MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 285/03/117C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on 20 April 2004

PRESENT: Miss S M Moran - Chair
Mr P Budden, Dr R J Fenwicke, Dr J L Virtue, Dr L F Wilson
(members)

APPEARANCES: Ms K L Davies - Hearing Officer
(for first part of call only)

COUNSEL: Ms K P McDonald QC for Complaints Assessment Committee

Mr C J Hodson and Ms G Phipps for respondent

Decision on the application for Name Suppression

Majority Decision

The decision of the Tribunal is a majority decision with Dr J L Virtue dissenting.

Introduction

1. Dr X is a vocationally registered xx employed by the [organisation] and practising in xx. On 12 January 2004 a Complaints Assessment Committee (CAC) laid a charge against Dr X pursuant to section 92(1) of the Medical Practitioners Act 1995 (the Act). The charge alleges professional misconduct on the part of Dr X in relation to his management of a patient and the delivery of her baby and an alleged failure relating to the provision of information and the obtaining of informed consent.

2. The charge is to be heard by the Tribunal at Wellington on 31 May, 1 and 2 June 2004.

3. The Tribunal convened (by way of a telephone conference) during the evening of 17 March 2004 to consider an application by Dr X for interim name suppression until his substantive application for name suppression could be heard. The Tribunal ordered that publication of Dr X's name, his occupation, the [place] where he was employed at the relevant time and any particulars leading to his identification be prohibited until the Tribunal could hear and determine Dr X's application for name suppression.

4. The Tribunal reconvened (again by way of telephone conference) during the evening of 20 April 2004 to consider Dr X's application.

5. Dr X seeks permanent name suppression but at this stage of the proceedings his Counsel asks that interim suppression only be considered, that is, until the findings are under consideration.

6. By a majority of four members, the Tribunal has determined that publication of Dr X's name, his occupation, the [place] where he was employed at the relevant time and any particulars leading to his identification, be prohibited but only until 9am on 31 May 2004 when the hearing commences, or such later date when the hearing of the substantive charge commences should the hearing date for 31 May be adjourned. The hearing itself shall be held in public. Dr Virtue dissented. It is her view that Dr X's application should be declined in full.

Basis of Dr X's application

7. Dr X's application was supported by a sworn affidavit from Dr A, Medical Adviser to the [organisation where Dr X is employed].

8. **Not for publication by Order of the Tribunal.**

9. The Tribunal notes that no affidavit has been filed by Dr X in support of his application.

10. Counsel on behalf of Dr X has filed a memorandum and has set out in the application for name suppression the grounds relied upon. They are:

(a) The antiquity of the matters complained of (8 October 1995).
(b) The antiquity of the complaint (25 July 2001).
(c) **Not for publication by Order of the Tribunal.**
(d) **Not for publication by Order of the Tribunal.**
(e) **Not for publication by Order of the Tribunal.**
(f) **Not for publication by Order of the Tribunal.**
(g) **Not for publication by Order of the Tribunal.**
(h) **Not for publication by Order of the Tribunal.**

CAC's Grounds of Opposition

11. Counsel for the CAC, Ms McDonald QC, filed very detailed submissions in support of the CAC's opposition to Dr X's application.

12. In essence, the CAC relied on two principal grounds:

(a) The public interest requires that there be publication of Dr X's name; and

(b) The circumstances disclosed by Dr X are insufficient to justify interim suppression of name and identifying details, either alone or in combination, and/or do not counter-balance the relevant public interest factors in this case.

13. Counsel for the CAC then referred to the name suppression principles and submitted that considerations of public interest outweighed the grounds relied upon by Dr X. The CAC referred to the matters set out below in support of its opposition.

Openness in judicial proceedings

13.1 The starting point in any consideration of name suppression (whether interim or otherwise) under the Act is section 106(1) which provides:

> *Except as provided in this section and in section 107 of this Act, every hearing of the Tribunal shall be held in public.*

This statutory provision creates the presumption that the Tribunal's inquiry into disciplinary charges should proceed in public which inevitably means that the practitioner's name will be published. This approach in the legislation was a change brought about because of public concern and criticism that disciplinary proceedings were conducted *behind closed doors* thereby enabling the profession to protect its own.

The fact that Dr X has denied the charge or that it is not at the most serious level of offending are not sufficient grounds in themselves to warrant name suppression and, in any hearing of this nature, publicity of a practitioner's name may cause a

detrimental effect and damage to reputation and members of the family but these are inevitable consequences of such proceedings and do not in themselves justify such an order.

Counsel referred to the more recent cases and submitted that, in summary, the Courts have emphasised the importance of open justice and freedom of expression. While the Act emphasises the public interest, the Tribunal must balance various factors and there must be a strong emphasis towards openness.

Exercising the discretion

13.2 In this regard Counsel referred to section 106(2)(d) of the Act which provides:

> *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.*

Counsel submitted that the Tribunal must be satisfied Dr X has attained the threshold of desirability before the balance can be tipped in favour of name suppression and that there is no presumption in favour of granting suppression pending determination of a disciplinary charge.

Counsel further submitted that the Tribunal must assess each application on its merits by applying the statutory criteria set out in section 106(2) of the Act, being the interests of any person and the public interest.

Dr X's grounds for application

13.3 Counsel referred to Dr X's application which set out eight grounds but submitted it would appear from his counsel's memorandum that the central concern is in relation to the effective functioning of [organisation where he is employed] and the prejudice to the reputation of [the organisation] that would arise from public reporting of this case which relates to a complaint **Not for publication by Order**

of the Tribunal.

Apart from the submission in Dr X's notice of application, counsel for the CAC submit that there is no evidence before the Tribunal of any concerns for, or potential effects on Dr X or his family if he is not granted name suppression.

The importance of freedom of speech and the right enshrined in section 15 of the New Zealand Bill of Rights Act 1990

13.4 The CAC referred to and relied upon the provisions in the NZBOR Act which relate to *freedom of speech* but submitted that it is not the only provision in this Act of relevance in this context.

Counsel referred to the presumption of innocence which is also relevant.

Counsel for the CAC submitted that the Tribunal should consider carefully and weigh these factors when exercising its discretion in this case but in doing so should recognise that the starting point must be the importance of freedom of speech, the importance of open judicial proceedings and the right of the media to report judicial proceedings.

The public's interest in knowing the name of a practitioner accused of a disciplinary offence

13.5 Here, the CAC submitted the fact that Dr X is charged with having professionally misconducted himself in the course of his practising medicine must be given more weight in relation to the issue of name suppression, than the outcome of his actions in terms of harm or insecurity and disequilibrium to patients treated at xx, and to the reputation of xx as a result of that conduct.

The CAC referred to relevant case law and concluded that while the Tribunal would be very concerned if there were a prospect of the evidence relating to the

charge being canvassed and prejudged prior to the hearing, it would be an improper action and the Tribunal cannot assume that would occur.

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Not for publication by Order of the Tribunal.

Accountability and transparency of the disciplinary process

13.6 The public's confidence in and respect for the medical profession is based in part on the existence of safeguards under the Act which ensure the competence and discipline of practitioners.

The CAC submitted that patients in the wider xx community are more likely to retain confidence in a profession that openly and publicly investigates incidents of poor practice rather than a system which seeks to cover them in secrecy.

The CAC further submitted that if the media is able to report proceedings in full then members of the public and the [particular] community may be *reassured* about the current standard of health care at [the organisation] rather than be caused *significant insecurity or disequilibrium* as counsel for Dr X have submitted they would suffer.

The Tribunal is not entitled to assume that there is a prospect of the evidence relating to the charge being canvassed in the media and pre-judged prior to the hearing and, were that to occur, then Dr X and/or the [employer] would have available to them various remedies such as the Press Association, the Broadcasting Act and the laws of Defamation.

