IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-003245
[2014] NZHC 189

UNDER	Health Practitioners Competence Assurance Act 2003
BETWEEN	A PROFESSIONAL CONDUCT COMMITTEE OF THE DENTAL COUNCIL Appellant
AND	CHOONSIK MOON Respondent

Hearing: 24 October 2013

Appearances: J P Coates for Appellant
H Walkens QC and V J Knell for First Respondent
G J Thomas for Health Practitioners Disciplinary Tribunal

Judgment: 18 February 2014

JUDGMENT OF ELLIS J

This judgment was delivered by me on Tuesday 18 February at 3.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……..

Counsel/Solicitors:
J P Coates, Claro, Wellington
H Walkens QC, Barrister, Auckland
V J Knell, Barrister, Auckland
G J Thomas, Thomas Dewar, Sziranyi, Letts, Lower Hutt, Wellington

[1] This judgment relates principally to an appeal by a Professional Conduct Committee of the Dental Council against a penalty imposed by the Health Practitioners Disciplinary Tribunal (the Tribunal) in the case of Mr Choonsik Moon.[1] It relates also to a cross-appeal by Mr Moon.

[2] The appeal by the Professional Conduct Committee (the PCC) relates to the Tribunal's order suspending Mr Moon's registration as a dentist for a period of one year, with the suspension not to take effect at all if certain conditions are, in the meantime, satisfied. This was referred to by all counsel as a penalty of "suspended suspension". The PCC's principal contention is that a sentence of suspended suspension is ultra vires the Tribunal's powers under s 101 of the Health Practitioners Competence Assurance Act 2003 (the HPCAA).

[3] For his part, Mr Moon supports the "suspended suspension" but seeks by his cross-appeal to impugn the other penalties imposed upon him by the Tribunal, namely orders that he pay a fine of $5000 fine and costs in the same amount. He also objects to the conditions placed on his on practice to which I have referred in the preceding paragraph.

[4] I begin by setting out the background to Mr Moon's encounter with the Tribunal in a little more detail.

Facts

[5] The events giving rise to the disciplinary charge against Mr Moon involved a breach of certain safety obligations imposed by the Dental Council's code of practice for medical emergencies in dental practice (the Code). Essentially the obligation at issue was that all dental practices are to possess, on site, an emergency kit that meets certain specifications.

[6] It has never been disputed that in 2011, the dental practice that was then owned by Mr Moon did not have all the emergency equipment required by the Code,

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1 *Re Moon* HPDT 536/Den12/231P.20 March 2013.

such as an oxygen supply, resuscitation equipment or drugs. When the Dental Council became aware of this they wrote to Mr Moon.[2]

[7] It is also undisputed that Mr Moon was, at that time, suffering from a number of severe health-related, financial and other stresses. These appear to have caused a kind of temporary mental paralysis on his part. Accordingly, although remedying the deficiencies identified by the Council was a straightforward matter he neither responded to, nor acted upon, the 2011 letter.

[8] As a result, on 10 April 2012, the Council advised Mr Moon by letter that it proposed to suspend his registration because of his continued failure to comply with the Code. The letter recorded the Council's view that his:

> ... failure to comply with the code of practice for medical emergencies in dental practice was serious and unsatisfactory, potentially impacting on the health and safety of members of the public using your services.

[9] But Mr Moon again did nothing. So, on 24 April 2012, the Dental Council wrote him a letter stating that, as from 26 April, his registration was suspended pursuant to s 43(1)(b) of the HPCAA. The Council told Mr Moon that the suspension would remain in effect until he had become fully compliant with the Code.

[10] A few days later, on 4 May 2012 a Dental Council agent, Mr East, visited Mr Moon's Henderson practice. Mr East asked the receptionist if he could speak with Mr Moon and was told that he was busy with a patient. Mr East deduced that Mr Moon was continuing to practise dentistry notwithstanding his suspension.

[11] What seems equally clear, however, is that by the date of Mr East's visit Mr Moon had, in fact, rectified the issues identified by the Council and had obtained the necessary emergency equipment. Indeed, the Council gave him the "all clear" in that regard on 8 May 2012.

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[2] As I understand it, the letter was written pursuant to the Council's powers to review competence under ss 36 and 37 of the HPCAA.

[12] Notwithstanding this "all clear", the Council appointed a PCC to investigate what had occurred. In due course, the PCC charged Mr Moon with practising while suspended. Necessarily, that charge related to the 12 day period between 26 April and 8 May 2012 referred to above.

[13] Mr Moon subsequently (by letter dated 11 October 2012) accepted that he had received the Dental Council's letter suspending his registration and also that, while he was aware that he was not permitted to practise while suspended, he had done so.

Proceedings in the Tribunal

[14] The charge was heard by the Tribunal in Auckland on 20 March 2013. Mr Moon was represented by counsel and personally attended the hearing.

[15] The Tribunal found the charge made out and held that Mr Moon's conduct amounted to professional misconduct. Specifically, the Tribunal found that it was both malpractice and negligence for Mr Moon to practise while suspended, and that it brought discredit to the profession for him to have done so. There has been no challenge to these aspects of the Tribunal's decision.

[16] As far as penalty is concerned, the Tribunal recorded the PCC's submission that Mr Moon be suspended for between 12 and 18 months. In the course of its detailed reasoning the Tribunal emphasised the importance of "standing behind" the Dental Council in the performance of its statutory powers and functions. Its conclusions were expressed in the following terms:

> 64. The Tribunal considered whether there should be suspension of Dr Moon from practice. This is a case which would normally have been appropriate for suspension. There are the aggravating and mitigating circumstances mentioned above. The offending is not such that on its own protection of the public and setting standards for the profession would be sufficiently dealt with simply by conditions, censure and fine.
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> 65. There needs to be a strong message sent to Dr Moon, the Dental Council, the dental profession, and the public, that the Tribunal expects that any suspension order made by the Dental Council or any other professional body empowered to impose that must be

> honoured. No matter what the merits may be and no matter whether there has been remediation of the matters at issue, the fact remains that a suspension must apply and must be respected until it has been withdrawn.
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> 66. Regard must be had to the other cases mentioned and the general principles of imposing penalty. The Tribunal is of the view that the severity of this case would warrant an order for suspension for 12 months.

[17] The Tribunal then went on to consider the submission made on behalf of Mr Moon that in the event a suspension order was made, there should be a further order deferring (possibly forever) the commencement of the suspension. After considering other cases[3] in which such a "suspended suspension" had been ordered the Tribunal said:

> 69. The Tribunal has considered those submissions carefully and is of the view that the operation of the 12 month suspension should be deferred for a period of 24 months from the date of this decision on the basis that, if the conditions referred to below are not met during that time, the matter will revert to the Tribunal for operation of the suspension; but on the further basis that, if those conditions are met during the 24 month period, the suspension will not apply.
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> 70. The reasons for this are because this will enable Dr Moon to continue in practice for the various reasons canvassed by counsel on his behalf and in the public interests identified in those submissions. It will ensure that during that time Dr Moon takes time to reflect on his practice and on the requirements that he has to comply with the law and the ethics of his profession and in particular prescribed recertification programmes under section 41 of the HPCA Act, orders of the Dental Council and the requirements of Codes of Practice on which any suspension order might be based. It will allow a period of time for Dr Moon to comply with the conditions referred to below as to completion of appropriate courses of ethics and for the mentoring period for 24 months to ensure compliance with the law, Codes of Practice, regulations and ethics of the profession as mentioned.
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> 71. During that time he will have to ensure that his practice is conducted carefully and thoroughly in accordance with the law, regulations and the ethics of his profession. He must know that any failure to do so, which may result in complaint or other disciplinary or other process, could result in a reference of this matter by the PCC back to the Tribunal for the suspension ordered to take effect for 12 months.
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> 72. The Tribunal considers that, combined with the conditions, censure and fine referred to below, deferring the suspension in this way will achieve the right balance between the competing interests of

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[3] These cases are addressed later in this judgment.

protecting the public and maintaining standards on the one hand and sending the right messages to the Dental Council, the profession and the public on the other.

73. The Tribunal does not consider that there should be an order for suspension on its own but rather tied in with the deferment process.

74. This is a case where Dr Moon should be censured. This is not a formality but is a mark of the Tribunal's and the profession's disapproval of the performance of professional duties by Dr Moon and will be a "*black mark*" against him now.

