MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

PO Box 11-649, Wellington • New Zealand
13th Floor, Mid City Tower • 139-143 Willis Street, Wellington
Telephone (04) 381 6816 • Fax (04) 802 4831
E-mail mpdt@mpdt.org.nz
Website www.mpdt.org.nz

DECISION NO: 321/05/128C

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) against K medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Dr D B Collins QC (Chair)

Dr R J Fenwicke, Dr J L Virtue, Mrs H White, Dr L F Wilson (members)

Ms G J Fraser (Secretary)

Ms H Hoffman (Stenographer)

Hearing held at Wellington on 12 September 2005

APPEARANCES: Ms J Hughson for the Complaints Assessment Committee

Ms C Garvey for Dr K

Introduction

1. Doctor K is a registered medical practitioner. He has vocational (specialist) registration as an anaesthetist and practises xx medicine at clinics in xx and xx.

2. On 3 June 2005 a Complaints Assessment Committee ("CAC") charged Dr K with professional misconduct. The charge was laid pursuant to s.102(1)(b) Medical Practitioners Act 1995 ("the Act").

3. The details of the charge are explained in paragraph 8 of this decision.

4. Doctor K did not defend the charge. He accepted that his conduct constituted professional misconduct.

5. At the conclusion of the hearing on 12 September the Tribunal advised that:

   5.1 The charge of professional misconduct had been established.

   5.2 Doctor K would only be permitted to practise medicine subject to a series of conditions. Those conditions are explained later in this decision.

   5.3 Doctor K would also be censured and required to pay a portion of the costs of the CAC and the Tribunal associated with the hearing.

   5.4 Doctor K's application for permanent name suppression would be declined.

6. The Tribunal's decision in relation to penalty, and its decision declining Dr K's application for permanent name suppression will take effect from 7 October 2005.

7. The Tribunal's reasons for its decisions are explained in the following paragraphs.

The Charge

8. The charge is very succinct. It alleges that between October 2003 and April 2004 Dr K forged on a number of prescriptions the signature of another medical practitioner in order to enable him to obtain pethidine for his own use from a pharmacist.

The Facts

9. The parties presented the Tribunal with a helpful summary of facts.

10. It is accepted that in 2003 Dr K rented a room from a clinic in xx. Soon after this arrangement commenced Dr K approached one of the other practitioners at the clinic and asked her to sign a prescription for pethidine for a patient of Dr K. The other doctor at the clinic obliged, and did so on a number of occasions until warned by a pharmacist that it was not wise for her to sign prescriptions for Dr K's patients.

11. In April 2004 a pharmacist contacted the doctor at the clinic who had assisted Dr K by signing prescriptions for his patients. The pharmacist showed a prescription to the doctor who realised immediately that her signature on the prescription was a forgery. A number of other prescriptions were examined. It became apparent that the doctor's signature had been forged on several occasions. It subsequently transpired Dr K admitted forging the doctor's signature on four occasions.

12. A letter of complaint was written to the Medical Council of New Zealand. Doctor K admitted the essential facts.

13. The Tribunal was informed Dr K has had a narcotic (opioid) dependence since 1992, and has been monitored by the Health Committee of Medical Council since that time. Doctor K has undergone treatment for his addiction since 1992. His treatment programmes have included periods of residential treatment at the Queen Mary Hanmer facility. Doctor K abstained from opioid use for several years. He suffered a relapse in April 2003. That relapse was discovered when his forging of prescriptions came to light.

14. Doctor K has suffered several seasonal lowerings of mood/dysphoria and associated symptoms of depression. Recently he has been diagnosed with depression. He partially attributes his relapse of narcotic use in April 2003 to depression.

15. After the forgery issues came to light Dr K voluntarily withdrew from practice for approximately two months. He returned to work in July 2004 subject to a number of conditions and undertakings given to the Medical Council.

16. Midway through 2004 Dr K attended a two week assessment and residential treatment programme at the xx in xx. The xx assists people with addiction problems. He subsequently attended a further one week programme at the xx.

17. The Tribunal was informed by both parties that Dr K is following a comprehensive ongoing care programme and that the Health Committee of the Medical Council is satisfied Dr K is fit to practise medicine.

Professional Misconduct

18. Notwithstanding Dr K's admission the Tribunal must be satisfied that the agreed facts constitute professional misconduct.

19. In determining whether or not Dr K's conduct amounted to professional misconduct the Tribunal has applied the following two step test:

    19.1 The first portion of the test involves an objective evaluation of the evidence and answer to the following question:

> Has the doctor so behaved in a professional capacity that the established acts and/or omissions under scrutiny would be reasonably regarded by the doctor's colleagues and representatives of the community as constituting professional misconduct?[1]

    19.2 The second limb of the test requires the Tribunal to ask that if the established conduct falls below the standard expected of a doctor:

> Is the departure significant enough to attract a disciplinary sanction for the purposes of protecting the public and/or maintaining professional standards, and/or punishing the doctor?[2]

---

1 *Ongley v Medical Council of New Zealand* (1984) 4 NZAR 369; *McKenzie v MPDT* (HC Auckland, CIV2002-404-1503-02, 12 June 2003 Venning J)

2 *Pillai v Messiter [No.2]* (1989) 16 NSWLR 197; *B v The Medical Council* (HC Auckland, HC 11/96, 8 July 1996, Elias J); *Staite v Psychologists Board* (1998) 18 FRNZ 18; *Tan v ARIC* (1999) NZAR 369

Onus and Standard of Proof

20. In applying the test as to what constitutes professional misconduct the Tribunal has borne in mind that the onus of proving the charge rests with the CAC. The standard of proof required is based upon the civil standard of proof tempered with the requirement that serious allegations require a high standard of proof.[3]

21. In this particular case the allegations are very serious. The agreed summary of facts has made the Tribunal's task relatively easy, but nevertheless it is important to record that the adverse findings made against Dr K are based on compelling evidence.

Tribunal's Findings

22. The Tribunal is unanimously of the view that Dr K's actions constituted professional misconduct.

23. Doctor K's conduct in forging the signature of a colleague on prescriptions so as to enable him to obtain pethidine for his own use was a very serious departure from the standards expected of a medical practitioner in New Zealand.

24. Forging a person's signature is a criminal offence. In the circumstances of this case, Dr K's conduct was also deceitful and a significant breach of trust.

25. The medical profession and community rightly place high expectations on members of the medical profession to act honestly and ethically. Doctor K's actions seriously departed from those standards, and readily justifies a disciplinary sanction for the purposes of maintaining professional standards and punishing Dr K.

Penalty

<u>Suspension</u>

26. The Tribunal gave careful consideration to suspending Dr K pursuant to s.110(1)(b) of the Act. One member of the Tribunal, Dr Virtue, records she believes Dr K should be

---

[3] *Ongley v Medical Council of New Zealand* (supra); *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139; *Brake v Preliminary Proceedings Committee* [1997] 1 NZLR 71; *M v Medical Council of New Zealand (No.2)* (HC Wellington, M 239/87, 11 October 1999, Greig J); *Cullen v Medical Council of New Zealand* (HC Auckland, 68/95, 20 March 1996, Blanchard J).

suspended, and to this extent she respectfully disagrees with the decision of the majority of the committee.

27. The reasons why Dr Virtue believes Dr K should be suspended, and the reasons why other members of the Tribunal were tempted to order suspension are:

27.1 By any analysis Dr K's offending was very serious and reflected adversely not only upon himself, but the medical profession as a whole.

27.2 The reports placed before the Tribunal included a thorough assessment of Dr K undertaken by Dr xx, a consultant psychiatrist. Dr xx advises that Dr K is vulnerable to relapse. His ongoing vulnerability is due to a number of factors including his:

- Personality traits; and
- Cognitive traits; and
- Lack of insight regarding his addiction.

