal has had to consider.*

For those reasons, the matter is sufficiently serious as to warrant discipline. But the Tribunal is also of the view that a strong message needs also to be sent to the profession itself indicating that conduct of this kind is simply unacceptable - this is a further reason as to why discipline is warranted.

The charge of professional misconduct is accordingly established."

Penalty:

85. The Tribunal established a timetable for the filing and service of submissions as to penalty. The penalty issues were then able to be determined on the papers.

86. The PCC submitted:

86.1. A description of the applicable case law relating to penalty was given - this is reflected in the summary as to sentencing principles set out below.

86.2. The findings against Ms Buckingham were very serious. The Tribunal needed to send a message to Ms Buckingham and to other members of the optometry profession that the established conduct was very serious and would not be tolerated by the profession.

86.3. Ms Buckingham's name should be removed from the Register. In doing so the following aggravating factors should be taken into account:

86.3.1. The conduct described in all five particulars, as established, amounted to gross negligence and malpractice.

86.3.2. The Tribunal had been satisfied that the conduct if considered individually was sufficiently serious to warrant discipline and therefore constitute professional misconduct.

86.3.3. The Tribunal was satisfied that it followed that if the five particulars were considered cumulatively then they clearly and obviously also amounted to sufficiently serious conduct as to warrant discipline and therefore constitute professional misconduct.

86.3.4. Ruling No 2 made it clear the Tribunal viewed the matter very seriously.

86.3.5. The conduct which the Tribunal was required to review in this case carried on from May 2011 to July 2012, which was a very long period.

86.3.6. It was not until late September 2012 that Ms Buckingham advised the Registrar for the first time of the precise location of the patient records, which by that time had been transferred to OPSM.

86.3.7. The Tribunal had recorded in its Ruling No 2 that a significant number of patients were prejudiced by Ms Buckingham's conduct. The established misconduct related potentially to tens of thousands of patients.

86.3.8. The patients who gave evidence, many of whom had complex eye conditions including cataracts and glaucoma and/or complex prescriptions, described their desire to obtain their records so they could transfer to an alternate provider of optometric care efficiently and effectively; they also needed alternate providers. The established conduct demonstrated that Ms Buckingham's primary focus at the relevant times was not on protecting the need for patients' continuity of care. She had disregarded patient interest contrary to the relevant ethical standards and guidelines, without any proper explanation ever being given.

86.3.9. Ms Buckingham had displayed no insight or understanding of the needs of patients, and reference was made to the statement recorded by the Tribunal in Ruling No 2. Mr Watters had considered this

statement most unfortunate and of significant concern, and the Tribunal had to consider that "*somewhat callous*", and indicating "*a serious attitude issue*".

86.3.10. Ms Buckingham's response to the concerns raised had been completely inadequate. She had concealed the exact whereabouts of the records and how they were being retained and/or stored. This was in a case where she had been made aware that patients were requesting records and its supply of information was required to ensure continuity of care.

86.3.11. She had displayed total disrespect for her professional body throughout, particularly in failing to notify the Registrar of the Board as to her up to date contact details and in her responses as to the whereabouts of the records.

86.3.12. In her written responses she had denied responsibility or wrongdoing, and there was never any acceptance of the reality of any of the matters pleaded in the charge. Because of the Tribunal's findings there could be no trust and confidence in Ms Buckingham as a registered optometrist.

86.3.13. She had acted unprofessionally and brought the optometry profession into disrepute.

86.4. The PCC did not consider there were any mitigating factors in the case.

86.5. Cancellation was the only outcome which would send a sufficiently strong message to Ms Buckingham and to the optometry profession that the established conduct was completely unacceptable and would not be tolerated.

86.6. If the Tribunal considered it was in a position to impose a fine in this case then it should do so.

86.7. The Tribunal should also order censure to express its strong disapproval of the reviewed conduct.

87. The PCC also made submissions as to costs. It submitted:

87.1. In *Kaye v Auckland District Law Society* [1998] 1 NZLR 151, the Appellant was a bankrupt barrister who admitted four breaches of professional standards. The High Court held that section 87(2) of the Insolvency Act 1967 did not apply to law practitioners facing disciplinary charges before the Tribunal. Further, the obligation to pay costs was only incurred if and when the Tribunal decided the costs should be paid. The potential for a practitioner facing a Tribunal hearing to suffer an award of costs was not, therefore, a contingent liability to which section 87(1) of the Insolvency Act 1967 applied. Additionally, a claim for costs which might or might not be awarded against a bankrupt practitioner fell within section 98 of the Insolvency Act 1967, which empowers the Official Assignee to reject a proof of debt where the value of the debt could not be fairly estimated.

87.2. The High Court had noted that as a matter of principle, however, a Tribunal should take into account the practitioner's ability to pay when determining the quantum of costs.

87.3. The PCC submitted these principles should apply in the present case.

87.4. The issue of costs in disciplinary cases had been considered by Doogue J in *Cooray v Preliminary Proceedings Committee*,[57] the effect of which was that the Tribunal should take in a general way 50% of the total reasonable costs as

[57] Doogue J, 14 September 1995, AP23/94 Wellington Registry.

a guide, and either increase that sum where there are aggravating factors, or discount it where there are mitigating factors.

87.5. It was for the Tribunal in the present case to take into account such factors, and Ms Buckingham's bankruptcy and her particular financial circumstances.

87.6. As to quantum:

87.6.1. The costs and expenses of the PCC's inquiry was $10,811.64, excluding GST.

87.6.2. The cost of prosecuting the disciplinary charge was $29,584.71, excluding GST.

87.6.3. The Tribunal's estimate of costs was $28,007.03, excluding GST.

88. Ms Buckingham sent the Tribunal an email on 5 December 2012, which stated:

88.1. With regard to costs or fines, she was 60 years of age, had no assets, no money and any job she had would cover day to day living and nothing more.

88.2. From the beginning she had said she would not attend, and yet the Tribunal, she said, had implied she was possibly going to attend. She submitted that perhaps that made her look callous but her health had suffered hugely from the whole situation and she could not attend to defend herself in person even if she had the money to do so.

88.3. She had no means of legal advice, although she said she had been informed there were a lot of areas where an appeal would be quite realistic. Also the inactions of the PCC and Board had been commented on.

88.4. She did not accept that she was callous. Part of the reason as to why the Eyezone situation came about was because this was so. She reiterated the following statement:

> "*I would point out that wherever possible I have attempted to ensure all people could get records.*

> *While no longer legally obliged, I personally paid (from borrowed money from family) to have glasses finished and released from the lab) and personally delivered every job ordered at the time of liquidation. I gave one Devonport person cash back for a credit he had outstanding at that time.*
>
> *It is very regretful for me that some people will need to get prescriptions done again, at their cost but as with any company failure there is unfortunately some that get caught up in the situation.*"

88.5. She submitted that may be she sounded callous, but it was very hard to judge someone in this way. She referred to the saying "*know me before you judge me*".

88.6. Having read the PCC's submission she was astounded that there was so much reference to deregistration. She had been saying from December 2009 that she was not registered after 2010, and had been saying consistently that she did not want to be registered again. She felt the process was a waste of money, whilst advantaging lawyers.

Legal principles as to sentencing:

89. In determining the appropriate penalties, the Tribunal recognised the following functions of disciplinary proceedings:

89.1. To protect the public – this object is reinforced by section 3 of the HPCA Act;

89.2. 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;

89.3. to punish the practitioner in question, as referred to in *Dentice v The Valuers Registration Board* and *Patel v Complaints Assessment Committee* (CIV-2007-404-1818, 13 August 2007 Lang J);

89.4. 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).

90. 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.[58] 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 terms 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 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".*"

91. 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.[59] 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:*

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[58] Paras 77-82.

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

> *Such consequences can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to 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 Council 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.*"[60]

92. The Tribunal must weigh up aggravating factors and mitigating factors in order to give a proportionate response.

Penalty – discussion:

93. The Tribunal has considered all the material that has been submitted to it in relation to penalty very carefully.

94. Whilst it recognises that Ms Buckingham had health issues, as already explained in this decision that cannot be a valid excuse for the duration of the period to which the charge relates.

95. For the reasons contained in the PCC's submission as to penalty, as summarised above, the Tribunal is of the clear view that the aggravating factors far outweigh the mitigating factors raised by Ms Buckingham, and that the only responsible decision it can make is to cancel Ms Buckingham's registration.

96. Ms Buckingham has submitted that as from late 2009 she never wished to be anything other than not registered. That submission, however, overlooks the fact that she had not achieved this status, and it must have been clear to her that this was so. As a

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[60] *Patel v The Dentists Disciplinary Tribunal* HC AK AP77/02, 8 October 2002.

97. registered health practitioner, she continued to have professional obligations; and following the liquidation these were simply not respected or honoured; throughout this matter she has not unfortunately, displayed any insight as to the difficulties which had been caused to multiple patients. Fundamentally, there has been a lack of appreciation of the importance of patient records, and even an assertion which suggests that they were not important. Ms Buckingham has demonstrated no insight as to the effect of her actions on patients. For these reasons, it is not appropriate to consider any lesser option such as suspension.

98. The PCC raised the issue of imposing a fine. Even although the Tribunal has very limited financial data from Ms Buckingham, given an order of cancellation and given the costs position which is about to be considered, the Tribunal does not consider the imposition of a fine as appropriate on this occasion. Had the financial circumstances been different, it might well have determined otherwise, in order to reinforce the strong message which needs to be sent indicating that conduct of this kind over such a prolonged period is unacceptable.

99. As to censure, the Tribunal agrees that it needs to make it clear that conduct of the kind the Tribunal has been required to review is not acceptable. Ms Buckingham and the profession need to realise this.

Costs:

100. The Tribunal accepts the position with regard to the imposition of costs in respect of a bankrupt petitioner is accurately summarised in *Kaye v Auckland District Law Society*, supra. In short:

100.1. There is no legal impediment under the Insolvency Act to impose an order of costs.

100.2. The Tribunal, however, should take any financial information that has been conveyed to it, into account.

101. The Tribunal must also take the general principles in relation to costs into account, which may be summarised as follows:

> "*[34] So far as the costs orders were concerned, the Tribunal correctly addressed a number of authorities and principles. These included that professional groups should be expected to bear all the costs of a disciplinary regime and that members of the profession who appeared on disciplinary charges should make a proper contribution towards the cost of the inquiry and a hearing; that costs are not punitive; that the practitioner's means, if known, are to be considered; that a practitioner has a right to defend himself and should not be deterred by the risk of a costs order; and that in a general way 50% of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards. The [Tribunal] went on to consider High Court judgments where that standard had been applied subsequently, and where adjustments were made when GST had been wrongly added to costs orders.*"[61]

102. Taking all these principles into account, and the very limited financial information with which it has been provided, the Tribunal finds:

102.1. Had there not been the factor of apparent financial impecuniosity, the Tribunal would have taken the view that a starting point of 40% was appropriate, particularly having regard to the fact the PCC was put to full proof.

102.2. Taking into account such financial information as it has been given, that percentage is reduced to 35% of the costs outlined above, producing the following figures:

102.2.1. $17,500.00 exclusive of GST which is not payable, in respect of the costs and disbursements of the PCC.

102.2.2. $9,800.00 exclusive of GST which is not payable, in respect of the costs and disbursements of the Tribunal.

103. Under section 105(2) of the Act, the costs order will be a debt due to the Board. If the sums ordered are not paid within a reasonable time, it will be for the Board to determine whether it wishes to enforce the debt. That will be a matter where Ms

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[61] *Vatsyayann v PCC* [2012] NZHC 1138, per Preistley J.

Buckingham's cooperation may be relevant on such matters as to her whereabouts, and as to proper information relating to her financial circumstances, including income, expenditure, and any assets and liabilities that could inform the prudence of an offer made and/or the merits of enforceability.

Conclusion:

104. The charge of professional misconduct is established.

105. There is an order cancelling Ms Buckingham's registration, which is to take effect on Thursday 21 February 2013.

106. There is an order of censure. The Tribunal must express its strong disapproval of the conduct it has been required to review.

107. There is an order for costs as follows:

107.1. $17,500.00 exclusive of GST which is not payable, in respect of the costs and disbursements of the PCC.

107.2. $9,800.00 exclusive of GST which is not payable, in respect of the costs and disbursements of the Tribunal.

108. 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.

109. The Tribunal expresses its appreciation to those members of the public who assisted it by giving evidence; particularly helpful was the evidence of patients.

DATED at Wellington this 14th day of February 2013

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B A Corkill QC
Chairperson
Health Practitioners Disciplinary Tribunal