MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 125/00/61C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **BERIS FORD** Medical Practitioner of Whangarei

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference at 7.30pm on Monday 31 July 2000

PRESENT: Mrs W N Brandon- Chair

Mrs J Courtney, Dr J C Cullen, Dr R W Jones, Dr U Manu (members)

APPEARANCES: Ms K P McDonald QC for Complaints Assessment Committee

Mr A J Knowsley for respondent

Ms K Davies - Hearing Officer

(for first part of call only)

DECISION ON THE APPLICATION FOR NAME SUPPRESSION

1.0 THE APPLICATIONS:

1.1 **A** Complaints Assessment Committee (the CAC) appointed to consider a complaint concerning Dr Ford has determined that it has reason to believe that grounds exist entitling the Medical Practitioners Disciplinary Tribunal (the Tribunal) to exercise it's powers under section 109 of the Medical Practitioners Act 1995 (the Act).

1.2 **BY** application dated 25 July 2000, counsel for Dr Ford has applied for an order prohibiting the publication of his name or any particulars of the affairs of Dr Ford. At the hearing of the application Mr Knowsley stated that the application is for interim name suppression only.

1.3 **THE** hearing of the application was by telephone conference commencing at 7.30 pm on Monday 31 July 2000. In advance of the hearing an affidavit in support of the application was received and circulated to the Tribunal members together with a Memorandum submitted on behalf of the CAC.

1.4 **BY** her Memorandum, Ms McDonald QC, Counsel for the CAC, sought name suppression for the complainant, together with a request that her evidence at the hearing be given in private. Mr Knowsley advised the Tribunal that Dr Ford did not oppose either of those applications and the Tribunal will grant the order for name suppression.

1.5 **SECTION** 107 of the Act provides that the complainant may give her evidence in private where the charge relates to any matter of a sexual nature, or matters of an intimate or distressing nature, and the Chairperson is required to advise the complainant of her rights in this regard before she gives her evidence. Therefore the complainant may, in the present circumstances, give her evidence in private as of right, and she will be formally invited to exercise that right at the hearing.

2.0 GROUNDS OF THE PRACTITIONER'S APPLICATION:

2.1 **THE** application is made principally on the grounds that Dr Ford has for many years suffered from hypertension and depression with suicidal ideation. He denies the allegations founding the charge, and he currently has medical and family help and support and is continuing to work. However he is very worried that should the allegations made against him become public knowledge he will become an 'outcast' in his community, and his practice will suffer. As a result, his depressive illness may worsen, and he may be unable to cope with the stress to the point where he may again become suicidal.

2.2 **A** medical report confirming Dr Ford's medical history and current condition was provided to the Tribunal.

3.0 SUBMISSIONS FOR CAC:

3.1 **IN** oral submissions opposing the application, Ms McDonald raised four grounds of objection:

(i) The approach taken by the courts in criminal cases was appropriate. Such applications should only be granted if there existed compelling reasons to do so. In

this case, the medical report provided was non-specific and did not refer to suicidal ideation. It was misleading in that there could be, or could have been, any number of events in Dr Ford's past which caused or explained such a condition.

(ii) There was no suggestion or submission that the present allegations caused or would aggravate Dr Ford's depression or suicidal ideation. He was receiving medical treatment, and if he became unduly distressed as a result of this complaint that would be picked up by his professional carers.

(iii) The second ground of objection was most important. It has been recognised by the District Court, the Tribunal, the High Court and the Court of Appeal that publicity about a charge or allegations made might lead to the detection of additional offences, complaints and evidence. In this case, given the nature of the complaint, there was a strong public interest in the possibility of similar fact evidence or other complaints being disclosed. If there were other incidences or complaints, these would be likely to come to fore as a result of pre-hearing publicity; the so-called 'flushing out' principle.

(iv) Ms McDonald referred to a judgment in the High Court, *A Defendant v Police*, AP44/97, Doogue J, and in particular to the reference in that case to *M v Police* (1991) 8 CRNZ 14, per Fisher J, a judgment previously referred to by this Tribunal:

> *"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. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to re-offend. It was the last of these considerations which particularly weighed with the learned Judge in the present case.*
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> *Against those considerations, however, there are balancing considerations seen from the viewpoint of the defendant. These will include the social,*

financial, and professional consequences to the defendant personally and to the members of his family, employers, employees, and acquaintances. Particular regard will be paid to any members of that group who are particularly vulnerable to adverse publicity due, for example, to poor health or sensitive business or professional reputations."

(v) These principles apply in respect of applications made before and after conviction.

Ms McDonald also indicated (but no more than that) that there was a *"strong likelihood"* of similar fact evidence in this present case. Ms McDonald also referred to recent cases as highlighting the circumstances where continuing name suppression was against the public interest.

(vi) The third ground was that name suppression provided the opportunity to re-offend.

In this present case that was advanced as a general ground of opposition only.

(vii) Finally, there is the possibility that granting name suppression may cause suspicion to fall on others, particularly other GP's in the community if there is publicity about this charge of a non-specific nature.

3.2 **MS** McDonald also requested that, in the event that the Tribunal granted the application, the CAC's opposition to the application be expressly recorded.

4.0 SUBMISSIONS FOR THE PRACTITIONER:

4.1 **IN** reply, Mr Knowsley acknowledged that the medical report provided was ambiguous. However, it confirmed that Dr Ford had a pre-existing condition of depression with suicidal ideation, and there was a clear possibility that this could return if his name was disclosed prior to the hearing. He stressed that the application was for interim name suppression, and he accepted that if Dr Ford was ultimately found guilty of the charge, it was unlikely that he would be granted permanent name suppression.

