Medical Practitioners Disciplinary Tribunal

PO Box 5249 Wellington Telephone (04) 499-2044 Facsimile (04) 499-2045
All Correspondence should be addressed to The Secretary

DECISION NO.: 53/98/18D

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **THOMAS NIGEL ELLISON** medical practitioner of Raglan

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING held at Hamilton on Thursday 1 October 1998

PRESENT: Mr P J Cartwright (Chair)

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

Mrs H White (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

APPEARANCES: Ms K G Davenport for Director of Proceedings

Mr H Waalkens for respondent

DECISION ON APPLICATION FOR REVOCATION OF NAME SUPPRESSION:

1.1 **ON** the application of Dr Ellison the Tribunal made the following orders in Decision No. 30/98/18D delivered on 24 April 1998:

(a) **THAT** publication of any report or account or any part of any hearing by the Tribunal in any manner in which Dr Ellison is named or identified, is prohibited.

(b) **THAT** publication of the name or any particulars of the affairs including the occupation, place of residence/practice of Dr Ellison, is prohibited.

1.2 **IN** support of Dr Ellison's application Mr Waalkens filed on his behalf with the Tribunal an affidavit wherein at paragraph 8 Dr Ellison said this was the first occasion on which he had been subject to a medical disciplinary hearing.

1.3 **SUBSEQUENTLY** Ms Davenport was told by the Tribunal Secretary that this was not correct in that Dr Ellison had, some years earlier, had a Disciplinary Committee hearing.

1.4 **THE** Director of Proceedings has made application for the Tribunal to revoke the orders granting suppression of name and details, such application being made in reliance on Section 108 of the Medical Practitioners Act 1995. The grounds of the application are:

1.4.1 **THAT** the interim suppression orders were made on the basis of an affidavit filed by Dr Ellison which contained incorrect information.

1.4.2 **THE** effect of this incorrect information is to render it inequitable that the order remain standing.

1.4.3 **THE** fact of the perjury of the doctor renders it inequitable that this Tribunal grant to him any indulgence.

1.5 **THE** application to revoke the interim name suppression orders is opposed by Dr Ellison. The grounds of opposition are:

1.5.1 **OVERSIGHT** as to the previous Disciplinary Committee hearing.

1.5.2 **HAVING** forgotten about the previous incident, it cannot be said that Dr Ellison knowingly made a false statement.

1.5.3 **IT** could hardly be said that a doctor or any person, for that matter, would deliberately express a falsity on such an issue when the falsity of the matter (in this case the fact of the previous hearing and its finding) is not only known by the Tribunal but is essentially, in all respects, the same Tribunal/Committee (by its predecessor).

1.5.4 **THE** fact of the previous finding should not swing the pendulum against the making of a name suppression order. The other points and bases upon which Dr Ellison sought name suppression still exist.

1.5.5 **THE** application is for interim name suppression (not permanent) pending the hearing of the charge, and the order should not be revoked.

2. ORDER:

2.1 **IT** is ordered that the interim suppression of name and other particulars orders made in Decision No. 30/98/18D be revoked.

3. REASONS FOR ORDER:

3.1 **DR** Ellison gave evidence of having been absent on account of ill health from his practice from the 21st of June this year. Basically Dr Ellison explained he has been feeling stress, anxiety and depression, and because he was worried that he might make mistakes with regards to his

diagnosis and treatment of his patients, he decided on the advice of his GP, Dr A, that he should take temporary leave of absence from his practice on medical grounds.

3.2 **PRODUCED** in evidence by Dr Ellison was a confidential "To Whom It May Concern" Certificate from Dr B, consultant psychiatrist, who certified he had examined Dr Ellison on 15 September 1998 and found him to be suffering from a stress-related psychological condition. Dr B noted Dr Ellison's symptomotology had, for a period of several months, included absent-mindedness and obtunding of memory of moderate degree.

3.3 **DR** Ellison explained that he had become forgetful over recent months, particularly over the last eighteen months, and that his wife could verify this was so.

3.4 **CROSS-EXAMINATION** by Ms Davenport elicited of Dr Ellison that his mis-statement that he had not previously appeared before a Disciplinary Tribunal was *"I unfortunately did that by mistake"*. Dr Ellison also verified that *"appearing before the Disciplinary Committee is very much a traumatic experience"*.

3.5 **IT** was also Dr Ellison's evidence that although he did not himself accept the adverse finding which was made against him by the Disciplinary Committee, he did not appeal the decision because it would have been too traumatic an experience for both himself and his wife.

3.6 **THE** note on which cross-examination by Ms Davenport concluded was that some little time after completing the affidavit, Dr Ellison actually remembered about the earlier conviction and

was just about to raise this with Mr Waalkens when the latter contacted him about the matter following raising of it by the Secretary.

3.7 **IN** answer to questions from members of the Tribunal, as to whether consumption of alcohol or the suffering of a head injury could have contributed to his memory lapses, Dr Ellison replied *"I don't think so"*.

3.8 **EVIDENCE** was also given briefly by Mrs Ellison, Dr Ellison's wife. She confirmed that her husband had become very forgetful over the past few months, maybe over the past year or more, and that it had been very worrying.

3.9 **MRS** Ellison also confirmed that the hearing of the complaint by the medical committee some 15 years ago had also been a very traumatic event for both of them. Agreeing that for both of them there had probably been a lingering sense of injustice as a result of that earlier disciplinary hearing, Mrs Ellison conceded nevertheless that even after 15 years the event was still very clear in her mind, and if she had been asked the direct question whether or not her husband had any previous convictions, she conceded she would certainly have remembered it.

3.10 **MRS** Ellison was able to confirm that she had not been privy to any discussions about the privacy application, her husband not having discussed it with her at any stage.

3.11 **MRS** Ellison agreed the stress that is apparently affecting Dr Ellison at the present time is probably primarily due to his ongoing involvement in the disciplinary process.

3.12 **MRS** Ellison spoke about three episodes of unconsciousness suffered by her husband in recent months. We would comment that this evidence was rather sketchy and lacking in precise details.

3.13 **WE** do not consider it is necessary to make any finding arising out of the evidence given by Dr and Mrs Ellison. Our view of the evidence, particularly that given by Dr Ellison, is that it is difficult to judge whether Dr Ellison genuinely did forget about the previous disciplinary conviction, or whether in fact he did probably remember about it, albeit subconsciously. However we are minded to make the comment, in light of the Disciplinary Committee's finding that *"Dr Ellison's shortcomings in this particular case were gross, substantial and inexcusable from an experienced general practitioner"*, that it is indeed extremely surprising that Dr Ellison, as he swore in his second affidavit, *"completely overlooked a hearing 15 years ago in respect of a complaint by Mr A"*.

3.14 **ALTHOUGH** one of the grounds of the application for revocation of the interim suppression order states *"The fact of the perjury of the doctor renders it inequitable that this Tribunal grant to him any indulgence"*, Mr Waalkens wholly disputed it was an act of perjury on the part of Dr Ellison. Having suggested one of the issues is whether Dr Ellison lied when he swore his first affidavit, Mr Waalkens simply noted with surprise that this proposition was never put to Dr Ellison.

3.15 **THE** Tribunal agrees with Ms Davenport, whether we find Dr Ellison lied or was forgetful, and the Tribunal has determined in this regard that it is not necessary to make a finding, the only issue really is the basis on which the Tribunal should re-examine its decision to grant Dr Ellison the benefit of interim name suppression.

3.16 **WHEN** we go back to the Tribunal's decision to grant interim suppression of name, we find the application was granted, principally because *"The factor which tipped the balance in favour of granting this application was the presumption of innocence of Dr Ellison"*.

3.17 **IT** is now necessary for us to ask the question, if we had been aware of the fact that Dr Ellison had been convicted of professional misconduct some 15 years ago, whether we would have been minded to grant the application?

3.18 **THE** consensus of us is, had we known about the conviction and the strong sense of rebuke explicit in the Disciplinary Committee's finding, we would most certainly have not granted the application.

3.19 **MR** Waalkens submitted the fact that Dr Ellison overlooked and wrongly omitted to disclose the conviction entered 15 years ago, does not stand in the way of the earlier order made by the Tribunal. Mr Waalkens explained the Courts have an unwritten rule, that convictions beyond five years or outside an immediate five year time frame are unimportant. Mr Waalkens invited the Tribunal to disregard the previous event of 15 years ago because, as Mrs Ellison said, they both have been trying to put it behind them. Dr Ellison has paid his penalty and to lift the interim suppression order would create a result which would be an unfair one because, after balancing the issues of the public interest in knowing against name suppression, Mr Waalkens said he saw no utility in Dr Ellison's name being in the public arena pending the hearing.

3.20 **THE** Tribunal considers the analogy which Mr Waalkens seeks to draw between the extinguishment of a minor criminal conviction after five years, and a conviction against a doctor of professional misconduct or the like, is not valid. In both cases the fact of conviction is a penalty. But in the case of the conviction entered against the professional person, there is the added ingredient of the public interest, which is not necessarily extinguished, even after expiry of a period as long as 15 years.

3.21 **MS** Davenport is correct in arguing, if the fact of the earlier conviction had been put before the Tribunal at first instance, we would have had the opportunity of considering the earlier decision and determining what effect that decision had on this decision to grant Dr Ellison an indulgence. We can see it is on very similar facts to the one now before this Tribunal. The allegation contained in the charge is that Dr Ellison failed to properly follow up on continuing complaints by Mr Wall and his family. These are similar to the facts before the Disciplinary Committee which is that Dr Ellison did not follow up a complaint made by Mrs B and Mr A that his complaint was worsening. That would have been a fact this Tribunal would have been entitled to take into account if it had been making the decision de novo.

3.22 **AS** the Tribunal noted in its Decision 14/97/3C in the case of a charge laid by the CAC against *Dr Sami,* Section 106 contains factors which require the Tribunal to exercise a cautious approach when granting exemptions to the basic proposition that the hearing be held in public. The *Sami* case concerned a revisiting of orders made under Section 106 and the mandatory nature of reporting in Section 138 of the Act. Nonetheless the Tribunal's observations about the significance of Section 106 are of relevance in the present case (at page 17):

".... while refusal to prohibit publication is not intended to be part of the penalty which the Tribunal may impose, it is acknowledged that the effect of publication may be

punitive. However, the Tribunal emphasises that the transparency of the disciplinary process and its outcome is an important protection both for the profession and for the public. More generally publication readily identifies for the public what measures are in place to protect it and to facilitate informed choice of professional medical services."

3.23 **THAT** publication of the name of Dr Ellison in this case may have some impact on his reputation, cannot be denied. Equally, it may cause some distress. However, such impact will be apparent in every case where a medical practitioner faces a charge under the Act. The issue arises only after a practitioner has been charged. Parliament would have been aware of this when drafting Section 106(1), so that cannot form the basis for an order made under Section 106(2) of the Act.

3.24 **FULL** publication of the hearing in accordance with the provisions of the Act will provide the necessary transparency that is called for by the Act, in circumstances where particularly sensitive personal issues are not to be disclosed.

3.25 **IN** revoking the interim suppression order the Tribunal adopts the concluding comments of the recent judgment of the Court of appeal in *The Queen v Dare* 25/6/98 Judgment of the Court delivered by Goddard J CA 195/98:

"We find no reason in Mr Dare's case to grant name suppression on the grounds of personal embarrassment and privacy considerations or simply on the basis of his acquittal given the absence of any other compelling reasons."

3.26 **COSTS** are reserved.

DATED at Auckland this 20th day of October 1998.

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P J Cartwright

CHAIR