75. The Tribunal is also of the view that a fine should be imposed. This must reflect the Tribunal's concerns about the offence and the balance between aggravating and mitigating factors referred to above and the Tribunal has decided that there should be a fine of $5,000.00.

76. The Tribunal considers that the matter must then be governed by conditions on Dr Moon's practice. Because Dr Moon can continue to practise those conditions can operate from the date of this decision. The Tribunal is of the view that this should be for the period of two years.

77. The aspects that need to be addressed by the conditions are an appropriate understanding and learning of the applicable ethics of the dental profession and guidance through a mentoring process to ensure application of those ethics to the practice that Dr Moon has.

78. The conditions which the Tribunal orders are therefore that for a period of two years from the date of this decision:

    78.1 Dr Moon attend at his expense such course or courses of training in the ethics of the dental profession as stipulated by the Dental Council and satisfy the Dental Council that he has attended and adequately passed those course.

    78.2 That Dr Moon be mentored, at his own expense, by a dental practitioner approved by the Dental Council to ensure that Dr Moon complies with all applicable laws, Codes of Practice, and ethical standards, with the mentor reporting to the Dental Council at such intervals as is directed by the Dental Council and that there be no adverse aspects of those reports.

[18] As I have said, the PCC has appealed the "suspended suspension" order on the grounds that it is not permitted by the HPCAA.

Appellate approach

[19] The right of appeal to this Court is conferred by s 109 of the HPCAA. Subsections (3) and (4) make it clear that the Court may confirm, reverse or modify the decision appealed against but may not review any decision or order against which no appeal has been brought: s 109(3) and (4).

[20] Because (as s 109(2) provides) the appeal is to be by way of rehearing, the appellate approach would prima facie appear to be governed by *Austin, Nichols & Co Inc v Stichting Lodestar*.[4] That position is, however, slightly less clear as a result of differing analyses by this Court in relation to appeals against penalty decisions of the kind presently at issue. This difference of view has most recently been considered by a Full Court of three (Panckhurst, Chisholm, Whata JJ) in *Sisson v the Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society*.[5] There, the Court said:

> [14] Recent cases show a divergence of view concerning the correct appellate approach in disciplinary cases. Under both the Law Practitioners Act 1982 and the Lawyers and Conveyancers Act 2006, appeals against any order or decision of a disciplinary tribunal are by way of rehearing; s 118(2) and s 253(3)(a), respectively. In *Bhanabhai v Auckland District Law Society*, a full Court (Priestley, Heath and Winkelmann JJ) favoured a divided approach whereby professional misconduct findings were to be considered afresh, but penalty decisions by reference to the principles that govern the exercise of a discretion. In *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee (2))*, Cooper J concluded that penalty decisions involved an evaluative exercise, were not discretionary in nature, and that the appellate Court should, therefore, form its own view. But, in *Auckland Standards Committee (1) v Fendall*, Wylie J preferred the approach adopted in *Bhanabhai*. Most recently, in *Hart v Auckland Standards Committee (1) of New Zealand Law Society*, a Full Court (Winkelmann, Lang JJ) concluded that, credibility determinations and matters involving technical expertise aside, an appellate Court must come to its own view on the merits of misconduct and penalty decisions without deference to the views of the Tribunal.
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> [15] This division of opinion flows from the difficulty in applying *Austin, Nichols & Co Inc v Stichting Lodestar* in the present context. We think it unnecessary to record the reasons advanced in support of the various viewpoints. We prefer the view that both misconduct findings, and the resulting penalty decision, require an assessment of fact and degree and entail a value judgment; such that it is incumbent upon the appellate Court to

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4 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141.

5 *Sisson v The Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society* [2013] NZHC 349, [2013] NZAR 416 (footnotes omitted).

> reach its own view on both aspects. We found the decision of the Supreme Court in *Kacem v Bashir* helpful in arriving at this conclusion.

[21] I respectfully intend to adopt the same approach.

The HPCAA

[22] As is tolerably well known, the HPCAA represented a consolidation of the previously separate statutes regulating each of the various health professions, including (inter alia) doctors, nurses, pharmacists and dentists.

[23] Section 3(1) of the Act declares that the statute's governing principle is:

> ... to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.

[24] Section 3 goes on to state that the Act is intended to achieve this purpose by providing (inter alia) a consistent accountability regime for all health professionals.

[25] The Act is divided into seven parts and its general scheme is outlined in s 4. Part 4 is concerned with discipline. I refer to the provisions of that part which are of particular relevance to this case below.

[26] First, s 68(3) states that where an authority (such as the Dental Council) has information in its possession that raises a question about the appropriateness of the conduct of or the safety of the practice of a health practitioner, it may refer that question to a PCC. Section 71 makes it clear that an authority (such as the Dental Council) may from time to time appoint a PCC "in relation to a case or cases of a particular class" and sets out how a PCC may be constituted. In addition:

(a) section 72 states that a PCC may regulate its own procedure;

(b) investigative and information gathering powers are bestowed on PCCs by ss 73 and 76 – 78;

(c) section 80 provides that, after completing an investigation, a PCC may (inter alia) determine that a charge should be brought before the Tribunal against the practitioner concerned;

(d) section 91 provides that a PCC may lay (subs (1)) and prosecute (subs (3)) a charge against a practitioner before the Tribunal. Subsection (2) says that when a PCC does so it must include a statement to the effect that it has reason to believe that grounds exist which entitle the Tribunal to exercise its powers under s 100.

[27] In turn, s 100 provides that the Tribunal (whose constitution and procedure are dealt with in ss 91 – 99) may make "any 1 or more" of the penalty orders under s 101 if, after conducting a hearing on a charge, it makes one or more findings that there are grounds for discipline as defined in s 100(1). Importantly, the last of the stipulated grounds for discipline is the breach by a practitioner of an order of the Tribunal made under s 101: see s 100(1)-(g).

[28] Section 101(1) provides that:

> (1) In any case to which section 100 applies, the Tribunal may -
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> (a) order that the registration of the health practitioner be cancelled:
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> (b) order that the registration of the health practitioner be suspended for a period not exceeding 3 years:
>
> (c) order that the health practitioner may, after commencing practice following the date of the order, for a period not exceeding 3 years, practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise that are specified in the order:
>
> (d) order that the health practitioner be censured:
>
> (e) subject to subsections (2) and (3), order that the health practitioner pay a fine not exceeding $30,000:
>
> (f) order that the health practitioner pay part or all of the costs and expenses of and incidental to any or all of the following:
>
> (i) …

(ii) any inquiry made by a professional conduct committee in relation to the subject matter of the charge:

(iii) the prosecution of the charge by the Director of Proceedings or a professional conduct committee, as the case may be:

(iv) the hearing by the Tribunal.

[29] Also of some relevance is s 102, which provides that:

> (1) When making an order that the registration of a health practitioner be cancelled, the Tribunal may impose 1 or more conditions that he or she must satisfy before he or she may apply for registration again.

Does the Tribunal have the power to suspend an order of suspension?

[30] This Court has, on previous occasions, noted the inelegant wording of s 101 and of the power to impose conditions under s 101(1)(c) in particular: *J v Director of Proceedings*.[6] The specific issue in that case was expressed by Baragwanath J as follows:[7]

> Does "the order" in line 2 relate to the order of suspension in the preceding subclause (b) and that of cancellation of registration under subclause (a) (which s 102 recognises may be followed by application for restoration to the register), or rather to the order imposing conditions with which subclause (c) begins?

[31] While noting that the Tribunal had on several occasions preferred the former construction, the learned Judge opted for the latter. He said:[8]

> ... But I prefer the alternative construction that "after commencing practice following the date of the order" is to be read, less than pedantically, as "recommencing".

[32] What Baragwanath J did not address in *J*, however, was whether s 101(1)(c) also empowers the Tribunal to impose conditions on practice independent of any deregistration or suspension order. In such cases there would, of course, be no "recommencement" of practice, but rather a continuation of it, subject to conditions.

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6 *J v Director of Proceedings* HC Auckland CIV-2006-404-2188, 17 October 2006.
7 At [53].
8 At [61].

[33] Because it will become relevant later in this judgment I simply record my view that s 101(1)(c) does authorise the independent imposition of conditions on practice. That broad interpretation is, in my view, consistent with the wording of s 100, legislative history,[9] with common sense and with other decisions of this Court.[10]

[34] Adopting a broad interpretation of s 101(1)(c) does not, however, answer the critical issue in the present case. That question is whether the Tribunal can:

(a) impose conditions on practice; *and*

(b) make a suspension order whose commencement is not only deferred, but made contingent upon, compliance with those conditions.

[35] I have formed the view that the answer to this question is "no". Because that conclusion is at odds with the approach taken by the Tribunal in a number of cases over a considerable period of time, I propose to set out my reasons in some detail below.

[36] First, s 101(1) contains no express power to suspend the operation of any of the penalties to which it refers.

[37] Secondly, I do not consider that the power to impose conditions on *practice* under s 101(1)(c) can reasonably be interpreted as authorising the Tribunal to make the operation of any of the other, discrete, penalties referred to in subs (1) contingent. Nor do I consider that the Tribunal's ability to regulate its own procedure by virtue of clause 5 of the First Schedule to the HPCAA empowers it to do so. In my view

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9 The wording of both 110(1)(i) of the Medical Practitioners Act 1995 and s 55 of the Dental Act 1988 was much clearer in this respect. For example the order that could be made under the latter provision was

> ...that the practitioner may, for a period not exceeding 3 years, practice only subject to such conditions as to employment, supervision, or otherwise as the Tribunal may specify in that order.

As Baragwanath J noted in *J* (above n 7, at [55]) some of the other statutes regulating the various health professions did not confer upon the relevant disciplinary body the power to impose conditions on practice at all.

10 See in particular *Vohora* v *A Professional Conduct Committee* [2012] NZHC 1013.

that power relates to the internal procedure followed by the Tribunal in relation to the hearing of disciplinary charges, not to the form of penalty it may impose.

[38] Thirdly, it seems to me that the imposition of conditions on practice *followed by* (possible) suspension effectively reverses the temporal order that appears to be contemplated by subs (1). As Baragwanath J noted in *J* the wording of para (c) suggests that an order for conditions on practice will become effective *following* a deregistration or cancellation order.

[39] Lastly, it seems to me the combined operation of ss 100 and 101 offers a more straightforward and preferable route to what is a very similar outcome. Put simply, the Tribunal is (as I have found above) empowered under s 101(1)(c) to impose conditions on practice, independently and without prior suspension. If such an order is made, but later breached by the practitioner, then s 100(1)(g) makes it clear that a further disciplinary offence has been committed. On the bringing of a charge for such a breach, the Tribunal then has the option to suspend, in an appropriate case.[11]

[40] Adoption of the process to which I have just referred also avoids the problems raised by Mr Coates for the PCC, namely that the HCPAA does not contemplate that a PCC should have an ongoing monitoring function, as appears to have been assumed by the Tribunal in Mr Moon's case.[12] Indeed it appears strongly arguable that a PCC that may be charged with investigating and prosecuting a particular charge is functus officio once those tasks are at an end.

[41] In my view a purposive interpretative approach further supports the above conclusions. In particular, it has long been recognised that the Tribunal's power to

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11 It is possibly significant that there was no equivalent to s 100(1)(g) under the earlier legislation, when the Tribunal's predecessors first began to impose "suspended suspensions".

12 Paragraph [71] of the Tribunal's decision (quoted at [16] above) seems to contemplate that the PCC will have some form of continued involvement with Mr Moon. I note that in some of the earlier cases (see in particular *Payne*, below n 18) leave has been expressly reserved to the PCC concerned to apply further to the Tribunal in the event of non-compliance with conditions or for "any other disciplinary reason".

suspend is a measure that is concerned principally with ensuring public safety.[13] To make a suspension order whose commencement is not only deferred (in Mr Moon's case, for two years) but which may never come into effect appears to me utterly to undermine that purpose. The public is either at risk to an extent that warrants protection through an order of (immediate) suspension, or it is not.

[42] As I have noted above, however, a penalty of "suspended suspension" is far from unprecedented in terms of the Tribunal's jurisprudence. Indeed, it seems that the Tribunal's practice of imposing such penalties predates the HPCAA itself.

[43] The first example to which I was referred was a decision by the Medical Practitioners Disciplinary Tribunal in *Re Gray*.[14] In that case, the Tribunal suspended Dr Gray for 6 months but said:

> ... because Dr Gray has practised for three and a half years since his offending occurred, it is the Tribunal's view that it would be artificial to now suspend him from practice. But, the Tribunal is also concerned that if it does not order a period of suspension the Medical Council's unequivocal policy on sexual misconduct/abuse in the professional relationship may be undermined.
>
> **Accordingly the Tribunal also orders that the period of suspension should itself be suspended provided that no other charge involving allegations of sexual misconduct is laid against Dr Gray during a period not exceeding three years.**
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> **In the event that any such charge is laid in the Tribunal then Dr Gray's registration should forthwith be suspended for not less than six months, such period to commence immediately upon receipt of the charge by the Tribunal, or any successor tribunal.**
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> This period of suspension is to take effect notwithstanding any other powers the Tribunal, or its successor, may have to suspend Dr Gray's registration in the context of any new charge as this suspension relates solely to this present charge, and is made pursuant to the powers vested in the Tribunal under section 110(1)(b) and clause 5 of the First Schedule to the Medical Practitioners Act 1995.[15]

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13 *Professional Conduct Committee v Martin* HC Wellington CIV-2006-485-1461, 27 February 2007 at [23]; *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].

14 *Re Gray* MPDT 182/01/72D, 22 November 2001 at 8-9 (emphasis added).

15 Section 110(1)(b) of the Medical Practitioners Act 1955 empowered the Medical Practitioners Disciplinary Tribunal to suspend a practitioner for a maximum of 12 months and clause 5 of the First Schedule permitted it to regulate its own procedure. I have already indicated that I do not accept that either of these provisions authorise suspended suspensions.

[44] Similar decisions made under the 2003 Act include *Re Janssen,*[16] *Re Marchand,*[17] *Re Payne,*[18] *Re Dr E,*[19] *Re Dr Chebbi*[20] and *Re Vaileba*.[21] I will refer to aspects of these decisions later, below.

[45] The above passage from *Gray* suggests that it was decision that was made in response to a particular set of circumstances where an order of suspension was (quite understandably) regarded as "artificial".[22] It perhaps seems unlikely that the Medical Practitioners Disciplinary Tribunal considered it would become a precedent of wider application. It also seems to me to be of some relevance that, at the time of the *Gray* decision, the criminal courts had the express power to impose a "suspended sentence" in appropriate circumstances. Section 21A of the Criminal Justice Act 1985 then provided:

> **21A Suspended sentences**
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> (1) Where a court sentences an offender to a term of imprisonment of not less than 6 months and not more than 2 years, it may make an order suspending the sentence for a period not exceeding 2 years from the date of the order.
>
> (2) A court shall not make an order under subsection (1) of this section if it would not have sentenced the offender to imprisonment in the absence of power to make an order suspending the sentence.
>
> (3) A court making an order under subsection (1) of this section shall specify a suspended sentence that corresponds in length to the sentence of imprisonment that it would have imposed in the absence of power to make an order suspending the sentence.
>
> (4) Where an offender who is subject to a suspended sentence is convicted of a further offence punishable by imprisonment, the court sentencing the offender for the further offence shall order that the suspended sentence shall take effect for the period specified in the order made under subsection (1) of this section, unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the circumstances of any further offending.

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16 *Re Janssen* HPDT 441/DH11/190P, 20 March 2012.
17 *Re Marchand* HPDT 280/Med09/133P, 5 March 2010.
18 *Re Payne* HPDT 405/Den11/184P, 11 October 2011.
19 *Re Dr E* HPDT 345/Med10/155P, 29 November 2010.
20 *Re Dr Chebbi* HPDT 541/Med12/223D, 23 May 2013.
21 *Re Vaileba* HPDT 560/Mrt13/235P, 29 July 2013.
22 Notwithstanding those somewhat unusual circumstances I nonetheless consider that the decision was wrong for all the reasons canvassed in this judgment.

(5) Where a court decides under subsection (4) that a suspended sentence is not to take effect for the period specified in the order, then, subject to this Act, the court must either—

(a) Order that the suspended sentence—

(i) Take effect with the substitution of a lesser term of imprisonment; or

(ii) Be cancelled and replaced by any non-custodial sentence that could have been imposed on the offender at the time when the offender was convicted of the offence for which the suspended sentence was imposed; or

(iii) Be cancelled; or

(b) Decline to make any order referred to in paragraph (a) concerning the suspended sentence.

(6) Where, pursuant to subsection (4) or subsection (5) of this section, a court orders that the suspended sentence shall take effect, then, notwithstanding section 78 of this Act but subject to any direction made under section 73(1) of this Act, the sentence shall commence on the date of the making of that order.

(7) Where a court sentences an offender for a further offence without taking into account the existence of a suspended sentence, the Solicitor-General or any member of the Police or a Crown Prosecutor may, before the expiry of the suspended sentence, apply to the court for the making of an order referred to in subsection (4) of this section.

(8) On any application under subsection (7) of this section, the court may issue a summons requiring the offender to appear, or issue a warrant to arrest the offender and bring him or her before the court, at the time and place appointed, for the purpose of being dealt with in accordance with subsection (4) of this section and that subsection shall have effect in all respects notwithstanding that the offender has already been sentenced for the further offence.

(9) Where a court imposes a suspended sentence for one offence, the court may also impose suspended sentences under subsection (1) of this section for other offences for which the offender has appeared for sentence, so long as the total period of all suspended sentences to which the offender is subject does not exceed 2 years from the date of commencement of the first such sentence; and, where 2 or more suspended sentences are imposed on an offender, the sentences shall be served concurrently.

(10) For the purposes of this section, a conviction includes a conviction entered in the Youth Court where the offender is referred to the District Court for sentencing pursuant to section 283(o) of the Children, Young Persons, and Their Families Act 1989.

[46] Section 21A was, however, repealed at the time the Sentencing Act was enacted in 2002 and there is now no power to suspend, strictly so-called.[23]

[47] The reason that I have set out s 21A in full, is to illustrate the point that, when Parliament has granted the Courts powers to suspend or defer sentences, it has done so on detailed and carefully thought out terms. For example, under s 21A:

(a) A court could only suspend a sentence where it would otherwise have imposed a sentence of imprisonment;

(b) There is an express relationship between the period of suspension and the period of imprisonment that would otherwise be imposed;

(c) Although an offender becomes liable to serve the sentence of imprisonment that has been suspended if there is further offending within the suspension period, that is not automatic. The Court is required to consider the justice of the particular matter in light of all the circumstances that have arisen since the imposition of the suspended sentence and the circumstances of the subsequent offending.

(d) If a Court decides not to activate the suspended sentence for the period specified in the suspension order, the section prescribes in some detail the options that are open to the Court.

[48] It goes without saying that the HPCAA contains no such guidance. The Tribunal has effectively been required to make it up as it goes along. The dangers associated with it doing so are obvious. Even with the best will in the world, imposing penalties in the absence of clear statutory authority runs the risk of decisions that are arbitrary, inconsistent and unworkable.

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[23] The closest equivalent that can be found in the Sentencing Act is s 110, which empowers a sentencing court to decline to impose any punitive sentence but instead to order that the offender is to appear for sentence if called on to do so within a period that does not exceed one year.

[49] Significantly, a number of these risks have, in my view, been realised in some of the Tribunal's decisions to which I have already referred. For example:

(a) The decisions evince no obvious or consistent relationship between the period of suspension and the period for which the suspension has been suspended;[24]

(b) There is a lack of clarity in and/or consistency between the decisions in terms of who is required to monitor compliance with the conditions upon which the suspension is predicated;[25]

(c) Some of the decisions say that the suspension will be activated automatically on the occurrence of certain events, while others say that on the occurrence of those events the matter is to be brought back before the Tribunal;[26]

(d) Some decisions say that suspension will be activated by the practitioners failure to perform conditions that are separately imposed, whereas others say that it will be activated (or potentially activated) -

(i) upon receipt of a further *complaint* about the practitioner concerned, without requiring that complaint first to be prosecuted and proved;[27]

(ii) upon the occurrence of a "disciplinary reason" or "other disciplinary event", without defining those terms.[28]

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[24] In *Gray* the period of suspension was 6 months and the period of the suspension of the suspension was 3 years. The comparable ratios in other cases include: *Janssen* 3 months/6 months; *Payne* 9 months/2 years; *E* 3 months/24 months; *Chebbi* 6 months/12 months; *Vaileba* 6 months/3 years.

[25] In *Gray* and *E* it was the Tribunal, in *Chebbi* it was the Medical Council, in *Janssen* it was the Dental Council and the Tribunal, in *Payne* it was the PCC and in *Vaileba* it is unclear.

[26] In *Chebbi* activation of the suspension was expressed as being automatic. In *Vaileba*, *E* and *Payne* activation was expressed as being a matter for reconsideration by the Tribunal.

[27] See *Janssen*, *Vaileba* and *Gray*

[28] See *Payne* and *Vaileba*.

[50] In my view the apparent vagaries of the approaches taken by the Tribunal in these cases serve to underscore my conclusions on the statutory interpretation issue.

[51] For all the reasons I have given above I have come to the clear view that the Tribunal has no power to impose a penalty of "suspended suspension". I make an order quashing that aspect of the penalty imposed on Mr Moon accordingly.

[52] Once that point is reached I have then been required to consider whether I should remit the matter back to the Tribunal in order that it can impose a different, additional, penalty. I have decided that it is not necessary to do so. That is because, for the reasons given at [39] above, quashing the order of suspended suspension will make little material difference to Mr Moon's position. He has been censured and remains subject to the conditions on practice imposed by the Tribunal. He is or has been required to pay a not insignificant fine. If he breaches his conditions of practice (or the other orders made) he prima facie commits a disciplinary offence and can be charged again. An order of suspension "proper" can be considered by the Tribunal on its merits if and when that occurs.

[53] I appreciate that the Tribunal was at pains to reiterate on a number of occasions in the decision under appeal that, in its view, an order of suspension was appropriate in Mr Moon's case. But I consider those statements to be at odds with its willingness to suspend the suspension order; as I have said, the public is either at risk or it is not. And in my view there is nothing in the circumstances of Mr Moon's case which suggests the existence of such a risk.

[54] Finally, I record my agreement with the Tribunal that it is important that the Tribunal is seen to stand behind the Dental Council and to support the orders it makes. Mr Moon was wrong to practice (briefly) while suspended. But I consider that the other penalties imposed on Mr Moon make that point quite appropriately.

Mr Moon's cross appeal

[55] Mr Moon's cross-appeal against the fine, costs award and conditions on practice were, at least to some extent, predicated on both the success of the PCC's

appeal and the consequent activation of the suspension order. Notwithstanding the PCC's success on the legal issue, however, I have made it clear in my decision above that I do not consider suspension to be an appropriate penalty in Mr Moon's case. On that basis, it seems to me that the most compelling argument in favour of interfering with the other penalties (namely that, viewed together, the penalties imposed were excessive) falls away.

[56] Although Mr Waalkens QC also submitted that Mr Moon's apparently straitened financial circumstances meant that the costs order and fine were unduly onerous, I do not accept that contention. In particular, I agree with the Tribunal that practising while suspended is a serious matter, for however short a period. I have also recorded my agreement that it is important that the Tribunal is seen to be meaningfully standing behind orders made by the Dental Council and other similar authorities.

[57] The case of *Katamat v Professional Conduct Committee* relied on by Mr Waalkens does not, in my view, set down any absolute rule in this respect.[29] Moreover, it relates only to a costs award, not the imposition of a fine. And in Mr Moon's case, the Tribunal's decision makes it clear that it considered, and in part accepted, the submissions based on that decision and on Mr Moon's financial position. In fact, the costs awarded by the Tribunal against the appellant in *Katamat* (which were overturned on appeal) were considerably (over seven times) greater than the costs and fine imposed on Mr Moon, combined.

[58] As far as the conditions on Mr Moon's practice are concerned, I propose (notwithstanding what I have said earlier about the approach to be taken to appeals of this kind) to defer to the Tribunal's expertise in that respect. In my view, no reason to differ from the Tribunal's assessment of any of these other penalty matters has been advanced.

[29] *Katamat v Professional Conduct Committee* [2012] NZAR 320 (HC).

Result

[59] The PCC's appeal is therefore allowed to the extent that the order suspending the order of suspension is quashed. The suspension order itself, however, is also quashed. Mr Moon's cross-appeal is dismissed. The censure, the fine, the costs award and the conditions on practice all stand.

Costs

[60] In my view this is not an appropriate case for an order of costs. If counsel disagree, memoranda may be filed.

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Rebecca Ellis J