MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 310/04/124C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Monday 14 March 2005

PRESENT: Dr D B Collins QC - Chair

Dr R J Fenwicke, Dr R W Jones, Dr J M McKenzie, Mr G Searancke (members)

APPEARANCES: Ms K P McDonald QC for Complaints Assessment Committee

Mr C H Toogood QC for respondent

Ms K L Davies – Hearing Officer

(for first part of call only)

Introduction

1. Doctor J is a medical practitioner. He lives in xx. A Complaints Assessment Committee has charged Dr J with a disciplinary offence. The charge, laid pursuant to s.93(1)(b) Medical Practitioners Act 1995 ("MP Act") alleges Dr J *"in an intimidatory manner verbally and physically abused"* a professional colleague. It is alleged the conduct complained of constituted "conduct unbecoming a medical practitioner which reflects adversely on his fitness to practice".

2. Doctor J has applied for two orders, namely:

   (a) An application that nothing be published which names or otherwise identifies him pending the determination of the charge by the Tribunal;

   (b) That the hearing be held in private.

3. The Tribunal has decided to grant Dr J's application for interim name suppression but declined his application to have the hearing heard in private.

4. The Tribunal explains its reasons for these two decisions in the following paragraphs, dealing first with the application for interim name suppression.

Interim Name Suppression

<u>Basis of Application</u>

5. Doctor J's application is based on the following points:

   (a) The charge is to be defended;

   (b) Severe prejudice will be caused to Dr J if his name were published in association with the charge which has at this juncture not been proven. Specifically, Dr J is concerned his reputation will be severely damaged by adverse publicity;

   (c) The events complained of concern a dispute between two practitioners. There is no question of patient or public safety raised by the complaint;

(d) The genesis of the complaint is a commercial dispute between Dr J and the complainant.

CAC's Position

6. The CAC neither consents nor opposes Dr J's application.

Relevant Legislation

7. The starting point when considering applications for name suppression by medical practitioners is subsections106(1) and (2) of the Medical Practitioners Act 1995. These provide:

> *"(1) Except as provided in this section and in section 107 of this Act, every hearing of the Tribunal shall be held in public.*
>
> *(2) 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, it may make any 1 or more of the following orders:*
>
> *…*
>
> *(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person".*

8. Subsection 106(1) of the MP Act emphasises the Tribunal's hearings are to be held in public unless the Tribunal, in its discretion applies the powers conferred on the Tribunal by s.106(2) of the Act. Another exception to the presumption that the Tribunal's hearings will be conducted in public can be found in s.107 which creates special protections for complainants required to give evidence of a sexual, intimate or distressing nature.

9. Whereas s.106(1) of the MP Act contains a presumption that the Tribunal's hearings shall be held in public, there is no presumption in s.106(2) of the Act. Where the Tribunal considers an application to suppress the name of any person appearing before the Tribunal, the Tribunal is required to consider whether it is desirable to prohibit publication of the name of the applicant after considering:

(a) The interests of any person (including the unlimited right of a complainant to privacy); and

(b) The public interest.

Public Interest

10. The following public interest considerations have been evaluated by the Tribunal when considering Dr J's applications:

(a) Openness and transparency of the disciplinary process;

(b) Accountability of the disciplinary process;

(c) The public interest in knowing the name of a doctor charged with a disciplinary offence;

(d) The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1990[1];

(e) The extent to which other medical practitioners may be unfairly impugned if Dr J's application is granted.

11. Each of these considerations will now be examined by reference to Dr J's application. In focusing on these public interest considerations the Tribunal notes no specific submissions were received relating to the complainant's interests in this case. The interests of the complainants have been subsumed into the public interest factors considered by the Tribunal.

<u>Openness and Transparency of Disciplinary Proceedings</u>

12. The following cases illustrate the importance of openness in judicial proceedings:

(a) In *M v Police*[2] Fisher J said:

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[1] "Freedom of expression – everyone has a right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any forum".

[2] (1991) CRNZ 14

> *"In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice be seen to be done".*

(b) In *R v Liddell*[3] the Court of Appeal said:

> *"… the starting point must always be the importance in a democracy of … open judicial proceedings …."*

(c) In *Lewis v Wilson & Horton Ltd*[4] the Court of Appeal reaffirmed what it had said in *Liddell*. The Court noted:

> *"…the starting point must always be …the importance of open judicial proceedings …."*

13. To these leading cases can be added *Scott v Scott*[5] and *Home Office v Harman*[6] where Lords Shaw and Diplock explained the rationale for openness in civil proceedings.

