Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 117/00/57D

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 Tuesday 18 April 2000.

PRESENT: Mrs W N Brandon - Chair
Dr I D S Civil, Ms S Cole, Dr R S J Gellatly, Dr L Henneveld (members)

APPEARANCES: Mr R Harrison QC, counsel for the Director of Proceedings
Mr H Waalkens, counsel for the respondent
Ms G J Fraser - Secretary
(for first part of call only)

DECISION ON THE APPLICATION FOR INTERIM NAME SUPPRESSION

1.0 **A** disciplinary charge has been laid against Dr J, a medical practitioner of xx by the Director of Proceedings designated under the Health and Disability Commissioner Act 1994. The Director of Proceedings has reason to believe that a ground exists entitling the Tribunal to exercise its powers under s109(1) of the Medical Practitioners Act 1995 ("the Act").

1.1 **THE** charge alleges certain failures and omissions on the part of Dr J in the course of care provided by him to the late A, at xx in xx on 20 April 1997. The charge also includes certain allegations regarding Dr J's conduct in the course of the Health and Disability Commissioner's subsequent investigation into the complaint made in relation to his care of Mr A.

1.2 **THE** charge is laid at the level of disgraceful conduct; the highest level of the hierarchy of charges contained in s109(1) of the Act.

1.3 **BY** application dated 21 March 2000, counsel for Dr J, Mr A H Waalkens, has applied for an interim order prohibiting publication of Dr J's name or any fact identifying him until the commencement of the hearing of the charge.

1.4 **THE** hearing of the application was by telephone conference commencing at 8.00 am on Tuesday 18 April 2000. In advance of the hearing, submissions in support of the application were filed by Mr Waalkens and in opposition to the application by Counsel for the Director of Proceedings, Mr Rhys Harrison QC.

2.0 GROUNDS OF THE APPLICATION:

2.1 THE grounds of the application were as follows:

2.1.1 Dr J denies the charge

2.1.2 Any publication of Dr J's name will inevitably result in substantial prejudice to him and to his immediate family

2.1.3 In addition there is some risk of damage to him and to his existing employer if his name and details of the charge were to be published.

3.0 SUBMISSIONS FOR THE APPLICANT:

3.1 AT the time of the hearing the members of the Tribunal had not received a complete copy of Mr Waalkens' written submissions. Mr Waalkens therefore made oral submissions, essentially reiterating those contained in his memorandum, in support of the application. Mr Waalkens summarised the submissions in support of the application as follows:

3.1.1 The requirement contained in s106 of the Act that hearings shall be heard in public unless the Tribunal is satisfied that it is desirable to order otherwise, is not compromised by granting interim suppression of publication of details which might identify Dr J;

3.1.2 Publication of the fact that a charge of disgraceful conduct has been laid against Dr J has a significant 'punitive element' notwithstanding that the respondent has not been found guilty of any charge. In this regard Mr Waalkens referred to the statement of Fisher J in *M v Police* [1991] 8 CRNZ 14, cited in *R v KA*, unreported, Smellie J, High Court Auckland (17/2/99):

"When these competing considerations [freedom of speech, open judicial proceedings, fair reporting] *have all been identified in any given case they must be weighed against each other. It seems to me that at this point one must recognise a crucial difference between the approach which is appropriate where the defendant is merely charged with an offence and the approach where he or she has been convicted. Publication of name is frequently a major and appropriate element of an offender's punishment once it is established that he or she is guilty. But punitive considerations are obviously irrelevant before conviction. At this stage the defendant is entitled to the presumption of innocence. Yet the stigma associated with the serious allegation will rarely be erased by a subsequent acquittal. Consequently when a Court allows publicity which will have serious adverse consequences for an unconvicted defendant, it must do so in the knowledge that it is penalising a potentially innocent person. That is far from saying that suppression should always be granted before guilt is established. But in my view the presumption of innocence and the risk of substantial harm to an innocent person should always be expressly articulated in these cases to avoid the danger that they will be overlooked."*

3.1.3 The respondent is entitled to the presumption of innocence, especially in the context of professional disciplinary proceedings where there is a real risk of permanent damage to a doctor's professional reputation if the fact that he is facing such a serious charge is published.

3.1.4 Mr Waalkens accepts that the Tribunal is less inclined to grant name suppression when serious charges have been laid against a doctor, and that this approach is correct when name suppression is sought on a permanent basis. But when name suppression is sought on an interim basis, prior to the hearing of the charge, an unqualified bias not to grant name suppression is not the correct approach;

3.1.5 The risk to a doctor's professional reputation is greater if the doctor is facing a charge of disgraceful conduct. Mr Waalkens suggested that the Tribunal was more inclined to grant applications for name suppression when a lesser

charge is involved, but submitted that in fact doctors facing serious charges were more in need of protection;

3.1.6 The charge against Dr J involves a single episode of care. There is no suggestion of multiple charges, or of significant public safety or public interest issues such as might also count against granting the application;

3.1.7 Interim suppression only until the commencement of the hearing is sought and the Tribunal is not precluded from revisiting the matter at any time.

4.0 SUBMISSIONS OPPOSING THE APPLICATION:

4.1 **FOR** the Director of Proceedings Mr Harrison referred to the "*starting point*" for the consideration of such applications referred to by the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538. In that decision, Cooke P stated that the 'starting point' *"must always be the importance of freedom of speech, open judicial proceedings and the right of the media to report the latter fairly and accurately as "surrogates" of the public"*.

4.2 **MR** Harrison emphasised that name suppression is not imposed lightly, but is a jurisdiction to be exercised with great care. Mr Harrison accepted that in the judgements referred to by Mr Waalkens, *M* and *KA*, the courts had qualified the fundamental principles referred to in *Liddell* for defendants who were both medical practitioner professionals.

4.3 **NOTWITHSTANDING** that this was not a charge involving sexual impropriety or multiple charges, the public has an interest in knowing all of the circumstances of

the charge and the name of the respondent. The Tribunal has a duty to act in the best interests of the public. The charge is a serious one and involves allegations which, if proven, are very serious. There is a significant public interest in this matter.

4.4 **IT** was Mr Harrison's submission that the grounds of this application do not disclose anything out of the ordinary in the context of disciplinary proceedings, and the Tribunal would need more by way of special circumstances to warrant granting this application.

4.5 **IN** reply, Mr Waalkens submitted that the *Liddell* case was a very different case to the present. In that case, the application was made post-conviction, and was for permanent name suppression. In relation to the public interest in the case, Mr Waalkens submitted that interim name suppression would not hinder the reporting of the proceedings; he was not suggesting that the public did not have an interest in the matter, but such interest was of less importance before the charge was established.

5. DECISION:

5.1 **HAVING** carefully considered the submissions referred to above, and the remainder of Mr Waalkens' written submissions circulated to the members after the telephone conference, the Tribunal is satisfied that, in the circumstances of this case, it is appropriate to grant the application for interim name suppression only.

6. REASONS:

6.1 **AS** is the case in all such applications, the Tribunal considered all of the submissions made to it very carefully. On it's face, there was little to distinguish this application from other such applications, but on closer examination the features of this

application which do make it unusual are significant. The nature of the allegations made against Dr J are, in equal parts, both unusual and serious. If proven, it would seem most unlikely that the Tribunal would be persuaded to grant name suppression on a permanent basis - a fact which Mr Waalkens appeared to accept.

6.2 **HOWEVER**, as has been said on many previous occasions, every application requiring the exercise of a discretion on the part of the Tribunal must be considered on its merits, and the factors which weigh on the side of refusing the application are, by and large, more in the nature of 'policy' considerations; those in favour of granting the application are peculiar to it.

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 **THUS** while s106(1) of the Act does contain a presumption that Tribunal hearings will be held in public, nevertheless that section also provides that the Tribunal may make any of a number of orders prohibiting publication of the name of any person involved in proceedings, or otherwise restricting the reporting of it's proceedings.

6.5 **AS** stated above, when exercising it's discretionary powers conferred under s106, the Tribunal must fairly consider every application entirely on its own merits and its particular facts. It must weigh those factors against the 'public interest' defined both

in general terms and in terms of the legitimate public interest in the relevant facts and the particular case, including the identity of the practitioner and the offence with which he is charged, and the more general relevant 'policy' considerations such as 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.

6.6 **ON** this occasion, the Tribunal is persuaded that there are 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, albeit the decision to grant the application was very finely balanced.

6.7 **IN** making the orders sought, the Tribunal does not consider that it is unduly restricting fair reporting of the charge in the period prior to the hearing 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. Given the narrow ambit of the orders sought, the Tribunal does not consider that it is unduly inhibiting the fair reporting of the hearing of the charge, nor is it restricting the right of any member of the general public to attend the hearing.

6.8 **ON** this occasion, the Tribunal was not persuaded that Dr J's family interests warranted the granting of the application. These interests, and the nature of the harm that might be caused to them if the application was not granted, are no different to those present in every such case. Nor is the fact that Dr J denies the charge

particularly significant. Virtually every such charge elicits a denial, invariably accompanied by an assertion that the charge will be strongly defended.

6.9 **DR** J has also expressed concern for the interests of his current employer. The Tribunal does consider that is a relevant factor to take into account. In *KA* this factor was clearly a principal reason for granting the application for permanent name suppression, notwithstanding the serious nature of the criminal offending, in circumstances where the identity of the defendant's employer was irrelevant in the context of the offending.

6.10 **SIMILARLY**, in this present case, the identity of Dr J's employer has no relevance to the subject-matter of the charge, nor to the allegations founding the charge, especially those made in relation to Dr J's conduct after the events giving rise to the original complaint. There is no discernible public interest in the identity of any third party and the consequences of any such publicity for Dr J in the context of his employment may well be disproportionate to any benefit derived to the community generally by the upholding of such principles as the freedom of speech and fair reporting.

6.11 **IT** is also significant that Dr J expressly denies the allegations of misconduct in relation to the post-episode of care events. It is important to record that the charge relates to both clinical and non-clinical acts and omissions on the part of Dr J; it is a charge of disgraceful conduct, and it is vehemently denied by Dr J in his affidavit filed in support of the application.

6.12 **TAKING** all of these considerations into account, the Tribunal is satisfied that this case does fall within that class of cases referred to in *Liddell*, and within the parameters of both *M* and *KA* (refer paragraph 3.1.2 above).

6.13 **DR** J is entitled to the presumption of innocence, and, in the particular circumstances of this case, the Tribunal is satisfied that a cautious approach is appropriate, especially given the narrow ambit of the orders sought, and their interim effect.

7. ORDERS:

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

7.1.1 **THAT** the publication of the practitioner applicant's name and any fact or details identifying him, including the names of his employers, is prohibited until the hearing of the charge laid against him by the Director of Proceedings, or until further order of the Tribunal.

DATED at Auckland this 28th day of April 2000.

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W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal