MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 314/05/127C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Wednesday 15 June 2005

PRESENT: Miss S M Moran - Chair
Mrs J Courtney, Dr R J Fenwicke, Dr M Honeyman,
Dr A D Stewart (members)

APPEARANCES: Neither counsel for the Complaints Assessment Committee (Ms K P McDonald QC and Ms J Hughson) nor counsel for the Respondent (Mr K N Hampton QC) took part in the Conference but were content to rely on their written submissions

Ms G J Fraser - Secretary attended for the first part of the call only.

Decision on application by Dr P for interim name suppression

Introduction

1. Dr P is a general medical practitioner in xx. On 19 April 2005 a Complaints Assessment Committee (the CAC) laid a charge against Dr P pursuant to s.92(1)(d) of the Medical Practitioners Act 1995 (the Act) alleging disgraceful conduct in a professional respect and/or in the alternative professional misconduct on the part of Dr P concerning a former patient. There are six particulars of the charge which allege that Dr P had a sexual relationship with the woman who was at the time or who had until recently been his patient; that he paid money to her in return for sexual services; that he provided prescription only drugs to her without prescription and without proper medical reasons or justification for so doing; that he gave her advice on how to prepare a lethal dose of medication for her to use as a suicide tool; that following a complaint made against him by another on behalf of the woman to the Health & Disability Commissioner concerning his treatment, he paid a sum of money to the woman in return for her not attending a planned interview with the Commissioner's office; and that he telephoned her on the morning of a proposed interview with her by the Complaints Assessment Committee in relation to a complaint made against him by another on behalf of the woman and attempted to dissuade her from meeting with the Committee.

2. The charge has been set down for a defended hearing to commence on 3 October 2005.

3. On 28 April 2005 the CAC applied for an interim order either suspending the registration of Dr P or placing conditions on his practice of medicine with a Memorandum of Counsel in support. A Notice of Opposition was filed on behalf of the doctor.

4. On 26 May 2005 Dr P applied for an interim order prohibiting publication of his name and any particulars which might lead to his identification, such order extending to the course of the hearing of the substantive charge and an affidavit of the doctor in support. Counsel for the CAC filed a Notice of Opposition and written submissions to which Dr P's counsel filed an Answer.

5. Thereafter there was a Directions Conference with the Chair and Counsel for the respective parties regarding timetabling and related issues. It was also indicated by Mr Hampton that Dr P would be resigning from his employment in his role as a general medical practitioner and medical adviser to the xx in xx where he was employed effective from end of work on 27 May 2005. Mr Hampton confirmed Dr P was not practising in any other capacity other than his work at the xx.

6. On 10 May 2005 Dr P gave a written undertaking both to the Medical Council of New Zealand and to this Tribunal that he had in fact so resigned and confirmed that he had written to the Medical Council on 29 April 2005 advising it that in view of the charge against him and the Tribunal hearing to be held and in view of the seriousness of the allegations he wished to relinquish his Medical Council registration and await the outcome of the hearing. He added that as he was obliged to give four weeks' notice of resignation to his employer, he requested that his registration be relinquished on 1 June 2005; and undertook to both the Medical Council and this Tribunal that he would not practise as a medical practitioner (whether as an employee or on his own account or in any other capacity) as from and including 1 June 2005.

7. On 16 May 2005 Ms McDonald, in view of the written undertaking given by Dr P, confirmed on behalf of the CAC she would now withdraw its application for interim suspension.

8. However, Dr P's application for interim name suppression remained a live issue.

9. On 15 June 2005 the Tribunal convened (by way of telephone conference) to consider Dr P's application for interim name suppression. The Tribunal determined that Dr P's name and any details which could identify him should be suppressed until the Tribunal has determined the charge against him. At that stage the Tribunal will then consider whether or not its interim orders should be discharged or made permanent following consideration of any further submissions which counsel for either party may wish to make.

The Legislative regime

10. The relevant provisions of the Act are:

> *"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) 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."*

Basis of application for name suppression

11. Dr P's application for name suppression relied specifically on three grounds, that is,

(a) that it was in the public interest and in the interests of Dr P for such an order to be made pending determination of the seriousness of the allegations made against him.
(b) that publication prior to determination could have a prejudicial effect on Dr P particularly if on the determination the charge is found not to be proved; and
(c) the contents of his affidavit.

12. In his affidavit sworn on 30 May 2005 Dr P raised the following issues:

(a) His professional circumstances.
(b) His personal circumstances.
(c) His family.
(d) His employer.

<u>Dr P's professional and personal circumstances</u>

13. Dr P denies the charge and the allegations which lie behind it. In particular he disputes vehemently the accounts given by the woman to the CAC and denies allegations of any sexual impropriety with her or any claimed inappropriate sexual relationship with her. He disputes all the particulars set out in the charge.

14. Dr P states that he gave the formal undertaking to the Medical Council and to the Tribunal due to his recognition of the serious nature of the allegations.

15. He has added that it is the serious nature of those allegations which could have prejudicial and far reaching effects on him and on his future if his name is published prior to determination of the charges and particularly so if they are found to be not proved.

16. Dr P is concerned not just for himself and his future but also for his family, particularly his children, and for his former employer.

Dr P's family and concern for others

17. While Dr P's marriage dissolved in 2001 (on an amicable basis) he has had continuing and close access to the two children of that marriage now aged xx years and xx years respectively. He states that the elder child is a healthy, well-adjusted child, excelling in her academic studies at high school. Her surname is very identifiable and somewhat unique to New Zealand. Publication would affect her considerably.

18. With regard to the younger child, Dr P states that she suffers from a rare and disabling illness contracted due to a viral infection in the early stages of her life. She is a markedly disabled child physically and has intellectual functioning of a child about half her age. She has a fulltime teacher's aide. While her intellectual functioning level is diminished, Dr P states that she is very aware of things and people outside will be extremely affected if his name is published. He has genuine concerns for her welfare.

19. Dr P states that he believes publication of his name will have very considerable [adverse] effect on both his children which he believes may be magnified in the case of the younger child due to her vulnerable state given his relationship with each of them. He states that he has a close and frequent involvement with his children, having maintained an excellent relationship with both of them.

20. Dr P has stated that he has formed a relationship with another woman with whom he has very recently had a child.

21. Dr P is concerned about the potential adverse implications of publication of his name on his employer where he has been employed from mid 2002 until his recent resignation in May this year. He states his name has been well-connected with his practice there, both professionally and in publications including a newspaper, a medical magazine, and advertised material. He is also concerned that publication of his name could also adversely affect his practice which he is in the throes of selling it to another organisation.

22. Dr P has stated that one of the reasons why he is not going to continue in general practice is that the new owners of his practice will be able to retain his patients.

CAC's grounds of opposition

23. Ms Hughson on behalf of the CAC has filed detailed submissions in opposition to Dr P's claim.

24. In essence, the CAC relies on three grounds:

(a) The public interest requires there be publication of the doctor's name; and
(b) The circumstances disclosed by him are insufficient to justify interim suppression either alone or in combination; and/or do not counterbalance the relevant public interest factors in this case; and
(c) It is not desirable that his name be suppressed on an interim basis.

25. The CAC has referred to s.106(1) of the Act which provides that except in certain circumstances every hearing of the Tribunal shall be held in public; and that the presumption is that the Tribunal's enquiry into disciplinary charges should proceed in public which inevitably means that the practitioner's name will be published.

26. The CAC has referred to the history of the legislation which came about because of public concerns and criticisms that disciplinary proceedings were conducted "behind closed doors"; the fact that the doctor denies the charge or that the charge is at the most serious level are not sufficient grounds in themselves to warrant interim suppression; and that in any disciplinary hearing publicity of the practitioner's name may cause detrimental effect and damage to their reputation and to members of the

doctor's family which, it is submitted, are inevitable consequences of such proceedings and again in themselves would not justify such an order being made.

27. The CAC has referred to the openness in judicial proceedings and has referred to the relevant authorities both reported and unreported and cited the essential principles from them.

28. It has referred to the Tribunal's exercise of discretion provided for under s.106(2)(d) of the Act and that the Tribunal must consider whether it is "*desirable*" to order suppression by determining that the interests of the doctor outweigh the public interest.

29. The CAC has submitted that there is no presumption in favour of granting applications for interim name suppression pending determination of a disciplinary charge.

30. The CAC has made forceful submissions in opposition to each of the grounds on which Dr P relies referring to the following factors:

(a) Public interest. Under this heading, it has submitted that given the strong presumption in favour of open and public disciplinary proceedings the burden is on Dr P to establish either one or a combination of his personal concerns outweigh or counterbalance the relevant public interest; and that in this case the public interest is significant.

(b) The importance of freedom of speech and the right enshrined in s.15 of the New Zealand Bill of Rights Act 1990. Essentially, the CAC refers to and relies upon the freedom of speech provisions in the New Zealand Bill of Rights Act but accepts it is not the only provision in this particular Act of relevance in this context.

The CAC very fairly points to the presumption of innocence contained in s.25(c) of the New Zealand Bill of Rights Act and s.27(1) which legislates that every person has the right to the observance of natural justice by a Tribunal

which has the power to make a determination in respect of that person's rights and interests.

The CAC has urged the Tribunal to consider and weigh carefully these various factors when exercising its discretion but when doing so recognizing the starting point must be the importance of freedom of speech and open judicial proceedings and the right of the media to report them.

The CAC has concluded under this heading that the allegations are so serious that it is in the public interest that the doctor's name should be known to the public even before the charge is determined.

(c) The public's interest in knowing the name of the practitioner accused of a disciplinary offence. In essence, under this heading, the CAC has submitted that the public has the right to know of Dr P's identity and that with which he has been charged.

While it accepts that the doctor has given an undertaking not to practise medicine pending determination of the charge, the background to the matters which are the subject of the charge also involve him having contact with the complainant in his capacity in part as a counselor.

The CAC has urged the Tribunal to give appropriate weight to the fact that this is a charge where factors of significant harm to patients pertain and involves issues of possibly the most serious nature which could arise in the context of the doctor/patient relationship; and to bear in mind that the allegations cover a period of more than two years and that publicity of the proceedings may lead to the discovery of additional complainants.

With regard to the various matters raised by the doctor in support of his application, the CAC has submitted that while they are matters for the Tribunal to consider and weigh, the public interest in the wider community should prevail in knowing the doctor's identity.

(d) Accountability and transparency of the disciplinary process. Under this

heading the CAC has submitted that the public's confidence and a respect for the medical profession is based in part on the existence of the safeguards under the Act which ensure the competence and discipline of practitioners and that those safeguards must be seen to be enforced; and has added that patients 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.

31. In conclusion, the CAC has submitted that the grounds relied on by Dr P have failed to overcome the burden of proving that neither one, nor a combination, of his concerns amounts to circumstances strong enough to displace the strong public interest factors in this case, and weigh against interim name suppression.

Dr P's reply

32. In reply to those submissions, Dr P has submitted:

(a) That his application is for interim suppression only and accepts that very different matters might apply dependant on the outcome.

(b) That a careful consideration of the CAC's submissions demonstrate that they are of particular relevance if the application for suppression was for a final order after determination.

(c) That such matters should not be determined by the seriousness of the allegation as that would be an inappropriate way of assessing the matter.

(d) That throughout he has strenuously denied the allegations which have yet to be determined; and that prior publication to determination will have a gravely significant effect.

(e) That particular care should be given regarding the CAC's submissions especially where it is claimed that where an enquiry into a disciplinary charge is held in public *"this inevitably means that the practitioner's name will be published"*. The doctor has taken issue with the word "*inevitably"* which he submits is not in accordance with the authorities.

(f) That many of the authorities cited refer to proceedings in the criminal jurisdiction and that there is a distinction between those proceedings and enquiries before disciplinary bodies.

Principles applied by the Tribunal

33. The Tribunal must consider whether it is *"desirable"* to grant name suppression in accordance with s.106(2)(d) of the Act. When exercising this discretion, the Tribunal must weigh in the balance the matters advanced by Dr P and those advanced by the CAC and whether, when weighting them, those advanced by Dr P outweigh the public interest. The Tribunal must be satisfied that, before granting name suppression, Dr P has satisfied the test of desirability.

34. Each case must be considered on its own facts and there can be no general presumption either in favour of, or against granting interim name suppression pending determination of the disciplinary charge.

