

IN THE DENTISTS DISCIPLINARY TRIBUNAL

IN THE MATTER of the Dental Act 1988

AND

IN THE MATTER Of a complaint by the **Health and Disability Commissioner** against **Michael Molloy** of Christchurch, Dentist.

TRIBUNAL Dr P A C Coote (Chair)
Dr C A Casswell
Ms W Davis
Ms W Davis

LEGAL ASSESSOR Ms K P McDonald QC

TRIBUNALS OFFICER Mrs S D'Ath

COUNSEL Ms T Baker (for Director of Proceedings)
Mr H Waalkens (for Dr Molloy)

DATE OF HEARING 11 to 13 November 2002

DATE OF DECISION 26 February 2003

DATE OF DECISION ON PENALTY 4 April 2003

DECISION OF THE TRIBUNAL

PENALTY

Background

1. In its decision of 14 November 2002 the Tribunal found that on specified dates in 1996, 1997 and 1999 Dr Molloy failed to detect and/or record open contacts between some of Mr Martin Wilkie's teeth and failed to adequately inform Mr Wilkie about these open contacts and discuss management options with him. The Tribunal also found that Dr Molloy failed to detect and or record defective crown margins in Mr Wilkie's tooth 26, failed to adequately inform him about defective crown margins in teeth 26 and 16, and failed to adequately discuss treatment options with him.
2. The Tribunal did not find that these failures were such that in relation to the individual charges disciplinary sanction should follow under either s54(1) (b) or s 54(1)(c) of the Act. However the Tribunal did find that the failures considered cumulatively met the threshold for a disciplinary finding under s54(1)(b) of the Act.
3. The Tribunal was particularly concerned about Dr Molloy's failure to tell Mr Wilkie about the marginal deficiency in tooth 16. This was a gross error and the deficiency caused significant problems for Mr Wilkie so that he had to have work done at additional cost. In its decision the Tribunal also noted that keeping adequate records, informing a patient of potential problems, and discussing treatment options with a patient are requirements of basic dental care. Mr Wilkie was entitled to know about the risks associated with the open contacts and marginal deficiencies so that he was able to make informed decisions about his dental care. The care provided by Dr Molloy to Mr Wilkie was substandard overall.

Penalty

4. Nevertheless the Tribunal accepts the submission of counsel for Dr Molloy that this is not a case at the serious level of disciplinary offending and therefore makes no order under s55(1)(a) or (b) for removal from the register or suspension. It would also be inappropriate to impose conditions on Dr Molloy's practice. The Tribunal notes that Dr Molloy's treatment of Mr Wilkie took place early on in his use of the CEREC system; the complexities involved in that system; that Dr Molloy has since audited his files and has found no other cases with similar outcomes (except for some cases involving over-grinding model dies by a technician); and that Dr Molloy is now very experienced in the use of the CEREC 1 system. In these circumstances the imposition of conditions would serve no useful purpose.
5. The penalty imposed must, however, reflect in an appropriate way the Tribunal's conclusion that the disciplinary threshold has been crossed in this case. The Tribunal orders under s55(1)(d) of the Act that Dr Molloy pay a fine of \$3,000 (the maximum fine available being \$5,000 because the charges relate to events prior to October 1999). The Tribunal also orders under s55(1)(e) that Dr Molloy be censured.

6. In reaching its decision on penalty the Tribunal has had regard to the submissions made on behalf of the Director of Proceedings and on behalf of Dr Molloy. The Tribunal considers that the matters referred to in paragraph 3 of this decision are aggravating factors. The failure to inform meant that Mr Wilkie was unaware of potential difficulties, especially the risk of decay, caused by these problems. In particular the failure to inform in respect of the marginal deficiency in tooth 16 was a gross error.
7. The Tribunal had regard to all of the matters raised by Mr Waalkens in mitigation and in particular the Tribunal considered the following factors to be significant:
 - Dr Molloy's responsible efforts to try to resolve or minimise the issues before the Tribunal. Prior to the hearing Dr Molloy indicated that he would be prepared to enter a guilty plea to a disciplinary charge at the level of s54(1)(b) with respect to particulars 4.3, 4.4 and 4.7 on a "without prejudice save as to costs" basis. If the Director of Proceedings had accepted this the length of the hearing would have been reduced and matters would have been confined to penalty.
 - The supportive references provided by several practitioners.
 - The problems occurred early on in Dr Molloy's use of the CEREC system and he has since audited his files in order to detect any similar problems.
 - This is the first occasion on which a disciplinary finding has been made against Dr Molloy and the level of offending is at the lower end of the scale.
 - Dr Molloy's financial position.

COSTS

8. The Tribunal orders that Dr Molloy meet 30% of the costs of and incidental to the Dentists Disciplinary Tribunal process.

NAME SUPPRESSION

9. Dr Molloy seeks name suppression on a permanent basis. In professional disciplinary proceedings the established principles favour openness. After carefully considering the submissions made by Dr Molloy's counsel in support of name suppression and then weighing the public interest against the interests of Dr Molloy, the Tribunal does not consider that the presumption of openness is outweighed in this case. The Tribunal therefore lifts the order for interim name suppression and makes no final order regarding name suppression.

APPEAL

10. Attached to, and forming part of this order, is the sheet headed "Notes", which states the Practitioner's right to appeal against the orders made, and the time within which notice of such appeal must be given.

Philip Coote
(Chairperson of the
Dentists Disciplinary Tribunal)