Medical Practitioners Disciplinary Tribunal

PO Box 5249 Wellington Telephone (04) 499-2044 Facsimile (04) 499-2045
All Correspondence should be addressed to The Secretary

DECISION NO.: 114/00/56C

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 Thursday 23 March 2000

PRESENT: Mrs W N Brandon - Chair
Dr G S Douglas, Dr R W Jones, Mr G Searancke, Dr L F Wilson (members)

APPEARANCES: Mr M F McClelland for Complaints Assessment Committee
Mr H Waalkens for respondent
Ms G J Fraser - Secretary (for first part of call only)

DECISION ON THE APPLICATION FOR INTERIM NAME SUPPRESSION

1.0 **A** Complaints Assessment Committee ("the CAC") established under Section 88 of the Medical Practitioners Act 1995 ("the Act") has determined in accordance with Section 92(1) of the Act that a complaint by A against Dr P should be considered by the Medical Practitioners Disciplinary Tribunal. The CAC has reason to believe that grounds exist entitling the Tribunal to exercise its powers under section 109 of the Act.

1.1 **BY** application dated 14 March 2000, counsel for Dr P has applied for an interim order prohibiting, until the commencement of the hearing of this disciplinary charge (and thereafter as this Tribunal may direct), the publication of his name or any fact identifying him.

1.2 **THE** hearing of the application was by telephone conference commencing at 7.45 am on Thursday 23 March 2000. In advance of the hearing submissions in support of the application were filed by Mr Waalkens, counsel for the applicant, and in opposition by Ms J Elliot, counsel for the CAC.

2.0 **GROUNDS OF THE APPLICATION:**

2.1 **THE** grounds of the application were as follows:

2.1.1 Dr P denies the charge;

2.1.2 Any publicity of Dr P's name will inevitably result in substantial prejudice to him and his immediate family;

2.1.3 The matters at issue are confined to the circumstances of the A case and publicity has a real risk of causing unnecessary worry and concern to his patients.

3. SUBMISSIONS FOR APPLICANT:

3.1 **IN** oral submissions made in support of the application to the Tribunal Mr Waalkens submitted that there was a strong case to grant interim name suppression in this case. The thrust of Mr Waalkens' submissions was two-fold: first, the circumstances in which the charge arises are confined to a single case and, unlike other cases cited to the Tribunal by the CAC, do not raise any serious issues of public safety or public interest, at least at this very preliminary stage. Secondly, while it is unusual for the Tribunal to grant such applications in cases involving very serious offending, or the possibility of a pattern of misconduct, this present charge is laid at the lower end of the scale of charges available to the CAC and the particulars of the charge are very specific and confined.

3.2 **IN** written submissions, Mr Waalkens referred to a decision of the High Court, *R v KA* T990076, 24/2/99, Smellie J, a decision made on a similar application in the context of criminal charges laid against a medical practitioner. In that case the Court weighed the various relevant factors, particularly the presumption of innocence; the fact that the application was for interim prohibition only; the absence of circumstances suggesting that repeat offending was likely, and the potential for irreparable harm to be caused to the doctor's reputation.

3.3 **IT** is also relevant that in *KA* the criminal charges did arise in the context of the doctor's professional practice.

3.4 **MR** Waalkens also referred to *A v B* 163/98, Auckland High Court, 15/6/99, Randerson J, a case involving an appeal from a disciplinary finding by the Medical Council. In that case the Court granted name suppression on a permanent basis in circumstances where the appeal was ultimately unsuccessful.

3.5 **AN** affidavit from Dr P was also filed in support of the application. In his affidavit, Dr P deposed to his concerns about the possible consequences of disclosure of his identity prior to the hearing of the complaint made against him. He is concerned that local news media have already expressed an interest in the complaint and, on the basis of his previous experience, he was concerned that any reporting of it may be inaccurate.

3.6 **HE** is also currently xx of xx, the local regional health provider, and is a senior member of the profession and president of his specialists' national professional body. He is concerned that any adverse comment about him may reflect adversely on that body and on his employer. As a specialist practitioner he is very dependent upon referrals to him by practitioners, and he considers that his patients and potential patients are especially vulnerable to becoming concerned about their care if they read any adverse comments about him or his practice in the news media.

3.7 **HE** has also on one previous occasion faced professional disciplinary charges and was ultimately exonerated when his appeal against the decision of the Medical Practitioners Disciplinary Committee was upheld. However, on that occasion, while the adverse finding of the Committee was reported in a national newspaper the fact that the Committee's decision was set aside on appeal appears not to have been reported.

3.8 **FINALLY**, Dr P expressed his concerns that any pre-hearing publicity would adversely affect his wife, who is also employed in the health sector, and his children, two of whom attend local schools.

4. SUBMISSIONS FOR CAC:

4.1 **COUNSEL** for the CAC referred to "*the presumption*" contained in section 106 of the Act that hearings of disciplinary charges should be heard in public, and to the balancing of the public interest and the interests of any other person against the presumption in favour of openness and transparency and the purpose of disciplinary proceedings to protect the public. In this context Counsel referred to *S v The Wellington District Law Society,* AP 319/95, High Court, Wellington, Tompkins J, and the Tribunal cases of *Sami***,** Decision No. 33/98/190 and *Fahey*, Decision No. 105/99/55C.

4.2 **IN** general terms, the CAC's submissions addressed (a) the importance of ensuring that the public retain confidence in the integrity of the disciplinary process, (b) that the media's right to fairly and accurately report disciplinary proceedings is not constrained, and, (c) the reasons for the approach taken by the Tribunal in both the *Sami* and *Fahey* proceedings.

4.3 **AS** to the specific aspects of these proceedings, the CAC submitted the interests of Dr P and his family were no different to those of any other practitioner facing disciplinary charges; that in terms of the publicity which might ensue, it is unlikely that this case will excite any particular interest, and in any event, Dr P had remedies available to him in the event of any unlawful damage to his reputation; that there is no evidence that there is a real risk of a publication in relation to the charges causing unnecessary worry and concern to

Dr P's patients; and that the risk of prejudice to Dr P and his family is outweighed by other relevant considerations.

4.4 **IN** relation to these specific matters, Mr Waalkens submitted that the application did not seek to restrict publication of the fact that charges had been laid, and that interim suppression of the practitioner's name would not restrict fair reporting of the Tribunal's hearing of the charge, or impact upon the public interest in the Tribunal's investigation of the matters which are the basis of the charge.

4.5 **THIS** is not a matter which raises any suggestion of impropriety on the part of the practitioner, nor does the charge suggest any conduct of a predatory nature, nor is the charge indicative of any pattern of offending, such that there is a real possibility that other complainants may come forward if the identity of the doctor was published.

5. DECISION:

5.1 **HAVING** carefully considered all of the matters raised in both of the oral and written submissions by both Counsel, the Tribunal is satisfied that, in the circumstances of this case, it is appropriate to grant the application sought and an order for interim suppression of Dr P's name and any details which might identify him will be made.

6. REASONS FOR DECISION:

6.1 **AT** first sight, the grounds advanced in support of this application do not appear to raise any issues which are not present in all such proceedings. However, as has been said on many previous occasions, every application requiring the exercise of a discretion on the

part of the Tribunal is considered on its merits. On this occasion, the Tribunal is persuaded that there is a combination of factors which it is relevant for it to take into consideration and which warrant the precaution of prohibiting publication of the practitioner's name on an interim basis.

6.2 **IN** making the orders sought, the Tribunal is not unduly restricting fair reporting of the charge, or the circumstances in which it arises. The application seeks only interim orders to the commencement of the hearing. In the event name suppression is sought past that point in time, then a further application may be made and the matter considered afresh.

6.3 **THE** Tribunal accepts that suppression orders are "*never to be imposed lightly*", and it has consistently followed that approach. The application is made under section 106 of the Act. Section 106 (2) 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 an order prohibiting the publication of the name, or any particulars of the affairs, of any person* (s.106(2)(d)."

6.4 **THE** Tribunal is required therefore to balance the competing interests of the practitioner, his or her family or wider interests, the interests of the complainant, the public interest defined variously as residing in the principle of open justice, the public's expectation of the accountability and transparency of the disciplinary process, the importance of freedom of speech and the media's right to report court proceedings fairly of interest to the public, and the interests of any other person.

6.5 **IN** undertaking that exercise in the present context the Tribunal has come to the view that the following factors satisfy it that this application should be granted:

6.5.1 The circumstances of the complaint are confined to a single episode of care and there is nothing to suggest that any other member of the public is at risk in a similar way - *A v Medical Council of New Zealand & Anor,* HC Auckland, HC163/98, 15/6/99.

6.5.2 Dr P has previously faced a disciplinary charge and was ultimately exonerated. There is the potential for reporting of the fact that he has previously been charged with a disciplinary offence and was found guilty to be reported in the absence of also reporting that the adverse finding was ultimately set aside.

6.5.3 Any reporting of the spent charge some years ago has the potential to adversely impact upon Dr P, his professional reputation, and his family and may cause past events to be unfairly revisited.

6.5.4 Dr P is the xx of xx, and in that capacity is responsible for the care of patients requiring specialist and/or emergency care in the only available major hospital in the xx region. In such circumstances, Dr P provides care to patients who may have no choice about placing themselves, and perhaps their xx, into his care.

6.5.5 In that situation, publishing the fact that he is facing a disciplinary charge (and no more than that at this stage) may cause xx coming under the aegis of his care

additional worry and concern at a time when they are already anxious and possibly unwell. The Tribunal is satisfied that xx patients especially are a particularly vulnerable class of patients in this context.

6.5.6 The Tribunal is also satisfied that it is appropriate for it to take into account the possibility that reporting the name of Dr P's employer may adversely affect it's reputation, and in circumstances in which it apparently has no involvement or interest. Publicity of the fact of Dr P's employment by xx is not warranted in the public interest and the publication of that fact will not advance that purpose.

6.5.7 For these reasons, the prohibition on reporting any details which might identify Dr P includes reporting the name of xx as his employer.

6.5.8 The Tribunal is also concerned that identification of Dr P as a xx and xx may cause suspicion to fall on any other of the small number of such practitioners practising in the xx district and therefore intends that the order for interim name suppression is to extend to the reporting of Dr P's specialist professional status.

6.5.9 The charge is at the lowest level of the charges available in the hierarchy of charges contained in Section 109 of the Act;

6.5.10 The orders made will not necessarily prevent either the events or the identity of the practitioner involved, ultimately being disclosed. This is a matter which can be reviewed by the Tribunal at any time.

6.6 **THE** Tribunal reiterates that it has taken all of the submissions made to it into account, not only those expressly referred to in paragraph 5 herein, and, on balance, it is satisfied that it is desirable that the application be granted.

6.7 **THE** Tribunal's decision is a majority decision, however those members who might have come to a different decision are content to abide the decision of the majority of the members.

7. ORDERS:

7.1 **THE** application is granted and the Tribunal orders as follows:

7.1.1 **THAT** the publication of the practitioner respondent's name or of any fact identifying him, including the name of his employer and his professional status as a xx and xx, is prohibited until the commencement of the hearing of the charge laid against him by the CAC, or until further order of the Tribunal.

DATED at Auckland this 31st day of March 2000

…….

W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal