



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 154/00/69C

IN THE MATTER of the MEDICAL PRACTITIONERS

ACT 1995

AND

IN THE MATTER of disciplinary proceedings against X of

XX

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Friday 9 February 2001

PRESENT: Mr T F Fookes - Chair

Ms S Cole, Dr R S J Gellatly, Professor W Gillett,

Dr A D Stewart (members)

APPEARANCES: Ms K P McDonald QC for Complaints Assessment Committee

Mr H Waalkens for respondent

Mrs D M Haswell - Assistant Secretary

(for first part of call only)

DECISION ON THE APPLICATION FOR INTERIM SUPPRESSION:**1. THE CHARGE:**

1.1 A Complaints Assessment Committee (“the CAC”) established under s. 88 of the Medical Practitioners Act 1995 (“the Act”) has laid a charge against a person (“the applicant”) who was previously a registered medical practitioner but whose name was ordered by the Tribunal to be removed from the register.

1.2 **THE** charge alleges that in 1995 the applicant acted in a way that amounted to conduct unbecoming a medical practitioner and that that conduct reflects adversely on the applicant’s fitness to practise medicine.

2. JURISDICTION:

2.1 **THE** applicant has filed with the Tribunal an application for an order declaring that the Tribunal has no jurisdiction over or in respect of the applicant.

2.2 **THE** grounds for that application allege, inter alia, that the jurisdiction of the Tribunal is in respect of a “medical practitioner” or “practitioner” which, it is argued, means the person registered under the Act, that the applicant is no longer a “medical practitioner” or a “practitioner” and that in no other respects can it be claimed that the Tribunal has jurisdiction in respect of complaints concerning the applicant.

2.3 **THAT** application is opposed by the CAC and is to be heard by the Tribunal a few days from now.

3. APPLICATION FOR INTERIM SUPPRESSION:

3.1 **THE** applicant also filed with the Tribunal an application for an interim order prohibiting, until the further order of this Tribunal (and thereafter as the Tribunal might direct), the publication of the name of, or any fact identifying, the applicant. The Tribunal heard that application on 9 February 2001.

3.2 **AT** that hearing it was made clear by Mr Waalkens, counsel for the applicant, that what is sought at this stage is an order for interim suppression until the publication of the Tribunal's decision in respect of the jurisdiction application. Mr Waalkens said that if that application were determined adversely to the applicant a further application for interim suppression would in all likelihood be made.

3.3 **THE** CAC did not seek to make submissions in opposition to the application for interim name suppression pending determination of the jurisdiction issue.

4. GROUNDS AND SUBMISSIONS:

4.1 **THE** grounds on which the application for interim suppression is made include the applicant's denial of the charge, the fact that it is a charge of conduct unbecoming (the lowest level at which a charge under the Act can be laid), publicity previously endured by the applicant, the risk of further publicity in respect of and out of proportion to the issues arising in the charge, the harm, embarrassment and unnecessary stress to the applicant, and the applicant's immediate family, which would result from publication of the applicant's name and the fact that such publication would cause or risk harm to other proceedings in which the applicant is involved.

4.2 **IN** oral submissions Mr Waalkens said that he had little to add to those grounds. After referring to the extent of previous publicity, and to the CAC's position in respect of the application, he submitted that it would be unreasonable for the applicant to be subjected to further publicity if there were no jurisdiction for the Tribunal to hear the charge.

4.3 **MS** McDonald QC informed the Tribunal that the CAC was not prepared to consent to the application but submitted that it would defeat the purpose of the jurisdiction argument if there were to be publication of the applicant's name at this stage.

4.4 **MS** McDonald made it clear, however, that if the Tribunal decided that it had jurisdiction to hear the charge she would want to oppose continued suppression of the applicant's name.

5. LEGAL CONSIDERATIONS:

5.1 **THE** Tribunal has reminded itself of the importance in a democracy of freedom of speech and open judicial proceedings and that the prima facie presumption as to reporting is always in favour of openness and the right of the media to report such proceedings as surrogates of the public: *R v Liddell* [1995] 1 NZLR 538.

5.2 **IT** has also had regard to the decision in *M v Police* (1991) 8 CRNZ 14 in which it was held that in general the healthy winds of publicity should blow through the workings of the Court and that it is important that justice should be seen to be done.

