



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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**PUBLICATION OF
THE NAME OF
THE COMPLAINANT
AND WITNESSES
AND THEIR
OCCUPATIONS
IS PROHIBITED**

DECISION NO:

IN THE MATTER

290/03/116D

of the Medical Practitioners Act 1995

-AND-

**BY ORDER OF THE
DISTRICT COURT
PUBLICATION OF
THE NAME OF THE
DOCTOR AND ANY
IDENTIFYING DETAILS
IS PROHIBITED**

IN THE MATTER

of a charge laid by the Director of
Proceedings pursuant to Section 102
of the Act against K medical
practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL:

Ms P Kapua (Chair)

Dr R W Jones, Dr J M McKenzie, Mr G Searancke,

Dr A D Stewart (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Auckland on Monday 22, Tuesday 23, Wednesday 24
and Thursday 25 March 2004

APPEARANCES: Mr M R Heron and Mr J Tamm for the Director of Proceedings
Mr A H Waalkens and Ms C Garvey for Dr K.

Supplementary Decision

1. In its decision 281/03/116D dated 22 April 2004 (“the substantive decision”) the Tribunal found Dr K guilty of disgraceful conduct in that he had an intimate and sexual relationship with his patient, A. This supplementary decision is the Tribunal’s determination of penalty and should be read in conjunction with the substantive decision.

Submissions on behalf of the Director of Proceedings

2. Mr Heron, on behalf of the Director of Proceedings, submitted that the findings against Dr K fall at the most serious end of the spectrum for offending of a sexual nature. The Director was of the view that there were a number of aggravating features, being that the relationship between a xx and his patient requires absolute and utmost trust, that the intimate and sexual relationship took place in Dr K’s consulting rooms, that Dr K continued to treat Mrs A after he ended their relationship and undertook further surgery on her and that Dr K has denied that the events took place thereby causing distress to Mrs A.
3. The Director therefore submitted that Dr K’s name should be removed from the Register in the public interest and in the interests of the profession. If removal did not occur the Director submitted that the maximum suspension period should be imposed combined with conditions as to employment and supervision upon resumption of practice.

4. The Director also considered that censure of Dr K would be appropriate as well as a fine and that an award of a minimum of 50% of the costs of investigation and prosecution should also be made.

Submissions for Dr K

5. In response, counsel for Dr K, Mr Waalkens, submitted that there is no principle that all sexual intimacy cases involving doctor and patient must result in removal of the doctor's name from the Register. Further Mr Waalkens submitted that there was no public protection factor as there was "*no (real) risk of any repetition*". Mr Waalkens also submitted that there was no issue as to Dr K's competency as a doctor and he had accepted conditions on his practice, namely that he offers all female patients a chaperone, he only undertakes counselling if it arises directly from his xx practice and will only meet a patient after hours with a chaperone/support person present – except in emergencies. If the Tribunal was minded to suspend Dr K rather than remove his name from the Register Mr Waalkens submitted that a period longer than 6 months would be unreasonable.
6. Mr Waalkens submitted that Dr K is agreeable to continuing to attend psychiatric assessments for up to 3 years and imposition of a condition that the Medical Council's Health Committee monitor his practice for up to 3 years and that he practise in a group environment rather than as a sole practitioner.
7. In respect of the imposition of a fine, Mr Waalkens submitted that Dr K is in a position to pay a fine and he suggested a costs award of 40% of the costs, on the basis that the starting position is 50% for disgraceful conduct and that the level of costs should not be such as to discourage doctors from defending proceedings.
8. Mr Waalkens noted that censure by the Tribunal is a penalty for Dr K.

Decision

9. Section 110 of the Medical Practitioners Act 1995 describes the penalties available to the Tribunal where it has found a practitioner guilty of disgraceful conduct. Those penalties are:
- (a) Removal of the practitioner's name from the register;
 - (b) Suspension for a period not exceeding 12 months;
 - (c) A requirement to practice medicine subject to conditions for a period not exceeding 3 years;
 - (d) Censure;
 - (e) Imposition of a fine not exceeding \$20,000; and
 - (f) Payment of part or all of the costs incurred.
10. It is accepted that a finding in and of itself is punitive to the practitioner and that in exercising the powers under the Act the Tribunal must do so primarily in order to protect the public.¹
11. The Tribunal has found Dr K guilty of a most serious charge. The Tribunal accepts Mr Heron's submission that the conduct engaged in by Dr K with his patient was at the serious end of the spectrum in respect of the Medical Council's "*Statement on Sexual Abuse in the Doctor/Patient Relationship*" and was ultimately abusive in nature.
12. The Tribunal considers that the imposition of conditions such as those proposed by Mr Waalkens do not provide the protection needed for the public from offending of this nature, particularly within a xx practice.
13. Mr Waalkens submitted that if the Tribunal were minded to remove Dr K's name from the Register then a period of two months would be required to allow Dr K to make arrangements for the hand over of his practice. The Tribunal acknowledges that there may well be some administrative issues to be addressed and therefore is prepared to allow a period of two weeks before the order for the removal of Dr K's name from the Register comes into effect.

¹ Teviotdale v Preliminary Proceedings Committee of the Medical Council of New Zealand [1996] NZAR 515; Pillai v Messiter (No. 2) (1989) 16 NSWLR 197

14. The Tribunal therefore orders in respect of penalty that:
- (a) Dr K's name be removed from the Register. This order is to come into effect two weeks from the date of receipt of this decision by the parties .
 - (b) Dr K be censured;
 - (c) Dr K is to pay 50 percent of the total costs of and incidental to the inquiry by the Director of Proceedings, prosecution of the charge by the Director of Proceedings and the hearing by the Tribunal.
 - (d) Dr K is to pay a fine of \$15,000; and
 - (e) A notice under Section 138(2) of the Act be published in the New Zealand Medical Journal;
15. The Tribunal also notes in passing that if Dr K were to apply for readmission to the Register it would recommend that the Medical Council look carefully at the question of imposing conditions on his practice. In the Tribunal's view it may be appropriate to confine Dr K's practice initially to a public hospital where there is little opportunity to engage in the behaviour that gave rise to the complaint and finding against Dr K.

Name Suppression

16. Prior to the hearing Dr K was granted interim name suppression and counsel were requested to address the issue of whether name suppression should continue. The basis of granting interim name suppression essentially related to the damage to Dr K's reputation.
17. Mr Waalkens submitted that publication would be devastating to Dr K and his family. The Tribunal acknowledges that there will always be an unfortunate effect on the family of a practitioner but the starting point for name suppression is found in s.106(1) which states that every hearing shall be held in public. Therefore there must be a good reason for granting name suppression.

18. Clearly the presumption in respect of the public process is intensified where a doctor has been found guilty of a disciplinary offence. It would only be in exceptional circumstances that publication would not follow a guilty finding. The Tribunal accepts that in instances of sexual impropriety there is a public interest in publishing the name of the practitioner in case of other instances and in order to reduce any possibility of re-offending. Further, other practitioners in the area may well be under suspicion where name suppression continues.
19. The Tribunal is of the view that in the public interest the application for an order granting permanent name suppression for Dr K should be declined. There being no extant circumstances relating to the decision to grant interim name suppression, given the adverse finding, this order is to come into effect upon receipt of the decision by the practitioner.
20. The Tribunal therefore orders that the application for permanent name suppression of Dr K is declined.

DATED at Auckland this 28th day of June 2004

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P Kapua

Deputy Chair

Medical Practitioners Disciplinary Tribunal