IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-6069
[2012] NZHC 1633

	BETWEEN	ARIEF NUGROHO PRIJONO KATAMAT Appellant
	AND	PROFESSIONAL CONDUCT COMMITTEE Respondent

Hearing: 10 July 2012

Counsel: F Joychild for Appellant
H Wilson and A Hall for Respondent

Judgment: 21 December 2012

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 1.30pm on the 21st December 2012.

JUDGMENT OF WILLIAMS J

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Introduction

[1] Mr Katamat (the appellant) is a former pharmacist. On 2 September 2011, the Health Practitioner's Disciplinary Tribunal cancelled his registration as a pharmacist, censured him, and ordered that he pay costs of $78,428.30.[1] The Tribunal had earlier[2] found him guilty of professional misconduct under s 100(1)(a) of the Health Practitioners Competence Assurance Act 2003 (the Act).

[2] Mr Katamat now appeals the Tribunal's decision on penalty only. He contends:

(a) the decision to de-register him was unreasonably harsh. A lesser penalty, namely suspension and close supervision on return to practice, would have sufficed;

(b) the decision to formally censure him was unreasonable and unnecessary;

(c) the costs award, amounting to 25 per cent of costs incurred in his prosecution, was excessive.

Facts

[3] The misconduct occurred while Mr Katamat was, through his company White Swan Pharmacy Limited, the owner of, and responsible pharmacist at, three pharmacies in Auckland. These were the "White Swan" pharmacies located at Mt Roskill, Mt Eden and Balmoral.

[4] The appellant had purchased the Mt Roskill pharmacy in 1997. He incorporated White Swan Pharmacy Limited the same year. The businesses expanded in 2006, purchasing the Balmoral and Mt Eden pharmacies.

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1 *Professional Conduct Committee v Katamat* HPDT 399/Phar10/162P, 2 September 2011.

2 *Professional Conduct Committee v Katamat* HPDT 378/Phar10/162P, 1 June 2011.

[5] When he purchased the last two pharmacies, the appellant employed Bakr El Saudi as pharmacist at the Balmoral pharmacy and Puli Pavan Kumar as pharmacist at the Mt Eden pharmacy. Mr Kumar's wife, Ujwala Karupakala, was also employed at the Mt Roskill pharmacy from April 2008.

[6] On 25 April 2009, Ms Karupakala made an internal complaint to management at the Mt Roskill pharmacy, and to the appellant himself, about practices at the Mt Roskill pharmacy. On 29 April 2009, she forwarded her complaint to the Medicines Control Team at the Ministry of Health (the Ministry). She resigned from White Swan Pharmacy Limited shortly afterward.

[7] In response, the Medicines Control Team requested reports of medicines purchased for the White Swan pharmacies between May 2006 and April 2009. On 3 June 2009, the Team also conducted unannounced, simultaneous inspections of all three pharmacies. On 9 June 2009, it conducted a second inspection of the Mt Roskill pharmacy.

[8] Reports were prepared for all four inspections. A common theme of the findings for each pharmacy was a discrepancy between medicines actually present and medicines recorded, and medicines ordered and prescription reports.

[9] On 26 June 2009, the Ministry of Health established a Professional Conduct Committee (PCC) to investigate the problems identified in the inspection reports. On 10 July 2009, the Ministry decided to suspend the appellant's licence to operate the Mt Roskill pharmacy from 17 July. On 30 July 2009, the Pharmacy Council of New Zealand suspended the appellant's pharmacy practising certificate until the PCC's general investigation was complete. Meanwhile, the PCC appointed Marie Scott, a medicines inspector, to investigate the White Swan pharmacies further. Ms Scott produced a report on 22 March 2010. A copy of this report was forwarded to the appellant for comment. Some months afterwards, on 17 August 2010, the PCC filed charges against the appellant.

[10] The Tribunal heard the matter in early February 2011 and gave judgment on liability on 1 June 2011. The principal charge was professional misconduct by

committing acts and omissions amounting to malpractice or negligence.[3] An alternative charge of committing an act or omission likely to bring discredit to the pharmaceutical profession was also laid.[4] There were several particulars. They seem to cover a significant part of a pharmacist's practice. I set them out in full:

> b. [acting in breach of] the Medicines Act 1981 in that [Mr Katamat]:
>
> (i) Failed to ensure records relating to the sale of Sudomyl (a Class C Part 5 controlled drug under the Misuse of Drugs Act) by the Pharmacies were retained, as required by section 45 of the Medicines Act.
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> (ii) Failed to ensure that records relating to the sale of codeine phosphate (a Class C Part 2 controlled drug under the Misuse of Drugs Act) by the Pharmacies were retained, as required by section 45 of the Medicines Act.
>
> (iii) Failed to ensure that records relating to the sale of prescription only medicines namely, Viagra, Cialis, Propecia, Reductil, and Duromine were kept by the Pharmacies as required by section 45 of the Medicines Act.
>
> (iv) Dispensed and sold prescription and/or permitted the sale of prescription only medicines namely, Viagra, Cialis, Propecia, Reductil, Salbutamol, Myocrisin, and antibiotics without a prescription as required by section 18 of the Medicines Act.
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> (v) Sold by way of wholesale and/or permitted the sale of prescription only medicine Lipitor otherwise than in accordance with a license issued under the Medicines Act 1981, as is required by section 17 of the Medicines Act.
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> c. [acting in breach of] the Medicines Regulations 1984 in that he:
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> (i) Failed to comply with labelling requirements of medicines in that he:
>
> A failed to label
>
> B failed to specify the expiry date
>
> C failed to provide the batch number of the medicines listed in Schedule 1, as is required by regulation 13 of the Medicines Regulations.
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> (ii) Failed to record:
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> A the date of each transaction.
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> B the name of the patient.

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3 Health Practitioners Competence Assurance Act 2003, s 100(1)(a).

4 Health Practitioners Competence Assurance Act 2003, s 100(1)(b).

C the address of the patient.

D the name of the medicine supplied.

E the quantity of the medicine supplied.

F the name of the prescriber.

G in the case of prescription medicine, the unique identifying number or code of the prescription.

when dispensing prescription only medicines in a 'Prescriptions register' or in any other form as required by regulation 57 of the Medicines Regulations which he was required to do not later than the ordinary business day following the day on which the medicine was dispensed or supplied.

(iii) Failed to keep a Sale of Medicines Register for restricted and prescription only medicine dispensed by the Pharmacies under a prescription and/or sold by wholesale as required by regulation 54A of the Medicines Regulations.

d. [acting in breach of] the Misuse of Drugs Regulations 1977 in that [Mr Katamat]:

(i) Dispensed the controlled drugs listed in Schedule 2, on the dates listed in Schedule 2 to those patients listed in Schedule 2, pursuant to a prescription that failed to conform in all respects with regulation 29 of the Misuse of Drugs Regulations.

(ii) Failed to ensure that controlled drug prescriptions were retained for a period of four years from the date on which the controlled drug was dispensed as required by regulation 33 of the Misuse of Drugs Regulations.

(iii) Failed to keep a Controlled Drugs Register consisting of a bound volume of consecutively numbered pages in the form prescribed by Schedule 1, Form 1, and failed to enter in the Controlled Drugs Register legibly and indelibly the particulars indicated in Schedule 1, Form 1 of the Misuse of Drugs Regulations all controlled drugs dispensed or in the Pharmacies possession, not later than the ordinary business day following the day on which that matter arose, as required by regulation 40 of the Misuse of Drugs Regulations.

(iv) Failed to initial every entry made in the Controlled Drugs Register as required by regulation 40 of the Misuse of Drugs Regulations.

(v) On 3 June 2009 failed to ensure that codeine phosphate was stored in a locked, secured and safe place as required by regulation 28 of the Misuse of Drugs Regulations.

e. [acting in breach of] the Pharmacy Council Code of Ethics in that [Mr Katamat]:

(i) Failed to exercise professional judgement to prevent the supply of prescription only medicines namely Viagra, Cialis, Propecia, Reductil, Salbutamol, and antibiotics which he knew or should reasonably be expected to realise that those prescription only medicines had in the circumstances the potential for misuse, abuse or dependency and/or were likely to constitute a hazard to health as required by principle 3.15 of the Code of Ethics.

(ii) Failed to uphold reasonably accepted standards of behaviour and to refrain from any conduct that might bring the profession into disrepute or impair the public's confidence in the pharmacy profession as required by principle 7.1 of the Code of Ethics.

(iii) Failed to act in accordance with his obligations to prevent harm to a patient or the public in that he recycled or reused or permitted to be recycled or reused medicines when he knew or ought to have known that such conduct posed a risk to patient safety and/or failed to ensure the supply of medicine where there is a reason to doubt its quality or safety as required by principle 3 of the Code of Ethics.

(iv) Failed to act in accordance with his obligations of integrity and trustworthiness as required by principles 6 and 7 of the Code of Ethics when:

A he accessed the Pharmacies on at least eight separate occasions after 16 June 2009 when he had undertaken not to enter the Pharmacies; and

B on or about 9 July 2009 he requested Bakr Al Saudi the pharmacist at White Swan Pharmacy Balmoral to dispense Hypnovel after 16 June 2009 when he had undertaken not to be involved in the day to day management and dispensing of any medicines, prescriptions or non-prescription in the Pharmacies until the conclusion of the Ministry of Health and Pharmacy Council's investigations.

(v) Failed to keep adequate records of the supply and/or dispensing of Sudomyl and/or codeine phosphate.

[11] From the outset, the appellant accepted some of the less serious particulars.[5]

[12] The most serious of the remaining particulars were those relating to the failure to keep adequate records of orders and sales of the drugs Sudomyl and

[5] Those that were material (as they were ultimately found proved by the Tribunal) were particulars b(ii), b(v), c(i) and(ii), and d(iii), (iv) and (v).

codeine phosphate, that is, particulars b(ii) and e(v). It was alleged the absence of adequate records for these drugs contravened s 45 of the Medicines Act 1984 and the Pharmacy Council Code of Ethics, respectively. Particular b(i) also related to Sudomyl record-keeping (and indeed was conceded by the appellant). However, the Tribunal found that, for reasons not relevant to this appeal,[6] it was wrongly brought and inapplicable.

[13] The seriousness of particulars b(ii) and e(v) stemmed from the fact that Sudomyl contains pseudoephedrine: a precursor substance for the manufacture of methamphetamine. Codeine can be used to manufacture morphine. The information collected by the PCC revealed that 26,261 Sudomyl tablets and 25,353 codeine tablets had been ordered by White Swan Pharmacies Ltd but not accounted for in any White Swan pharmacy records.

[14] It is also important to understand the nature of the allegations encapsulated by these particulars. The PCC was not alleging (at least not directly) that the appellant had deliberately ordered Sudomyl and codeine, or intentionally and wrongfully sold it to others. Rather, the allegation was simply that he had failed to keep adequate records of these drugs (albeit in very dubious circumstances) so as to breach s 45 of the Medicines Act and/or the Pharmacy Council Code of Ethics.

[15] Other than the specific concessions noted above, the appellant denied these and the remaining particulars. His defence regarding the failures to record Sudomyl and codeine orders and sales was that he had been "set up" by one or more of his employees at his pharmacies. He denied making the orders concerned, saying he could prove he was not present when orders were allegedly placed. He suspected his employees of theft and of harbouring animosity toward him. He said that, building on that fact, he should not be blamed for failing to record details of orders he did not place and was not aware of.

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6 But which are set out extensively in the Tribunal's decision on liability, *Professional Conduct Committee v Katamat* HPDT 378/Phar10/162P, 1 June 2011, at [360]–[381].

[16] He defended all other particulars, including failing to record sales of prescription only medicines, using recycled medicines and selling the drug Lipitor wholesale without justification, on similar (albeit not entirely overlapping) grounds.

[17] In its judgment on liability, the Tribunal found that the appellant's conduct justified a finding of malpractice or negligence (the principal charge). Regarding the Sudomyl record-keeping, after a discussion of the evidence, the Tribunal concluded:

> 143. There is no question that there were significant orders of Sudomyl made from all three Pharmacies. The detail is tabulated in Ms Scott's report. ... Mr Katamat was at all times the responsible pharmacist for all three Pharmacies. He had knowledge of all user and access codes. He had keys to all three Pharmacies. The orders for Sudomyl in quantities of 10 bottles were all made from all three Pharmacies at times when he is shown in the record as having either opened or closed the Pharmacy, that is having been present at the time the order was placed; and in particular there are times when the Pharmacy in question was open for only a short time and out of normal hours, opened by and closed by Mr Katamat and the order was placed during that time.
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> 144. The overwhelming conclusion that the Tribunal has reached is that it is likely that those orders were in fact made by Mr Katamat himself.

[18] And similarly in relation to the evidence regarding codeine phosphate record-keeping failures:

> 156. The Tribunal will deal with credibility issues below. Because the Tribunal finds that the explanations given by Mr Katamat are not credible, it accepts the undisputed record concerning the ordering and failure to record and account for Codeine Phosphate.
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> ...
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> 158. The charges concerning Codeine Phosphate, as with the charges concerning Sudomyl, relate to record keeping. The Charge in Particular b(ii) concerns record keeping and retention as required by the provisions of the Medicines Act 1981; and the Charge in Particular e(v) relates to record keeping in the context of the Pharmacy Council Code of Ethics. The Tribunal is not required to consider what was done with the Codeine Phosphate. There are no charges relating to that.
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> 159. The primary responsibility for record keeping in relation to this serious risk medicine which is so open to abuse lay with Mr Katamat. He was at the time the Charge Pharmacist of Mt Roskill Pharmacy and responsible pharmacist for all three Pharmacies.

