



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 260/03/109D

IN THE MATTER of the MEDICAL
PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against
PETER FISHER medical
practitioner of Invercargill

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Thursday 6 November 2003

PRESENT: Dr D B Collins QC - Chair

Ms G J Fraser - Secretary

APPEARANCES: Ms K P McDonald QC and Ms T Baker for the Director of
Proceedings

Mr C J Hodson QC and Ms H Janes for Dr Fisher

Decision on the application for adjournment of the hearing

Introduction

1. Dr Fisher is registered as a medical practitioner in New Zealand. At the relevant time Dr Fisher worked at Invercargill for the Southland District Health Board. In May 2002 Dr Fisher returned to the United Kingdom. He has not been employed since his return to the United Kingdom.
2. On 5 June 2003 the Director of Proceedings laid a disciplinary charge against Dr Fisher. The charge is very serious. The charge alleges Dr Fisher mismanaged a patient. The patient's name is Mark Burton who received psychiatric care from Dr Fisher when he was a patient at Southland Hospital. The charge particularises Dr Fisher's alleged shortcomings in relation to his management of Mark Burton. The charge alleges Dr Fisher's acts and omissions constituted disgraceful conduct in a professional respect, or in the alternative, professional misconduct.
3. The charge is set down to be heard in Invercargill. The case has been allocated five days. The case is scheduled to commence on the 17th November 2003.
4. On 5 November 2003 the Director of Proceedings sought a Directions Conference with the Chair of the Tribunal. The Directions Conference was held on 6 November. During the course of that conference the Director of Proceedings, through her counsel Ms McDonald QC, made an oral application to adjourn the hearing. That application was strongly opposed. The application for the adjournment has been carefully considered and is declined. Out of deference and respect for the submissions made on behalf of the Director of Proceedings the Tribunal will explain the reasons why the application is declined.

Dr O'Flynn

5. It is necessary to mention from the outset that the Director of Proceedings has also laid a charge of professional conduct against Dr O'Flynn. The essence of the allegation against Dr O'Flynn is that he failed to adequately supervise Dr Fisher in his management of Mark

Burton. The charge against Dr O'Flynn was scheduled to be heard on 24 November 2003. One week was allocated for that hearing.

6. On 3 November 2003 the Director of Proceedings applied in writing to have the charge against Dr O'Flynn adjourned. Several reasons were advanced for that application. The grounds for the application included the following:
 - 6.1 The hearing of the charge against Dr Fisher needs to be heard, and a decision delivered, including, if relevant, a decision as to penalty before the Tribunal can commence hearing evidence in the case against Dr O'Flynn;
 - 6.2 The case against Dr Fisher is likely to take more than one week and encroach on the time allocated for the hearing of the case against Dr O'Flynn;
 - 6.3 The briefs of evidence for Dr O'Flynn will not be filed prior to the hearing which will also impact on the estimated time of the hearing.
7. Mr Rennie QC appears for Dr O'Flynn. He filed a full and helpful memorandum addressing issues raised in the memorandum filed by the Director of Proceedings and other matters that had arisen.
8. The application to adjourn the hearing of the Dr O'Flynn case was heard on the 6th November. During the course of that hearing it became apparent that the Tribunal had little alternative other than to adjourn that hearing. In reaching the conclusion that it must adjourn the hearing the Tribunal is acutely aware that an adjournment will cause considerable inconvenience to witnesses, counsel and the Tribunal. Mr Rennie acknowledged that an adjournment was probably unavoidable, although it should be recorded Dr O'Flynn did not consent to the hearing of the case against him being adjourned.
9. For reasons which will be apparent later in this decision, the hearing of the case against Dr O'Flynn will now not proceed on the 24th November 2003. A new date for the hearing of that charge will be allocated as soon as possible. Consideration will also be given to

allocating a Tribunal to hear the case against Dr O’Flynn which is entirely different from the Tribunal which hears the case against Dr Fisher. The formal decision relating to the application to adjourn the Dr O’Flynn case is being delivered contemporaneously with this decision.

Jurisdiction

10. The decision not to grant the Director of Proceedings’ application to adjourn the hearing against Dr Fisher has been made by the Chairperson of the Tribunal pursuant to s.100(3)(4) Medical Practitioners Act 1995 (“the Act”).

Background

11. It is important to understand the background leading to the Director of Proceedings’ application.
12. On 4 July 2003 the Director of Proceedings applied to have the charges against Drs Fisher and O’Flynn heard together. That application was advanced on three grounds:
 - 12.1 The factual scenario was common to both cases in that both cases related to the care provided to Mark Burton;
 - 12.2 It was in the public interest that both charges *‘be expedited by way of one hearing particularly in relation to time, cost and emotional consequences ...’* for those required to give evidence;
 - 12.3 There was no prejudice to Dr Fisher and Dr O’Flynn if the two cases were heard together.
13. On 9 July 2003 a directions conference was held in relation to both cases. At that directions conference:
 - 13.1 Counsel for Dr O’Flynn indicated it was likely he would oppose the application to have both cases heard together;

- 13.2 Counsel for Dr O'Flynn indicated an application may be made to have the case against Dr O'Flynn heard by a Tribunal comprising persons who were substantially different from the Tribunal which was to hear Dr Fisher's case;
 - 13.3 Counsel for Dr Fisher instructed he may wish to be heard on the Director of Proceedings' application for a joint hearing;
 - 13.4 Counsel for Drs Fisher and O'Flynn were asked to make their submissions in response to the Director of Proceedings' application by 23 July;
 - 13.5 Counsel involved in the Dr Fisher case estimated the case would take five days. Counsel involved in the Dr O'Flynn case thought that hearing would take three days;
 - 13.6 Tentative hearing dates were set for the period 15 to 24 December inclusive subject to the possibility that the hearings could be brought forward to November if counsel for Dr Fisher (Mr Hodson QC) became available in November;
 - 13.7 Consideration was given to an application to amend the charge against Dr O'Flynn.
14. On 21 July 2003 counsel for Dr O'Flynn advised the Tribunal and Director of Proceedings in writing that the application for a joint hearing of the charges against Drs Fisher and O'Flynn was opposed and that the Tribunal which heard the charge against Dr O'Flynn should be substantially different from the Tribunal which was to hear the charge against Dr Fisher.
15. A further directions conference was held on 12 August 2003. At that directions conference:
- 15.1 Counsel for Dr O'Flynn indicated there was unlikely to be any opposition to the Director of Proceedings amending the charge against Dr O'Flynn;

- 15.2 The Director of Proceedings advised that if the charge against Dr O’Flynn could be heard immediately after the hearing of the charge against Dr Fisher she would not pursue her application to have the cases heard together;
- 15.3 Counsel for Dr O’Flynn advised that he foresaw no difficulty in the Chair of the Tribunal sitting as Chair of both cases;
- 15.4 Counsel for Dr Fisher was not able to advise of his availability in November.
16. A further directions conference was held on 29 August 2003. At that directions conference:
- 16.1 Counsel for Dr Fisher advised his other commitments in November had been resolved;
- 16.2 The Tribunal directed that the charge against Dr Fisher be heard 17 to 21 November 2003 (inclusive);
- 16.3 The Tribunal directed the charge against Dr O’Flynn be heard 24 to 26 November 2003 (inclusive);
- 16.4 A final response on the amendment of the charge against Dr O’Flynn would be received from counsel for Dr O’Flynn during the week of 1 September;
- 16.5 A timetable for filing briefs was settled. That timetable required:
- the Director of Proceedings briefs of evidence (in both cases) be filed by 13 October 2003;
 - Dr Fisher’s briefs be filed by 3 November 2003;
 - Dr O’Flynn’s briefs be filed by 11 November 2003.

17. The next significant step concerned the composition of the Tribunal to hear both charges. Dr O'Flynn agreed that the Chairperson and Ms Courtney (a lay person on the Tribunal who is also a lawyer) could sit to hear both cases. Issues were raised about the appropriateness of Dr McKenzie sitting. Dr McKenzie is a psychiatrist. Her husband is also a psychiatrist. There was a concern Dr McKenzie may be put in an invidious position if she were to hear the case against Dr O'Flynn. This issue raised difficulties for the Tribunal. There were just three psychiatrists on the panel of persons able to be appointed to hear disciplinary cases pursuant to section 99 of the Act. One of those psychiatrists was believed to be living in Africa, and another was scheduled to be out of New Zealand during the duration of the hearing of the charges. Because it was important to have a psychiatrist sit in judgment of Drs Fisher and O'Flynn the Minister of Health at very short notice urgently appointed Dr Honeyman, the then Chairperson of the New Zealand section of the Royal Australia and New Zealand College of Psychiatrists to join the panel.
18. Initially no issue was taken by any party to Dr Honeyman's appointment.
19. A further directions conference was held on 23 September. At that conference two issues were traversed namely:
 - 19.1 Replacing Dr McKenzie with Dr Honeyman;
 - 19.2 The issuing of a subpoena, at the request of the Director of Proceedings to obtain Dr Fisher's file held by the Department of Human Resources at the Southland District Health Board (Dr Fisher's personnel file);
20. On 1 October the Director of Proceedings advised the Tribunal that the hearing of the charge against Dr O'Flynn was likely to take more than three days. The Director of Proceedings also sought a slight extension to the time she had been given to file the briefs of evidence in the case against Dr O'Flynn. Mr Rennie responded advising that he had already reserved a week for hearing the case against his client. Mr Rennie also recorded:

"It is in everyone's interest that this matter is disposed of this year. It would be oppressive in particular to Dr O'Flynn if that were not the

case. Indeed fair trial issues under the NZ Bill of Rights Act 1990 are already relevant”.

Mr Rennie’s letter also raised issues about the appropriateness of the Director of Proceedings being given an extension of time to file her briefs of evidence in the case against Dr O’Flynn.

21. At this time an issue also arose about extending the time for the Director of Proceedings to file one of her briefs of evidence in the case against Dr Fisher. In an effort to resolve these and other issues a further directions conference was convened on 7 October. That conference could not proceed as scheduled because of the unavailability of counsel. The conference was rescheduled for 13 October at 7pm. At that conference:
 - 21.1 It was agreed that the charge against Dr O’Flynn would be amended on the basis previously indicated by the Director of Proceedings;
 - 21.2 It was agreed that there was no issue about the composition of the Tribunal to hear both cases;
 - 21.3 The hearing dates for the charge against Dr O’Flynn would be extended by two days;
 - 21.4 The Director of Proceedings was granted an extension to 22 October to file her briefs of evidence in the case against Dr O’Flynn;
 - 21.5 It was recorded the Director of Proceedings had served all but one brief in the case against Dr Fisher. The outstanding brief was to be served by 22 October;
 - 21.6 Consideration was given to outstanding issues concerning the obtaining of Dr Fisher’s personnel file.
22. On 16 October the Director of Proceedings applied to amend the charge against Dr Fisher. That application involved the withdrawing of three particulars of the charge laid on 5 June.

23. By 21 October it appeared the only outstanding issue concerned the obtaining of Dr Fisher's personnel file. It is not necessary to detail the dispute between the parties concerning the obtaining of Dr Fisher's personnel file. In order to resolve this issue a further directions conference was scheduled for 30 October. The agenda for that directions conference was expanded to include further issues which had emerged, namely:

23.1 Applications by the Director of Proceedings to have the evidence of two witnesses be given by way of video link/telephone conference. That application related only to the case against Dr O'Flynn;

23.2 Amending the charge against Dr Fisher;

23.3 Outstanding briefs of evidence;

23.4 The appropriateness of Dr Honeyman being on the Tribunal.

24. The directions conference scheduled for 30 October had to be rescheduled and took place on 31 October. At that conference:

24.1 Proceedings for dealing with Dr Fisher's personnel file were settled;

24.2 Mr Hodson raised an objection to the Tribunal receiving a brief of evidence from Dr Patten, a witness being called to give testimony on behalf of the Director of Proceedings. Dr Patten lives in Tasmania. Mr Hodson said he proposed to challenge Dr Patten's status as an expert;

24.3 Mr Hodson advised it was essential that the Tribunal hearing the charge against Dr Fisher conclude its deliberations and deliver its decision on penalty (if appropriate) before it commenced hearing the case against Dr O'Flynn. The reason for this was apparently two witnesses in the case against Dr O'Flynn were to give evidence that could adversely affect the Tribunal's view of Dr Fisher. Mr Lewis, who appeared as counsel for Dr O'Flynn at that conference agreed with the essence of Mr Hodson's submission and said that if the hearing of the case against Dr Fisher had not concluded before the hearing of the case against Dr

O’Flynn was to start, then a differently constituted Tribunal should be convened to hear the case against Dr O’Flynn;

- 24.4 There were strong indications that the hearing of the case against Dr Fisher would go beyond the week of 17 November. Ms McDonald QC, who had recently been instructed to appear for the Director of Proceedings in the case against Dr Fisher advised that she:

“... would not be available on Friday 21 November nor the following week but that Ms Baker who is assisting, would be available.”

- 24.5 The Chair of the Tribunal indicated the Tribunal would be willing to sit extended hours to accommodate the parties and their counsel;
- 24.6 The Director of Proceedings indicated that if the case against Dr Fisher was to extend into the week of 24 November this would cause considerable difficulties for the hearing of the case against Dr O’Flynn. The principal difficulty related to the availability of witnesses;
- 24.7 The Chair of the Tribunal said that at that stage it was premature to adjourn the hearing of the Dr O’Flynn case;
- 24.8 Counsel reconfirmed they took no issue with Dr Honeyman sitting on the Tribunal to hear both cases;
- 24.9 Consideration was given to requests for subpoenas;
- 24.10 A significant part of the directions conference was taken up with hearing opposed applications for the hearing of evidence from two witnesses by way of video link/teleconference;
- 24.11 Counsel for Dr O’Flynn recorded issue would be taken to the admissibility of several briefs of evidence in the case against Dr O’Flynn;

- 24.12 Counsel for Dr Fisher advised that there would be a delay in providing the briefs of evidence for Dr Fisher. The briefs of two experts called by Dr Fisher would be provided by 3 November and Dr Fisher's brief by 6 November.
25. On 3 November the Tribunal delivered its decision concerning the Director of Proceedings' application to have the evidence of a witness given by video link/teleconference.
26. On 3 November the Director of Proceedings filed her application, supported by a full memorandum, to adjourn the hearing of the case against Dr O'Flynn. Mr Rennie's detailed memorandum in response was received on 5 November.
27. On 5 November the Director of Proceedings requested a teleconference in respect of the hearing against Dr Fisher. The Director of Proceedings advised that:
- "The issues to be discussed are in relation to timing, particularly in view of the evidence recently filed on behalf of Dr Fisher".*
28. A telephone conference was convened on 6 November at 1pm. That telephone conference lasted 45 minutes and was immediately followed by a short telephone conference in relation to the charge against Dr O'Flynn. It was during the course of the telephone conference on 6 November in relation to Dr Fisher that Ms McDonald applied for an adjournment of the hearing of the charge against Dr Fisher.
29. The preceding brief description of the background to the Director of Proceedings' application for an adjournment illustrates:
- 29.1 Considerable effort and thought has been given by counsel for all parties and the Tribunal to ensuring pre-hearing issues have been considered and substantially resolved;
- 29.2 The Tribunal has accommodated the parties and their counsel in an effort to resolve at short notice pre-hearing issues as they have arisen.

30. In briefly describing the pre-hearing steps taken in this case sight should not be lost of the fact that the parties and their counsel have worked diligently in preparing briefs of evidence and in attending directions conferences. The Tribunal has also expended considerable time and effort in arranging venues, travel for Tribunal members and in assembling Tribunal panels. All members of the Tribunal are busy professionals who have scheduled time from their private practices to hear these charges. Witnesses have been briefed in the expectation that the evidence will be heard during the week of 17 November. The complainant, Mr Burton, and Drs Fisher and O'Flynn undoubtedly expect and desire the hearing of these cases to proceed as scheduled.

Grounds for Application for Adjournment

31. In her oral submissions Ms McDonald said:

- 31.1 The hearing of the case against Dr Fisher would now take eight days, and that she was not available during the week of 24 November. Ms McDonald did not wish to foist the responsibility of the hearing upon Ms Baker during the week of 24 November;
- 31.2 Delays could be incurred in resolving whether or not Dr Patten's evidence was admissible;
- 31.3 If Dr Patten's evidence was not admissible the Director of Proceedings would not have an expert;
- 31.4 The Director of Proceedings has encountered hostility and opposition in trying to obtain witnesses;
- 31.5 The case was very important and should not be rushed unnecessarily;
- 31.6 The Tribunal might wish to hear from Dr O'Flynn and/or the Director of Proceedings may wish to call Dr O'Flynn to rebut evidence to be called by Dr Fisher. Ms McDonald also suggested the Tribunal may wish to hear both cases together;

31.7 Ms McDonald was clearly frustrated by delays that had occurred in obtaining Dr Fisher's briefs of evidence. She emphasised that the Tribunal's role was inquisitorial and that Dr Fisher could not assert he had no obligation to give evidence at all (refer *Auckland District Law Society v Leary* HC Auckland, M1471/84, 12 November 1985, Hardie-Boys J);

31.8 Ms McDonald confirmed she had only recently accepted instructions and had advised at the time she accepted her instructions that she was engaged as counsel in a four week trial commencing in Palmerston North on 24 November.

Grounds of Opposition

32. Mr Hodson ardently opposed the application. He advised his client had just arrived back in New Zealand specifically to attend the hearing of the charge against him. He is unemployed and cannot regain work as a doctor whilst the charge against him remains unresolved. It would cause oppressive and extreme hardship to Dr Fisher if the hearing of the charge against him were to be adjourned to some date next year.

33. Mr Hodson pointed out that *Auckland District Law Society v Leary* was not relevant. His client acknowledged he had a responsibility to give evidence in this case and proposed to do exactly that.

34. Mr Hodson suggested that as Ms McDonald had only recently accepted instructions another senior counsel should be able to be briefed if Ms McDonald's commitments prevented her from completing her duties as counsel for the Director of Proceedings in this case.

Reasons for Declining Application

35. In considering the application to adjourn this case the Tribunal is required to balance any potential prejudice and unfairness if an adjournment is declined against potential prejudice and unfairness if the adjournment is allowed.

36. The Tribunal is acutely aware of the difficulties encountered by the Director of Proceedings in preparing for this hearing. Nevertheless the hearing has been set down for and agreed to for ten weeks. It is acknowledged that the genuine and conscientious estimates of time for the hearing of the case may prove to be underestimates. To accommodate this concern the Tribunal is willing to sit extended hours. The Tribunal is willing to sit from 9am to 6pm (and even longer if necessary) each day and to also sit on Saturday 22 November. These extended hours could provide approximately 15 extra hearing hours. If necessary the Tribunal will also sit during the week of 24 November.
37. The Tribunal notes Ms McDonald's concerns about transferring her responsibilities to Ms Baker. The Tribunal knows Ms Baker and believes she is a very competent counsel. The Tribunal also notes that the Director of Proceedings was counsel in this matter until comparatively recently. In light of the fact the case against Dr O'Flynn will not proceed in the week of 24 November, it may be possible for the Director of Proceedings to consider resuming a role in the prosecution of Dr Fisher. The Tribunal accepts it is unrealistic to expect another senior counsel with no prior knowledge of this case to be briefed at this juncture to represent the Director of Proceedings.
38. The Tribunal is very concerned that the parties and their witnesses not be put to further inconvenience and disruption through a last minute adjournment.
39. The overwhelming factor which has heavily influenced the decision not to grant the Director of Proceedings' application concerns Dr Fisher's personal circumstances. This disciplinary hearing could potentially affect Dr Fisher's ability to practise medicine (at least in New Zealand). It is a serious case. Dr Fisher cannot obtain employment until this case is resolved. He has incurred considerable personal expense in returning to New Zealand to have the charge heard against him. Ms McDonald characterised an adjournment of the hearing as a mere "inconvenience" for Dr Fisher. The Tribunal does not agree. It would be oppressive and fundamentally unfair to adjourn the hearing of the case against Dr Fisher at this juncture in light of his personal circumstances.

Dr Patten

40. It may assist in the hearing of the case against Dr Fisher if Dr Patten's status is resolved before the commencement of the hearing. Mr Hodson is asked to file a very brief memorandum setting out his grounds for challenging Dr Patten's status as an expert. That memorandum should be filed by 5pm on 11 November 2003. Ms McDonald's response should be filed by 5pm on 12 November 2003. If the parties agree, the Chair will make a determination on Dr Patten's status and advise the parties of his decision on 13 November 2003.

DATED at Wellington this 7th day of November 2003.

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D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal