ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF THE COMPLAINANT.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-11175
[2015] NZHC 1110

IN THE MATTER	of an appeal pursuant to s 106(2) of the Health Practitioners Competence Assurance Act 2003
BETWEEN	MWAFFAK RABIH Appellant
AND	A PROFESSIONAL CONDUCT COMMITTEE OF THE DENTAL COUNCIL Respondent

Hearing: 25-26 March 2015

Counsel: A H Waalkens QC and H C Stuart for Appellant
J P Coates for Respondent

Judgment: 21 May 2015

JUDGMENT OF BROWN J

Contents

[1] One winter evening in 2012 an incident occurred between a dental products representative (A) and the appellant at his dental surgery which led to a charge being laid by the respondent under the Health Practitioner's Competence Assurance Act 2003 (the HPCA Act). At the hearing of the charge before the Health Practitioner's Disciplinary Tribunal in November 2013 there was a conflict of evidence between A and the appellant as to the events on that evening.

[2] The Tribunal preferred the evidence of A. In its decision dated 20 February 2014 the Tribunal found the charge proved save in respect of one particular.[1] Subsequently in a penalty decision dated 11 August 2014 the Tribunal censured the appellant, ordered that his registration as a dental practitioner be suspended for three months and directed that he pay a contribution towards the costs and expenses of the prosecution and hearing in the sum of $50,000.[2]

[3] The appellant appeals against the Tribunal's finding of professional misconduct and against the penalties of suspension of registration and payment of costs. He also challenges the refusal by the Tribunal of his application for permanent suppression of his name and identifying particulars. The respondent cross-appeals against the Tribunal's refusal to impose conditions on the appellant's practice.

[4] Hence there are five primary issues for determination. Did the Tribunal err:

(a) in accepting A's evidence instead of the appellant's evidence;

(b) in concluding that the appellant's conduct (as found) amounted to professional misconduct;

(c) in the penalties which it imposed on the appellant;

(d) in refusing to impose conditions on the appellant's practice;

(e) in refusing to grant permanent suppression of the appellant's name and identifying particulars.

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1 Decision No 605/Den 13/240P.
2 Decision No 638/Den 13/240P.

The approach to the appeals

[5] The right of appeal to this Court conferred by s 106(2)(b) of the HPCA Act is by way of rehearing.[3] On hearing the appeal the Court may confirm, reverse or modify the decision or order appealed against.[4]

[6] The parties were in accord that the appeal against the finding of professional misconduct was to be determined applying the approach in *Austin, Nichols & Co Inc v Stichting Lodestar*.[5] However they diverged on the approach to be adopted in relation to the appeal on penalty and the cross appeal.

Penalty appeals

[7] The appellant submitted that penalty appeals are also governed by *Austin, Nichols* whereas the respondent contended that such appeals are against discretionary decisions and hence the principles in *May v May* apply.[6]

[8] It was the appellant's case that the correct approach is reflected in the judgment of the Full Court of the High Court in *Sisson v Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society* where, after reviewing several previous decisions, the Court said: [7]

> 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 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.
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> (references omitted)

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3 HPCA Act, s 109(2).
4 Section 109(3).
5 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
6 *May v May* (1982) 1 NZLFR 165, (1982) 5 MPC 92 (CA).
7 *Sisson v Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society* [2013] NZHC 349, [2013] NZAR 416 at [15].

[9] Mr Waalkens QC drew attention to the fact that *Sisson* has been followed in *A Professional Conduct Committee of Dental Council v Moon*[8] and *Withers v Standards Committee No. 3 of the Canterbury-Westland Branch of the New Zealand Law Society*.[9] In *Davidson v Auckland Standards Committee No 3* I also adopted the *Sisson* approach pending appellate direction.[10]

[10] In support of the application of the *May v May* approach, Mr Coates cited *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* in which a number of the conflicting judgments were reviewed.[11] After considering the relevant statutory framework and the approach taken in both bail appeals and name suppression appeals, Collins J stated:[12]

> **Is the Tribunal's penalty decision an exercise of discretion?**
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> The distinction between an appeal from the exercise of discretion, and a general appeal is not always clear. However, in my assessment the penalty decision in this case involved the exercise of discretion by the Tribunal. I have reached this conclusion because, when deciding what penalty to impose the Tribunal evaluated a wide range of factors, including the penalty options that were available. The process of evaluating penalty options and deciding what penalty to impose involved an exercise of discretion by the Tribunal in the same way that a decision about bail or name suppression also involves the exercise of discretion by judicial officers. All involve the careful evaluation of options and the choosing of the most suitable option that is available. In this respect, the Tribunal's penalty decision can be distinguished from its role when interpreting the law, deciding facts and/or applying the law to established facts when determining if a practitioner has committed a disciplinary offence. That aspect of the Tribunal's role does not involve the exercise of discretion.

[11] Mr Coates noted that *Roberts* has been followed by the High Court in *Katamat v Professional Conduct Committee*[13] and *Joseph v Professional Conduct Committee*.[14] He also drew attention to other High Court decisions which have applied the *May v May* approach to penalty appeals, namely *L v Professional*

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8 *A Professional Conduct Committee of Dental Council v Moon* [2014] NZHC 189.
9 *Withers v Standards Committee No. 3 of the Canterbury-Westland Branch of the New Zealand Law Society* [2014] NZHC 611.
10 *Davidson v Auckland Standards Committee No 3* [2013] NZHC 2315, [2013] NZAR 1519.
11 *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.
12 At [43].
13 *Katamat v Professional Conduct Committee* [2012] NZHC 1633 at [37]-[38].
14 *Joseph v Professional Conduct Committee* [2013] NZHC 1131 at [36].

