MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 309/03/115C

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 S registered medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Miss S M Moran (Chair)

Dr R S J Gellatly, Dr A R G Humphrey, Dr J L Virtue,

Mrs H White (Members)

Ms K L Davies (Hearing Officer)

Mrs G Rogers (Stenographer)

Hearing held at Wellington on Monday 26 through to and including Thursday 29 April and Thursday 17 June 2004 and Tribunal convened to deliberate on 8 July 2004

APPEARANCES: Ms K P McDonald QC and Ms J Hughson for a Complaints Assessment Committee ("the CAC")

Mr C W James for Dr S.

Supplementary Decision on

(a) Penalty

(b) Name Suppression

1. In Decision No. 306/03/115C dated 2 December 2004 (the substantive decision), the Tribunal found Dr S guilty of professional misconduct in four respects. In accordance with normal practice, this decision should be read in conjunction with the substantive decision.

2. The finding of professional misconduct was made following the hearing by the Tribunal of a charge laid by the Complaints Assessment Committee (CAC). The charge arose in the context of Dr S's dealings with and management of A between the period 28 February and 16 September 2001 when Dr S was the visiting medical practitioner for xx (with whom he had a contract) where he was conducting clinics at the xx meatworks and where Mr A was employed as a freezing worker.

3. The Tribunal concluded that Dr S was in a treating role with Mr A and that Mr A was his patient for whom he had a primary responsibility.

4. At the hearing, Dr S defended the charge in all its particulars and denied that he had been guilty of professional misconduct.

Particulars 1, 2, 3 and 4.

5. With regard to particular 1, the Tribunal found that Dr S failed to accept the hospital diagnosis of leptospirosis in circumstances where Mr A's presentation was clear cut, obvious and classical. It found that Dr S's actions in refusing to accept the diagnosis were inexplicable and resulted solely in a benefit for xx and its insurer at Mr A's expense.

6. With regard to particular 2, the Tribunal found that Dr S (a) failed to recognise the ACC requirements for acceptance of cover; (b) refused to provide Mr A with the certification he needed to enable him to claim compensation from ACC; and (c) contributed to a climate of confrontation with Mr A which resulted in unnecessary hardship and stress for Mr A and may have been prejudicial to his recovery. The Tribunal further found that Dr S's attitude was inflexible and intransigent.

7. With regard to particular 3, the Tribunal found that despite other medical practitioners having formed a contrary view, Dr S did not accept Mr A's chronic malaise and fatigue were due to the after effects of leptospirosis and did not provide Mr A with the ACC certification to which he was entitled which resulted in major stress and financial hardship for Mr A during the relevant period. With regard to this particular, the Tribunal found that Dr S was not focusing on Mr A's needs and nor was he making it clear to Mr A who he (Dr S) was the agent for at any particular time. With regard to this particular, the Tribunal was of the view that Dr S was blurring his roles and did not appear to be addressing his mind to which role he was undertaking and for whom at any given time. It found that he had become rigid in his thinking as a result of which Mr A was adversely affected.

8. With regard to particular 4, the Tribunal found that in the course of his dealings with Mr A, Dr S's actions breached the general ethical principles applying to all doctors (whether or not practising occupational medicine), that is, to do no harm, to try and help the patient and to be fair.

Submissions on Penalty on behalf of the Complaints Assessment Committee

9. On behalf of the CAC, Ms McDonald submitted that the findings were serious in respect of Dr S, a practitioner who was an experienced xx general practitioner, who had a diploma in industrial health, and who had worked as an industrial medical officer at a freezing works for almost 20 years at the time of the relevant events (where he was holding clinics in an "at risk" industry). She submitted that the seriousness of Dr S's offending should be reflected in the penalty imposed.

10. Ms McDonald then addressed the range of penalties pursuant to section 110 of the Medical Practitioners Act 1995.

11. With regard to suspension, Ms McDonald suggested that given the seriousness of the offending suspension was something the Tribunal may consider appropriate.

12. With regard to a fine, she submitted this was an appropriate case for the imposition of a fine which would have a deterrent effect in that it would send a clear message to other practitioners who work in an industrial setting and/or who have obligations to third party providers including employers and insurers that acting to benefit or protect the interests of a third party at the expense of one's patient cannot and will not be tolerated by the profession.

13. With regard to censure, Ms McDonald considered this would be justified.

14. With regard to conditions, Ms McDonald submitted that Dr S's failures and shortcomings (as identified in the Tribunal's substantive decision) were such that he should be required to undergo a period of supervision by an appropriately qualified industrial medicine specialist. Ms McDonald also proposed various courses which Dr S should be required to undertake.

15. With regard to costs, she submitted that Dr S should pay part of the costs and expenses of and incidental to the Complaints Assessment Committee's enquiry and the Tribunal hearing.

Submissions on Penalty on behalf of Dr S

16. Mr James made a number of submissions on behalf of Dr S.

17. He stated that Dr S had made concessions in evidence including that he could have been more flexible in his approach to Mr A's condition; that there were failings in his (Dr S's) communication; that it would have been prudent to involve other practitioners and arrange a case management conference; and that in retrospect he could have handled matters better.

18. He submitted that these concessions were indicative of Dr S's insight and willingness to learn from his mistakes.

19. He referred to the substantial volume of character references and related material which had already been produced to the Tribunal during the substantive hearing. He submitted that they attested to Dr S's laudable qualities and his standing in the community and that his good reputation had been hard earned.

20. Mr James referred to Dr S's feeling of a deep sense of shame that he had been found remiss in his management of Mr A and recognised that not only had he let Mr A down but also his own profession as well as himself.

21. He stated that Dr S had *"taken hard"* the criticisms of the Tribunal in its findings and had taken time to reflect on what steps he would take in the future which included taking advice and counselling to assist him to move forward. He stated that Dr S had learnt from this unfortunate matter and was prepared to address areas of shortcoming as identified. He added that the events before the Tribunal occurred in 2001 and in a number of respects the issues had already been addressed or otherwise Dr S had moved a considerable way forward.

22. He referred to the numerous courses and conferences and training sessions which Dr S had attended and referred to the fact that he had been subjected to a Competence Review by the Medical Council. This had arisen because of five complaints from freezing workers at the xx Plant which were put forward by their union representative and which had been

investigated by the CAC. While none of the complaints gave rise to charges, the investigation resulted in a Competence Review being directed which commenced and was completed in 2004.

23. Mr James referred to Dr S's demeanour before the Tribunal which was considerate, co-operative and courteous, displaying an attitude which had been consistent throughout the entire process.

24. Mr James referred to the various penalties available to the Tribunal.

25. With regard to suspension, Mr James advanced persuasive grounds and attached further documentary evidence as to why Dr S should not be suspended. In essence, Dr S's services are required and sought in the geographical areas in which he practises.

26. With regard to censure, Mr James submitted that in itself this would be a significant penalty for Dr S which he would take seriously and was a substantial matter for him.

27. With regard to a fine, he submitted that while Dr S was in a position to pay a fine it should be tempered to the circumstances of the case and reflect the extent to which Dr S was to be further penalised as a consequence of what has happened and that he had already suffered considerably as a consequence of this case including the overwhelming stress he had undergone during this lengthy process.

28. With regard to conditions, Mr James informed the Tribunal that Dr S has completed three years of a four year occupational medicine training scheme; and has virtually completed the required research for the presentation of his paper for his final year. He submitted that Dr S was currently under a form of supervision regarding the above scheme and would continue to be so if he elected to complete the course during this year.

29. Mr James added that Dr S, since 2001, had been under a relatively extensive regimen of supervision, mentoring, training and "improvement" and that in the circumstances it would be unreasonably onerous and unnecessary for him to be subjected to further requirements

as he had already given considerable input whereby topics of education, communication and ethics had been addressed.

30. With regard to costs, he reminded the Tribunal that it is a contribution only towards costs which can be made.

Decision on Penalty

31. The Tribunal accepts that Dr S is sincere in his regret and remorse concerning this matter; agrees that Dr S was courteous and co-operative throughout the hearing and made the concessions referred to; notes the many laudatory testimonials which he produced; and has had regard to the full and able submissions made by his counsel on his behalf.

32. The Tribunal turns now specifically to the various penalties which it can impose.

Suspension

33. While the charge of professional misconduct was proved and the findings in relation to it were serious, the Tribunal was of the view that this was not a case which warranted suspension.

Censure

34. The Tribunal accepts Mr James' submission that for Dr S censure itself will be a significant penalty but it considers that in the circumstances a censure is appropriate.

Fine

35. The Act provides for a fine up to a maximum of $20,000.

36. The Tribunal has carefully taken into account all of the relevant circumstances and is of the view that a fine should be imposed. It considers that a fine at the level of $7,500.00 would be appropriate.

Conditions

37. The charge before the Tribunal (and the other complaints referred to above) arose at the xx Plant and related to that part of Dr S's practice involving Occupational Medicine.

38. Essentially, Dr S's clinical skills have not been in issue. The Competence Review looked at three areas, that is, working as a vocationally registered General Practitioner with emphasis on Occupational Health medicine, communication, and ethical issues surrounding conflicting interests in Occupational Health medicine.

39. The Tribunal has taken into account the Competence Review and courses which Dr S has undergone, however, the Tribunal requires that conditions be placed on Dr S's practice that he undertake two further courses at the direction of the Medical Council of New Zealand. Those courses are:

(a) An appropriate course in the training of disputes resolution; and
(b) An appropriate course in the training of ethics in the Occupational Health Medicine frame

and that the cost of these courses be borne by Dr S. Upon completion of these courses and subject to the satisfaction of the Medical Council of New Zealand, these conditions shall be lifted.

40. The Tribunal commends Dr S's intention to approach Dr B a GP in his area, who also practises in the field of occupational medicine to be a mentor and to provide back-up support; and his intention to approach others to explore the prospects of establishing a peer support network.

41. The Tribunal would also encourage Dr S to continue his liaisons with Dr C an Occupational Medical Specialist in xx which will provide Dr S with a broader view in this area of his practice.

Costs

42. The cost incurred by the CAC inquiry and prosecution was $86,713.04; and by the Tribunal hearing was $56,438.93, amounting in total to $143,169.97.

43. The Tribunal considers Dr S should make a contribution to the costs of the CAC and the Tribunal and that a contribution of 35 per cent of the total amount would be appropriate.

44. In fixing the level, the Tribunal had regard to the relevant legal principles, the Tribunal's findings in relation to the charge, the penalties imposed and the submissions made on Dr S's behalf.

Application for Permanent Name Suppression

45. Prior to the substantive hearing of the charge Dr S applied for name suppression. On 23 April 2004 the Tribunal granted name suppression on an interim basis only until the Tribunal had determined the charge against him.

46. Following determination of the charge, the Tribunal expressed the view that the interim order should be discharged but in fairness to Dr S ordered that it remain in place until Dr S had an opportunity to make submissions on the matter.

Principles followed by the Tribunal

47. 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.

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

> *"… it is important to emphasise … 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."*

Basis of Dr S's application

49. Dr S relies on his original application and the affidavits sworn in support by himself, his wife, Dr B and Mr D a senior solicitor at xx

50. These affidavits contain material relating to Dr S's professional circumstances; his personal circumstances; and his family and his concerns for others.

51. The Tribunal does not propose to traverse them again in this decision as they are appropriately summarised in the Tribunal's decision of 23 April 2004.

52. In addition to the earlier submissions, Mr James has filed further submissions. He submits that the primary ground advanced in support of continuing name suppression was that put forward in support of the interim name suppression, that is, that Dr S practises in a highly judgmental community and that the "fallout" from this decision could well be severely damaging to his practice as trust and confidence, which he has worked hard to establish, would be eroded and that publication of his name would represent a severe penalty.

53. Mr James stated in his present submissions that a disturbing feature regarding name suppression and suppression of particulars which could lead to identification is that the Tribunal's findings (following its decision on the charge) have been given wide national currency in the media and, in particular, in xx and xx. The doctor was referred to as "Dr S" and because of the particular details of the case identification of Dr S had been comparatively easy such that the media had made contact with Dr and Mrs S for comment.

54. Mr James submitted that publicity would have a marked effect on Dr S's reputation and the consequences for him and his family would be out of all proportion to the level of wrongdoing.

55. In this regard, he referred to the decision of Justice Frater in *S v MPDT and CAC* (High Court Auck. AP 113/02) in which the learned Judge referred to the High Court decision of Justice Ellis in *J v NZ Psychologists Board* (AP 34/01). In that decision Justice Frater said the two factors which weighed with Ellis J in deciding against publication were that the misconduct in issue was an error of professional judgment rather than any moral or professional turpitude, and that the damage caused to the practitioner by the publication would be out of proportion to his culpable conduct.

56. Mr James has requested the Tribunal to permit the current interim order to remain in place for a period of two weeks if it is not minded to grant permanent name suppression to afford Dr S the opportunity to consider appeal and other rights. This is a reasonable request.

CAC's submissions

57. Ms McDonald, on behalf of the CAC, similarly has relied on her submissions made in opposition to Dr S's earlier application.

58. She has cited *F v Medical Practitioners Disciplinary Tribunal* (AP 21-SW01 HC Akld 5 Dec. 2001) in which Justice Laurenson recognised that different considerations applied once the practitioner had been found guilty of misconduct and referred in particular to his decision at paragraph 4 where he observed that the requirement under the present Act for a hearing to be in public was a clear indication that the legislature intended the public was to be informed; and that the change must be seen in the context of the principal purpose of protecting the public; and that members of the public were entitled to be able to make an informed choice regarding which practitioner they engaged. She referred to the observations later in his decision that once the practitioner had been found guilty of misconduct the expectation would strongly favour publication of the practitioner's name.

59. Ms McDonald submitted that as the Tribunal had now made a finding of professional misconduct the interim order prohibiting publication should be lifted.

60. Ms McDonald relied on the submissions she had made in opposition to Dr S's original application.

61. In summary, Ms McDonald's submissions raised issues of public interest; the importance of freedom of speech and the right enshrined in s.15 of the New Zealand Bill of Rights Act 1990; the public's interest in knowing the name of the practitioner accused of a disciplinary offence; accountability and transparency of the disciplinary process; and other public interest factors.

62. Ms McDonald submitted that the public interest required that Dr S's name be published, that the public had a right to know and it was in the public's interest that it knows Dr S's name; and that it is in the public's interest that the outcome of the proceedings be made known if the integrity of the profession is to be maintained. She submitted that the public interest outweighed any private interests of Dr S and accordingly it was not desirable that Dr S's name should remain suppressed.

Decision on Name Suppression

63. The Tribunal is not persuaded by Dr S's primary submissions that xx is a highly judgmental community. While that may be the opinions of some (such as those who filed affidavits in support of Dr S's application) this does not necessarily lead the Tribunal to conclude that xx is any different from other similar communities of its kind and size in New Zealand with a variety of inhabitants who hold views and opinions from one end of the social spectrum to the other.

64. Dr S has already produced a significant number of testimonials from members of his community (including his peers and patients) who speak highly of him and many of whom would have been aware of the charge he was facing, hence their testimonials (addressed to his counsel).

65. While the Tribunal accepts that Dr S is genuinely fearful that publication of the decision may affect his practice adversely, the Tribunal does not accept that it will. The events, which are the subject of the charge, occurred in 2001. Since then he has continued to

practise and, according to the evidence provided (in opposition to any possibility of suspension) his services are required and sought in the community and by his local hospital. Knowledge of the charge has not affected their favourable view of him.

66. With regard to the legal authorities cited by his counsel, the "*misconduct*" in Dr S's case was more than "*an error of professional judgment*". The findings (referred to at paragraphs 5-8 above) were serious and speak for themselves.

67. The Tribunal has carefully weighed the factors advanced by Dr S and the CAC. It is not persuaded that the threshold of "desirability" has been met.

68. In the Tribunal's view it is in the public interest for there to be openness and transparency. The interim order for suppression should be discharged. However, the Tribunal grants Mr James' request for a delayed period of two weeks before it is lifted.

Conclusion and orders

69. The Tribunal makes the following orders:

(a) Dr S is censured.

(b) Dr S is fined $7,500

(c) That conditions be placed on Dr S's practice that he undertake the following courses at the direction of the Medical Council of New Zealand, namely:

(i) An appropriate course in the training of disputes resolution; and

(ii) An appropriate course in the training of ethics in the Occupational Health medicine frame.

And that the cost of these courses be borne by Dr S. Upon completion of these courses and subject to the satisfaction of the Medical Council of New Zealand, these conditions shall be lifted.

(d) Dr S is to pay 35 per cent of the costs and expenses of the investigation by the Complaints Assessment Committee and prosecution of the charge (which amounted to $86,731.04) and of the hearing of the Tribunal (which amounted to $56,438.93). The total amount of costs Dr S is required to pay is therefore $50,109.49.

(e) The order made by the Tribunal on 23 April 2004 granting Dr S name suppression on an interim basis until the Tribunal had determined the charge against him is to be discharged at the expiration of 14 days from the receipt by Dr S of the Tribunal's decision.

DATED at Wellington this 15th day of March 2005

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S M Moran
Senior Deputy Chair
Medical Practitioners Disciplinary Tribunal