This assessment causes concern. One of the functions of the Tribunal is to protect the public. This responsibility is compromised if Dr K is allowed to continue practising and suffers a relapse. Doctor Virtue has concluded that this concern outweighs Dr K's interests and that in these circumstances he should be suspended.

Conditions on Practice

28. The majority of the Tribunal has concluded the appropriate penalty in this case is the imposition of conditions on Dr K's ability to practise medicine over the next 3 years. These conditions are imposed pursuant to s.110(1)(c) of the Act.

29. The reasons why the majority of the Tribunal have decided to impose conditions upon Dr K's ability to practise, and not suspend him are:

29.1 This is the first occasion that Dr K has been charged with a disciplinary offence.

29.2 The offending, whilst very serious, was caused by Dr K's addiction.

29.3 There was no "victim" of the offending.

29.4 Doctor K has fully co-operated with the Medical Council and the Tribunal.

29.5 Doctor K has taken responsible steps to obtain treatment for his health problems.

29.6 Doctor K will continue to be monitored by the Medical Council's Health Committee.

29.7 The Medical Council's Health Committee believes Dr K is fit to practise medicine.

30. The conditions which are to be imposed on Dr K's ability to practise medicine are set out in paragraph 31 of this decision. Conditions 31.2 to 31.16 substantially coincide with the conditions currently imposed by the Medical Council's Health Committee, and Dr K's undertakings to the Medical Council.

31. The conditions under which Dr K is to practise medicine over the next 3 years are:

31.1 Doctor K must practise under the oversight of a vocationally registered medical practitioner who practises xx medicine.

31.2 Doctor K should not prescribe Class B controlled drugs.

31.3 Doctor K is not to have access to Class B controlled drugs, medicine pads or forms.

31.4 Doctor K is to maintain a controlled drugs register which must be available for independent audit at all times.

31.5 Doctor K must not take possession of any controlled drugs or prescriptions for controlled drugs.

31.6 In each place where Dr K works there must be a person other than Dr K who takes responsibility for the custody, security and oversight of controlled drugs, prescription pads and forms.

31.7 All staff of the places where Dr K works are to be made aware of the conditions on his ability to practise and their responsibility to contact the Medical Council's Health Committee if they have any concerns about Dr K.

31.8 Doctor K is to practise only in places approved by the Chairperson of the Medical Council's Health Committee and comply with the practice protocols for those places of work.

31.9 Doctor K is to establish and maintain therapeutic relationships with a general practitioner and/or counsellor and/or psychiatrist approved by the Medical Council's Health Committee and comply with the therapies recommended by those persons.

31.10 Doctor K is to attend Alcoholics Anonymous and/or Narcotics Anonymous every week.

31.11 Doctor K is to abstain from alcohol and mood altering drugs (except as may be prescribed by a health professional in accordance with paragraph 31.9 of this decision).

31.12 Doctor K is not to prescribe or administer to himself any medicines or drugs (except as may be prescribed by a health professional in accordance with paragraph 31.9 of this decision).

31.13 Doctor K is to undergo drug urine testing and hair testing at any time required by the Medical Council's Health Committee.

31.14 Doctor K is to attend Dr xx or any other assessors when required by the Medical Council's Health Committee so that he can be assessed.

31.15 Doctor K is to attend any meetings which the Medical Council's Health Committee wishes him to attend.

31.16 Doctor K is to seek treatment and withdraw from practice if he fails to abstain from taking any addictive drugs.

31.17 Doctor K is to attend peer review meetings at least 9 times a year and submit written reports of his attendances at those meetings to the Medical Council of New Zealand.

32. The 17 conditions imposed on Dr K's ability to practise medicine are designed to assist Dr K's recovery and to protect the public from any relapses which may occur over the next 3 years.

33. Doctor K should be left in no doubt that failure to comply with these conditions and/or any repeat offending will be viewed very seriously by the Tribunal and is likely to result in his suspension.

Censure

34. The Tribunal records its condemnation of Dr K by formally censuring him.

Fine

35. The Tribunal has the ability to impose a fine of up to $20,000. The Tribunal understands Dr K's financial circumstances are difficult. He is separated from his wife and is responsible for maintaining two children aged xx and xx. In these circumstances the Tribunal does not believe it appropriate to impose an additional punishment in the form of a fine.

Costs

36. Doctor K has recognised that it is appropriate he pay a contribution towards the costs of the CAC and the Tribunal in relation to the hearing of the charge.

37. Costs awards vary considerably. In this case the Tribunal has taken into account the following factors:

    37.1 Doctor K's financial circumstances;

    37.2 The fact Dr K has co-operated fully with the Medical Council, the CAC and the Tribunal;

    37.3 Doctor K has been found guilty of professional misconduct in circumstances where his offending was serious.

38. The total costs of the CAC were $8,458.36

39. The total costs of the Tribunal were $8,135.64

40. The Tribunal has determined that Dr K should pay costs totalling $4,148.50 being 25% of the total costs of the CAC and Tribunal. This order is made pursuant to s.110(1)(f)(ii) and (iv) of the Act. The costs paid by Dr K are to be paid in equal portions to the CAC and Tribunal.

Name Suppression

41. On 26 August 2005 the Tribunal granted Dr K interim name suppression. In making that order the Tribunal made it clear that it did not commit itself to making a permanent order for name suppression.

42. Doctor K's application for permanent name suppression was based upon the evidence he placed before the Tribunal when it considered his application for interim name suppression.

43. The starting point when considering applications for name suppression is s.106(1) and (2)(d) of the Act which 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 one or more of the following orders …*
>
> *(d) … an order prohibiting the publication of the name, or any particulars of the affairs, of any person".*

44. Whereas section 106(1) of the Act contains a presumption that the Tribunal's hearing shall be held in public, there is no presumption in section 106(2) of the Act. When 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:

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

44.2 The public interest.

Basis of Application

45. The grounds advanced by Dr K in support of his application can be summarised in the following way:

45.1 Doctor K is very concerned that any publicity in relation to this decision is likely to jeopardise his efforts to recover from his illness and addiction. Doctor K has explained this concern in the following way:

> *"While I accept I have created this difficult situation for myself, it is a very stressful position to be in even without the possibility of, or actual publicity. I feel a continuing sense of shame, embarrassment and self loathing over my behaviour that contributes to my depressive state of mind. I am making a genuine effort to make a recovery and I do strongly believe that publicity will create further pressure and difficult[ies] for me."*

45.2 Doctor K's marriage has ended. There are ongoing issues relating to custody and access to Dr K's children (aged xx and xx). Doctor K is concerned that publicity in relation to this decision will adversely affect his relationship with his children. Doctor K has told the Tribunal:

> *"My children are aware of the events leading to the charge, and it has been a matter of significant difficulty for them. My daughter presently refuses to speak or have anything to do with me. I find this extremely upsetting, and am trying to resolve this situation. I have no doubt that if there was publicity about this disciplinary charge it would only make the situation with my daughter worse."*

45.3 Doctor K has suggested that there is a lack of xx specialists in xx and a small number of xx specialists in xx. He believes publicity about this case would undermine his patients' confidence in him. He also believes that if he lost his positions as a result of publicity it would be extremely difficult to obtain locum cover. During the course of the hearing Dr K acknowledged through his counsel that other xx specialists work in the public health sector in xx.

45.4 Doctor K submitted that the Tribunal should take a lenient approach towards his application because public safety issues are addressed through the monitoring role of the Medical Council's Health Committee.

45.5 Finally, it was stressed that there were no issues concerning Dr K's competence to practise medicine and that adverse publicity would unfairly impact upon Dr K's reputation.

The CAC's Position

46. The CAC opposed Dr K's application for permanent name suppression. Previously the CAC had taken a neutral stance in relation to Dr K's application for interim name suppression.

47. The CAC's application was substantially based on the proposition that name suppression should rarely be afforded to a practitioner found guilty of a disciplinary offence. The CAC supported this submission by drawing the Tribunal's attention to *F v Medical Practitioners Disciplinary Tribunal*[4] in which Laurenson J recognised that once a practitioner has been found guilty of professional misconduct the expectation will strongly favour publication of the practitioner's name.

Public Interest

48. The following public interest considerations have been evaluated by the Tribunal when considering Dr K's application:

48.1 Openness and transparency of the disciplinary process;

48.2 Accountability of the disciplinary process;

48.3 The public interest in knowing the name of a doctor found guilty of a disciplinary offence;

48.4 The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1990[5];

48.5 The extent to which other doctors may be unfairly impugned if Dr K's application is granted.

---

4 HC Auckland, AP21/SWO1, 5 December 2001

5 "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".

Openness and Transparency of Disciplinary Proceedings

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

49.1 In *M v Police*[6] Fisher J said:

> *"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".*

49.2 In R v Liddell[7] the Court of Appeal said:

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

49.3 In Lewis v Wilson & Horton Ltd[8] 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 …."*

50. To these leading cases can be added *Scott v Scott*[9] and *Home Office v Harman*[10] where Lords Shaw and Diplock explained the rationale for openness in civil proceedings.

51. The Tribunal appreciates it is neither a criminal nor a civil Court. However, as Frater J noted in *Director of Proceedings v I*[11] when explaining the scope of s.106 of the MP Act:

> *"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

52. 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

---

6 (1991) CRNZ 14
7 [1995] 1 NZLR 538
8 [2003] 3 NZLR 546
9 [1913] AC 47
10 [1982] 1 All ER 532

Director of Proceedings v Nursing Council [12] 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.

Public Interest in Knowing the Identity of a Doctor Found Guilty of a Disciplinary Offence

53. 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 found guilty of 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 has been found wanting by the Tribunal. This factor is particularly important in the present case where Dr K's offending was very serious.

54. 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*[13] where the Court, relying on *S v Wellington District Law Society*[14] 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

55. 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[15].

---

[11] [2004] NZAR 635
[12] [1999] 3 NZLR 360
[13] Unreported HC Auckland, AP21-SW01-5 December 01, Laurenson J
[14] [2001] NZAR 465

[15] See for example, *Liddell* and *Lewis* (supra)

56. The Tribunal does not know if there is going to be any media coverage of its decision. If the media wish to publish reports about the Tribunal's proceedings and identify Dr K 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 K's application.

Unfairly Impugning Other Doctors

57. A further factor in the public interest is the concern that other doctors may be unfairly impugned if Dr K'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 public.

Balancing of Competing Considerations

58. It is necessary to balance these public interest factors against the interests of Dr K and his family before reaching any conclusion as to whether or not it is desirable to grant Dr K's application.

59. In balancing the factors urged upon the Tribunal by Dr K the Tribunal has paid special regard to the potential impact of adverse publicity upon:

    59.1 Doctor K's reputation and standing in the profession;

    59.2 Doctor K's children;

    59.3 Doctor K's health.

60. Notwithstanding these concerns, the Tribunal is unanimous in its view that the public interest considerations identified in this decision outweigh Dr K's personal interests, and the interests of his family. The Tribunal has been particularly influenced in this case by:

    60.1 The seriousness of Dr K's offending;

    60.2 The need for members of the health community in xx and xx to know of Dr K's circumstances and the Tribunal's decision so as to ensure any hint of a relapse is promptly reported and dealt with;

60.3 The right of the community to know about Dr K's circumstances so as to enable patients to make an informed decision about consulting him.

61. The Tribunal accordingly declines Dr K's application for permanent name suppression.

DATED at Wellington this 30th day of September 2005

.....

D B Collins QC

Chairperson

Medical Practitioners Disciplinary Tribunal