4.2 **HOWEVER**, the allegations were, in some instances, over 10 years old, and disclosure of his name before he had an opportunity to defend the charges would be a severe penalty, and one which would have a lasting effect even if he successfully defended the charge. These factors should weigh heavily in the Tribunal's mind.

4.3 **THE** doctor's personal circumstances were relevant. In this case he was in poor health and he has a sensitive business and professional reputation. He was a practitioner in a small town, and the possibility of re-offending was protected against by the imposition of conditions on his practice (which has been done). There is no need to name the doctor to prevent re-offending.

4.4 **WITH** regard to the fourth of the grounds advanced by the CAC, Mr Knowsley submitted that he practised in an area where there were a limited number of practitioners and this factor might enable him to be identified, or suspicion to fall on others. In light of those factors, Mr Knowsley also sought that the identity of the town in which he practices ought also to suppressed.

5.0 **DECISION:**

5.1 **THE** complainant's name is suppressed, as is the publication of any details or other information which might lead to her identification. The Tribunal is satisfied that in the circumstances of this charge, and given the complainant's right to privacy provided under Section 107 of the Act, it is appropriate to make the order sought. In any event, no objection to this course is made on behalf of the practitioner.

5.2 **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 and on the basis of the evidence and information provided to-date, it will grant the application sought and an interim order for suppression of the practitioner's name and any details which might identify him will be made, pending further order of the Tribunal.

5.3 **THE** Tribunal does not consider that it is necessary to suppress the name of the town in which Dr Ford practises, or it's geographical location, and it declines to make such an order.

6.0 **REASONS FOR DECISION:**

6.1 **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 possibility that Dr Ford's pre-existing medical condition could be exacerbated by the stress of the disclosure of his identity in relation to this charge.

6.2 **IN** the context of this charge, it is relevant that the allegations relate to events which occurred between 1989 and 1992. The Tribunal makes no comment whatsoever on the fact of the long period of time prior to the allegations being made, however it is not satisfied that in the context of complaints which took some 8 years to come to light delaying the disclosure of Dr Ford's name in relation to the allegations founding the charge for a further period of 3 or 4 months will unduly prejudice any other potential complainant.

6.3 **THE** date for the hearing has been set for early October. The outcome of the hearing is likely to be known within 4 - 6 weeks after that. A further factor in support of this approach is that the hearing will be open to the public, and the date, time and place of the hearing will be advised by way of public notice in the local newspaper in accordance with the Tribunal's usual practice.

6.4 **ALSO,** in making the orders sought, the Tribunal is not unduly restricting fair reporting of the charge, or the circumstances in which it arises. Additionally, the orders are of an interim nature only and, if as a result of such publicity or in the course of the preparation for the hearing additional information becomes available, then counsel may return to the Tribunal to seek a re-consideration of the orders made.

6.5 **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)).

6.6 **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.

6.7 **IN** undertaking that exercise in the present context the Tribunal has also considered the submissions made by both counsel in response to a question from the Tribunal regarding the relevance of the criminal vs civil standard of proof, particularly in relation to the relevance of the High Court decision referred to by Ms McDonald.

6.8 **IN** this regard, Ms McDonald submitted that the Tribunal's jurisdiction was hybrid in nature; it is a civil tribunal, but certain procedural aspects are criminal in nature. It must apply a civil standard of proof, but on a sliding scale. For procedural guidance, it tended to look to the criminal courts, especially when considering applications for name suppression as such applications rarely arose in the civil context.

6.9 **PERHAPS** understandably, Mr Knowsley rejected that submission. Charges brought to the Tribunal are not criminal charges; this is a civil jurisdiction and the civil standard of proof applies. The CAC cannot have it both ways, Mr Knowsley submitted. It has only to meet a civil standard of proof to establish the charge, it would be unfair to require the applicant to meet a criminal standard of proof in relation to this application.

6.10 **THE** Tribunal accepts Mr Knowsley's submission. Whilst it is free to determine it's own procedures, it is required to observe the principles of natural justice. The CAC is required to meet a lower standard of proof, the balance of probabilities, if it is to prove the charge, albeit a sliding scale applies and the standard will, in the context of this charge, be correspondingly higher than the civil standard *simpliciter*.

6.11 **BUT**, as a matter of natural justice, both parties must be held to the same standard. In considering this application the Tribunal has taken that approach as best it could in the circumstances.

6.12 **THE** Tribunal reiterates that it has taken all of the submissions made to it into account, not only those expressly referred to herein, and, on balance, it is satisfied that it is desirable that the application be granted. It is mindful of the serious nature of the charge, and, given the subject-matter, it is very mindful of the potential for other offending to come to light as a result of pre-hearing publicity.

6.13 **WHILST** the likelihood of similar fact evidence being presented at the hearing has been indicated by the CAC, no factual or evidential basis or background information has been made known to the Tribunal. If that situation changes, then the Tribunal would of course urgently consider any such material presented to it, and re-visit all of the orders made by it thus far. However, it is satisfied that, in the present circumstances, the potential consequences for Dr Ford and his family if his name was prematurely disclosed outweigh the public interest in knowing his identity at this time.

6.14 **THE** Tribunal's decisions are unanimous.

7.0 **ORDERS:**

7.1 **THE** applications are granted and the Tribunal orders as follows:

7.1.1 **THAT** the publication of the complainant's name is prohibited.

7.1.2 **THAT** publication of the practitioner's name or any particulars of his affairs is prohibited until further order of the Tribunal.

DATED at Auckland this 8th day of August 2000.

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W N Brandon

CHAIR