Conduct Committee of the New Zealand Psychologists Board[15] and *GS v A Professional Conduct Committee*.[16]

[12] He argued that the *Roberts* line of authority is more persuasive and should be followed for four reasons:

(a) the Court in *Sisson* did not record its reasoning for its conclusion and did not consider *Roberts*, *Katamat* or *Joseph*;

(b) *Sisson* was not decided under the HPCA Act but under the Lawyers and Conveyancers Act 2006 (the LCA);

(c) authorities decided under the HPCA Act that held *Austin, Nichols* applies to penalty appeals were decided either prior to *Roberts* or did not consider *Roberts*;

(d) penalty decisions are substantively an exercise of discretion which involves the Tribunal balancing competing factors and principles and choosing between options. It can be contrasted with a decision of fact and degree such as a conviction decision where the Tribunal determines facts and assesses those facts against the law.

[13] Absent material differences in the applicable statutory provisions, I do not consider that there should be a difference in the approach of the High Court to the determination of appeals from different professional disciplinary tribunals. Hence, subject to the ambit of the particular appeal entitlement, I do not consider that there is a principled basis for concluding that a penalty in a health professional context is discretionary while in a legal practitioner context it is subject to a general right of appeal.

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15 *L v Professional Conduct Committee of the New Zealand Psychologists Board* (2009) 20 PRNZ 92 (HC).

16 *GS v A Professional Conduct Committee* [2010] NZAR 417 (HC).

[14] A review of the equivalent provisions in the HPCA Act and the LCA does not reveal, in my view, any material point of distinction. Both statutes provide that the appeal is by way of rehearing;[17] both provide that the Court may confirm, reverse or modify the Tribunal's decision;[18] in both instances the right to confirm reverse or modify is in relation to the decision or order appealed against.[19]

[15] In *Kacem v Bashir*[20] Tipping J observed that the distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract, adding however that the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. The issue was helpfully explored in *Ophthalmological Society of New Zealand Inc v Commerce Commission*:[21]

> [37] It is by no means easy to define when the process of applying the law to the facts is the exercise of a discretion. The difficulty of this question of characterisation is brought out of the discussion in K J Keith, "Appeals from Administrative Tribunals" (1969) 5 VUWLR 123, pp 134–153. The contrast is sometimes described as being between the exercise of a discretion and a finding based on evidence, as in *Merck & Co Inc v Pacific Pharmaceuticals Ltd* [1990] 2 NZLR 55 (CA) at p 58, a case cited by Mr Brown. A key indication of a discretion is whether the area for personal appreciation by the first instance Court or decision maker is large (Keith at p 135). In the context of the orders and decisions of Masters, whether the interests involved in a particular manner are purely procedural, or concern wider issues of principle in relation to the application of the law to the facts, will also be relevant to whether a decision is discretionary in nature. In the latter type of case it may more readily be seen that ultimately only one view is legally possible, even if there is scope for considerable argument as to what it is. If that is the case the decision maker does not have the margin of appreciation inherent in discretion.

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17 HPCA Act, s 109(2); LCA, s 253(3)(a).
18 HPCA Act, s 109(3)(a); LCA, s 253(4).
19 Ibid.
20 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].
21 *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [37].

[16] It is also instructive to consider the nature of a decision which involves the exercise of discretion. In *G v G* (albeit in a custody of children context) Lord Fraser said:[22]

> The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong. In such cases therefore the judge has a discretion and they are cases to which the observations of Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345 apply. … That was an appeal against an order for maintenance payable to a divorced wife. Asquith LJ said:
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> > It is, of course, not enough for a wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.

[17] While I am mindful of the analogy which may be drawn with appeals against sentence in criminal matters, nevertheless in my view a decision about the penalty to be imposed on a professional person by the relevant professional body should be one of relative uniformity and consistency. I do not consider that such a decision is one where differently constituted tribunals should legitimately reach widely different decisions in relation to equivalent conduct. Nor do I consider that such decisions involve a significant area for personal appreciation on the part of the tribunal.

[18] Consequently in the absence of appellate clarification I proceed on the basis that an appeal against a penalty is governed by the *Austin, Nichols* approach for two reasons: first, because that is the approach of a Full Court of the High Court; secondly because in my view a decision as to penalty in the professional disciplinary context is not of the nature traditionally viewed as importing a discretion.

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[22] *G v G* [1985] 2 All ER 225 (HL) at 228.

Name suppression appeal

[19] The approach of the parties to the name suppression appeal mirrored their contentions in relation to penalty appeals. The appellant contended that the assessment of the criteria for granting name suppression was no different in concept to other instances where *Austin, Nichols* applied. The respondent relied on *N v Professional Conduct Committee of Medical Council of New Zealand* to support the view that name suppression decisions are an exercise of discretion and attract the *May v May* approach.[23] Mallon J there rejected as incorrect a third approach which involved the application of a two step process explained by Wylie J in *Kewene v Professional Conduct Committee of the Dental Council* as follows:[24]

> Under s 95(2) of the Health Practitioners Competence Assurance Act, the Tribunal is required first to consider whether or not it is desirable to make an order under the section, having regard to the interests of any person and to the public interest. It is then given a discretion to make an order prohibiting the publication of the name of any person. The section requires a two-stage approach.
>
> In my judgment, the *Austin, Nichols* principles apply to the deliberative judgment necessary in relation to the threshold requirement of desirability, and the *May v May* approach applies to the discretionary component, which only comes into play if the threshold requirement of desirability is first met.