- 5.3** **THE** Tribunal has also taken account of the decision of the Court of Appeal in *Lewis v Wilson & Horton Ltd* (unreported, CA 131/00, 29 August 2000) in which it was held that the Judge must identify and weigh the interests, public and private, which are relevant in the particular case and that it will be necessary to confront the principle of open justice and on what basis it should yield.
- 5.4** **GIVEN** that the applicant denies the charge the presumption of innocence is a factor which must be brought into account, when the question of suppression arises before trial, and the weight to be given to it depends on the particular circumstances of the case. It is a significant factor to be weighed in the balance against the principles which favour open reporting: *R v Proctor* [1997] 1 NZLR 295, 298.
- 5.5** **THE** balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome: *Lewis v Wilson & Horton Ltd* p 18.
- 5.6** **SECTION** 106(2) of the Act provides that 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 one or more of the orders set out therein. These include an order prohibiting the publication of the name, or any particulars of the affairs, of any person. The section plainly requires the Tribunal to balance such factors as the public interest in the principle of open justice, the public expectation of accountability and transparency in the professional disciplinary process, the maintenance of public confidence in that process and the medical

profession generally, the importance of freedom of speech and the media's right to report proceedings fairly of interest to the public against the private interests of the applicant and those most closely connected with him.

6. DECISION:

6.1 **THE** Tribunal has decided that the name of, and any particulars which might tend to identify, the applicant should be suppressed pending the Tribunal's decision on the jurisdiction issue. It has also decided that to avoid any risk of the applicant being identified as a result of publication of all or any of the complainant's name, the place where the relevant events allegedly took place, the name of the health institution and the team referred to in the charge and the place where the applicant resides all such details should also be suppressed pending the further order of the Tribunal. This decision is an interim measure only and is to be reviewed once the outcome of the jurisdiction is known. Certain orders will be made to ensure that that review takes place and they will be set out later in this decision.

7. REASONS FOR DECISION:

7.1 **AS** we have already recorded, Mr Waalkens submitted that it would be unreasonable for the applicant to be subjected to further publicity if there were no jurisdiction for the Tribunal to hear the charge. No doubt the submission reflects the fact that in many cases where a person is charged under the Act his or her name is not published prior to the commencement of the hearing of that charge. It may therefore be argued that if the charge against the applicant is not to go to a hearing, which would be the case if the Tribunal finds

in the applicant's favour on the jurisdictional point, it would be unfair and unreasonable for the name of the person charged to have been publicised.

7.2 **IT** appears to the Tribunal that there may also be arguments which could be advanced in opposition to this submission.

7.3 **IT** is not necessary for the Tribunal to determine at this stage the validity of Mr Waalkens' submission and it has not done so nor formed any preliminary view on that issue. Nor is it desirable that it should do so at this stage as it is at least possible that if the Tribunal holds that it has no jurisdiction to hear and determine the charge against the applicant the CAC might then want to apply for an order that the applicant's name suppression should be lifted. In view of that possibility the Tribunal considers it desirable to refrain from giving detailed consideration to the validity of Mr Waalkens' submission at this stage.

7.4 **WHILE** noting the grounds which have been advanced in support of the application the Tribunal does not consider it desirable to determine the validity of those grounds at this stage. That is because Mr Waalkens has already indicated that if the jurisdiction point is determined adversely to the applicant a further application for interim suppression will, in all likelihood, be made and Ms McDonald has indicated that such an application would be opposed. As any such application might be made on the very grounds set out in the current application for interim suppression, and as the Tribunal has no knowledge of the grounds on which such an application would be opposed, the Tribunal needs to be careful not to effectively determine any such application before it is has been made and argued.

7.5 **THE** application for interim suppression pending determination of the jurisdiction issue is not opposed by the CAC. No doubt this reflects the fact that, unless the applicant's name is suppressed pending the determination of the jurisdiction point, there would be little or no point in the applicant – in the event of an adverse decision on jurisdiction – thereafter making an application for further interim suppression. The applicant's name, and the fact that the applicant was facing a charge under the Act, would already have been publicised in connection with the jurisdiction hearing and a further application would then effectively be pointless.

7.6 **IT** is that consideration which has persuaded the Tribunal that the applicant should be granted interim suppression pending determination of the jurisdiction point. Not to grant the application would effectively deny the applicant the opportunity of attempting to persuade the Tribunal, if its decision on the jurisdiction point is adverse to the applicant, that interim suppression should be granted in relation to the hearing of the charge. While an application could still be made it would be likely to be a pointless exercise if the applicant's name had already become public knowledge in connection with the jurisdiction hearing. The Tribunal considers that the interests of justice require that the opportunity for the applicant to make such an application and have it considered on its merits should at this stage be preserved and not effectively done away with.

7.7 **BEFORE** arriving at this decision the Tribunal had careful regard to the public interest. It considered the nature of the charge and the particulars set out therein. It took into account that the period for which suppression is sought is very short as the jurisdiction hearing is to take place within a few days. It had regard to the fact that the applicant is not currently

practising medicine. It noted that the charge is denied and that that is a factor to be weighed. Having considered these matters, the interests of the complainant and the public interest generally, and having noted that the decisions of the Courts appear to show an increasing trend towards openness in the reporting of judicial, and quasi-judicial, proceedings, the Tribunal considers that in these unusual circumstances the interests of justice require that there should be interim suppression of the applicant's name and identifying particulars pending determination of the jurisdiction issue. It particularly notes that the interim suppression of the applicant's name will not in any way restrict the ability of the media to report the submissions made to the Tribunal concerning jurisdiction or the Tribunal's decision on that issue.

7.8 **IN** all the circumstances the Tribunal considers that, in relation to the pending jurisdiction hearing, the principle of open justice should yield to the extent that the applicant should not be able to be identified in the meantime. It is satisfied that in the particular, and unusual, circumstances the balance comes down clearly in favour of interim suppression until the jurisdiction point has been determined.

7.9 **THE** Tribunal wishes to stress that its decision is only that interim suppression should be granted pending the Tribunal arriving at, and delivering, its decision on the jurisdiction application. It proposes to review the whole question further once the outcome of the jurisdiction hearing is known and to do that irrespective of whether any further applications are made by the parties. To that end it proposes to make the orders which are set out in sub-paragraphs 8.1.3 to 8.1.5 of this decision.

7.10 THE Tribunal's decision is unanimous.

8. ORDERS:

8.1 BEING satisfied that it is desirable to do so, and after having regard to the interests referred to in s. 106(2) of the Act, the Tribunal hereby orders that:

8.1.1 publication of the name of, and any particulars which do or might tend to identify, the applicant is hereby prohibited until the further order of the Tribunal;

8.1.2 without in any way limiting the generality of that order, publication of all or any of the name of the complainant, the place where the events referred to in the charge allegedly took place, the health institution and the team referred to in the charge and the place in which the applicant resides are all prohibited until the further order of the Tribunal;

8.1.3 if the applicant's application dated the 1st day of February 2001 for an order declaring that the Tribunal has no jurisdiction over or in respect of the applicant is determined against the applicant, the applicant may, within seven days after and exclusive of the date of the Tribunal's written decision on that application, apply to the Tribunal for any further interim suppression which is sought; (Any such application would, as Ms McDonald has said, be opposed by the CAC and there would then be a further hearing to consider and determine any such application.)

8.1.4 whether the jurisdiction application is determined in favour of or against the applicant the CAC may, within seven days after and exclusive of the date of the Tribunal's written decision on that application, apply to the Tribunal for an order that the interim suppression hereby granted be revoked; (If such an application is

made by the CAC and opposed by the applicant there would then be a further hearing to consider and determine that application.)

- 8.1.5** if the jurisdiction application is determined in favour of the applicant and, by the expiration of the seven day period, neither party has applied to the Tribunal for any such order the Secretary of the Tribunal is to convene a further hearing of this Tribunal, so that it can review the position and consider and determine whether any, and if so what, further order relating to suppression or publication should be made, and is to notify counsel for both parties of the date and time fixed for that hearing and invite them to attend and make submissions on that question;
- 8.1.6** costs in relation to the application dated the 25th day of January 2000 for interim suppression are reserved;
- 8.1.7** pending the further order of the Tribunal this decision is not to be published beyond the Tribunal, the parties or their counsel in a form which contains any reference to the name, first letter of the surname, or place of residence, of the applicant.

9. CONCLUSION:

- 9.1** IT should be clearly understood that the suppression which has been granted is of an interim nature only. The Tribunal will consider the matter further after the delivery of its decision on the jurisdiction application.

DATED at Wellington this 14th day of February 2001.

T F Fookes

SENIOR DEPUTY CHAIR