Other public interest factors

13.7 Counsel for the CAC accepted that the likelihood of further *historical* complaints being made about Dr X **Not for publication by Order of the Tribunal.** ; and that it is probably unlikely that non-publication of Dr X's name and identifying

details in connection with the charge would cause suspicion to fall on other practitioners in the [particular] area. Given the nature of the allegations, the subject of the present charge, and **Not for publication by Order of the Tribunal**, and the fact that the wider xx community is relatively small, it is probable that members of the community may assume the doctor concerned is Dr X in any event.

Procedural matters

13.8 The CAC submitted that two of Dr X's grounds in support of his application (age of the matter complained of and age of the complaint) are not matters which are capable of rebutting the presumption that disciplinary proceedings be open and public. There is no time limitation period specified in the Act for bringing a charge before the Tribunal.

Principles followed by the Tribunal

14. When exercising its discretion under s.106(2)(d) of the Act (referred to at para. 13.2 above) the Tribunal must consider whether it is "desirable" to order name suppression by assessing whether or not the factors advanced by Dr X outweigh the public interest. In other words, the Tribunal must be satisfied Dr X has met the threshold of "desirability" before his application can be granted.

15. There is no presumption in favour of granting an application for interim name suppression pending determination of the disciplinary charge.

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

> *"… 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."*

The Tribunal's Decision

17. The Tribunal has carefully considered and weighed the public interest factors referred to by the CAC against the argument put forward on behalf of Dr X.

18. There is considerable force in the CAC's submissions, with which the Tribunal, in essence, agrees.

19. Dr X has not produced any evidence that he (or his family) has suffered or will suffer any prejudice or harm if he is not granted name suppression.

20. Dr A's affidavit is directed towards protecting the reputation of the [organisation], of its unit, and those who work in it. He is also concerned to ensure that the trust and confidence of the public (and patients) is not undermined or damaged by publicity.

21. He has asserted that there is a *potential* that if there is publicity about the hearing a *misunderstanding* may arise that the charge arises out of a current issue rather than one which dates back to 1995 (and since which time there has been a significant review when xx introduced changes to the unit and addressed issues particular to Dr X).

22. The fact that there may be a *potential* for misunderstanding by some members of the public is not in the Tribunal's view sufficient ground for the Tribunal, in the particular circumstances of this case, to depart from the presumption of open justice.

23. The Tribunal is not satisfied that it is desirable to grant name suppression until its *findings are under consideration.*

24. The Tribunal stresses the need for openness and transparency in its proceedings. Section 106(1) of the Act emphasises that hearings shall be in public (subject to certain exceptions). It recognises specifically the principle of open justice.

25. However, the Tribunal is prepared to accommodate the concerns expressed in Dr A's affidavit to the extent that it will grant name suppression but only to the commencement of the hearing of the substantive charge.

26. In this way, there can be no prior publicity which could give rise to a loss of public confidence in the [organisation] or its unit.

27. Once the hearing commences, then the news media, as surrogates of the public, are entitled to report the proceedings and are obliged to do so fairly and accurately.

28. At that time, if counsel for Dr X so wishes, the Tribunal would be prepared to consider an application by his counsel that his counsel be entitled to make an opening statement immediately after counsel for the CAC has made an opening statement so that if there is media coverage then there will also be the balance of both statements being reported at the same time.

29. Such statement, on behalf of Dr X, could refer to the pertinent issues and highlight the concerns raised in this application.

30. The Tribunal (by a majority of four) accordingly orders that:

> Dr X's name, his occupation, the [organisation] where he was employed at the relevant time and any particulars leading to his identification, be prohibited, but only until 9am on 31 May 2004 when the hearing commences, or such later date when the hearing of the substantive charge commences should the hearing date for 31 May be adjourned. The hearing itself shall be held in public.
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> Dr Virtue dissents. It is her view that the "desirability" threshold has not been met and that a case has not been made out at all for any form of suppression.

DATED at Wellington this 12th day of May 2004

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S M Moran

Senior Deputy Chair

Medical Practitioners Disciplinary Tribunal