[20] Decisions granting or refusing name suppression have traditionally been viewed as decisions involving the exercise of a discretion and therefore governed by the *May v May* approach.[25] Nevertheless the particular structure of the statutory provision conferring the power may dictate a different approach, in particular the two-stage approach applied in *Kewene*: see for example *Beacon Media Group Ltd v Waititi*.[26]

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23 *N v Professional Conduct Committee of Medical Council of New Zealand* [2013] NZHC 3405, [2014] NZAR 350.

24 *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZHC 933, [2013] NZAR 1055 at [35]-[36].

25 *Rowley and Skinner v Commissioner of Inland Revenue* [2011] NZCA 160, (2011) 25 NZTC 20-051; leave to appeal to the Supreme Court refused: *Rowley and Skinner v Commissioner of Inland Revenue* [2011] NZSC 76, (2011) 25 NZTC 20-052.

26 *Beacon Media Group Ltd v Waititi* [2014] NZHC 281. See also *R v Rajamani* [2007] NZSC 68, [2008] 1 NZLR 723 at [4]–[5].

[21] However I do not consider that s 95(2) falls within the category of statutory provisions which requires a gateway or threshold to be passed as a pre-requisite to the exercise by the Court of the discretion to make a suppression order. Consequently I do not agree with the *Kewene* analysis at [38] which applies the two-stage approach to s 95(2). I share the view of Mallon J that the determination of desirability in s 95(2) is simply part and parcel of the exercise of the discretion.

[22] Accordingly I proceed on the basis that an appeal against the refusal to grant name suppression is an appeal against the exercise of discretion to be decided in accordance with the *May v May* principles.

The decision on the professional misconduct charge

[23] The decision commenced with a detailed consideration of the evidence of the three witnesses for the respondent, namely A, a colleague of A and Ms Young, the Deputy Registrar of the Dental Council. The judgment then similarly reviews the evidence of the appellant and two of his employees before summarising the cases for the respondent and the appellant.

[24] The Tribunal then recited both the general principles applicable to the charge and the principles which it proposed to apply with reference to determining credibility questions before turning to a lengthy discussion (spanning paras 105–186) of the evidence and the areas of factual dispute.

[25] Save for particular 10, it found all the particulars of charge proved, namely:

> 1. Dr Rabih asked [A] "how come every time I see you, you are looking more beautiful than the last time" or words to that effect.
>
> 2. Dr Rabih rubbed his finger up and down [A's] leg, against [A's] wishes and without her consent.
>
> 3. Dr Rabih asked [A] if he could kiss her.
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> 4. Dr Rabih kissed [A] on the face and neck, against [A's] wishes and without her consent.
>
> 5. Dr Rabih asked [A] if he could touch her breast.
>
> 6. Dr Rabih touched and groped [A's] breast with her hands, against [A's] wishes and without her consent.

7. Dr Rabih placed his hands on [A's] shoulders and pressed himself against [A's] body, against [A's] wishes and without her consent.

8. Dr Rabih pressed his erect penis into [A's] side, against [A's] wishes and without her consent.

9. Dr Rabih grabbed [A's] shoulder with force and pulled her on to his knee, against [A's] wishes and without her consent, and said into [A's] ear "please sit on my knee, please sit on my knee" or words to that effect.

The penalty decision

[26] After reciting the submissions of the respondent and the appellant, and identifying eight factors which it said are normally taken into account in the assessment of penalty, the Tribunal reviewed a number of previous cases and concluded that a period of three months suspension should be ordered.

[27] In doing so the Tribunal noted that:

(a) cases involving a health professional's relationship with a patient are significantly different from those involving a colleague as in this case;

(b) cases of inappropriate consensual connection were to be distinguished from this case where there was no consent on the part of A;

(c) the appellant's behaviour was serious involving both words spoken and actions taken but did not lead to any more significant outcome.

[28] The Tribunal did not consider that any further order for conditions on resumption of practice after the period of suspension should be imposed, being of the view that the period of suspension should be sufficient time for the appellant to have reflected on matters and taken such advice and assistance as he needs.

[29] The total costs of the respondent and the Tribunal exceeded $112,000. The Tribunal noted that the normal approach was to start with a 50 per cent contribution which may be reduced for a variety of factors recited in the decision. It concluded that the appropriate contribution was $50,000 which allowed a discount of over

$12,000 "in respect of matters which may have been outside of the strict costs involved in the prosecution".

[30] The Tribunal considered the terms of s 95 of the HPCA Act, noting that the test was whether it was "desirable" to prohibit publication and recognising that both the interest of any person and the public interest must be considered. It concluded that the principles of open justice outweighed the personal circumstances of the appellant and declined a permanent order for name suppression.

The grounds of appeal

[31] The notice of appeal is cast in reasonably general terms. So far as the primary decision was concerned it pleads:

> The substantive decision is wrong both at fact and law. Full details and particulars will be set out in written submissions to be filed and served in advance of the hearing, but which will include the following:
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> a. The Tribunal failed to adequately apply the onus of proof and the standard of proof given the nature of the allegations;
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> b. It was unreasonable for the Tribunal to find that the appellant conducted himself in the manner described in the disciplinary charge; and
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> c. It wrongly determined the conduct to amount to professional misconduct.

[32] Because the filing of the notice of appeal was deferred until after the penalty decision was available, it was necessary for the appellant to seek leave to extend the time for filing the appeal in respect of the primary decision. That application was not opposed. Leave is granted accordingly.

[33] In respect of the penalty decision, the grounds of appeal are as follows:

> … the penalties … are excessive and unreasonable for reasons including:
>
> a. The suspension of the appellant from the dental register for a period of 3 months is harsh;
>
> b. The suspension of the appellant from the dental register for 3 months is unnecessary in terms of protecting the health and safety of the public;

c. Adequate conditions can be put in place to adequately protect the health and safety of the public if necessary;

d. The suspension period of 3 months is out of step with other disciplinary sanctions imposed in cases of this nature; and

e. The costs awards by the Tribunal are harsh and excessive.

Issue one: Did the Tribunal err in accepting A's evidence instead of the appellant's evidence?

[34] The appellant's contention that the physical exchange was both limited and consensual was disputed by A. Their different perspectives were portrayed in the appellant's submission in this way:

> … in summary the appellant said following some banter between himself and the complainant after the demonstration of the dental equipment, he placed his hand on the outside of the clothing of the complainant and felt her breasts. He said this was consensual. The complainant said it was not. She also alleged he kissed her, grabbed her, and at one stage pushed his groin against her body (denied).

[35] As Mr Waalkens put it, this was a case about the appellant's word against A's word. The Tribunal concluded that the totality of A's evidence "rang true"[27] and it rejected the appellant's account.

[36] Mr Waalkens acknowledged that an appeal, albeit by way of rehearing, is "more challenging" for an appellant when it confronts credibility findings. The significance of credibility findings for the determination of appeals was recognised in *Austin, Nichols*:[28]

> The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary" caution appropriate when seeing the witnesses provides an advantage because credibility is important.

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27 At [106].

28 *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 5, at [13] (citations omitted).

[37] A footnote to that sentence referred to the description of such advantages in *Powell v Streatham Manor Nursing Home* where Lord MacMillan said:[29]

> Where, however, as in the present instance, the question is one of credibility, where either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced and where the personal motives and interests of the parties cannot but affect their testimony, this House has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error.

[38] The Scottish and English approaches have recently been firmly reiterated in *McGraddie v McGraddie*[30] and *Mutual Holdings (Bermuda) Ltd v Hendricks*,[31] the latter stating that an appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness.

[39] Instructive on the circumstances in which an appellate court will or will not reach a different conclusion when credibility is in issue is the Court of Appeal's judgment in *Hutton v Palmer* where Somers J summarised the law in this way:[32]

> The principles are not in doubt. An appeal such as the present is by way of rehearing and the Court has an obligation to come to its own conclusion. Running across that principle is another, namely, that an appellate Court is under the disadvantage that it has not seen or heard the witnesses. In a case which depends on an opinion as to conflicting testimony an appellate Court will not interfere unless it can be shown that the trial Judge has failed to use or has palpably misused his advantage; it ought not to reverse the conclusions at which he has arrived merely from its own comparison and criticisms of the witnesses and its own view of the probabilities of the case; *SS Hontestroom v SS Sagaporack* [1927] AC 37, 47. Thus an appellate Court will interfere where the evidence accepted by the trial Judge is inconsistent with facts incontrovertibly established by other evidence or is patently improbable; *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 39; *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 62 ALR 53.

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29 *Powell v Streatham Manor Nursing Home* [1935] AC 243 (HL) at 256.

30 *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477 at [4].

31 *Mutual Holdings (Bermuda) Ltd v Hendricks* [2013] UKPC 13 at [28].

32 *Hutton v Palmer* [1990] 2 NZLR 260 (CA) at 268. Similarly see *Fox v Percy* [2003] HCA 22, (2003) 214 CLR 118 (HCA) at 28 where it was said that in particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.

[40] By reference to an earlier Tribunal decision in *Mr Y*, the Tribunal adopted as a test for "credibility" the dictum in *Faryna v Chorny* (which had been cited by Mr Waalkens)[33] that the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognise as reasonable in that place and in those conditions.[34] *Mr Y* then noted the following relevant factors:

(a) The manner and demeanour of the witness when giving evidence.

(b) Issues of potential bias, that is, to what extent was evidence given from a position of self interest.

(c) Internal consistency or, in other words, whether the evidence of the witness was consistent throughout, either during the hearing itself, or with regard to previous statements.

(d) External consistency or, in other words, was the evidence of the witness consistent with that given by other witnesses.

(e) Whether non-advantageous concessions were freely tendered.

Mr Y then concluded that essentially what is involved is an analysis of all the evidence rather than merely asserting that one party rather than another is to be believed.

[41] In the decision under appeal the Tribunal recorded that it had applied those principles stated in *Mr Y* in relation to any items of evidence where credibility was at stake.[35] No issue could be taken with that manner of self-direction which is similar in many respects to the analysis of Hammond J in *Angus Kenson Electrical Ltd v Shahnaaz Enterprises Ltd*.[36]

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33 At [103].
34 *Faryna v Chorny* [1952] 2 DLR 354 (BCCA) at 357.
35 At [104].
36 *Angus Kenson Electrical Ltd v Shahnaaz Enterprises Ltd* HC Wellington CIV-2002-485-210, 4 July 2003 at [63].

[42] The Tribunal proceeded to analyse the evidence in accordance with that self-direction. Its focus on consistency and totality is reflected in the paragraphs which followed its expression of view that the totality of A's evidence rang true:[37]

> It was consistent that, in the context that she had had previous exchanges with Dr Rabih which included personal matters and which led to her having some concerns about him that she contacted her friend, the colleague, before the meeting on 29 May 2012 to discuss these concerns with her. It is inconsistent, to take Dr Rabih's version, that she would express those concerns to her colleague and seek the reassurance but then proceed the following day to consent to Dr Rabih's touching her breasts.
>
> The Tribunal finds the way she had dealt with the unfolding events on the night in question was credible and consistent with concerns she must have felt in that environment at the time of a winter's night. How she processed matters after the event, whom she told and how she completed her counselling sessions and consultation with the Police are also consistent.
>
> By contrast, Dr Rabih sought to portray this as a consensual connection followed by a quiet and dignified departure; but that is inconsistent with his evidence that the complainant said on leaving that she did not want to look at him again. His initial responses to the Dental Council following its formal inquiry were evasive. The Tribunal concludes that he was aware to whom the Council's letter referred and chose to avoid this. The email that his lawyer gave to the Dental Council did not give the full picture of the email exchanges.

[43] Furthermore, while there are a number of references to demeanour, it does not appear that demeanour ultimately played a significant role in the Tribunal's analysis given the observation that:[38]

> As to demeanour, the Tribunal preferred the way in which the complainant gave her evidence to that in which Dr Rabih did so. This was a fine balance and the Tribunal made due allowance for the fact that English was not Dr Rabih's first language.

[44] On the issue of consistency, the appellant placed emphasis on his comment the subject of Particular 1[39] (which comment he acknowledged) and A's response to the effect that "the gym must be working". The appellant described these comments as the introductory exchange giving rise to banter between them. He maintained that it was in the conversation which followed that A pointed to her chest and said "but these are not natural" which then led to the appellant's request to touch A's breasts.

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37 At [107]–[109].
38 At [180].
39 At [25] above.

[45] It was contended that the comment "the gym must be working" was entirely consistent with the appellant only having learned from A on the evening in question that her breasts were not natural and that this was a significant part of a course of banter culminating in a consensual touching. A statement to the effect that her breasts were not natural was said to be "not out of kilter" with the acknowledged comment about the results of the gym. However the Tribunal accepted A's evidence that the subject had come up not on the evening in question but at a previous meeting. The appellant attacked that finding as an unreasonable rejection of the appellant's evidence. However, the Tribunal having so found, there is no proper basis for contending that A's evidence on this topic lacked consistency.

[46] The appellant also drew attention to A's comment as she left the surgery to the effect "I don't know how I can look at you again". He said that the comment was made in the context of A having been embarrassed about the touching and contended that the comment was entirely consistent with consensual behaviour in respect of which she had subsequently had second thoughts. No doubt such a comment could be interpreted in different ways and much would depend on context. I do not consider that the Tribunal's view was erroneous that that evidence was more consistent with A's version of the events of that evening than the appellant's.[40]

[47] In the context of consistency it is also convenient to note the appellant's argument that, in a case which involves essentially the word of one person against another, propensity evidence in the form of two of the appellant's co-workers should have been carefully weighed and factored into the case. I do not accept the contention that the Tribunal failed to do so. The Tribunal noted the consistency among the appellant's witnesses but concluded that the content of the propensity evidence did not assist in its assessment of credibility on the critical matters between the appellant and A.[41]

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[40] At [158].
[41] At [179].

[48] Mr Waalkens mounted a skilful argument to the effect that in making its credibility findings the Tribunal had reversed, or at least misapplied, the onus of proof and in consequence had applied an unreasonably restrictive approach to the evidence of the appellant but a significantly more lenient or "open" approach to A's evidence.

[49] It was said that the Tribunal had made numerous factual findings which were "utterly unreliable". In particular the appellant was critical of:

(a) the Tribunal's approach to the "saliva and drool" evidence, which he submitted was gross exaggeration;

(b) the Tribunal's discounting shortcomings in A's evidence;

(c) the Tribunal's acceptance that A would have significant difficulty in accurately recollecting the duration of the physical touching.

[50] I do not consider that those criticisms are justified. It is apparent that the Tribunal carefully sifted through the evidence and counsel's criticisms of it. It recognised some inadequacies on both sides. With reference to A, in relation to the drool and saliva evidence it recognised that A's language was excessive or colourful, but nevertheless considered that it did not affect A's credibility as to the fact of kissing having occurred (which the appellant denied).

[51] While it noted that A did not make concessions freely to any notable degree, the Tribunal expressly stated that it did not view that as affecting her credibility, recognising the fact that she was being extensively cross-examined about personal matters of a sexual nature and was understandably defensive in her responses.[42]

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[42] At [164].

[52] Similarly the care with which the Tribunal evaluated the evidence concerning the duration of the physical encounter is apparent from, for example, paragraph 121:

> The Tribunal has assessed this evidence from both parties carefully. It accepts that the complainant would have had significant difficulty in accurately recollecting the length of time that this physical encounter took place. If the complainant had not consented to this physical touching, that encounter would have been traumatic for her and she would have had to assess the correct reaction. This would have partly been a conscious assessment and partly an automatic reaction. Even if the complainant had consented to the touching, her assessment of time given significantly later could not be expected to be accurate.

[53] I do not consider that the Tribunal's analysis of these various matters reflects any error in the application of the onus or standard of proof. The Tribunal had prefaced its factual analysis by noting that the more serious the allegation, the greater must be the degree of satisfaction on the balance of probabilities,[43] citing *Z v Dental Complaints Assessment Committee*.[44]

[54] Fundamental to this case were credibility findings on whether the initial touching (acknowledged by the appellant) was consensual and whether, after A said "stop it Mike" (as he accepted she did), the subsequent alleged conduct (denied by the appellant) occurred at all.

[55] The Tribunal's factual review is lengthy, spanning paragraphs 105–186 and its conclusion is summed up in this way:

> 181. It is after having weighed up those issues in the context of judicial guidance as to credibility principles that the Tribunal has formed the view that it prefers the evidence of the complainant on critical issues to that of Dr Rabih.

[56] I do not consider that in the course of its assessment of the credibility of the appellant and A, the Tribunal misapplied the onus of proof, or that, in the words of the appellant's submissions, it applied a much lesser standard on the credibility of A's evidence or that it was "blind to any credibility/inconsistencies" on A's part.

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43 At [96].

44 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

[57] In my view the Tribunal's conclusion is neither inconsistent with facts incontrovertibly established by other evidence or patently improbable.[45] Indeed, subject to the frequently explained limitations of an appellate court when working from a written transcript, my conclusion is the same as the Tribunal. In reaching that view I draw attention, by way of example only, to the following points:

(a) it would have been inconsistent conduct on the part of A to raise concerns with her colleague the previous day about her impending visit to the appellant's surgery but then proceed that following day to offer her breasts to the appellant and consent to his touching them;

(b) it was surprising that in his initial response to the Dental Council on 18 July 2012 that the appellant could not recall any incident on 29 May 2012 that could remotely be interpreted as sexual advances;

(c) the appellant's explanation that he was not attracted to A, that there was nothing sexual about the touching, and that he touched her breasts out of "curiosity" is not consistent with his acknowledged statement in Particular 1.

[58] I should add, however, that I consider that the Tribunal's consideration of the evidence of the appellant and A from the perspective of what it described as "self-interest" is not useful. It was appropriate for the Tribunal to consider that factor in relation to the other supporting witnesses, as it did for example in relation to A's colleague.[46] However the evidence of a protagonist will inevitably be vulnerable to a criticism on the ground of self-interest.[47] I consider that factor (b) in the citation above[48] is more suitably deployed in the context of supporting witnesses rather than the key participants themselves. While I have some sympathy with Mr Waalkens' submission on this issue, it does not detract from my conclusion that there was no error by the Tribunal in its conclusion accepting the evidence of A on the critical issues.

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45 See *Hutton v Palmer*, above n 38.
46 At [138].
47 See *Powell v Streatham Manor Nursing Home* at [36] above.
48 At [40] above.

Issue two: Did the Tribunal err in concluding that the appellant's conduct (as found) amounted to professional misconduct?

[59] Before the Tribunal the appellant referred to other prosecutions where evidence had been led as to appropriate professional standards of conduct, his submission being that it was a fundamental error on the part of the respondent not to have called evidence in this matter to establish appropriate standards in order to discharge the onus of proof.

[60] The Tribunal rejected that submission, but in doing so referred in several places to its perception that the appellant's conduct amounted to "criminal activity". One example is paragraph 188:

> The Tribunal rejects the submissions made on behalf of Dr Rabih that there need be called evidence to prove that appropriate standards have been breached. This case is one where there has been proven to the satisfaction of the Tribunal that there has been criminal activity on the part of the health practitioner, Dr Rabih, namely a sexual assault. That that criminal activity is a breach of professional standards is something for the Tribunal to assess on its own interpretation of the HPCA Act, particularly section 100(1)(b), and in light of first the facts as found and secondly other decisions of the Tribunal and of the courts.

[61] Renewing the submission that the respondent had failed to prove its case by omitting to adduce expert evidence as to appropriate professional standards, unsurprisingly Mr Waalkens was critical of the Tribunal's comments about criminal activity, pointing out that it was unsatisfactory for the Tribunal to make findings of criminal conduct applying the civil standard of proof. With reference to the observation in paragraph 188 he said:

> The appellant contends this finding was contrived to avoid the consequences of a substantial obstacle for the prosecution where routinely an expert is called to establish the appropriate standards and issues impacting upon the profession.

[62] For the respondent Mr Coates accepted that it was not the Tribunal's role to make a finding that there was criminal wrong-doing and he described the Tribunal's choice of language as unfortunate. However he contended that those observations did not undermine the integrity of the Tribunal's finding that the non-consensual touching amounted to professional misconduct, concluding that:

> Regardless of what non-consensual touching may or may not amount to in another jurisdiction, the Tribunal's finding that non-consensual touching does constitute professional misconduct in this jurisdiction is sound.

[63] I agree with that submission. Section 100(1)(b) of the HPCA Act provides for a finding of professional misconduct in respect of an act or omission that "in the judgment of the Tribunal" has brought or is likely to bring discredit to the profession. On my reading of the decision the Tribunal used the phrase "criminal activity" for two purposes: first, as a phrase to encapsulate the entirety of the conduct which it had found as a matter of fact had occurred; secondly to contrast non-consensual conduct (where it considered expert evidence was not required) from the category of cases "raising moral questions involving a consensual relationship with a patient, former patient, staff member or colleague".[49]

[64] In that part of its decision headed "Breach of standards", the Tribunal proceeded to apply its judgment to the distinct issue whether that activity brought or was likely to bring discredit to the dental profession. It does not appear to me that the Tribunal reasoned that the fact of such activity, which it described as "criminal", meant that ipso facto discredit to the profession must automatically follow. The fact that the Tribunal proceeded to exercise the judgment which s 100(1)(b) requires is apparent from a number of paragraphs in the decision:[50]

> The Tribunal does not accept that that needs to be proven by independent evidence as a breach of professional standards. That decision applies in respect of those aspects of the Charge which relate to the conduct bringing or being likely to bring discredit to the dental profession. Proven criminal activity by a dental practitioner can bring discredit to his profession. This is especially so when the activity occurred in the dental practitioner's own professional rooms at night with a colleague with whom he had professional dealings and the contact with whom had been initiated by (sic) for professional purposes, namely the demonstration of equipment that had been sold by the colleague to the dentist. **The Tribunal, comprising in the majority members from the dental profession, is well placed to decide whether that activity did in fact bring or was likely to bring discredit to the dental profession; and the Tribunal finds in this case that this was so.**

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49 At [201].

50 At [190] and [200] (emphasis added).

> The Tribunal considers that those cases, *G* and *Lake*, are distinguishable from the present case. In the present case the acts of Dr Rabih which form part of the Charge are, as stated above, criminal activity and there can be no question but that, that having been proved to the Tribunal**, the Tribunal and its individual members with their expertise can decide whether that activity is or is not misconduct under section 100(1)(b) of the HPCA Act**.
> …

[65] Of course, unlike the Tribunal's determination of the credibility issue, the decision whether the actions found to have occurred constitute professional misconduct is one in respect of which, generally speaking,[51] I am in as good a position as the Tribunal to reach a conclusion. Applying the *Austin Nichols* approach, I am required to form my own judgment on the issue.[52]

[66] I agree with Mr Coates that whether expert evidence is required to prove a disciplinary charge will depend on the particular facts of the case. Generally speaking, expert evidence will likely be required when a charge is brought under s 100(1)(a) where it is necessary to prove malpractice or negligence. However, while some cases concerning s 100(1)(b) will require expert evidence,[53] in my view the present issue is one in relation to which the Tribunal and the High Court are able to make a judgment about professional misconduct without the assistance of expert evidence.

[67] It having been found that the appellant did engage in the alleged conduct against A (a colleague in the wider dental profession) at the appellant's dental surgery at the end of the working day,[54] and that the conduct was non-consensual, in my view the only proper conclusion is that the collective conduct in particulars 2 to 9 would bring discredit to the dental profession. However I agree with Mr Waalkens that the conduct in particular 1 was not of that character. Consequently, with that qualification, there was no error in the Tribunal's ultimate conclusion, notwithstanding its inappropriate references to the conduct as criminal activity.

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51 I recognise that the majority of the Tribunal were dentists.

52 *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 5, at [16].

53 *Dr G v Director of Proceedings* HC Auckland CIV-2009-404-951, 13 October 2009.

54 I consider the appellant's suggestion that the incident was "after hours" is inapt. The meeting was a business meeting scheduled for 6pm subsequent to the appellant's last patient appointment for the day at 5pm which was to involve complex extractions.

Issue three: Did the Tribunal err in the penalties which it imposed on the appellant?

[68] On appeal the appellant renewed his submission[55] that the facts of this case were "exceptionally unique", in particular that:

(a) the conduct did not involve a patient;

(b) it occurred outside conventional working hours;

(c) it was a "one off" instance.

[69] The appellant was supported by no less than eight references which collectively pointed to his being a well-principled person for whom the conduct in question was entirely out of character.

[70] He submitted that the fact of an adverse disciplinary finding together with a censure was alone a substantial penalty and that the order for suspension should be quashed because it was excessive and unreasonable and not required for the purpose of protecting the public.

[71] His principal emphasis in his submission was the contention that the Tribunal was in error in taking into account a punitive function as a relevant factor, drawing attention to its inclusion as the third factor in the list at paragraph 21 taken from *Roberts* where Collins J observed:[56]

> Thirdly, it is also important to recognise that penalties imposed by the Tribunal may have a punitive function. I accept that punishment is often viewed as a by-product of the penalties imposed by the Tribunal and that protecting the public and setting professional standards are the most important factors for the Tribunal to bear in mind when setting a penalty. However, where the Tribunal imposes a fine or censure it normally does so in order to punish the health professional.

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55 Penalty decision, above n 2, at [38].

56 *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*, above n 11 at [46].

[72] Mr Waalkens drew attention to the recent decision in *Singh v Director of Proceedings* where Ellis J recorded reservations about the correctness of the statement in *Katamat* that in *Roberts* Collins J had identified punishment of the practitioner as being a factor relevant whenever the Tribunal is determining an appropriate penalty.[57] At para [57] Ellis J said:

> On my own reading of *Roberts*, Collins J did not say that punishment was a necessary focus of the disciplinary penalty exercise. Rather he merely accepted (as I have above) that punishment may be an incident of such an exercise and acknowledged that a decision by the Tribunal to impose a fine appears, necessarily, to be punishment-oriented.

[73] I did not understand Mr Coates to demur from the statement in *Roberts* as explained in *Singh*. Indeed I note that the penalty decision records the respondent's submission as being that "the incidental consequences of an order for suspension as a penalty was said to be appropriate". Mr Coates' point was that the Tribunal's decision did not appear to place any obvious weight on punishment notwithstanding the inclusion of punitive function in the list of factors which it stated were "normally" taken into account.[58] I concur in that assessment.

[74] The Tribunal recognised both the distinction between a relationship with a patient and a professional collegiate connection, and the difference where the inappropriate connection was consensual. However it did not accept the appellant's depiction of the incident:

> 39. The Tribunal does not accept the description of the events as "*exceptionally unique*" except perhaps in the context of comparison to other cases. The basic facts are that there was a professional person in his professional rooms outside of office hours at a time when a member of the opposite sex attended for business purposes and was then subjected to personal insult and distress by words and conduct on the part of Dr Rabih which were quite inappropriate in any context and certainly a professional one.

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57 *Singh v Director of Proceedings* [2014] NZHC 2848.

58 Penalty decision, above n 2, at [21.3].

[75] While it was mindful of the professional and financial consequences of suspension, the Tribunal was plainly influenced by its view of what the public interest required:

> 43. The Tribunal rejects the submission that an order for suspension is not required "*whether to protect the public interest or otherwise*". It takes into account those matters said to be "*contrary to the public interest*" the number of permanent and "*enrolled*" patients who would be affected in having to find the services of another dentist, that the staff would also be adversely affected, and that there would be a detrimental effect on the family through Dr Rabih's inability to earn an income. Although it was said that "*obtaining a locum is known to be notoriously difficult*", there was no evidence tendered on this.
>
> …
>
> 47. The period of suspension is required to enable Dr Rabih to reflect on the matters which have led to the suspension in question. He may need to take some counselling or guidance on factors in his life such as self-control, sexual discipline, or professional treatment of others. As was submitted for the PCC by reference to the passage from *A v Professional Conduct Committee* referred to above, Dr Rabih may or may have not have a propensity to act towards others in the way he acted towards the complainant and the propensity, if there is one, may or may not be amenable to cure. A period of suspension will enable that assessment to be made and any steps towards cure, if needed, taken.
>
> 48. Accordingly the decision of the Tribunal is that Dr Rabih should be suspended for a period of 3 months.

[76] As I read the Tribunal's decision, the primary factors underlying the imposition of a period of suspension were the protection of the public, the rehabilitation of the appellant and the role of setting professional standards. I do not consider that there was any error on the part of the Tribunal in concluding that a period of suspension of three months, which is quite a short period,[59] was required. I agree with the Tribunal's decision on suspension. I also find no error in the order of a contribution towards costs which was consistent with the Tribunal's normal approach.

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[59] The respondent had suggested a period of four to six months.

Issue four: Did the Tribunal err in refusing to impose conditions on the appellant's practice?

[77] The respondent's cross-appeal challenged the Tribunal's refusal to impose conditions on the following grounds:

> (a) The decision of the Tribunal is wrong and/or plainly wrong in that:
>
> (i) the Tribunal erred in finding that no conditions on the appellant's practice are necessary as the period of suspension is "*sufficient time for [the appellant] to have reflected on matters and taken such advice and assistance as he needs*" (at [50]); and
>
> (ii) the imposition of conditions on the appellant is necessary to protect the public.

[78] It argues that having regard to the seriousness of the matter and the appellant's denials of wrong-doing, it is difficult to see how a period of self-reflection will result in the identification and management of any future risk to the public.

[79] Consequently it seeks as conditions the following:

> (i) that the appellant is to undergo an assessment as to his risk of sexual offending as directed by the Dental Council;
>
> (ii) following the assessment of his risk of sexual offending, the appellant is to complete any training or rehabilitation as directed by the Dental Council; and
>
> (iii) the appellant is to practise in accordance with any conditions as the Dental Council considers appropriate in order to address any risks of further offending as identified in the assessment described in (i) above.

[80] The Tribunal reached its conclusion on the basis of its assessment of the appellant and having regard to the several references which were presented in support of him. It also appears to have accepted the appellant's submission that this incident was a "one-off" case in that it accepted that this matter was to be distinguished from *Chand*[60] (which was relied on by the respondent) where there were several charges and the offending occurred over a period of time.

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[60] 106/Nur 06/49P.

[81] I consider the Tribunal was justified in making the assessment it did, particularly so in the absence of evidence from the respondent on the question of the need for the imposition of the particular conditions. I am unable to identify an error in the Tribunal's decision on this point and I have not been persuaded to reach a different conclusion.

Issue five: Did the Tribunal err in refusing to grant name suppression of the appellant's name and identifying circumstances?

[82] The appellant's submissions approached this issue on an *Austin, Nichols'* footing and canvassed in detail the various points favouring the making of a suppression order, including:

(a) the statutory test of "desirable" is a low threshold;

(b) identification for the purposes of standards setting was not required;

(c) three years have passed since the conduct in issue;

(d) the proposition that, absent publication, another practitioner might be impugned.

[83] For the reasons stated above,[61] I approach the issue on the basis that the Tribunal's decision in this respect is a discretionary one and hence the *May v May* principles apply to my consideration of this aspect of the appeal.

[84] I accept Mr Coates' submission that the Tribunal's decision adopted the conventional and well-established principles. The Tribunal directed itself as to the requirements of s 95,[62] recognised the many public interest factors identified in previous Tribunal decisions,[63] and referred to various statements of principle in High Court decisions.[64]

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61 At [19]–[21] above.
62 At [63]–[64].
63 At [65].
64 At [66].

[85] It referred to the matters in the appellant's affidavit including the implications of publication of his name for his wife and children and the consequences for his business and staff. It concluded that it was in the interests of his present and any future potential patients to know of the findings of the Tribunal and the reasons why the penalty had been imposed

[86] I do not consider that there is any error apparent in the Tribunal's decision of the nature recognised in *May v May* which would warrant the setting aside of the decision and the exercise of the discretion afresh by this Court.

Disposition

[87] For the reasons above, both the appeal and the cross-appeal are dismissed.

[88] At the parties' suggestion, costs are reserved to be agreed between the parties. In the event that agreement is not reached within 25 working days, the respondent is to file a memorandum and the appellant is to file a memorandum in response five working days after service of the respondent's memorandum.

[89] At the appellant's request, the Tribunal allowed a period of two months to run before the order for suspension took effect in order that the appellant could make arrangements for his patients and to exercise any appeal rights.[65] The respondent did not challenge that course.[66] Consequently the two month period will run from the date following the date of delivery of this judgment.

Brown J

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[65] At [49].
[66] Note s 109(4).