14. The Tribunal appreciates it is neither a criminal nor a civil Court. However, as Frater J noted in *Director of Proceedings v I*[7] when explaining the scope of s.106 of the Medical Practitioners Act 1995:

> *"The presumption in s.106(1) of the Act, in fair and public hearings makes it clear that, as in proceedings before the civil and criminal Courts, the starting point in any consideration of the procedure to be followed in medical disciplinary proceedings must also be the principle of open justice."*

Accountability of the Disciplinary Process

15. Closely aligned to the concept of openness and transparency is the need to ensure that the disciplinary process is accountable and that members of the public and profession can have confidence in its processes. This point was noted by Baragwanath J in *Director of Proceedings v Nursing Council* [8] where His Honour drew upon the writings of Jeremy Bentham and Viscount Haldane in *Scott v Scott* to illustrate the importance of accountability in professional disciplinary proceedings.

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3 [1995] 1 NZLR 538
4 [2003] 3 NZLR 546
5 [1913] AC 47
6 [1982] 1 All ER 532

Public Interest in Knowing the Identity of a Medical Practitioner Charged With a Disciplinary Offence

16. There is a well recognised public interest in members of the public, as well as other members of the profession knowing the identity of a health professional charged with a disciplinary offence. The interest lies in providing members of the public and other members of the profession with information which may influence their decision to consult with the person who is the subject of the charge.

17. The public interest in knowing the identity of a health professional who is the subject of a disciplinary charge was referred to in *Director of Proceedings v Nursing Council* under the heading of "Education and alerting the community to risk". It was also a factor referred to in *F v Medical Practitioners Disciplinary Tribunal*[9] where the Court, relying on *S v Wellington District Law Society*[10] noted:

> *"(a) The public interest is the interest of the public, including members of the profession, who have a right to know about proceedings affecting a practitioner …*
>
> *(c) In considering the public interest the Tribunal is required to consider the extent to which publication of the proceedings would provide some degree of protection to the public or the profession …".*

Importance of Freedom of Speech and the Right Enshrined in s.14 New Zealand Bill of Rights Act 1990

18. The public interest in preserving freedom of speech and allowing the media "as surrogates of the public" to report Tribunal proceedings has been approved on a number of occasions by appellate Courts[11].

19. The Tribunal does not know if the media proposes reporting anything about the charges faced by Dr J. If the media wish to publish reports about the Tribunal's proceedings and

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7 [2004] NZAR 635
8 [1999] 3 NZLR 360
9 Unreported HC Auckland, AP21-SW01-5 December 01, Laurenson J
10 [2001] NZAR 465
11 See for example, *Liddell* and *Lewis* (supra)

identify Dr J then clearly the importance of freedom of speech enshrined in s.14 New Zealand Bill of Rights Act 1990 is a factor which weighs against Dr J's application.

Unfairly Impugning Other Doctors

20. A further factor in the public interest is the concern that other medical practitioners may be unfairly impugned if Dr J's name is suppressed. This point has been emphasised on numerous occasions in Criminal Courts where Judges have declined name suppression to avoid suspicion falling on other members of the profession.

21. The Tribunal has carefully weighed Dr J's circumstances and interests against the public interest considerations set out in this decision.

22. The Tribunal is satisfied there is a risk of harm to Dr J's reputation and practice if his name is published in association with the charge prior to the charge being heard and determined.

23. The charge is at the lower end of the spectrum of matters which come before the Tribunal and even if it is proven, it is not likely to give rise to concerns about patient or public safety.

24. The Tribunal orders nothing be published which names or otherwise identifies Dr J until the Tribunal has determined the outcome of the charge.

Private Hearing

25. There is a powerful presumption in s106(1) of the MP Act that the Tribunals hearings are held in public.

26. The basis of the application for the hearing to be held in private is essentially the same as the reasons advanced in support of Dr J's application for interim name suppression.

27. The Tribunal is firmly of the view:

(a) Nothing has been put forward which rebuts the presumption of a public hearing set out in s106(1) MP Act;

(b) Doctor J's concerns about privacy are effectively addressed by the interim name suppression orders made by the Tribunal.

28. The Tribunal has accordingly declined to order that its hearing of the charge be heard in private.

DATED at Wellington this 20th day of April 2005

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D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal