MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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PUBLICATION OF THE NAME OF THE DOCTOR IS PROHIBITED

DECISION NO: 282/03/115C

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of disciplinary proceedings against S medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Thursday 8 April 2004

PRESENT: Dr D B Collins QC - Chair

Dr L Ding, Dr R S J Gellatly, Dr A R G Humphrey, Mrs H White (members)

APPEARANCES: Ms K P McDonald QC for the Complaints Assessment Committee

Mr C W James for respondent

Ms G J Fraser - Secretary

(for first part of call only)

Decision on the application for Interim Name Suppression

Introduction

1. Doctor S is a general medical practitioner in xx. On 6 October 2003 a Complaints Assessment Committee laid a charge against Dr S. The charge was laid pursuant to s.92(1)(d) of the Medical Practitioners Act 1995 ("the Act") and alleges professional misconduct on the part of Dr S in relation to his diagnosis and management of a patient suffering leptosporosis.

2. The charge is to be heard by the Tribunal from 26 to 29 April 2004.

3. On 19 March 2004 Dr S applied for an order suppressing publication of his name and any identifying features. A notice of opposition and very full submissions were filed by Ms McDonald QC on 25 March.

4. The Tribunal convened (by way of telephone conference) on the evening of Thursday 8 April to consider Dr S's application. The Tribunal has determined Dr S's name, and any details which could identify him should be suppressed until the Tribunal has determined the charge against him. At that point the Tribunal will consider whether or not its interim orders should be made permanent.

Basis of the Application

5. Doctor S's application was supported by affidavits sworn by:

   5.1 Himself

   5.2 Mrs S

   5.3 Dr A, a general practitioner in xx

   5.4 Mr B, a senior solicitor in xx

6. The contents of the affidavits filed by and on behalf of Dr S can be conveniently distilled to the following topics:

6.1 Dr S's professional circumstances

6.2 Dr S's personal circumstances

6.3 Dr S's family and his concerns for others.

Dr S's Professional Circumstances

7. Doctor S has practised in the xx and xx areas for 24 years. He has a special interest in xx.

8. In his affidavit Dr S explains that he spent many years establishing his professional reputation in a xx "somewhat judgemental" community. Doctor S's concerns about the impact of publicity on his professional reputation is supported by Dr A, another general practitioner who has worked in xx for the past 18 years. Doctor A explained that:

> *"As a general practitioner in a xx community, one's life becomes part of that community in a large variety of ways. As a consequence one's name and reputation becomes an integral part of the practice in a xx community. Doctor S is no exception to this rule and publication of his name and the publicity that would undoubtedly surround that would severely impact on his reputation locally."*

9. Similarly, Mr B, a xx solicitor and one of New Zealand's most senior lawyers, has informed the Tribunal that:

> *"Doctor S practises in a xx setting town of a population of about xx people and a similar population in the xx area served by the town. Professional practices in the fields of law, medicine and accounting and their families are a small percentage of the population, whose activities or alleged deficiencies are of intense interest to and comment by the bulk of the district's citizens …*
>
> *Allegations relating to professional misconduct to be heard by the Medical Practitioners Tribunal would be items of widespread comment and pre-determination by many people in the community. The local*

> *press and radio media would subject the allegations to repeated dissemination."*

Dr S's Personal Circumstances

10. In her affidavit Mrs S explains that her husband was born and grew up in xx and chose to return to his community to practice medicine. She explains that the xx community is judgemental and that she has seen:

> *"… on many occasions examples of how the community hits out at its own, especially its own who have done well. There seems to be a difficulty within the community in accepting that someone who went to the same school and from the same background has done well and belongs to a 'profession'."*

11. Mrs S also explains that she has concerns about her husband's health because he required xx and xx in 2000. Doctor S also refers to these matters in his affidavit.

Dr S's Family and His Concerns for Others

12. Doctor S expressed concerns about the effects of publicity upon his xx children, **not for publication by order of the Tribunal.**

13. Doctor S has drawn attention to the circumstances of his elderly mother who lives in the xx region. Doctor S is concerned that publication of his name could have a detrimental effect upon his mother.

14. Doctor S has also referred to his practice manager who is dependant upon Dr S for employment. The practice manager cares for her xx son who has xx. Doctor S believes publication of his name would be "harmful and hurtful" to his practice manager.

Grounds of Opposition

15. Counsel for the CAC filed detailed and very helpful submissions. In her submissions Ms McDonald QC emphasised sections 106(1) and 106(2)(d) of the Act. Those provisions state:

> *106(1) "Except as provided in this section and section 107 of this Act, every hearing of the Tribunal shall be held in public."*
>
> *106(2)(d) "Where the Tribunal is satisfied that it is desirable to do so, after having regard to the interests of any person (including (without limitation) the privacy of the complainant (if any) and to the public interest), [the Tribunal] may make … an order prohibiting the publication of the name, or any particulars of the affairs, of any person."*

16. The CAC strenuously submitted that public interest considerations outweighed the grounds relied upon by Dr S in his application. In particular the CAC submitted the following factors justified the Tribunal declining Dr S's application:

16.1 <u>The importance of freedom of speech and the right enshrined in section 15 of the New Zealand Bill of Rights Act 1990</u>.