35. In this regard, the Tribunal refers (as did the CAC in its submissions) to the observations of Justice Frater in *Director of Proceedings v I and MPDT* (High Court Auckland CIV 2003-385-2180, 20 February 2004) who observed:

> *"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 the presumption in favour of open justice should be departed from. It would be wrong to elevate a statement of reality - … to a presumption in favour of granting such applications pending determination of a charge."*

Reasons for Tribunal's decision

36. The Tribunal has considered with care all the matters raised by both parties and has had regard to the relevant legal authorities.

37. The Tribunal has had regard to the submission of the CAC that the factors which Dr P has raised are common to most disciplinary proceedings before the Tribunal and do not in themselves justify an order being made. While there is validity in this submission, the Tribunal is entitled to and, indeed, must have careful regard to the factors which he has raised and is satisfied that it is desirable that the interim order should be made.

38. Having had regard to the interests of Dr P, his children, and his former employer and to the public interest, the Tribunal is satisfied that it is desirable to prohibit publication of Dr P's name or any particulars which may lead to his identification pending determination by the Tribunal of the charge.

39. The Tribunal recognises that it is a testing experience for any doctor having to face a charge before a disciplinary tribunal. Such an experience is usually accompanied by stress and anxiety for the doctor and the doctor's family particularly where publicity ensues. However, that is not a reason in itself to grant an application for name suppression, be it interim or permanent. There must be other factors of a persuasive nature before the Tribunal is satisfied that the threshold of desirability has been crossed.

40. There are a number of factors to which the Tribunal has given careful consideration and which have persuaded the Tribunal to grant an interim suppression order.

41. The Tribunal accepts that either or both of Dr P's children, who are at a vulnerable age, could be adversely affected as a result of publication of his name. Their particular circumstances are already referred to above (paragraphs 17 to 20). The Tribunal accepts that because of their locality and their surname they could be readily identified with their father and, as a result, they could be adversely affected.

42. The Tribunal has also had regard to the potential adverse implications on his previous employer, xx at xx, with whom the doctor's name appears to have been publicly identified. Publication of the doctor's name at this stage could also adversely affect the confidence of those persons who use the particular service which that xx provides.

43. The Tribunal has also had regard to and accepts the fact that publication of the doctor's name at this stage could adversely affect his general practice which, at the time of the hearing, he was in the throes of selling to a community health centre and that the former patients of Dr P are most likely to transfer to that centre.

44. Dr P denies the charge and all its particulars. Without doubt they raise allegations of a most serious nature which Dr P acknowledges. It was his recognition of the

serious nature of the charges which led him to give the formal undertakings to the Medical Council and the Tribunal of 10 May this year (see paragraph 6 above).

45. The fact that the charge and its particulars raise matters of a serious nature is not necessarily by or in itself a reason either to grant or decline interim name suppression. As Frater J has stated in *Director of Proceeding v I* (above), each case must be considered according to its own circumstances. In this particular case, the allegations made are of such a serious nature that, if they were found not to be proved, the dismissal of the charge would not in itself be sufficient to undo any adverse effect which the allegations themselves could have on Dr P's name or future practice.

46. The Tribunal has considered the submission of the CAC that the publicity of these proceedings may possibly lead to the discovery of additional complaints. That is a matter which the Tribunal has considered in the balance; and has also taken into account that he has voluntarily relinquished his registration so that from a future perspective there can be no harm to the public.

47. The hearing itself will be held in public and the news media will be entitled to be present to report on the proceedings as representatives of the public even although suppression orders will be in place.

48. If, at the conclusion of the hearing, the charge is proved then further and different considerations may apply regarding whether the interim order for suppression should be discharged or made permanent. If it is discharged, then the public will have an opportunity at that stage to learn of Dr P's name.

49. This Tribunal has repeatedly emphasised the importance of openness in its proceedings. The principle of open justice is recognised in (s.106(1)) of the Act; but the Act also recognises (s.106(2)(d)) that there will be occasions when that principle is tempered with name suppression orders, be they permanent or interim.

CONCLUSION AND ORDER

50. In the particular circumstances of Dr P, the Tribunal is satisfied he has established that it is "desirable" that neither his name nor any particulars which could identify him (which shall include his former place of employment) should be published until the Tribunal has determined the charge against him.

DATED at Wellington this 28th day of July 2005

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Sandra Moran

Deputy Chair

Medical Practitioners Disciplinary Tribunal