

Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 33/98/19D

IN THE MATTER of the MEDICAL PRACTITIONERS

ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **J** medical
practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Wednesday 8 April 1998

PRESENT: Mr P J Cartwright - Chair

Dr J W Gleisner, Associate Professor Dame N Restieaux,

Dr B J Trenwith, Mr P Budden (members)

APPEARANCES: Ms K G Davenport, Director of Proceedings

Mrs A Lombard for respondent

Ms G J Fraser - Secretary

(for first part of call only)

DECISION ON THE APPLICATION FOR HEARING TO BE HELD IN PRIVATE AND FOR SUPPRESSION OF NAME

- 1.1** **THE** Director of Proceedings under the Health and Disability Commissioner Act 1994 has determined that a complaint made to the Health and Disability Commissioner should be considered by the Medical Practitioners Disciplinary Tribunal ("the Tribunal"). The charge against Dr J has been set down for hearing in xx on 7 May 1998.
- 1.2** **APPLICATION** has been made for the following orders pending the finding of the Tribunal:
- 1.2.1** **THAT** the whole of the hearing by held in private (Section 106(2)(a)).
- 1.2.2** **PROHIBITING** the publication of the name of Dr J (Section 106(2)(d)).
- 1.3** **IN** advance of the telephone conference hearing an affidavit affirmed by Dr J was filed in support of the application by Mrs Lombard. In expressing opposition to the hearing being held in private, Ms Davenport indicated that the complainant wanted the hearing to be held in public and also the doctor's name published. However Ms Davenport indicated that this was an appropriate case for the making of a name suppression order.
- 2. THE TRIBUNAL ORDERS, PENDING ITS FINDING INTO THE CHARGE:**
- 2.1** **THAT** the hearing by the Tribunal of the charge against Dr J be held in public.
- 2.2** **THAT** publication of the name of Dr J be prohibited.

3. AFFIDAVIT BY DR J:

3.1 HE is xx years of age and is on the point of retiring from medical practice.

3.2 HIS practice (and home) is on the market at present. If the medical community became aware of the complaint it is likely that the sale price of the practice would be adversely affected, given also the fact that rural practices do not attract many medical practitioners.

3.3 KNOWLEDGE of the complaint and the type of allegations made (even if he was acquitted) to his current patients would result in patients leaving his practice. This would diminish its value. xx is a very small community.

3.4 FOR a considerable number of years he has worked to build up and maintain the practice which he has regarded as an investment for a retirement fund.

3.5 IT is his wish to retire as soon as his practice is sold.

3.6 HE is deeply distressed by the allegations made against him, he having practised medicine for over 40 years with an unblemished record.

3.7 IN the current circumstances the financial loss which would accrue following publicity of his name would be an inordinately harsh and disproportionate penalty.

4. REASONS FOR DECISION:

4.1 THIS is a formal application pursuant to Section 106 of the Act the relevant parts of which for the purpose of the application, provide:

"106. Hearings of Tribunal to be in public:

- (1) Except as provided in this section and in Section 107 of this Act, every hearing of the Tribunal shall be 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:
 - (a) An order that the whole or any part of a hearing shall be held in private:
 - (b) An order prohibiting the publication of any report or account of any part of any hearing by the Tribunal, whether held in public or in private:
 - (c) An order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
 - (d) Subject to subsection (7) of this section, an order prohibiting the publication of the name, or any particulars of the affairs, of any person.
- (3) Every application to the Tribunal for any order under this section shall be heard in private, but the other parties to the proceedings and the complainant (if any) shall be entitled to be present and to make submissions with regard to the application.
- (4) In any case where a hearing of the Tribunal is held in private, the Tribunal may allow any particular person to attend the private hearing if it is satisfied that the person has a particular interest in the matter to be heard.

- (5)
- (6)
- (7)
 - (a)
 - (b)
 - (c)"

4.2 **FIRST** the Tribunal will consider the application in so far as it seeks an order that the whole of the hearing be held in private.

4.3 **ONE** of the major criticisms of the disciplinary procedures in the 1968 Medical Practitioners Act was that hearings were held in private. The general principle which is reflected in Section 106(1) of the Act is that hearings should be conducted in public. That disciplinary proceedings against medical practitioners should generally be held in public accords with the principles of open reporting and the public interest, which were emphasised by the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 at 546-547.

4.4 **WHILE** there may be tensions on occasions between the need for public and open reporting and privacy issues, there are many instances in, for example, the criminal law, where the public interest in open hearings and privacy concerns of the parties are balanced without difficulty. Section 106 of the Act requires an exercise to be carried out whereby there is a balancing between the general principle that every hearing of the Tribunal shall be in public and the desirability of having regard to the privacy of any persons and of the public interest.

- 4.5 HAVING** considered carefully the reasons advanced for the hearing to be held in private, the Tribunal has not been persuaded that the particular facts and circumstances argued in the first part of the application justify departure from the general principles stated in Section 106(1) of the Act, that hearings of the Tribunal shall be heard in public. In making its assessment the Tribunal has considered the extent to which holding the hearing in public should provide some degree of protection to the public and the medical profession. It has then weighed the public interest in that sense against the interest of Dr J in deciding that the hearing should be held in public.
- 4.6 SO** far as the application for name suppression is concerned, the interests of Dr J have been explained in his affidavit. The Tribunal does not consider that all of them are compelling. There is never likely going to be a case where reputation is not in issue. Many medical practitioners have a close involvement in their community activities. And for many doctors, often in practice for several years without a blemish on their record, in times of heightened accountability and a sharper focus on consumerism, there will be a first time experience of the professional disciplinary process. Nevertheless the factors adverted to by Dr J in his affidavit are available to be weighed in the balance when considering an application of this nature.
- 4.7 THE** public interest is the remaining aspect of the statutory criteria which requires careful consideration.
- 4.8 IN *S v Wellington District Law Society***, High Court, Auckland, AP 319/95, Wellington, Judgement 22.10.96, a full bench issued a reminder, that proceedings before the Society's Disciplinary Tribunal are not criminal proceedings in which there is a very plain and pervading

presumption in favour of openness rooted in the importance of freedom of speech and the media right to report to the public. Nor are such proceedings punitive in the ordinary sense.

4.9 **IN S** the Court concluded that the public interest to be considered, when determining whether the Tribunal, or on appeal the Court, should make an order prohibiting the publication of the report of the proceedings, requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the profession, or the Court.

As was said in that case:

"It is the public interest in that sense which must be weighed against the interests of other persons including the practitioner, when exercising the discretion of whether or not to prohibit publication."

4.10 **THE** Tribunal has concluded in this case that publication to the extent of naming Dr J is not necessary to provide some degree of protection to the public or the medical profession, pending determination of the charge against him. The Tribunal makes the comment that it has found it very difficult to assess the seriousness of the charge from the way in which it has been formulated. The hearing is scheduled for 7 May next. A long period of waiting for an outcome to the charge is not expected.

4.11 **THE** factor which tipped the balance in favour of granting this application is the presumption of innocence of Dr J. The Tribunal acknowledges that the starting point in considering an application for suppression of an accused's name in the criminal jurisdiction, is application of the principles articulated in *R v Liddell* (supra). But as was stated by the Court of Appeal in *Prockter v R* [1997] 1 NZLR 295 at 298:

"..... the presumption of innocence is undoubtedly a factor which must be taken into account when the question arises before trial. What weight the presumption of innocence is then to be given will depend on the particular circumstances of the case. But it becomes a significant factor to be weighed in the balance against the principles which favour open reporting."

4.12 THE Act has expressly recognised that in medical disciplinary proceedings, there will be occasions when privacy orders are appropriate. The Act attempts to balance the general principles in favour of the open administration of justice with the particular issues raised by the medical disciplinary process.

4.13 FOR the reasons given the application for suppression of Dr J's name pending the finding of the Tribunal, is granted.

DATED at Auckland this 24th day of April 1998.

P J Cartwright

CHAIR