In essence the CAC relied upon "freedom of speech" provisions enacted in the New Zealand Bill of Rights Act 1990 and submitted that principle would be compromised if Dr S's application were granted.

16.2 <u>The public's interest in knowing the name of a practitioner accused of a disciplinary offence</u>.

Under this heading the CAC submitted that the public is entitled to know Dr S has been charged with professional misconduct. The CAC points out that there is likely to be attention given to the proceedings by the xx media and this in itself underscores the community's "right to know" Dr S's identity.

16.3 Accountability and transparency of the disciplinary process.

The CAC suggests that the public's confidence in the medical profession's disciplinary processes may be compromised if Dr S's name is suppressed. The CAC submits that Dr S's application should not be granted in order to preserve public confidence in the transparency and openness of the disciplinary process.

16.4 Other considerations

Finally the CAC submits that there can be no certainty the events giving rise to the charge were isolated.

17. In summary, the CAC submits the grounds advanced by Dr S do not justify suppression of his name, and that the factors he relies upon "do not counterbalance the relevant public interest factors in this case".

Principles followed by the Tribunal

18. When exercising its discretion under s.106(2)(d) of the Act the Tribunal must consider whether it is "desirable" to order name suppression by assessing whether or not the factors advanced by Dr S outweigh the public interest. That is to say, the Tribunal must be satisfied Dr S has met the threshold of "desirability" before his application could be granted.

19. There can be no presumption in favour of granting applications for interim name suppression pending determination of the disciplinary charge.

20. Justice Frater recently stated in *Director of Proceedings v I* (HC Auckland, CIV/203/385/2180, 20 February 2004)

> *"… it is important to emphasize … that each case must be considered on its own facts. There can be no general presumption either in favour of, or against name suppression and that applies in all contexts. In each case the onus is on the applicant to satisfy the decision maker/s, on the balance of probabilities, that their presumption of open justice should be departed from."*

Reasons for Tribunal's Decision

21. In this case the Tribunal has carefully weighed the public interest factor stressed by the CAC against the arguments put forward by Dr S. The Tribunal has concluded that Dr S has satisfied the Tribunal it is desirable to grant his application.

22. In reaching its conclusion the Tribunal stresses that the fact Dr S and his family are distressed by the charge, and would be further distressed if Dr S was subjected to publicity is not a factor which weighs heavily with the Tribunal. All doctors facing disciplinary charges suffer stress. The families of doctors charged with disciplinary offences also invariably suffer anxiety and stress. Facing a disciplinary charge is an ordeal for any professional person and their family. The inevitable stress and anxiety suffered by a doctor and their family as a result of publicity associated with a disciplinary hearing are not factors which, in this case, persuade the Tribunal that it is desirable to grant interim name suppression.

23. The Tribunal has given careful consideration to Dr S's personal health. This factor was not at the forefront of Dr S's application. Whilst the Tribunal can understand Mrs S's concerns for her husband's medical well being, the evidence submitted relating to Dr S's health is not particularly persuasive.

24. The factor which has tipped the scale in favour of Dr S's application concerns the environment in which he practises medicine. The Tribunal has carefully considered the evidence provided by Dr A and Mr B and concluded there is a real risk Dr S's professional reputation in xx would be disproportionately damaged if he were not granted interim name suppression. In reaching the conclusion that publicity would cause disproportionate harm to Dr S if he were not granted interim name suppression the Tribunal has placed particular weight on the following two factors:

    24.1 The evidence from Dr A and Mr B that Dr S practises in a highly judgemental community. The Tribunal accepts that publication of Dr S's name prior to the charge being determined would result in widespread comment within the xx community and pre-determination by many in that region. The resulting damage to Dr S's reputation would be disproportionate in this case because:

24.2 Whilst the circumstances leading to the charge faced by Dr S were no doubt distressing and disturbing for the complainant, the allegation, on its face, does not appear to warrant risking considerable damage to Dr S's professional reputation before the Tribunal has an opportunity to assess whether or not Dr S is culpable

25. The Tribunal has on many occasions stressed the need for transparency and openness in its proceedings. Section 106(1) emphasises that the Tribunal's hearings will be in public. Section 106(1) recognises the principle of open justice. The Tribunal's decision in this case should not be regarded as a departure from its previously expressed stance that medical disciplinary proceedings should be open and transparent.

26. In the circumstances of this case however, the Tribunal is satisfied Dr S has established that it is desirable that nothing be published which identifies him until the Tribunal has determined the charge against him.

DATED at Wellington this 22nd day of April 2004

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D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal