

Medical Practitioners Disciplinary Tribunal

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NOTE: NAMES OF PARTIES

DECISION NO: 27/97/14C

NOT FOR PUBLICATION

IN THE MATTER of the Medical Practitioners
Act 1995

-AND-

IN THE MATTER of a charge laid by a
Complaints Assessment
Committee pursuant to
Section 93(1)(b) of the Act
against **O** medical
practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL:

Mr P J Cartwright (Chair)

Dr J C Cullen, Dr A F N Sutherland, Dr D C Williams,

Ms S Cole (Members)

Ms G J Fraser (Secretary)

Ms K G Davenport (Legal Assessor)

Mrs E Huse (Stenographer)

Hearing held at xx on Tuesday 17 February 1998

APPEARANCES: Mr M F McClelland for the Complaints Assessment Committee ("the CAC").

Mr C J Hodson for Dr O

DECISION

1. THE CHARGE:

THE respondent is charged by the CAC, pursuant to Section 93(1)(b) of the Medical Practitioners Act 1995 that on or about 19 June 1996 at xx he communicated with Mrs A in an inappropriate manner by stating;

"xx won't be getting any extras tonight."

such conduct constituting conduct unbecoming a medical practitioner, and that conduct reflects adversely on the practitioner's fitness to practise medicine.

2. PRIVACY APPLICATION:

BY application dated 14 November 1997 Mr McClelland on behalf of Mrs A sought from the Tribunal an order prohibiting publication of her name or any particulars of her affairs, in reliance on Section 106(2)(d) of the Act. Through a misunderstanding the application was not dealt with at the time. On the day of the hearing Mr McClelland asked the Tribunal to rule on the application. Mr Hodson indicated that he did not oppose the application provided that any privacy order made in terms of the application extended for the benefit of Dr O. An order was duly made prohibiting publication of the name and any particulars of the affairs of both Mrs A and Dr O.

3. BACKGROUND:

- 3.1** IN June 1996 Mrs A was a regular patient of Dr B at the xx Health Centre, xx. On 19 June Mrs A rang to make an appointment with Dr B because she had a sore throat or something similar. She was told that Dr B would not be available but that her appointment would be with Dr O.
- 3.2** MR A drove Mrs A to the Centre as he had an appointment with the nurse, C, to have the dressing on a thumb injury attended to.
- 3.3** IN getting out of the car Mr A accidentally shut his wife's hand in the door.
- 3.4** AFTER waiting a short time in the waiting room Mrs A went in to see Dr O in his room. Mr A did not accompany her as he was having his thumb dressed in the side room.
- 3.5** IT was when Mrs A told Dr O that her hand was sore that she claims he stated "*xx won't be getting any extras tonight*".
- 3.6** AFTER leaving Dr O's room Mrs A went into the side room where her husband's thumb was being dressed by nurse C where she told nurse C and her husband what she claimed had been said to her by Dr O.
- 3.7** THE following day, 20 June 1996, Mrs A was still very upset and decided to write a letter to Dr O expressing her upset and advising him that if she did not receive a written apology within seven days of the letter, she would have no hesitation in making a formal complaint. Mrs A gave the letter to nurse C who put the letter in Dr O's tray in accordance with usual practice.

3.8 MRS A received no formal apology or any other contact from Dr O. She then wrote a formal letter of complaint to the Medical Council on 8 August 1996.

4. EVIDENCE:

4.1 MRS A explained that on the occasions when Dr B was not available she had had to make arrangements with other doctors. Usually a locum was organised for Dr B, but not always, and that she would have seen Dr O approximately 2-3 times over 5-6 years. When she saw Dr O, she was accompanied by her husband as a rule.

4.2 ON the occasion in question, 19 June 1996, she attended at the Centre with a minor complaint (flu symptoms/sore throat) from memory, and this time her husband did not accompany her into Dr O's room because he was having his thumb dressing attended to by the nurse in a side room.

4.3 NO-ONE else was present inside Dr O's room. When Mrs A told Dr O that her hand was very sore, she said he asked her what had happened and she told him about shutting her hand in the car door. Mrs A said that is when Dr O responded "*xx won't be getting any extras tonight*". Mrs A said she recalled that Dr O made the statement in question "*..... in a snide manner and I took him to be referring to a sexual connotation*".

4.4 MRS A said that Dr O then examined her for her sore throat. Mrs A said when she left Dr O's room and went into the side room where nurse C and her husband were, she told nurse C what Dr O had said and the former "*..... appeared horrified*".

- 4.5 MRS A** further explained she had told nurse C that her hand was still sore. Dr O had gone out to reception. Mrs A said nurse C asked him if her hand should be x-rayed and Dr O casually responded *"to just put some spray stuff on it"*, which nurse C did.
- 4.6 MRS A** said she was very angry when she left Dr O's room. Her anger did not subside and ultimately she made her complaint to the Medical Council. Mrs A added that until the incident on 19 June 1996, she found Dr O to be satisfactory and had no difficulties with him.
- 4.7 IT** was the evidence of nurse C that in her capacity as practice nurse she had met Mrs A often, who would come into the clinic one or two times a week, and telephone about every second day. Usually she came to the clinic in company with her husband.
- 4.8 NURSE C** said she recalled Mrs A coming to see Dr O on 19 June, as her regular doctor, Dr B, did not work Wednesday afternoons. Mrs A's complaint was of a sore throat. Nurse C confirmed that she attended Mr A to re-dress his thumb injury.
- 4.9 NURSE C** said she recalled Mrs A coming into the treatment room, which is adjacent to Dr O's room, and saying to her words to the effect *"do you know what that doctor just said to me?"*. Nurse C said when she asked Mrs A what the doctor had said, Mrs A replied that Dr O had told her *"xx won't be getting any extras tonight"*.
- 4.10 NURSE C** explained *"I was quite shocked as it did not appear an appropriate thing to have said, and obviously had a sexual connotation"*.

4.11 NURSE C added *"This type of comment is not common for Dr O, who appears to have a good rapport with patients and I have never had any complaints from patients about him saying anything untoward"*.

4.12 CONCLUDING her evidence, nurse C said she recalled Mrs A coming into the Medical Centre and giving her a letter on either the Friday or the following Monday. Nurse C said she put the letter in Dr O's tray, in accordance with usual practice.

4.13 MR A's evidence confirmed generally and was along the lines of the evidence given by Mrs A.

4.14 IT was Dr O's evidence that prior to 19 June 1996 he had never been consulted by Mrs A. He said he knew her by sight as she was a frequent attender at the xx practice.

4.15 ON the day in question, 19 June 1996, Dr O said no-one else was present during the consultation with Mrs A. She complained of a sore mouth and a sore throat. He examined her with a spatula and torch, but there was very little to find. He said he noted that she had been prescribed augmentin on 11 June. Dr O said his diagnosis was of post-augmentin pharyngitis with a suspicion of candida of the mouth. He prescribed mycostatin pastilles.

4.16 AT the end of the consultation, as he was getting ready to go, after Mrs A had left the surgery, Dr O said she came back in and said that she had hurt her hand or arm. Dr O said he looked at it and could see no sign of injury. He said he asked Mrs A to see the practice nurse if she wished. No claim was made by the practice for that matter and nor did Mrs A pay for the consultation, Dr O added.

4.17 DR O stated that the words which Mrs A said he used are completely foreign to him. He said he would not have used such words. He added *"I would have no reason to. I have no knowledge of 'xx'"*.

4.18 WITH respect to the letter of complaint, Dr O explained he had no recollection at all of seeing a letter from Mrs A. He said *"Had I seen it I would have discussed it with the practice nurse but this did not happen"*.

4.19 DR O said he saw Mrs A from time to time afterwards at the practice but only when she was in the waiting room and never for consultation. She said nothing to indicate that she had any complaint against him. The first he heard of any complaint about the consultation was when he heard from the Medical Council at the time a CAC was appointed to inquire into the matter. He then expressed his regret that Mrs A's perception of her consultation was less than satisfactory, and added *".... I said accurately that neither myself nor my nurse could recall anything untoward as having occurred"*.

5. EVIDENTIAL RULING:

5.1 SEVERAL weeks prior to the hearing the Chair became aware, through the Secretariat, that it was Mr Hodson's intention to produce all of Mrs A's medical records, with the intention of questioning her credibility. Apparently Mr McClelland had indicated that if all of Mrs A's medical records were to be produced at the hearing, that he would be objecting on the grounds of relevancy. Were the Tribunal to agree that the records were relevant, Mr McClelland intimated to the Secretariat that he would then ask for the hearing to be adjourned to enable him to apply for it to be held in private.

5.2 THE Tribunal was advised that the issue of Mrs A's records had been resolved. The Tribunal was met with a renewed application at the hearing, which in its view ought to have been dealt with when the issue was first raised.

5.3 THE Tribunal was then asked to rule on the use of Mrs A's notes and whether Mr Hodson could ask her questions about the notes. Rule 10(1)(f)(ii) of the Health Information Privacy Code 1994 provides that a health agency that holds health information obtained in connection with one purpose must not use the information for any other purpose unless the health agency believes on reasonable grounds that non-compliance is necessary for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation). However Rule 10 is subject to the provisions of Section 7 of the Privacy Act 1993, which says that the Privacy Act itself is subject to any other enactment which might contain a statement on the privacy of any particular matter. In this regard, therefore, it must be noted that Rule 10 (1)(f)(ii) is limited by the provisions of Section 32 of the Evidence Amendment (No. 2) Act 1980. That section states that no registered medical practitioner shall disclose in any civil proceedings any protected communication, except with the consent of the patient. "Protected communication" means (inter alia) a communication to a registered medical practitioner by a patient who believes that the communication is necessary to enable the registered medical practitioner to examine, treat or act for the patient.

5.4 CLEARLY Section 32 would apply to Dr O giving evidence and information about any protected communication with Mrs A. The question for the Tribunal is whether or not Section 32 applies where the patient herself is being asked questions about her own attendances on a doctor other than the one who has been charged. Whether Mrs A, as the patient, can claim the

benefit of Section 32 in the context of the "protected communication" regime, is part of the issue for determination by the Tribunal.

5.5 IN the Tribunal's view Section 32 exists only to enable a patient to prevent his or her doctor from giving protected information, and holds accordingly. Having so held, it is the view of the Tribunal that Rule 10 (1)(f)(ii) of the Health Information Privacy Code 1994 permits it to allow the line of cross-examination of Mrs A embarked upon by Mr Hodson. Furthermore the Tribunal considers that the information sought by Mr Hodson of Mrs A is strengthened by Clause 7 of the First Schedule of the Medical Practitioners Act 1995 which states:

"7. Powers of investigation -

- (1) For the purpose of dealing with the matters before it, the Tribunal of any person authorised by it in writing to do so may -*
 - (a) Inspect and examine any papers, documents, records, or things:*
 - (b) Require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control, and to allow copies of or extracts from any such papers, documents, or records to be made:*
 - (c) Require any person to furnish, in a form approved by or acceptable to the Tribunal, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records.*
- (2) The Tribunal may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this clause shall be verified by statutory declaration or otherwise as the Tribunal may require."*

5.6 **IN** terms of assessing issues of confidentiality, issues of relevance and the rules of natural justice, the Tribunal felt it was important that Mr Hodson be permitted to continue his line of cross examination of Mrs A.

6. DISCUSSION:

6.1 **THE** Tribunal must determine whether the facts alleged in the charge have been proved to the required standard, the balance of probabilities. If the facts are established to the required standard, then the Tribunal must go on to determine whether the conduct established by the proven facts amounts to conduct unbecoming.

6.2 **ESSENTIALLY** the exercise involves the Tribunal in considering and determining three issues as set out in the CAC's submissions. These are:

6.2.1 **DID** Dr O make the statement "*xx won't be getting any extras tonight*" to Mrs A on or about 19 June 1996?

6.2.2 **IF** so, was that communication to Mrs A inappropriate?

6.2.3 **AND** if so, does that conduct amount to conduct unbecoming a medical practitioner and that conduct reflects adversely on Dr O's fitness to practise medicine.

6.3 **WHETHER** or not the statement was made is a credibility issue which the Tribunal must consider and determine.

6.4 **DR** O denies that the statement was made.

6.5 **IN** her evidence Mrs A described how Dr O made the statement in the course of a medical consultation. Mrs A is quite clear that she did not misunderstand or mis-hear what Dr O had said to her.

6.6 **MR** McClelland submitted the Tribunal may well feel that Mrs A's evidence is very much supported by her subsequent conduct. First, within a short time Mrs A told the practice nurse and her husband what Dr O had said to her. The practice nurse's evidence was that Mrs A became increasingly angry about what Dr O said. Mr McClelland submitted this, in itself, is consistent with the statement having been made.

6.7 **SECONDLY**, the following day Mrs A telephoned the practice nurse and told her she was going to write to Dr O and complain and later that day, or shortly thereafter, Mrs A delivered to the practice nurse a letter addressed to Dr O and this was processed in accordance with the usual practice at the Centre. Dr O has said that he did not receive the letter and therefore did not respond. Likewise this is a matter for the Tribunal to determine.

6.8 **FINALLY** Mr McClelland submitted the Tribunal may well conclude that Mrs A had little or no time to fabricate a story such as this between the time that the statement was made and the time she reported it first to the practice nurse and her husband.

7. FINDING:

7.1 **HAVING** carefully considered all of the evidence and submissions of counsel, the Tribunal is not satisfied that the statement in question was made by Dr O. A number of factors have influenced the Tribunal in making this judgment. First the Tribunal is entitled to prefer the evidence of one

witness over the evidence of another witness. In this case the evidence of Dr O is preferred over the evidence of Mrs A. The Tribunal has considered all the evidence and determined the statement was not made. But that is not to say that Mrs A does not hold an honest belief that Dr O did say something which she construed in such a way as to cause her upset. Unfortunately there is nothing in the notes or nurse C's recollection that supports her view on the treatment of her hand. If in informing Dr O that she had hurt her hand to an extent that treatment was required, then the record of the consultation is such that no treatment was either offered or given. No ACC claim was made and, furthermore, although Mrs A said nurse C asked Dr O if she should get her hand x-rayed, in fact nurse C could not recall this at all. When cross-examined by Mr Hodson nurse C could not recall spraying the hand or even examining it. Nurse C was rather non-committal, saying simply *"I didn't really pay much attention"*.

7.2 ANOTHER aspect of the matter which the Tribunal is entitled to take into account, is nurse C's observation that the type of comment attributed by Mrs A to Dr O, was certainly not common for him. Furthermore nurse C indicated, in response to Mr Hodson's suggestion that such a remark would be absolutely unusual to the point of being unheard of, the answer *"definitely, yes!"*.

7.3 CONCERNING Mrs A's letter of complaint, which Dr O said he had no recollection at all of seeing, nurse C confirmed that Dr O made no comment about the matter until he had heard from the Medical Council. When that happened nurse C said Dr O expressed surprise, and yes, at that point he did discuss the letter with her.

7.4 ANOTHER inconsistency which does not cast Mrs A's evidence in a favourable light, is her assertion that she had consulted Dr O approximately 2-3 times over 5-6 years. Dr O said he was certain that prior to 19 June 1996 he had never been consulted by Mrs A. In cross-examination by Mr Hodson nurse C was asked if she could help with the occasions when Mrs A might or might not have seen Dr O previously. Nurse C said she could recall possibly only one occasion and that she could not recall even one time when Mr A may have consulted Dr O. Both Dr O and nurse C indicated the unlikelihood of the former even knowing Mr A by his christian name of "xx". Dr O said on oath that he hadn't the faintest idea what Mr A's christian name was. The Tribunal takes the view it is entitled to conclude that Dr O was not lying about this or any other aspect of his response to Mrs A's complaint.

7.5 HAVING concluded as an issue of credibility that the statement in question was not made, it thus becomes unnecessary for the Tribunal to consider the appropriateness or otherwise either of the statement or whether the making of the statement constitutes conduct unbecoming. The charge is therefore dismissed.

DATED at Auckland this 19th day of March 1998

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P J Cartwright

Chair

Medical Practitioners Disciplinary Tribunal