

Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 30/98/18D

IN THE MATTER of the MEDICAL PRACTITIONERS

ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Friday 3 April and Tuesday 7 April 1998

PRESENT: Mr P J Cartwright - Chair

Dr J W Gleisner, Dr R S J Gellatly, Dr B J Trenwith

Mrs H White (members)

APPEARANCES: Ms K G Davenport, Director of Proceedings

Mr H Waalkens for respondent

Ms G J Fraser - Secretary

(for first part of call only)

DECISION ON APPLICATION FOR SUPPRESSION OF NAME AND IDENTIFYING PARTICULARS

- 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 charge against Dr E has been set down for hearing in xx on 18 May 1998.
- 1.2** **APPLICATION** has been made for the following orders pending the hearing of the disciplinary charge:
- 1.2.1 PROHIBITING** the publication of any report or account or any part of any hearing by the Tribunal (Section 106(2)(b)) in any manner in which Dr E is named or identified; and/or
- 1.2.2 PROHIBITING** the publication of the name or any particulars of the affairs including the occupation, place of residence/practice of Dr E (Section 106(2)(d)); and/or
- 1.2.3 FURTHER** orders as the Tribunal may deem appropriate.
- 1.3** **IN** advance of the telephone conference hearings submissions in support of the application were filed by Mr Waalkens. Earlier Ms Davenport had indicated, while not consenting to the application, that it was not opposed by the Director of Proceedings.

2. ORDERS:

2.1 THAT publication of any report or account or any part of any hearing by the Tribunal in any manner in which Dr E is named or identified, is prohibited.

2.2 THAT publication of the name or any particulars of the affairs including the occupation, place of residence/practice of Dr E, is prohibited.

3. GROUNDS OF APPLICATION:

3.1 PUBLICATION of the name and occupation of Dr E or the nature of the complaint would cause unnecessary and unjustified public concern.

3.2 PUBLICATION of the name and occupation of Dr E or the nature of the complaint would result in the risk that Dr E will suffer damage to his professional reputation which would be disproportionate to the nature of the conduct in issue.

3.3 PUBLICATION of the name and occupation of Dr E carries a risk of causing stress or worry to other patients of Dr E.

4. AFFIDAVIT BY DR E:

4.1 HE has practised as a general practitioner for 32 years, all of which has been spent in the xx region. He is still in active private practice. A lot of his work has been with elderly patients.

- 4.2 **HE** is happily married with three adult sons all of whom live away from home.
- 4.3 **HE** is a recognised xx in the xx region. He does a lot of local community work for the betterment of the local xx community.
- 4.4 **THIS** is the first occasion when he has been subjected to a medical disciplinary hearing. He is very worried about the effect of publicity about the case, particularly if his name or particulars are mentioned so that he can be identified in such publicity. He is particularly worried about damage that this would cause to his reputation if he were named or identified.
- 4.5 **THERE** are presently six other general medical practitioners in xx, all of whom are in private practice.
- 4.6 **HE** will be defending the proceedings concerning the complaint. In his opinion publicity about the case if he is named or identified carries a very real risk that other patients might read or learn of the matter which may well cause them unnecessary stress and concern. Such publicity also carries with it a very real risk that patients may move from him to another practitioner.
- 4.7 **HE** has received a letter from the Health and Disability Commissioner confirming that the family of the complainant have accepted his apology.

5. REASONS FOR ORDERS:

5.1 **THERE** may be a risk, when applications of this nature are unopposed, of them being granted without the necessary degree of scrutiny. Accordingly it will always be important to ensure compliance with the statutory criteria.

5.2 **SECTION** 106 of the Medical Practitioners Act 1995 requires that every hearing of the Tribunal ("shall") be held in public, except as provided in the Section and in Section 107 of the Act. The latter offers certain special protections of a privacy nature for complainants. Otherwise Section 106 provides, where the Tribunal is satisfied that it is desirable to do so, having regard to the interests of any person, including the privacy of the complainant, and to the public interest, that it may make one or more of a number of stipulated orders. Those orders include having the whole or any part of a hearing in private, or orders prohibiting publication of documents, or the name or any particulars of the affairs of any person.

5.3 **IT** is understood that the complainant is happy for the hearing to be held in public and Dr E has not applied for it to be heard in private. Accordingly the issue is simply whether it will offend against the public interest for publication of any report in which Dr E is named or identified, or publication of the name or particulars of the affairs of Dr E, is prohibited, pending determination of the charge against him.

5.4 **IN** having regard to the interests of Dr E, which have been explained in his affidavit, the Tribunal does not consider that all of them are compelling. There is likely never going to be a case where reputation is not an 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 E in his affidavit are available to be weighed in the balance when considering an application of this nature.

5.5 **THE** public interest is the remaining aspect of the statutory criteria which requires careful consideration.

5.6 **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's right to report to the public. Nor are such proceedings punitive in the ordinary sense.

5.7 **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."

5.8 **THE** Tribunal has concluded in this case that publication to the extent of naming or identifying Dr E, his place of residence and practice, is not necessary to provide some degree of

protection to the public or the medical profession, pending determination of the charge against him. The comment is made that it has been found very difficult to assess the seriousness of the charge from the way in which it has been formulated. Consequently the Tribunal has taken a conservative approach in considering this application. The hearing is scheduled for 18 May next. A long period of waiting for an outcome to the charge is not expected.

5.9 **THE** factor which tipped the balance in favour of granting this application was the "presumption of innocence" of Dr E. 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* [1995] 1 NZLR 538. But as was stated by the Court of Appeal in *Procktor 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."

5.10 **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.

5.11 **FOR** the reasons given the application is granted.

DATED at Auckland this 24th day of April 1998.

P J Cartwright

CHAIR