> 160. Orders were placed as the records clearly and unambiguously show. Those orders were met by the suppliers and the product would have been received at the respective Pharmacies. A careful track of these drugs was required to be kept.

[19] When discussing the application of the relevant law to the facts as found, however, the Tribunal affirmed that the identity of the orderer was not an element of the charge:[7]

> The charges relate ... to keeping records. The Tribunal does not need expressly to find that Mr Katamat in fact ordered these drugs.

[20] The Tribunal then concluded nonetheless that it was likely to be Mr Katamat who did the ordering:

> 333. ... What is established is that [the Sudomyl and codeine phosphate tablets ordered but unaccounted for] were ordered from Pharmacies where Mr Katamat had responsibility for these drugs. What is also established is that, such significant quantities of these drugs having been ordered, Mr Katamat had the obligation to keep records relating to the retention, sale, supply, dispensing or other disposal of these drugs.
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> ...
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> 342. The Tribunal does not accept [Mr Katamat's] defences. The overwhelming inference to be drawn is that Mr Katamat had access to the respective Pharmacies at the times the orders for Sudomyl and Codeine Phosphate were made and it is unlikely that others were there at the time. These occurred sometimes out of regular pharmacy hours and sometimes for a short period of time only. There is no evidence of what occurred with the supply of those medicines pursuant to those orders but the prime responsibility to account for these and record them, lay with Mr Katamat. They are serious drugs and should be carefully recorded and accounted for.
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> ...
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> 350. The matter has been comprehensively investigated by Ms Scott. The Tribunal accepts the detail of her report as being accurate and no evidence called from Mr Katamat is sufficient to negate the critical aspects of it.
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> 351. Mr Katamat had a prime responsibility for all these matters. He has attempted to exonerate himself by blaming others. The Tribunal does not accept his account of the responsibility of other people for his alleged motivation on their part by self interest. These are significant and serious matters for which he had prime responsibility and the Tribunal finds that he did not discharge that responsibility.

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7 At [333].

[21] The finding that the appellant ordered the Sudomyl and codeine phosphate became a material factor in assessing penalty.

[22] All the remaining particulars except particular b(i) were also found proved. While I have not emphasised these particulars thus far, it is worth noting that the Tribunal considered them serious in their own right:

> 353. The Tribunal is of the view that even if the Particulars which were admitted by Mr Katamat stood on their own the Charge would be made out. He has effectively admitted the wholesale sale of the Lipitor, failures to comply with labelling requirements, failing to keep the Controlled Drugs Register as required, failing on a specific date to secure a supply of Codeine Phosphate. These in themselves are serious matters.

[23] The Tribunal gave its judgment on penalty on 2 September 2011. It imposed:

> (1) immediate cancellation of the appellant's registration as a pharmacist; and
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> (2) censure; and
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> (3) an order to contribute to costs incidental to the prosecution, specifically 25 per cent of the costs of the PCC ($40,928.31) and 25 per cent of the costs of the Tribunal ($18,750.00).

[24] In his submissions to the Tribunal on penalty, the appellant had argued that deregistration was excessive and that an order for his suspension should be preferred. He accepted, however, that censure was "clearly appropriate" and some costs award was inevitable. He emphasised his "proven" record of good administration and his willingness to participate in rehabilitation. He maintained his denial of the Sudomyl and codeine ordering charges, but admitted his professional judgement in not maintaining proper records of drugs and in recycling medicines had fallen below acceptable standards. He described his misconduct as caused by stress due to overreaching in expanding his practice in 2006.

[25] Nonetheless, the Tribunal decided to de-register him. It concluded his ordering and failing to record large quantities of Sudomyl and codeine were "a serious breach of standards". His failure to maintain a Controlled Drug Register also showed "a significant breach of his statutory obligations and his ethical obligations."

[26] The Tribunal specifically considered whether a lesser penalty would have sufficed. It dismissed that suggestion, relying on the seriousness of the appellant's breaches of professional standards, the significant potential for harm created by those breaches, his lack of remorse, the unpersuasiveness of his evidence of previous good character and the lack of evidence supporting his prospects of rehabilitation.

[27] On censure, the Tribunal concluded:[8]

> [The Tribunal] is also of the view that Mr Katamat should be censured for his offending. Although cancellation of registration is in itself a significant censure, the Tribunal is of the view that there needs to be an express record that the Tribunal is censuring him for this offending.

[28] On costs, the Tribunal took into account the fact the appellant had denied many of the allegations in the face of strong evidence. The Tribunal was also mindful of the appellant's recent bankruptcy. It nonetheless decided a costs award was justifiable, given the loss-spreading purpose of such awards in the professional disciplinary context.

Appellate jurisdiction

Permissible scope of appeal

[29] This appeal is brought pursuant to s 106(2)(b) of the Act. My powers on appeal are set out in ss 109 and 110 of the Act. Section 109(2) states this appeal is by way of rehearing.

[30] Section 109(4) is particularly important in this case. It provides that, on an appeal from the Tribunal:

> ...
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> (4) The court must not review—
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> (a) any part of a decision or order not appealed against; or
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> (b) any decision or order not appealed against at all.

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8 At [179].

[31] The subsection is important because Mr Katamat does not appeal the Tribunal's decision on his liability. I therefore "must not" review that decision pursuant to s 109(4)(b).

[32] A preliminary issue arises, however, as to the scope of that prohibition. This is because in its liability decision, the Tribunal made the important finding (set out above) that, in addition to failing to keep proper records of Sudomyl and codeine tablets, Mr Katamat had personally ordered those tablets. That greatly increased his culpability for penalty purposes. In light of the elements of the offence, was that finding even relevant to liability? Can it now be challenged on a penalty-only appeal? To answer these questions, I must assess whether the finding Mr Katamat ordered the tablets is "locked in" as part of the liability decision, or alternatively whether it was really superfluous to that decision and not binding on me in this appeal under s 109(4)(b) because such a finding only goes to penalty.

[33] I have concluded that Mr Katamat is indeed stuck with the Tribunal's findings regarding the ordering. A helpful starting point is the decision of Heath J in *Cullen v Professional Conduct Committee*.[9] In that case, it was alleged Dr Cullen "wrote a substantial number of prescriptions for Sudomyl" either to patients without justification or in the names of persons who had no idea they were being prescribed the drug. In its written decision on both liability and penalty, the Tribunal found that, in addition to merely writing the prescriptions, Dr Cullen had written them for an "illegal purpose". On appeal, Heath J held the latter finding was inappropriate and refused to take it into account when considering liability and penalty. His Honour said:[10]

> It was unnecessary for the Tribunal to make a finding of "illegal purpose" in order to determine the charge. To determine the charge, the Tribunal had to decide whether one or both of the particulars were proved and, if so, whether the conduct in issue amounted to professional misconduct. On that phase of the Tribunal's inquiry, "illegal purpose" was irrelevant because of the way in which the charge was framed.

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9 *Cullen v Professional Conduct Committee* HC Auckland CIV-2008-404-6786, 14 November 2008.

10 At [45].

[34] The relevant particulars in this case – b(ii) and e(v)[11] – are different from those in *Cullen*. They allege failures to keep records of codeine sales contrary to s 45 Medicines Act 1981, and failures to keep records of the "supply and/or dispensing" of Sudomyl contrary to principle 3.15 of the Pharmacy Council Code of Ethics 2004.[12] It is clear from the wording of both s 45 and principle 3.15 that neither requires proof the accused actually ordered the drugs. The Tribunal acknowledged that itself.[13] Indeed, there being no statutory language to the contrary, it can be inferred from the nature of the offence,[14] the penalty[15] and the wider statutory context[16] that s 45 is a strict liability offence.[17] No intent, recklessness or carelessness regarding failing to keep records needs to be proved. The position is the same in respect of principle 3.15.[18]

[35] Nonetheless, I consider the ordering finding was still "necessary" (in Heath J's terms) given the way Mr Katamat defended these allegations. Strict liability offences can be defended if the defendant proves on the balance of probabilities that he or she was not at fault in any way for the breach.[19] This is essentially what Mr Katamat argued. He said that, since he (apparently) did not order the tablets, it would be unfair to find him liable for failing later to account for them.[20] In that context, it was necessary for the Tribunal to inquire into whether Mr Katamat made the orders in order to address his total absence of fault defence.

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11 Reproduced at [10] above.

12 Technically the provision is "specific obligation 15" which pertains to principle 3 (non-malfeasance) but nothing turns on that. Additionally the 2004 Code has since been replaced by the Pharmacy Council Code of Ethics 2011 but nothing turns on that either.

13 *Professional Conduct Committee v Katamat* HPDT 378/Phar10/162P, 1 June 2011 at [333], specifically "The charges relate, however, to keeping records. The Tribunal does not need expressly to find that Mr Katamat in fact ordered these drugs."

14 A professional regulatory offence.

15 Pursuant to the Medicines Act 1981, s 78, only 3 months imprisonment or a fine not exceeding $500 and, if the offence is a continuing one, a further fine not exceeding $50 for every day or part of a day during which the offence has continued.

16 Namely s 80 of the Act (which expressly provides for strict liability for *selling* medicines contrary to the provisions of the Act or associated Regulations).

17 By application of the principles enunciated by the Court of Appeal in *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) and *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA).

18 Albeit that the concept of strict liability is only applied to the Code by analogy, given the Code (obviously) does not, of itself, prescribe criminal offences.

19 See generally *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) and *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA). A parallel is to be found in the statutory defences to general liability of principals for the acts of agents in s 79(2), and to strict liability for selling offences in 80(2) of the Medicines Act 1981.

20 *Professional Conduct Committee v Katamat* HPDT 378/Phar10/162P, 1 June 2011 at [38] – [40].

The finding he ordered the tablets accordingly formed a necessary part of the Tribunal's liability decision and cannot now be revisited in this penalty appeal.

Appeal standard

[36] There is another preliminary issue about the standard to which the appellant must prove his case to succeed on appeal. For the respondent, Mr Wilson submits that, consistent with recent High Court decisions on appeals by medical practitioners against disciplinary penalty,[21] this appeal is against an exercise of discretion and should therefore attract the stricter appeal standard set out in *May v May*.[22] Mr Wilson conceded, however, that certain other High Court decisions[23] have characterised these appeals as appeals against assessments of fact and degree, therefore engaging the less restrictive standard outlined by the Supreme Court in *Austin, Nicholls & Co Inc v Stichting Lodestar*.[24] Mr Wilson's response is that these decisions are wrong and should not be followed.

[37] The conflict in the authorities was recently addressed at length by Collins J in *Roberts v Professional Conduct Committee*.[25] After considering the relevant statutory provisions and judgments on both sides of the divide, the Judge found that appeals against penalty decisions of the Health Practitioners Disciplinary Tribunal are properly considered appeals against exercises of discretion, concluding:[26]

> 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 an exercise of discretion by the Tribunal. I have reached this conclusion because, when deciding what penalty to impose

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21 *GS v Professional Conduct Committee* [2010] NZAR 417 (HC), *L v Professional Conduct Committee of the New Zealand Psychologists' Board* (2009) 20 PRNZ 92 (HC) (in which the *Austin, Nicholls* approach, however, was confirmed as applicable to appeals against *conviction* for professional misconduct) and *Geary v Professional Conduct Committee* HC Wellington CIV-2009-485-2641, 22 July 2010.

22 *May v May* [1982] 1 NZFLR 165 (CA), the standard being that an appellant must show that the first-instance decision-maker acted on a wrong principle; or that he/she failed to take into account some relevant matter or that he/she took account of some irrelevant matter or was plainly wrong.

23 *Dr E v Director of Proceedings* (2008) 18 PRNZ 1003 (HC), *O v Professional Conduct Committee* [2011] NZAR 565 (HC), *Vohora v Professional Conduct Committee* HC Auckland CIV-2011-412-00076, 23 March 2012, *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008.

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

25 *Roberts v Professional Conduct Committee* [2012] NZHC 3354 at [22] – [43].

26 At [43].

> 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 a discretion.

[38] I am content to agree and treat this appeal as an appeal against the exercise of a discretion attracting the *May v May* standard. First, there were few specific constraints on the Tribunal's power to determine an appropriate penalty.[27] Second, the key question – namely whether the appellant's conduct was sufficiently serious to warrant deregistration – was one that called for the Tribunal's specialist judgement in determining the risk someone in the appellant's position posed to public health and to the integrity of the pharmaceutical profession generally. Third, this categorisation is also consistent with several similar cases.[28]

[39] Having said that, I doubt (as Collins J did in *Roberts*)[29] that there is any significant practical impact in the difference between the tests in *May v May* and *Austin, Nicholls* in this case at least, even if that difference could be pinned down.

[40] To succeed in this appeal, therefore, the appellant must show that the Tribunal acted on a wrong principle, failed to take into account some relevant matter or took account of some irrelevant matter, or was plainly wrong.

Submissions

[41] I now turn to the substance of the appeal. For the appellant, Ms Joychild submits that Mr Katamat should have not been de-registered because:

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27 A highly influential factor in *Auckland Standards Committee v Fendall* [2012] NZHC 1825.

28 *L v Professional Conduct Committee of the New Zealand Psychologists' Board* (2009) 20 PRNZ 92 (HC), *Geary v Professional Conduct Committee* HC Wellington CIV-2009-485-2641, 22 July 2010 at [4], *GS v Professional Conduct Committee* [2010] NZAR 417 (HC).

29 At [42].

(a) the charges were not sufficiently serious. Specifically, the Tribunal placed too much weight on the charges relating to Sudomyl and codeine ordering and record-keeping. This was because:

(i) the Tribunal's findings on the Sudomyl and codeine charges were based on circumstantial evidence only;

(ii) the appellant's defence to them had not been properly put at the hearing. Key prosecution witnesses were not cross-examined on the substance of the appellant's defence. This failure was so abject that the Tribunal was under an obligation to raise it with the appellant's counsel;

(iii) in its penalty decision, the Tribunal summarised its findings on liability in a "highly inaccurate and … highly prejudicial" way, mischaracterising the strength of the appellant's defence;

(iv) no criminal prosecutions have followed;

(v) if the Sudomyl and codeine ordering misconduct is put to one side, the appellant's other wrongdoing is not actually serious enough to warrant deregistration;

(vi) deregistration is not consistent with previous cases. The present case represents less serious offending than described in the Tribunal's decision in *Pulman*[30] (where deregistration was imposed) and is really closer to the facts of *May*[31] and *Chiew*[32] (where de-registration was not imposed).

(b) the Tribunal did not properly consider the appellant's rehabilitative prospects, or alternatives to de-registration. In particular, the Tribunal was wrong:

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30 *Professional Conduct Committee v Pulman* HPDT 375/Phar11/171P, 11 May 2011.

31 *Professional Conduct Committee v May* HPDT 222/Phar08/99P, 5 May 2009.

32 *Professional Conduct Committee v Chiew* HPDT 180/Phar08/95P, 30 September 2008.

(i) to find no evidence the appellant had passed previous Ministry of Health audits;

(ii) not to take into account the contribution of running multiple pharmacies to the instances of negligence;

(iii) not to consider the punitive aspect of suspension as an alternative penalty;

(iv) not to find any persuasive evidence of remorse or previous good character; and

(v) not to grant credit for admissions of guilt.

[42] Ms Joychild also submits it was unfair for the Tribunal to censure Mr Katamat, given his earlier suspension and the wide publicity of his case. Finally, she submits that, "in all the circumstances ... it was unjust" to make a costs order of 25 per cent, given Mr Katamat's personal and financial circumstances.

[43] For the respondent, Mr Wilson submits that the Tribunal's decision was correct and should be upheld in all respects. He submits the decision to de-register should be upheld because:

(a) the charges, principally but not exclusively the Sudomyl and codeine ordering charges, were sufficiently serious to warrant de-registration. First, they must be accepted as the appellant is not appealing liability. Second, a large number of tablets were ordered and unaccounted for. The ordering was intentional. The record-keeping failures were extensive. Third, the seriousness of the charges is not undermined by the appellant's former counsel's failure to cross-examine certain witnesses on his theory of the case. Regardless, the Tribunal did remind the appellant's counsel of the importance of cross-examination, and the theory was put to certain witnesses, who refuted it;

(b) the Tribunal was entitled to accept the appellant was not remorseful and did not accept responsibility. He only admitted some charges from the outset. He continued to deny the most serious charges. He blamed others. When pressed in cross-examination, he refused to accept responsibility;

(c) the Tribunal was entitled to accept the appellant's rehabilitative prospects were low. The appellant adduced no evidence of his previous pharmaceutical record.

[44] Mr Wilson submits the costs award should also not be disturbed. It was justifiable because the appellant's denials led to undue prolongation of the proceeding. The award was modest and consistent with past cases. The Tribunal carefully considered the appellant's financial position and the award represents the exercise of its discretion which should not be disturbed.

Deregistration

General principles

[45] I deal first with the decision to de-register the appellant – the most significant penalty. The Tribunal's power to sanction a practitioner for misconduct stems from Part 4 of the Act, specifically s 100 (which sets out the types of conduct which the Tribunal may sanction) and s 101 (which sets out permissible penalties). It is unnecessary to set those sections out in full.

[46] The Act does not set out specifically the factors the Tribunal, or a Judge on appeal, must consider when deciding whether to de-register a health practitioner .

[47] That said, the discretion to impose a penalty of de-registration must be seen in the light of the principal purpose of the Act, which is:[33]

[33] Medical Practitioners Competence Assurance Act 2003, s 3(1).

> ... 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.

[48] The discretion has also been the subject of several relevant judicial decisions. It suffices to refer to a few. In *Professional Conduct Committee v Martin*, Gendall J affirmed the importance of the purposes of protecting the public and deterrence, as well as the secondary role of punishment, when imposing professional disciplinary penalties:[34]

> Obviously striking off or suspension has a punitive effect. However, that is not necessarily the purpose of the order. A professional (e.g. lawyer or accountant) who steals from clients and who is imprisoned is usually de-registered so as to maintain professional standards and deter others. That he/she is punished by the disciplinary penalty is a consequence of the order but not necessarily why the order should be made. *It is made for the primary purpose of protecting the public and community by upholding proper professional standards, deterrence (both specific and general), ensuring only those who are fit, in the widest sense, to practise are given that privilege*. (emphasis added).

[49] In *Roberts v Professional Conduct Committee*, Collins J identified the following eight factors as being relevant whenever the Tribunal is determining an appropriate penalty.[35] They are which penalty:

> (1) most appropriately protects the public and deters others;
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> (2) facilitates the Tribunal's "important" role in setting professional standards;
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> (3) punishes the practitioner;
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> (4) allows for the rehabilitation of the health practitioner;
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> (5) promotes consistency with penalties in similar cases;
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> (6) reflects the seriousness of the misconduct;
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> (7) is the least restrictive penalty appropriate in the circumstances; and
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> (8) looked at overall, is the penalty which is "fair, reasonable and proportionate in the circumstances".

[50] In *Patel v Dentists Disciplinary Tribunal*, regarding the decision to de-register the practitioner specifically, Randerson J held that:[36]

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34 At [23].

35 At [44]-[51].

> ... the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist's fitness to practice against the need for removal and its consequences to the individual: *Dad v General Dental Council* at 1543. As the Privy Council further observed: [in *Dad*]
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> > Such consequences [cancellation] can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.

[51] Similarly in *A v Professional Conduct Committee*,[37] Keane J derived the following five principles from the Privy Council speeches in *Taylor v General Medical Council*:[38]

> First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element'. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practise which may or may not be amenable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.

[52] Keane J continued, affirming the importance of considerations of rehabilitation:[39]

> ... the Tribunal cannot ignore the rehabilitation of the practitioner: *B v B* (HC Auckland, HC 4/92, 6 April 1993) Blanchard J. Moreover, as was said in *Giele v The General Medical Council* [2005] EWHC 2143, though '… the maintenance of public confidence … must outweigh the interests of the individual doctor', that is not absolute – 'the existence of the public interest in not ending the career of a competent doctor will play a part.'

[53] In summary, the case law reveals that several factors will be relevant to assessing what penalty is appropriate in the circumstances. Some factors, such as the need to protect the public and to maintain professional standards, are more intuitive in their application. Others, such as the seriousness of offending and consistency

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36 *Patel v Dentists Disciplinary Tribunal* HC Auckland, AP 77-02 8 October 2002 at [30].

37 *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].

38 *Taylor v General Medical Council* [1990] 2 All ER 263 (PC) at 266.

39 At [82].

with past cases, are more concrete and capable of precise evaluation. Of all the factors discussed, the primary factor will be what penalty is required to protect the public and deter similar conduct. The need to punish the practitioner can be considered, but is of secondary importance. The objective seriousness of the misconduct, the need for consistency with past cases, the likelihood of rehabilitation and the need to impose the least restrictive penalty that is appropriate will all be relevant to the inquiry. It bears repeating, however, that the overall decision is ultimately one involving an exercise of discretion.

[54] I will consider the appropriateness of Mr Katamat's de-registration by first examining the seriousness of the misconduct, similar cases, the appellant's likelihood of rehabilitation and the suitability of less restrictive penalties. I will then step back and consider whether de-registration was fair and reasonable in the circumstances, having regard to all other relevant purposes and the appropriate weight I must place on each.

Seriousness of the misconduct

[55] As discussed, Ms Joychild for the appellant has submitted that the Tribunal erred in evaluating the seriousness of the appellant's misconduct in several ways.

[56] First, Ms Joychild submitted the Tribunal overstated the seriousness of the Sudomyl and codeine breaches specifically, given those particulars were found proved on circumstantial evidence and that the appellant's defence to them was not properly put by counsel at the hearing. With respect to Ms Joychild, that submission misses the mark slightly. The Sudomyl and codeine particulars related to poor record-keeping. That allegation was found proven on direct, not circumstantial evidence, namely the reports of the Medicines Control Team and the subsequent report of Ms Marie Scott.

[57] I accept that the ancillary finding that Mr Katamat made the orders himself relied on circumstantial evidence, combined with a complete and firm rejection of Mr Katamat's evidence on the point. I accept that, while the record-keeping failures were serious in their own right, the finding regarding ordering was an important

aggravating factor. I accept also that Mr Katamat's counsel did a poor job of marshalling his defence on this aspect.

[58] This does not get the appellant far, however. Regardless of the type of evidence by which it found Mr Katamat had made the orders, at the end of the day, the Tribunal was satisfied, to the requisite standard of proof, that he had done so. As I have concluded, that was a finding that was well open to – and indeed necessary for – the Tribunal to make. Not having appealed liability, the appellant cannot now complain that it is taken into account when determining penalty.

[59] Second, Ms Joychild submitted the fact that no criminal charges have been laid against the appellant shows the offending was of generally lower seriousness. That is not necessarily right. The lack of criminal charges is simply not relevant to an objective assessment of the seriousness of the misconduct. The decision to lay criminal charges was not something within the Tribunal's control. The focus for the Tribunal had to be on the evidence of what the appellant actually did (or rather, failed to do) in the particular circumstances. Anything else is speculation on the Tribunal's part.

[60] Third, Ms Joychild argued that the Tribunal's penalty judgment reveals it was labouring under an inaccurate or exaggerated view of the weakness of the appellant's defence to the allegation he ordered and failed to account for the Sudomyl and codeine.[40] She points to its observations that there had been "no evidence, whatever[;] ... [no] vestige of evidence" to support his defence of being "set up" by his employees, and its framing of his defence as being based on "wild allegations."[41] Whether Ms Joychild is right or not on that point is beside the point now. The Tribunal's liability judgment covered the issue of Mr Katamat's credibility in detail and reached findings on who placed the orders. That judgment is not challenged on appeal. Again, in the light of s 109(4) of the Act, I cannot review the Tribunal's rejection of Mr Katamat's credibility on a penalty-only appeal.

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40 That is, that other employees in the appellant's pharmacies must have placed the disputed orders.

41 At [123].

[61] I have tried to make my own assessment of the seriousness of the appellant's offending as proven before the Tribunal. In my view, accepting the failings regarding record-keeping as I must, and being mindful of the difficulties the appellant faced in presenting his defence, I nonetheless conclude the offending was very serious. I emphasise:

(a) the nature of the appellant's offending. The number of charges and the different types of misconduct are significant. They include selling a variety of drugs without prescriptions, selling medicine wholesale without a licence, failing to date and label medicines and medicine transactions, dispensing drugs with incomplete prescriptions, failing to retain prescriptions, failing to maintain a Controlled Drugs Register and failing to store Codeine properly;

(b) the seriousness of the Sudomyl and codeine charges specifically. The appellant failed to detect and record very large quantities of those serious drugs. Such drugs are very dangerous if not properly managed. The appellant admitted he was aware of the criminal purposes to which they could be put. And, as I have said, the appellant is stuck with the finding that he ordered the drugs – a clearly aggravating feature of his offending;

(c) the length of time over which the misconduct occurred. Ms Joychild submitted that the duration of the misconduct (18 months) should *mitigate* the appellant's culpability. I disagree. While not as extensive as in *Wilson* (referred to below), it is still a lengthy period.

Consistency with penalties imposed in similar cases

[62] The next relevant factor is the need for consistency with similar cases. On the importance of consistency generally, see *A v Professional Conduct Committee*, in which Keane J said:[42]

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[42] At [31].

> ... while absolute consistency is something of a pipe dream, and cases are necessarily fact-dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.

[63] Of the cases I have been referred to, many are only tangentially helpful, dealing with deregistration for inappropriate sexual conduct[43] or disclosure of confidential patient information.[44] Those closer to the present case include:

(a) *Pulman:*[45] Mr Pulman was a pharmacist. Over two years, he sold between 30,000–61,000 tablets containing pseudoephedrine to customers, often at elevated prices. Many tablets were used in the manufacture of methamphetamine. Mr Pulman was convicted of manufacturing methamphetamine and sentenced to five years eight months' imprisonment. Because of this conviction, the Disciplinary Tribunal cancelled his registration, censured him and ordered that he pay costs.

(b) *Pellowe:*[46] Mr Pellowe was also a pharmacist. He made fraudulent claims for subsidies for medicines. The total amount falsely obtained was $219,366.66. He was charged with 47 counts of dishonestly using a document, to which he pleaded guilty and for which he was sentenced to nine months' home detention. He co-operated with the audit, removed himself from practice, admitted his guilt, made full reparation of the amount defrauded and paid the full investigative costs. Nonetheless the Disciplinary Tribunal cancelled his registration, censured him and ordered he pay costs.

(c) *Wilson:*[47] Mr Wilson was a doctor. He ran his own practice, and had worked at several others. Among many other failings, over a two month period, Mr Wilson ordered approximately 41,000 tabs of

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43 *Professional Conduct Committee* v *Singleton* HPDT 398/Phys10/158P, 10 August 2011, *D v Professional Conduct Committee* HC Wellington CIV 2010-463-382, 29 October 2010.

44 *Geary v Professional Conduct Committee* HC Wellington CIV-2009-485-002641, 22 July 2010.

45 *Professional Conduct Committee v Pulman* HPDT 375/Phar11/171P, 11 May 2011.

46 *Professional Conduct Committee v Pellowe* HPDT 137/Phar07/74P, 4 December 2007.

47 *Professional Conduct Committee v Wilson* HPDT 314/Med10/145P, 12 July 2010.

Sudomyl and supplied them to individuals who were not patients. Some were gang members. He also falsified Sudomyl prescriptions, and was found guilty of many other charges involving other drugs over several years. While the Tribunal considered the range, seriousness and duration of offending and the need to protect public health justified de-registration, it affirmed that the Sudomyl charges by themselves were, sufficiently serious to warrant this sanction.

(d) *Vohora v Professional Conduct Committee:*[48] Mr Vohora was a pharmacist who, over a period of ten years, failed to maintain a Controlled Drug Register or document standard operating procedures in his pharmacy, and also allowed an unqualified person to dispense medicines. Mr Vohora admitted failing to keep proper records and document procedures, saying he did so intentionally as a way of protesting what he saw as improper restrictions on his practice. The Tribunal found him guilty of professional misconduct amounting to malpractice and cancelled his registration as a pharmacist accordingly. On appeal, Whata J confirmed Mr Vohora's liability but quashed the cancellation of his registration. While accepting Mr Vohora's malpractice was "significant", it was nonetheless relevant that the offending was not covert, there had been no complaints about pharmacy management, Mr Vohora still kept a close eye on the dispensing process and kept some records of controlled drugs. The Medical Council had also failed to take any other disciplinary action despite having evidence of Mr Vohora's malpractice for approximately 10 years. Whata J referred the matter back to the Tribunal with a suggestion that suspension was appropriate.

[64] I have also considered *Cullen v Professional Conduct Committee*[49] (already discussed in the context of jurisdiction). Over two years, Dr Cullen had written prescriptions for very large quantities (46,300 tablets) of Sudomyl in his patients'

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[48] *Vohora v Professional Conduct Committee* [2012] NZHC 507, [2012] 2 NZLR 668.

[49] *Professional Conduct Committee v Cullen* HC Auckland CIV-2008-404-006786, 14 November 2008.

names without authorisation or justification. He had been subject to a police investigation in respect of this conduct, but criminal charges had not been brought. The Tribunal found Dr Cullen guilty of professional misconduct. As mentioned, the Tribunal's oral and written reasons for its decision included a finding that Dr Cullen had appropriated the Sudomyl for an "illegal purpose". There was evidence from a detective that the quantities prescribed could only be consistent with prescription for the manufacture of methamphetamine. On appeal against liability and penalty, Heath J found that, while the Tribunal went too far in making the "illegal purpose" finding, it nonetheless upheld the charge of professional misconduct and the penalty of cancellation. His Honour found Dr Cullen's ordering and record-keeping failures were sufficient to justify cancellation of registration.[50]

[65] While the present case is considerably less serious than *Wilson* and *Pulman*, it is closer (in terms of overall culpability) to *Pellowe* and is very close to *Cullen* on the basis of this Tribunal's finding (with which the appellant is now stuck) that Mr Katamat ordered the Sudomyl and codeine. I find Heath J's conclusions in *Cullen* particularly on point. De-registration was clearly within range here. The volume of prescribed drugs unaccounted for and the risk of their diversion for illicit purposes as a result of the appellant's mismanagement are considerations sufficiently serious to warrant deregistration. The case is distinguishable from *Vohora* on the basis that Mr Katamat intentionally ordered Sudomyl and codeine, admitted negligence in respect of several other record keeping requirements, had been the subject of an internal complaint, and there was no material delay by the Medical Council in proceeding against him.

[66] It therefore cannot be said the Tribunal was plainly out of step with similar cases in deciding to de-register the appellant.

Prospects of rehabilitation

[67] The next factor to consider is the appellant's prospects of successful rehabilitation. As Collins J noted in *Roberts v Professional Conduct Committee*:[51]

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50 At [60]–[61].

51 *Roberts v Professional Conduct Committee* [2012] NZHC 3354 at [47].

> A reason why rehabilitation may be an important consideration in that health professionals and society as a whole make considerable investments in the training and development of health practitioners. Where appropriate, the Tribunal should endeavour to ensure these investments are not permanently lost, provided of course the practitioner is truly capable of being rehabilitated and reintegrated into the profession.

[68] In its penalty judgment, the Tribunal held that it "[did] not accept, on what [had] been provided, that Mr Katamat [had] the potential for any rehabilitation".[52] The Tribunal emphasised the appellant "[had] shown no remorse for this situation throughout".[53] This was illustrated by the fact he continued to deny the Sudomyl and codeine allegations, and did so by making serious allegations of fraud against others, in his submissions on penalty. It also found the evidence of the appellant's previous good character unpersuasive, relying on the fact the appellant's 2007 audit had also revealed several breaches of the Medicines Regulations 1984, for which disciplinary charges were not formally brought, but for which the appellant had made reparation. The Tribunal therefore concluded that, given the seriousness of the offending, no punishment short of de-registration would be sufficient.

[69] Ms Joychild challenged these findings in several respects. While I have considered each submission carefully, ultimately, for the reasons that follow, I am not persuaded the Tribunal was plainly wrong in finding that Mr Katamat's prospects of rehabilitation were low.

[70] First, Ms Joychild submitted that the Tribunal wrongly discounted letters from members of the community. In my assessment, the weight to afford to these references was a matter squarely within the Tribunal's discretion. The Tribunal considered the references and made a decision.[54] Having read the references myself, I would not disturb that decision on appeal.

[71] Second, Ms Joychild submitted there was some evidence of the appellant's remorse in the "tenor" of his affidavit on penalty, or alternatively the lack of evidence was a "mere oversight". I have read the affidavit. In it, the appellant accepts his pharmacy management "left a lot to be desired" and that "in retrospect

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52 At [177].
53 At [176.5].
54 At [164].

[he] should have focused more on record-keeping and ... management". But nowhere does he acknowledge the consequences of his offending or demonstrate remorse for it. The "tenor" is one of self-deprecation and I agree with the Tribunal, not genuine remorse.

[72] Third, Ms Joychild submitted that I should have regard to a supplementary affidavit of the appellant, dated 14 May 2012. In it, the appellant "accept[s] ... [he] failed in respect of [his] duties as a pharmacist to keep records" but continues to deny the particulars that imply ordering. He also reflects on his current financial circumstances, the public shame he has suffered as a result of the prosecution, and reasserts his willingness to participate in rehabilitative programmes.

[73] In my assessment, the affidavit adds very little to what is already before the court. It does not reveal any greater understanding by the appellant of the real consequences of his misconduct for the profession or to public health more generally.

[74] Regardless, additional evidence may only be admitted on appeal subject to the relevant High Court Rules. Leave is required.[55] The power to grant leave is exercised sparingly. The general test is that the evidence must be cogent and likely to be material, and that it could not reasonably have been discovered at an earlier stage.[56] That test is plainly not satisfied here. Information about the likely financial and stigmatic effect of de-registration could, and indeed was, before the Tribunal when it made its decision.[57] There is nothing new in the affidavit which suggests the position regarding remorse has changed. I would not grant leave to admit it.

[75] Fourth, Ms Joychild submitted the Tribunal was wrong to find no evidence the appellant had previously passed all his Ministry of Health audits. She says it was within the Tribunal's power to infer this as fact. On my reading of the relevant part of the penalty decision,[58] the Tribunal was less troubled by the lack of positive evidence of clean audits (though this is remarked on) than by the evidence of

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55 High Court Rules, r 20.16(2).

56 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1991] 2 NZLR 557 (CA).

57 At [186]–[188].

58 At [146]–[148].

problems in the 2007 audit which tended to show a pattern of disregard for the rules. This was a relevant consideration which the Tribunal was entitled to take into account.

[76] Fifth, Ms Joychild submitted that the Tribunal was wrong not to give the appellant credit for his admissions. As I have said at [11], the appellant admitted some of the particulars of the Notice of Charge dated 18 August 2010. I accept this submission – but only to a point. The Tribunal did not specifically refer to the admissions in the portions of its judgment addressing the application of the principles of deciding on penalties to the facts, or on costs. It should have done. This was a mistake. However, seen in context, this error was not material. The appellant's admissions were in relation to the less serious particulars. He denied (and has continued to deny) the most serious particulars. Moreover, he has blamed others for those serious failings, in a defence ultimately found not to have been credible. Any credit for his admissions, therefore, would not have dislodged the Tribunal's reasons for de-registration.

[77] Sixth, Ms Joychild submitted it was improper for the Tribunal to observe the appellant had "put up no evidence to support [his rehabilitation prospects] such as evidence from colleagues or professional advisers or psychologists or the like". This, Ms Joychild said, implied the Tribunal expected the appellant to have obtained independent, professional advice, which was unrealistic and impracticable for him, given his financial circumstances.

[78] The Tribunal could only determine the appellant's prospects of rehabilitation based on the information before it. If no persuasive evidence of the appellant's rehabilitative prospects were before it, it could not make a finding in that regard. It is not unreasonable, in my view, to expect a medical practitioner in a penalty hearing to adduce evidence of, say, colleagues as to his or her past good character, general competence and ability to cope in difficult circumstances.

[79] Finally, Ms Joychild submitted the Tribunal was wrong to take into account the fact the appellant had not been punished in other fora as a factor in favour of its approach to penalty in this case. I accept that submission – but again, only to a

point. The Tribunal's task is not to compensate for a lack of penalty in other fora. Its task is to impose the penalty that is most consistent with the purpose of the Act and the considerations set out in the case law I have referred to. As *A v Professional Conduct Committee* and *Professional Conduct Committee v Martin* makes clear,[59] however, punishment itself is a legitimate, if secondary, consideration when deciding whether to de-register a medical practitioner. The Tribunal clearly based its decision to de-register the appellant principally on the seriousness of the charges before it, and the need to protect the health and safety of the public. This point is repeated on several occasions. The Tribunal mentioned punishment only after first discussing the importance of protecting the public and maintaining professional standards.[60] In my judgement, this is not a case of the Tribunal seeking purely to punish the appellant without reference to those primary considerations, or being primarily driven by a desire to punish. In short, the Tribunal did make an error, but again it was not material and did not affect the result.

Adequacy of alternative punishments

[80] This factor can be considered briefly. Ms Joychild submitted that the Tribunal did not properly consider the punitive effect of an alternative penalty of suspension. I am not persuaded this is the case. The Tribunal considered the (in)adequacy of suspension in detail.[61]

[81] The unsuitability of alternative punishments – in particular a long term of suspension with conditions on Mr Katamat's return to practice – is supported by the Tribunal's conclusions, affirmed earlier in this judgment, regarding Mr Katamat's prospects of rehabilitation.

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59 *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].

60 At [171]–[174].

61 At [175] – [177].

Overall assessment

[82] In my assessment, the Tribunal was entitled to find that de-registration was the appropriate penalty in the circumstances. The seriousness of professional misconduct and the absence of persuasive, admissible evidence of the appellant's prospects of rehabilitation suggest that any alternative penalty would be insufficient to meet the overriding purpose of the Act. I would uphold the Tribunal's decision regarding de-registration.

Censure and costs

[83] The Tribunal exercised its discretion to censure the appellant. I am not persuaded it was plainly wrong in doing so. There is precedent for this course of action (that is, censure in addition to de-registration) being taken.[62] The Tribunal considered censure was necessary given the seriousness of the misconduct and in the light of the purpose of the Act. I would not interfere with that decision.

[84] The Tribunal's order for costs is a different matter. It explained the relevant principles as follows:

> 194. The principles applicable to costs are these. In *Cooray v Preliminary Proceedings Committee* there is reference to a 50% contribution. That is in the context, however, of a starting point and other factors may be taken into account to reduce or mitigate that proportion.
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> 195. In *Winefield*, the Tribunal held that costs of some 30% of actual costs were appropriate having regard to:
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> 195.1 the hearing being able to proceed on an agreed statement of facts,
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> 195.2 co-operation of Mr Winefield,
>
> 195.3 the attendance of Mr Winefield at the hearing,
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> 195.4 consistency with the level of costs in previous decisions.

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[62] See, for example, *Professional Conduct Committee v Pellowe* HPDT 137/Phar07/74P, 4 December 2007.

[85] On the purpose of costs orders, it affirmed:

> The Tribunal emphasises that costs is not a penalty against the practitioner. It is ... a way in which the burden of the cost of prosecuting a health practitioner such as Mr Katamat is relieved, at least in part from other members of that profession who are all working hard and indeed incurring cost themselves in compliance with standards, Statutes, Regulations and the Code of Ethics.

[86] Ms Joychild submitted the orders made (for 25 per cent of costs of the PCC investigation and the Tribunal, $78,428.30 total) were simply unjust in all the circumstances. She points in particular to the appellant's financial circumstances, including his recent bankruptcy. The submission is that the Tribunal was wrong in imposing such a substantial costs award (even on a lower than usual tariff), in light of the appellant's lack of income or assets.

[87] I agree with that submission. The appellant has been adjudged bankrupt. He no longer owns a home or car. He and his wife are beneficiaries. While the Tribunal clearly took the appellant's financial circumstances into account (as reflected in the 25 per cent reduction in the costs award recommended as a matter of general principle in *Cooray*),[63] in my view this was still out of step with the requirements of justice in this particular case. There is little to be gained making such a significant order for costs against someone in Mr Katamat's circumstances. In exercise of my discretion on appeal, I would make no costs award.

Conclusion

[88] The appeal against the costs award is allowed. All other aspects of the appeal are dismissed.

[89] There will be no award of costs on the appeal for the same reason.

Williams J

[63] At [197].