



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 318/05/128C

IN THE MATTER of the Medical Practitioners Act
1995

-AND-

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Thursday 25 August 2005

PRESENT: Miss S M Moran (Chair)
Dr R J Fenwicke, Dr J L Virtue, Dr L F Wilson, Mrs H White
(Members)

APPEARANCES: Neither counsel took part in the hearing.
Ms G J Fraser (Secretary)
(for first part of call only)

COUNSEL: Ms J Hughson for a Complaints Assessment Committee ("the CAC")

Ms C Garvey for Dr K

The application

1. Dr K is a medical practitioner working in the area of xx medicine at clinics in xx and xx. On 3 June 2005 a Complaints Assessment Committee (CAC) charged Dr K with professional misconduct pursuant to section 92(1)(d) of the Medical Practitioners Act 1995 (the Act).
2. On 11 July 2005 Dr K applied for an interim order that pending the determination by the Tribunal of its decision publication of his name be suppressed or any fact identifying him including the area where he lives and the areas where he practises, being Auckland and xx, and naming or identifying his employers. This application is made pursuant to section 106(2)(d) of the Act.
3. On 11 July 2005 Dr K swore an affidavit which he has filed in support of his application.

The Charge and the Plea

4. The charge of professional misconduct alleges that between October 2003 and April 2004 Dr K forged on a number of prescriptions the signature of another medical practitioner, Dr Y, to enable him to obtain pethidine for his own use from a pharmacist.
5. The charge has been set down for hearing for 12 September 2005.
6. Dr K has sworn in his affidavit that he is not completely certain at the time of swearing it of the number of prescriptions involved but believes them to be three or four in number. He has further sworn that he intends to plead guilty to the charge which reflects those facts.

Summary of Grounds for Application

7. The grounds upon which Dr K relies in support of his application include the following:
 - (a) There is a prior risk of damage to his name and reputation as a consequence of any publicity wherein he may be identified.
 - (b) Any publicity of his name or identity or that of his employers runs the risk that his employment may be terminated.
 - (c) Publicity of his name will risk unnecessary and unreasonable damage and upset to his family, in particular his children.
 - (d) Publicity of his name will risk serious damage to his health.
 - (e) Further matters set out in his affidavit.

8. The principal points in Dr K's affidavit are:
 - (a) That he is being monitored by the Health Committee of the Medical Council of New Zealand to whom he has given a voluntary undertaking.
 - (b) The written form of the undertaking is very detailed and extensive in its requirements and the safeguards which the arrangement puts in place.
 - (c) Dr K also attends regular counselling which has followed the completion by him of a residential drug and alcohol programme.
 - (d) Dr K is seen by an addiction medicine specialist appointed by the Health Committee who reports to that Committee.
 - (e) Dr K undergoes regular drug testing by way of random urine testing and the giving of hair samples.
 - (f) There is also in place a Practice Protocol which Dr K has agreed with the Health Committee, and which has been in place since July 2004, which includes prohibition on the prescribing of and access to controlled drugs together with other restrictive conditions. The Health Committee is satisfied that the safeguards imposed minimize the chance of relapse and also means there would be early detection should a relapse occur.

9. Dr K has also provided evidence regarding the effect of publication of his name on his family and in particular his children, his work colleagues, his employers and his patients and former patients.
10. Further, Dr K anticipates that if he is identified at this stage then he may well have his employment terminated and would find it extremely difficult to obtain work as a locum.
11. Last but not least, Dr K has stated that publication of his name could well cause damage to his health and, by implication, to his rehabilitation.
12. Dr K has annexed to his affidavit relevant documentation supporting the statements he has made in his affidavit.

Submissions of Counsel for Dr K

13. On behalf of Dr K, Ms Garvey filed written submissions stating there were sufficient grounds to find that Dr K's interests and those of his family, patients and colleagues outweighed the interest of the public in knowing his identity in relation to this proceeding.
14. She submitted that serious harm was foreseeable if suppression were not granted, not only to Dr K but also to those referred to in his affidavit; and added that there could be no benefit in the public knowing his name in these circumstances particularly where there was no risk to the public and no potential to bring to light undisclosed offences; and that prohibition of publication did not preclude the general facts of the case being made known.
15. She stated that those who do have a genuine interest in knowing of the matters which are the subject of the charge already have that knowledge. Those persons or groups of persons were Dr K's family, his colleagues, the Health Committee of the Medical Council and his treating practitioners.
16. She concluded that the Tribunal would have an opportunity to hear from Dr K at the substantive hearing when it could consider again the issue of suppression at that time; but that the damage of publicity prior to that time would be irreparable.

17. In her submissions she referred to the judgment of Frater J in *Director of Proceedings v I* (CIV-2003-485-2180 High Court Auckland 20 Feb. 2004) and the MPDT decision No. 140/00/63C of 29 November 2000.

Attitude of CAC

18. The CAC by its counsel, Ms Jo Hughson, has informed the Tribunal by letter of 2 August 2005 that the CAC will abide the Tribunal's decision on this application.

Principles Applicable to Name Suppression Application

19. The starting point is section 106 of the Act which provides that every hearing of the Tribunal should be held in public. However, it also provides that where the Tribunal is satisfied that it is "*desirable*" to do so, after having regard to the interests of any person and to the public interest, it may make certain orders including an order prohibiting the publication of the name or any particulars of the affairs of any person.
20. The reference to the "*interests of any person*" includes Dr K.
21. When exercising its discretion whether it is desirable to grant name suppression the Tribunal must take into account the "*public interest*" and the matters which underpin it and the competing claims of Dr K.
22. When considering the issue of public interest the Tribunal should have (and has had) regard to the following matters:
 - (a) The public interest in knowing the name of a doctor accused of a disciplinary offence.
 - (b) Accountability and transparency of the disciplinary process.
 - (c) The importance of freedom of speech and the right enshrined in section 14 of the New Zealand Bill of Rights Act 1999 that "*everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form*".
 - (d) The extent to which other doctors may be unfairly implicated if the subject doctor is not named.

- (e) The possibility that publicity might lead to discovery of additional evidence.
 - (f) The extent to which the absence of publicity may allow an opportunity for further alleged offending.
23. The principal purpose of the Act is to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practise medicine.
 24. This is an unusual application in that Dr K has indicated he will be pleading guilty to the charge to the extent referred to at paragraph 6 above.
 25. When having regard to the public interest and to the factors advanced by and on behalf of Dr K, the Tribunal is satisfied that sufficient safeguards have been put in place to protect both the health and safety of members of the public and of Dr K himself. Having regard to the public interest and to the factors advanced by and on behalf of Dr K with regard to public safety, there is no present evidence before the Tribunal that Dr K is incompetent to practise or that his patients are at risk.
 26. The Tribunal accepts the submission of Dr K's counsel that there are protocols and safeguards in place; that he has restrictions on his practice and that his colleagues are aware of his situation. In this regard there is also before the Tribunal a letter from the Clinical Director of the xx where Dr K has worked. He confirms that during the period Dr K was employed at the service, Dr K's work had been of a high standard. The Clinical Director has confirmed that in his opinion, naming Dr K at this stage is not necessary from the point of view of public safety. The Clinical Director has added that there have not been any complaints about Dr K's standard of work by patients or staff and at no time were patients considered at risk by his condition. He has subsequently met all of the patients previously managed by Dr K and there are no defined discrepancies in his clinical practice in the workplace, neither prospectively nor retrospectively.
 27. The Tribunal notes the submission of Dr K's counsel that the fact that Dr K intends to plead guilty does not detract from the value of suppression in the circumstances. She has stated it is not being suggested that his actions are to be excused and readily

acknowledges that they involve a breach of trust and of his position as a medical practitioner.

28. The Tribunal accepts that publishing Dr K's name at this juncture could well have adverse consequences on his health and on his rehabilitation (as well as on his reputation).
29. The Tribunal also accepts that such publicity might well put in jeopardy Dr K's present employment and, should that occur, he could well have difficulty in obtaining employment as a locum in the foreseeable future.
30. To a limited and lesser extent, the Tribunal is prepared to accept for the purposes of this application that publicity could have an adverse effect on his children who share his name which is an unusual one; and that there could be some adverse impact on his employers and on his current patients.
31. The Tribunal has also taken into account the stance of the CAC. While not consenting to the application, it has raised no objection either and is prepared to abide the decision of the Tribunal.
32. The Tribunal has also had regard to the fact that the date for the substantive hearing is less than three weeks away.
33. In *Director of Proceedings v I Frater J* stated at para. [81]

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 the charge."

34. The Tribunal observes that this is an application for an interim order only and that there will be further opportunity before the Tribunal at the hearing on 12 September for either or both parties to make submissions or further submissions either in support of or in opposition to the matter of suppression. In the interim, the Tribunal is entitled to take into account the overall picture when evaluating the competing

claims of private interest and public interest in order to make a balanced and fair decision when exercising its discretion.

Conclusion and Order

35. Taking into account all the relevant circumstances, the Tribunal is satisfied that Dr K has established that it is desirable that an order be made granting him interim name suppression.
36. Accordingly, the Tribunal orders that pending determination by the Tribunal of its decision in respect of the charge of professional misconduct (and thereafter whatever the Tribunal might direct) there will be an order prohibiting publication of Dr K's name or any fact identifying him including the area where he practises being xx and xx, as well as the names or identification of his employer/s.
37. As Dr A is a colleague of Dr K's the Tribunal considers it prudent that any publication of her name be excluded. However, the Tribunal does not consider it necessary to prohibit publication of the area where Dr K now resides, that is, Auckland so long as other identifying details are not published.
38. In making this interim order for name suppression the Tribunal wishes to make it clear that it does not commit itself to making a permanent order for name suppression. That decision will be made at the conclusion of the hearing after the presentation of evidence and the submissions of counsel.

DATED at Wellington this 26th day of August 2005

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Sandra Moran

Senior Deputy Chair

Medical Practitioners Disciplinary Tribunal