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Introduction

1. Holding a current annual practising certificate (APC) is an essential requirement for any health practitioner practising within his or her scope of practice.
2. It is the primary responsibility of the practitioner to ensure that a current APC has been issued before performing services within the description of that person's profession.
3. Although there may be some internal employment arrangements involving an employer for carrying out the mechanics of application for an APC or for payment of fees thereon, that does not relieve the health practitioner from that primary responsibility.
4. In this case Ms Lucke, a registered Dispensing Optician, had been issued with an APC but went on maternity leave from her employment some three weeks later. For the ensuing registration year Ms Lucke indicated she wished to remain on the register but did not wish to hold an APC. Ms Lucke did not practise for some months during that year but did resume limited practice later in the year without having renewed her APC. The work that she did for her employer included work as a registered Dispensing Optician. It was only after a work colleague made clear to Ms Lucke and her employer the necessity for an APC, that the appropriate application was made, several weeks after she had returned to work.
5. A Professional Conduct Committee (PCC) of the Optometrists and Dispensing Opticians Board (the Board) investigated the matter and laid a charge before the Tribunal under section 100(1)(d) of the Health Practitioners Competence Assurance Act 2003 (the HPCA Act). The Tribunal inquired into the matter.

The Charge and hearing

6. The Charge against Ms Lucke read as follows:

“During the period 17 November 2015 to 25 February 2016 (inclusive) when she was employed at Specsavers Optometrists Hastings [Ms Lucke] practised her profession of optical dispensing while not holding a current practising certificate.

The conduct alleged amounts to a breach of section 100(1)(d) of [the HPCA Act]”.

7. At the hearing the PCC was represented by counsel and Ms Lucke represented herself. An Agreed Summary of Facts signed by Ms Lucke was produced to the Tribunal. In that Agreed Summary of Facts Ms Lucke admitted that during the relevant period she practised as a Dispensing Optician while not holding a current APC. She also admitted that she breached section 100(1)(d) of the HPCA Act. A bundle of documents was produced by consent which contained a copy of the Charge, certain relevant information, documents concerning Ms Lucke’s registration and her APC, and a copy of the Standards of Ethical Conduct for Dispensing Opticians issued by the Board (Standards of Ethical Conduct).

Background

8. Ms Lucke has worked at Specsavers Optometrists Hastings (Specsavers Hastings) since 30 November 2009. She was originally employed as a fulltime Optical Assistant.
9. On 24 October 2014 Ms Lucke became registered as a Dispensing Optician and was issued by the Board with an APC for the practising year to 31 March 2015.
10. Some three weeks later, on 17 November 2014, Ms Lucke left Specsavers Hastings to go on maternity leave for the birth of her first child.
11. In the course of preparation for this, Ms Lucke asked Jennifer Dobson, retail director of Specsavers Hastings (Ms Dobson), what was the best course of action regarding her registration. Ms Dobson agreed to organise for her APC to be “*put on hold*” for the duration of her maternity leave.

12. On 30 March 2015 Ms Lucke completed a standard form provided by the Board concerning her registration for the following year including that she

“wished to remain on the Register and receive Board newsletters... [and did not] wish to hold an Annual Practising Certificate nor to have [her] Continued Professional Development points recorded... [and that she understood] that without those [she could not] lawfully practise in New Zealand”.

That form was signed by Ms Lucke with credit card information from a third person and was faxed by Ms Dobson to the Board. The payment was received and Ms Lucke’s practising status noted as *“non-practising”*.

13. Certain newsletters were sent by the Board to members, including Ms Lucke, which included reminders about renewal of APCs; but Ms Lucke did not read any of these as she was on maternity leave, she maintaining that she had little focus on work matters during that period.
14. On 17 November 2015 Ms Lucke returned to Specsavers Hastings to resume work after her 12 month period of maternity leave.
15. On 27 November 2015 Ms Lucke emailed the Board to advise she had returned to work after a one year maternity leave during which she had put her *“registration on hold”* and asking *“what [she needed] to do to get it current again”*.
16. On 30 November 2015 the Board replied advising the requirement to complete an APC1 form and return the original, with comments about the appropriate fee.
17. The Agreed Summary of Facts records that Ms Lucke *“maintains”* that she discussed the matter of her APC with her employer and the decision was made to wait until March 2016 when the APCs were due for renewal before applying to renew hers. (In the absence of any evidence to the contrary from the PCC, the Tribunal accepts that that did in fact occur).
18. The Agreed Summary of Facts also records that Ms Lucke’s employer paid her APC fees *“and saving that fee was a factor in the decision to delay applying for a renewal*

of her APC to 2016". Again the Agreed Summary of Facts is ambiguous as to whether this is what is "*maintained*" by Ms Lucke or in fact agreed between the parties, and in the absence of evidence to the contrary from the PCC, the Tribunal accepts that as a fact.

19. Between 17 November 2015 and 29 February 2016 Ms Lucke worked as a Dispensing Optician at Specsavers Hastings. She did not hold a current practising certificate during that period. Evidence was given about her role which included reception duties for 14 out of the 28 days, a dispensing role for 13 out of the 28 days and a pre-testing role for 1 of the 28 days. The Tribunal was not given an elaboration on how those divisions were made other than that this is what the PCC was advised by Ms Dobson.
20. The Agreed Summary of Facts also records that Ms Lucke "*maintains*" that her name badge that she wore at work in this period identified her as an Optical Assistant and that she thought that not calling herself a Dispensing Optician covered the situation of the working without an APC. Again, in the absence of evidence to the contrary from the PCC which was apparently given this allegation in its inquiry, the Tribunal is prepared to accept as fact that she wore the badge; but is not prepared to accept, in the absence of further evidence, her explanation on that.
21. In early February 2016 Ms Lorraine Helson (Ms Helson), also an employee at Specsavers Hastings, advised Ms Lucke that she should not be working without an APC.
22. On 5 February 2016 Ms Lucke made application to the Board for a current APC and the application was submitted by Ms Dobson on her behalf. In the covering letter Ms Dobson apologised for not having submitted the application before Ms Lucke had returned from maternity leave; and made no reference to the fact that Ms Lucke had been performing roles which fell under her scope of practice as a Dispensing Optician in the preceding months since 17 November 2015. In the application form, signed by

Ms Lucke, Ms Lucke ticked the entry reading “*I have not recently practised in New Zealand*” and in the “*Evidence of employment*” section there is no reference to her work at Specsavers Hastings between 17 November 2015, and the date of the form, 5 February 2016.

23. On 10 February 2016 Ms Lucke wrote “*To whom it may concern*” (apparently the Board) by way of explanation as to why her APC was not completed in time including:

“As soon as I was told that I was still on the register and needed to put in my APC application I immediately corrected my error and with the assistance of my employer sent in the forms”.

24. On 26 February 2016 the Board approved the application for renewal and issued an APC from that date to 31 March 2016.

The Charge – discussion

25. The PCC submitted:

25.1. That the essential elements of the Charge were proven;

25.2. That there was no requirement to prove any element of knowledge or intention on the part of the practitioner;

25.3. That the offence was an “*absolute*” one, not requiring proof of any deliberate intention to flout obligations or even knowledge.

The PCC submitted that the Charge was made out accordingly.

Ms Lucke did not dispute this and accepted that the Charge was proven.

26. In any charge before the Tribunal the onus is on the PCC to prove the charge. That onus is one of the balance of probabilities and the more serious the charge, the greater level of proof required.

27. In charges under section 100(1)(d) of the HPCA Act the Tribunal has on many occasions found that there needs to be proven:

27.1. That the practitioner was registered in the appropriate scope during the dates set out in the charge.

- 27.2. That the practitioner practised in that scope during those dates.
- 27.3. That the practitioner did not hold a current APC during those same dates.
28. The finding under section 100(1)(d) must be that the practitioner has “*practised her profession*”; that expression is defined in section 5 to mean “*to perform services that fall within the description of a health profession*”; a “*health profession*” is defined in that section to mean “*the practice of a profession in respect of which an authority is appointed by or under [the HPCA Act]*”; and “*authority*” is defined to mean “*a body corporate appointed ... responsible for the registration and oversight of practitioners of a particular health profession*”. To answer the question referred to in paragraph 27.2, therefore, it is necessary to find that Ms Lucke has performed services that fall within the Board’s authority.
29. The facts as agreed between the parties and accepted by the Tribunal include:
- 29.1. That Ms Lucke was registered as a Dispensing Optician during the period referred to in the Charge, 17 November 2015 to 25 February 2016.
- 29.2. That, although originally Ms Lucke did have an APC, this was not renewed after 31 March 2015 until 26 February 2016.
- 29.3. That Ms Lucke practised her profession of optical dispensing during that period in her employment at Specsavers Hastings.
30. The extent of that practice was somewhat obscure. The agreed summary referred to the advice from Ms Dobson that of the 28 days in question, Ms Lucke had a “*reception role*” for one-half of that time, 14 days. That reception role involved “*answering the telephone, booking appointments, greeting and checking in customers, inwards and outwards courier deliveries, managing customer question sheets, and operating the till*”. It is the Tribunal’s assessment that those activities as such were not work strictly as a Dispensing Optician. It is also the Tribunal’s assessment that this is likely not to be a strict division of daily numbers but rather an approximation of Ms Lucke’s

working role to about one-half of the time she spent on these activities and that there were not specific days during which Ms Lucke did nothing but reception work.

31. The advice from Ms Dobson was that for the further 13 of those 28 days Ms Lucke was involved in a “*dispensing role*” which was said to involve “*lens and frame selection, ordering glasses, booking fitting appointments, receipting payments, fitting and adjusting spectacles, checking and procuring collections, and frame repairs*”. The Tribunal was given details of the Scope of Practice for Optical Dispensing from the 5 November 2015 NZ Gazette reading as follows:

“Optical Dispensing describes the practice of the interpreting and dispensing of optical prescriptions by a person with a recognised qualification. This includes the giving of advice and instruction and the dispensing of spectacle lenses, spectacle frames (including their fitting), contact lenses, and any other optical device intended for correction of a defect of sight”.

It is the Tribunal’s assessment that at least some of, if not all of, the dispensing work referred to fell within this Scope of Practice. Again it is unclear whether there were 13 distinct days when this work was done by Ms Lucke or whether this was more of an assessment of the proportion of work done by her during the period in question; and the Tribunal assesses that it is likely to have been the latter.

32. The third category of work described by Ms Dobson occupied 1 of the 28 days (and again the Tribunal’s assessment is that this is a proportion rather than an actual day) was described as “*pre-testing role*” said to involve “*greeting and checking in customers auto-refraction and pre-tests, preparing paperwork, lifestyle questionnaires, booking appointments, visual fields, and phoning out appointment reminders*”. Some of these may fall outside the Scope of Practice as defined.
33. Essentially, the facts indicate to the Tribunal that Ms Lucke was employed by Specsavers Hastings as a Dispensing Optician and that, although some of the work during the period in question may not have been strictly within the Scope of Practice

for Optical Dispensing, she was working for Specsavers Hastings in that capacity doing work, including work within that Scope.

34. Although she was wearing a badge which describes her as an Optical Assistant (as she maintained to the PCC) and said that she thought not calling herself a Dispensing Optician covered the situation, the Tribunal finds that is not a sufficient or adequate explanation to address the question of what Ms Lucke was in fact doing. In answer to a question from the Tribunal, Ms Lucke said that, because practising as a Dispensing Optician required that she have a practising certificate, in the absence of such a certificate it was sufficient that she did not describe herself as such. This indicates to the Tribunal a measure of naivety and complete misunderstanding of the reasons behind the requirement for an APC; and tends to suggest that Ms Lucke was aware at the time that she should have an APC.
35. The Tribunal accordingly finds that the Charge is made out. That finding having been announced to the hearing, submissions were made on penalty.

Penalty - PCC submissions

36. The PCC submissions included:
- 36.1. That Ms Lucke's breach represented a failure to maintain an important professional obligation.
- 36.2. That registration brought with it privileges and responsibilities and the onus was on each individual practitioner to comply with requirements imposed by the regulatory regime.
- 36.3. Reference to certain cases and to the aggravating and mitigating factors said to apply.
- 36.4. That one key purpose to be achieved was to send a clear message to the profession that practising without a current practising certificate for any length of time is unacceptable in any circumstances and will not be tolerated.

36.5. That an APC is an important part of the principal purpose of the HPCA Act to protect the health and safety of the public, its being in effect a notice to the world that the practitioner is fit and competent to practise.

36.6. That there is a requirement in this case for general deterrence to the optical dispensing profession as well as a specific deterrence to the practitioner.

36.7. That the Tribunal should censure Ms Lucke and impose a fine “*in the order of \$1,000.00*”, and order costs.

Penalty – practitioner’s position

37. Ms Lucke gave evidence to the Tribunal which included certain submissions. She accepted the submissions that had been made on behalf of the PCC and said that her principal concern was any order for costs. In answer to questions from the Tribunal, Ms Lucke did not seek to lay blame with her employer and accepted that it was her responsibility.

Penalty – discussion

38. Having a current practising certificate at all times when a health practitioner is practising his or her profession is a basic and essential requirement. No person can practise in any health profession without having a current practising certificate (which in turn requires not only proper qualification but also that the practitioner meet other requirements of the responsible regulatory authority) and this is prohibited by the HPCA Act.

39. It is the requirement that every health practitioner before commencing practice in his or her profession obtain an APC; and that this be renewed regularly as required by the responsible authority. The process of renewal requires an assessment of various things, including questions of convictions in the courts in the meantime, compliance with continuing professional development requirements, and various other standards fixed by the responsible authority for the individual profession.

40. It is only by the regular review of all relevant matters that the responsible authority can be assured that the individual practitioner may continue properly to practise his or her profession, that standards will be maintained, and that the public will be protected. Those are primary requirements and purposes of the HPCA Act and the processes for achievement of that.
41. There can be no room for flexibility in compliance with those requirements.
42. In this case the responsible authority had sent clear reminders to practitioners, including the practitioner in question, about the need to comply with renewal of APCs in a timely fashion. The evidence before the Tribunal included newsletters that had been sent to Ms Lucke and the submission was that it was “*irresponsible*” of Ms Lucke not to have read those various newsletters which would have reminded her about the necessity for renewal of her APC before commencing practice again. The Tribunal does not accept in the circumstances that Ms Lucke was not in fact practising and had a young baby that it was necessarily “*irresponsible*” of her not to read newsletters; but at the same time it was not obligatory on the responsible authority to send the reminders and the principal obligation lay with Ms Lucke to renew her APC when she wished to recommence practice.
43. Ms Lucke had embarked on a career as a Dispensing Optician and it was only a short time after that that the personal circumstances of maternity leave took her from the profession for a period. Other responsibilities may have distracted her from professional matters, but when the time came for her to resume professional practice, the obligation was on Ms Lucke to do what was necessary to renew her APC.
44. The course taken by Ms Lucke included some consultation with her employer. The decision was made not to renew the APC until the commencement of the coming practice year some 4 months later. Ms Lucke does not blame her employer, but there does appear to the Tribunal to have been a measure of influence by the employer in

the course taken and the employer had the financial interest in the decision made in not having to make any payment of a practising fee for that period of time.

45. In fact it had been shortly after she started working again at Specsavers Hastings Ms Lucke inquired about an APC and was sent an Application for Renewal Form for completion; and it was after discussion with Ms Dobson that completion of the form was deferred. It was only some weeks later when a fellow employee advised that Ms Lucke should not be working without an APC that Ms Lucke made the application for renewal for the remainder of the practising year.

46. It is of some concern to the Tribunal that, in the application form that was completed, it was still incorrect in failing to refer to practice that had happened in the meantime.

In answer to questions on this by the Tribunal Ms Lucke said:

"I just don't think I read it properly. I didn't sort of comprehend what it sort of meant as such. I thought because I wasn't calling myself a dispensing optician, I wasn't, um, I was calling myself an optical assistant, that it wasn't sort of under the same parameters. I now understand that that is a mistake and that I was still on the Register, therefore I needed to have an APC.

CHAIR: *It does say, the form does at page 29 of the bundle "I have not recently practised in New Zealand".*

A. Yes.

CHAIR: *"I attach a covering letter detailing any continuing professional development" - it does say "I have not recently practised".*

A. Yes.

CHAIR: *Did you tick that, or did you turn your mind to what it was saying?*

A. I understand at the time, because I wasn't calling myself a dispensing optician I wasn't sort of practising as a dispensing optician. I now know that that's just silly.

Yeah, at that time that's what I understood.

47. The aggravating features in this case include:

47.1. That there was clear written advice to Ms Lucke at the time of registration and subsequently in newsletters to practitioners of the need to renew the APC for the practising year.

47.2. That despite having been advised on 30 November 2015 of the need to renew her APC, Ms Lucke failed to do this until 5 February 2016.

48. It was submitted for the PCC that the incorrectness in the application form when it was completed was an aggravating feature but the Tribunal does not categorise it as such. The practising without an APC had already occurred by then and that question goes more to accuracy of completion of forms and intention than the matters covered by the Charge.
49. The mitigating factors include:
- 49.1. That only a short period elapsed after registration before Ms Lucke sought to go on maternity leave and no longer required a current APC.
- 49.2. That Ms Lucke inquired promptly of the Board what she was required to do and was sent the appropriate form; but when she consulted with her employer about the correct process and took advice on what course was to be followed she was encouraged not to complete the form or incur the cost of it until the next practising year.
- 49.3. That Ms Lucke co-operated with the PCC during its investigation and during the prosecution before the Tribunal, including agreement to a Summary of Facts and Bundle of documents. That has enabled the prompt and cost-effective disposal of the Charge.
- 49.4. That Ms Lucke has accepted responsibility for her actions, has apologised for failure to renew her APC and has taken the responsibility for this rather than laying blame on her employer.
- 49.5. That the PCC considers that it is unlikely there is any risk that Ms Lucke will act in a similar way in the future.
50. It is helpful to consider other cases to achieve some measure of consistency; although each case must be decided on its own facts. The Tribunal was referred by the PCC to

many cases¹ involving different professionals. The outcomes were similar and were essentially censure and a fine within a range of some \$500.00 to \$2,500.00.

51. There appears to be something of a confusion in this profession about terminology and about the requirement for registration. There are “*Dispensing Opticians*”, “*Optometrists*”, “*Ophthalmology Assistants*”, and “*Optical Assistants*”. Some of the work done by them can be done by unlicensed practitioners. Registration, however, brings its advantages. There is recognition of the qualification. There is membership of a professional group and the collegiality and stimulation that this brings. To obtain these benefits of registration, however, a practitioner must comply with the standards set by the registration authority and must obtain and maintain a current APC.
52. It might be said that information provided by the Board, such as in its April 2015 newsletter is not strictly accurate in the context of Parental leave in the expression: “*When returning from parental leave during a practising year, contact the Board’s office for information on how to change your status back to ‘practising’*”. The sentence might more accurately commence: “***Before*** returning from parental leave...”.
53. Having taken all factors into account it is the Tribunal’s conclusion that there should be an order for censure and an order for payment of a fine of \$500.00.
54. The order for censure is not a formality but expresses the Tribunal’s disquiet about non-compliance with standards and the need to maintain those standards and protect the public.

¹ *Devine* 555/DTech13/232P; *Stokes* 556/DTech13/233; *van Vliet* 550DTech13/234; *Petelo* 569/Den13/249P; *Wolmarans* 554/DTech13/236P; *Dr E* 503/Den12/219P; *Dr S* 445/Den11/198P; *Henderson* 477/Phar12/210P and 12/213P; *Ms H* 256/Psy09/128P; *Williams* 632/Pod13/271P; and *Mrs R* 689/MLS14/294P

Costs

55. The PCC sought an order for contribution to costs, submitting that an order of some 25 - 30% would be reasonable. It referred to the costs having been reduced because of co-operation from Ms Lucke. To a degree, for there to be a credit given on the percentage of costs ordered by Ms Lucke might be seen to be a double credit for that co-operation. The PCC estimated its total costs at \$13,240.00. The Tribunal's costs were estimated at \$21,292.00. This is a total estimated cost of some \$34,532.00.
56. In any costs award the Tribunal must take into account that, to the extent that these are not met by Ms Lucke, they must be met by the profession as a whole. The starting point for a contribution to costs has traditionally been 50% but there are many factors which might alter that percentage.
57. The Tribunal was given evidence of Ms Lucke's means in this case. The Tribunal is mindful that this prosecution may have been brought to set an example to other Dispensing Opticians and practitioners in that field. Had those factors not been present the Tribunal would have ordered some 25 – 30% contribution to the total cost but in all the circumstances is of the view that the correct contribution be \$1,500.00.

Result and orders

58. The Tribunal finds the Charge made out under section 100(1)(d) of the HPCA Act.
59. Pursuant to section 101(1)(d) of the HPCA Act the Tribunal censures Ms Lucke.
60. Pursuant to section 101(1)(e) of the HPCA Act the Tribunal orders that Ms Lucke pay a fine of \$500.00.
61. Pursuant to section 101(1)(f) of the HPCA Act the Tribunal orders that Ms Lucke make a contribution to the costs of the PCC and the Tribunal totalling \$1,500.00 to be divided equally between the PCC and the Tribunal.

62. The Tribunal directs pursuant to section 157 of the HPCA Act that the Executive Officer publish a copy of this decision and a summary on the Tribunal's website. The Tribunal further directs the Executive Officer to request that a notice stating the effect of the Tribunal's decision be published on the Board's website and in the Board's Newsletter (or that at least in those publications there be a hypertext link to the Tribunal's website concerning this decision).

DATED at Auckland this 13th day of October 2016

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David M Carden
Chairperson
Health Practitioners Disciplinary Tribunal