

Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 26/97/17D

IN THE MATTER of the MEDICAL PRACTITIONERS
ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Wednesday 11 February 1998

PRESENT: Mr P J Cartwright - Chair

Dr I D S Civil, Dr R S J Gellatly, Associate Professor N Restieaux,

Mrs H White (members)

APPEARANCES: Ms K G Davenport for Director of Proceedings

Mr C W James for respondent

Ms G J Fraser - Secretary

(for first part of call only)

DECISION ON THE APPLICATION FOR PRIVACY BY DR W

- 1.0** DR W has applied to have the hearing held in private or, alternatively suppression of his name pending the findings of the Tribunal. The following reasons have been advanced by Mr James in support of the application:
- 1.1** DR W is 70 years of age and is on the point of retiring from medical practice.
- 1.2** DR W is proposing to advertise for sale his medical practice. If the medical community becomes aware of this complaint, it is likely that the sale price will be adversely affected as prospective purchasers would construe the sale as a "forced sale" and make a substantially lower offer than he or she might otherwise contemplate.
- 1.3** **KNOWLEDGE** of this complaint and the type of allegations made (even if Dr W is acquitted) to his current patients would result in patients leaving the practice, thereby diminishing its value for sale to a successor.
- 1.4** DR W has strived for many years to build up and maintain a practice over a considerable number of years and this investment has been regarded as a retirement fund.
- 1.5** DR W is on the verge of his planned retirement at aged 70 and is deeply distressed by allegations of "indecent assault or sexual violation" which are anathema to him, he having practised medicine for over forty years without blemish or previous complaint.

1.6 **IN** these circumstances financial losses which would accrue following publicity of Dr W's name would be an inordinately harsh and disproportionate penalty.

2.0 **PROVISIONS OF SECTION 106 OF THE ACT:**

2.1 **RELEVANTLY** summarised in the context of the specific application by Dr W, Section 106(1) provides, except as provided later in the Section and in Section 107 of the Act, that every hearing of the Tribunal shall be held in public.

2.2 **SUBSECTION (2)** of Section 106 provides 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 any one or more of a number of orders. The particular order sought by or on behalf of Dr W, is to have the hearing held in private (Section 106(2)(a)), or alternatively, an order prohibiting publication of his name (Section 106(2)(d)).

3.0 **ORDER:**

3.1 **PURSUANT** to Section 106(2)(d) of the Act the Tribunal makes an order prohibiting publication of the name of Dr W pending the outcome of the proceedings against him.

4.0 **REASONS FOR ORDER:**

4.1 **THE** Tribunal has declined to order specifically on the application of Dr W, and without prejudice to a similar application made by the initial complainant, Ms B, that the whole of the hearing be held in private. However the Tribunal is satisfied that it is desirable to make the alternative order of name suppression sought by Dr W, for these reasons.

4.2 **FIRST**, Dr W is 70 years of age and on the point of retiring from medical practice. Secondly, Dr W is said by Mr James to be "deeply distressed by allegations of "indecent assault or sexual violation" which are anathema to him, he having practised medicine for over forty years without blemish or previous complaint". In these circumstances the Tribunal considers that the interest of Dr W would best be served by publication of his name being prohibited pending outcome of the proceedings against him. Additionally the Tribunal does not consider that there are any compelling public interest considerations which require publication of Dr W's name prior to determination of the charge.

4.3 **THE** reasons should also be explained for the Tribunal's unanimous decision to decline Dr W's application for the hearing to be held in private. In considering that application, the Tribunal was required to have regard to Dr W's interests and to the public interest.

4.4 **IN** the main it seems to the Tribunal that the interests advanced by Mr James on behalf of Dr W are of a property and investment nature and not of sufficiently wider importance to justify the hearing being held in private. It is understandable that Dr W would wish to protect the financial stake which he has built up in his medical practice over a lifetime in the profession. However if any financial loss is suffered by Dr W following the making of any adverse findings against him by the Tribunal, it would seem that such an occurrence would be part of the penalty arising out of his offending.

4.5 **SO** far as the public interest aspect is concerned, it must be acknowledged that Dr W has been charged with disgraceful conduct. Such type of alleged conduct was described by His Honour

Judge Roderick Joyce QC in his oral judgement in *B v The Medical Practitioners Disciplinary Tribunal* (AP 2154/97 20 May 1997) as:

"..... offending at the top end of the medical scale [previously] dealt with by the Medical Council"

In *E v MPDT* (supra) the Court was considering a joint appeal from a respondent doctor and a patient complainant against the refusal of the MPDT to make an order that the whole of the hearing of charges be held in private. Given that the alleged offending had been described by counsel for the respondent "as being at the lowest end of the scale", His Honour observed:

"..... it seems to the Court, there surely can be no proper public interest in material as in this case".

The inference which can be drawn from the context of the above extracts from *E v MPDT*, is that a complaint of disgraceful conduct "offending at the top end of the medical scale", "could be in a different category" in considering the public interest.

DECISION ON THE APPLICATION FOR PRIVACY BY THE INITIAL COMPLAINANT,

MS B:

- 1.0** MS B has made a separate application for the whole of the hearing to be held in private.
- 1.1** IN summary the grounds of the application are that the charge involves a sensitive and difficult matter and that it is culturally insensitive for Ms B to have to give her evidence in public.

- 1.2** **IN** an affidavit sworn by Ms B in support of her application she explained that the allegations which she has made against Dr W concern a recurring vaginal complaint which she has and she finds the whole subject matter of the complaint very embarrassing and personally distressing.
- 1.3** **WHILE** understanding that she may be able to give her evidence in private under Section 107 of the Act, Ms B does not believe that this conveys upon her enough privacy to deal with the issue completely.
- 1.4** **MS** B explained that she is a Maori and that it is culturally very difficult for her to give her evidence in a situation where she may be exposed to comment and criticism by others who will be free to attend the hearing.
- 1.5** **IN** addition Ms B explained, as Dr W was aware, that she has been the victim of sexual abuse and has been receiving ongoing counselling paid for by the Accident Compensation Corporation. Therefore it is also psychologically very difficult for her to give her evidence and she is very anxious about her participation in the hearing as a whole.
- 1.6** **MS** B concluded her affidavit on this note:
- "It will be very difficult for me and I will consider not giving evidence at all if I could not be assured that the hearing was closed and I was only required to tell my story to the Tribunal and the lawyers present. I do not know of any way other than this both emotionally and culturally which would be appropriate for me to attend the hearing. However I do believe I have a very valid complaint against Dr W and it would be very hard for me if the matter could not be dealt with in private."*

2.0 THE LAW:

2.1 IN light of the arguments which have been made in support of the application, it is appropriate to set out the substance of Section 106 and the entirety of the following Section 107.

Respectively they provide as follows:

"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)
- (5)
- (6)
- (7)

107. Special protections for complainants -

- (1) This section applies in respect of any hearing of the Tribunal on a charge laid under Section 102 of this Act, where the charge relates to or involves -
 - (a) Any matter of a sexual nature; or
 - (b) Any matter that may require or result in the complainant giving evidence of matters of an intimate or distressing nature.
- (2) Without limiting Section 106 (2) of this Act, where this section applies in respect of any hearing of the Tribunal, -
 - (a) Before the complainant begins to give oral evidence, the presiding officer shall -
 - (i) Advise the complainant of the complainant's right to give his or her oral evidence in private; and
 - (ii) Ascertain whether or not the complainant wishes to exercise that right; and
 - (b) If the complainant wishes to exercise that right, the presiding officer shall -
 - (i) Ensure that no person other than one referred to in paragraph (c) of this subsection is present in the room in which the hearing is being held; and
 - (ii) Advise the complainant of the complainant's right to request the presence of any person under paragraph (c) (viii) of this subsection; and
 - (iii) Advise the medical practitioner to whom the charge being heard relates of his or her right to request the presence of any person under paragraph (c) (ix) of his subsection; and
 - (c) If the complainant chooses to exercise the right to give his or her oral evidence in private, then, while the complainant is giving oral evidence at the hearing, no person shall be present in the room in which the hearing is being held except the following:

- (i) The members of the Tribunal:
 - (ii) The medical practitioner to whom the charge being heard relates:
 - (iii) The person who is prosecuting the charge:
 - (iv) Any barrister or solicitor engaged in the proceedings:
 - (v) Any officer of the Tribunal:
 - (vi) Any person who is for the time being responsible for recording the proceedings:
 - (vii) Any accredited news media reporter:
 - (viii) Any person whose presence is requested by the complainant:
 - (ix) Any person whose presence is requested by the medical practitioner to whom the charge being heard relates, unless the complainant objects to that person being present:
 - (x) Any person expressly permitted by the Tribunal to be present.
- (3) Without limiting Section 106 (2) of this Act, where this section applies in respect of any hearing of the Tribunal, the Tribunal may, if it is of the opinion that the interests of the complainant so require, make an order under Section 106 (2) (b) of this Act forbidding publication of any report or account giving details of any acts alleged to have been performed on the complainant or of any acts that the complainant is alleged to have been compelled or induced to perform or to consent to or acquiesce in."

3.0 ORDER:

PURSUANT to Section 106(2)(a) of the Act the Tribunal makes an Order that the whole of the hearing shall be held in private. This Order shall continue in force pending further order of the Tribunal provided however that any permanent privacy Order will be a matter for the Tribunal's

consideration following determination of the charge or at such earlier date as either party or the Tribunal in its discretion may consider appropriate.

4.0 REASONS FOR ORDER (MAJORITY DECISION):

4.1 THE majority is satisfied that it is desirable to make the order sought. In so acting the Tribunal is required by the legislation to have regard to the interests and the privacy of the complainant, on the one hand, and to the public interest on the other hand.

4.2 THE interests of the complainant in making this application are detailed in her affidavit. It is probably fair to say that the majority placed most weight on the interests of the complainant, including her perception of her privacy, in granting the Order sought.

4.3 IN summary the majority was impressed by the eloquent plea made by both Ms B and the Director of Proceedings on her behalf. Without reservation the majority accepted the argument that culturally, psychologically and emotionally it would be very difficult for the complainant to give her evidence in a situation where she may be exposed to comment and criticism by others who will be free to attend the hearing.

4.4 ANOTHER factor on which the majority placed considerable weight in granting the application, was their perception of the distress and vulnerability which Ms B may feel as a result of Dr W giving his evidence before a wider audience than would be present if the hearing was not held in private.

4.5 **THE** public interest is the second statutory consideration. One aspect which influenced the majority considerably was Ms B's indication that she would consider not giving evidence at all if she could not be assured that the hearing was closed. It was the view of the majority that there would be a dis-service to the public interest were Ms B to decline to give her evidence at a hearing open to the public. This sentiment was articulated notwithstanding the special protections given to complainants under Section 107 of the Act and about which Ms B acknowledged an awareness in her affidavit.

4.6 **ANOTHER** aspect of the public interest component of the equation which found favour with the majority, was that it is open to the Tribunal to publicise any adverse findings made against Dr W, post-hearing. In this way the majority concluded that the public interest would not be prejudiced by the making of an Order for the hearing to be held in private. A third factor, actually suggested by Mr James and taken on board by the majority, was that to decline this privacy application could act as a disincentive for other women faced with making similar allegations of sexual impropriety against their doctor, to lodge a complaint with the authorities.

4.7 **FOR** the reasons given it is the Order of the majority that the whole of the hearing of the charge against Dr W be held in private.

5.0 DISSENTING MINORITY OPINION OF THE CHAIR:

5.1 **AT** the outset the Chair wishes to emphasise that he respects the reasons advanced by the majority for their decision. Without reservation the Chair respects equally the reasons given in both making and in granting the application. Where the Chair would differ from the majority is

in questioning whether their reasons are sufficiently compelling to justify ordering the hearing to be held in private.

5.2 ANY disquiet on the part of the Chair arising out of the majority decision stems from the precedent value which may be ascribed to it. For this reason, as well as others quite genuinely held, the Chair considers that it is important, at this early stage in the application and development of the new legislation, to present another point of view. Again the exercise will be undertaken by reference to the statutory criteria, that is, the interests of any person, including without limitation the privacy of the complainant, and to the public interest.

5.3 ALTHOUGH the structure of the Decision thus far has been to deal with the separate applications from the initial complainant and from the respondent doctor, separately, the legislation contemplates that the interests "of any person", including without limitation "the privacy of the complainant", are of equal importance.

5.4 ON record earlier in this Decision is the unanimous conclusion of the Tribunal that neither the interests of Dr W or the public interest would be served by granting his application to have the hearing in private. In the Chair's respectful view this determination has not been taken sufficiently into account in granting the application by Ms B.

5.5 IN considering the interest and the privacy of Ms B, the Chair also considers that insufficient regard has been given to the value of the special protections for complainants contained in Section 107 of the Act. Although Ms B in her affidavit acknowledges an awareness of the

Section 107 provisions (set out in full earlier in this Decision), in the main the Chair's reading of her affidavit discloses a lack of a clear understanding of those provisions on the part of Ms B.

5.6 IT seems to the Chair that the Section 107 provisions, which refer expressly to any matter of a sexual nature or any matter that may require or result in the complainant giving evidence of matters of any intimate or distressing nature, are designed specifically for the situation in which Ms B finds herself.

5.7 SO far as public interest considerations are concerned, the Chair doubts whether any particular Tribunal decision to decline an application for a hearing in private, would or should act as a disincentive generally for women to make complaints against doctors involving matters of a sexual, intimate or distressing nature. In fact quite the reverse pertains in a similar privacy application currently before the Tribunal (different membership) involving a female complainant and allegations of sexual impropriety among other things. In seeking an order prohibiting publication of her name or any particulars of her affairs, this complainant expressly deposed in her affidavit in support of the application that she believed what the doctor had done ought to be made public so that there was accountability in full for his actions.

5.8 THE public interest is the second statutory consideration. Section 106(1) states the principle, subject to certain exceptions, that every hearing of the Tribunal "shall" (Chair's emphasis) be held in public.

5.9 TO the extent that there is a presumption in favour of Tribunal hearings being held in public, it therefore becomes necessary to weigh and endeavour to balance the competing interests, in this

case the interests and the privacy of the complainant, against the public interest of having the hearing held in public.

5.10 **IN** carrying out such a balancing exercise, the Chair finds himself obliged to hold that the public interest of a public hearing outweighs the interest which Ms B claims to have the hearing in private. As explained earlier in the Decision, a charge of disgraceful conduct comes at the top end of the medical scale which, in terms of public interest, Joyce DC J in *E v MPDT* observed could be in a different category. Given the position of trust held by a doctor in relation to his patient, the Chair considers there would need to be more compelling reasons to displace the statutory presumption in this case that the hearing be held in public.

5.11 **IN** this case, after giving due and serious consideration to Ms B's application, particularly in light of the provisions of Section 107 of the Act, the Chair would opt to have the hearing in public together with an Order prohibiting publication of the name of Ms B or any particulars of her affairs.

Dated at Auckland this 25th day of February 1998.

P J Cartwright

CHAIR