New Zealand Health Practitioners Disciplinary Tribunal

Level 6, 80 The Terrace, Wellington 6011
PO Box 10509, The Terrace, Wellington 6143, New Zealand
Telephone: 64 4 381 6816 Facsimile: 64 4 381 6770
Email: dgainey@hpdt.org.nz
Website: www.hpdt.org.nz

DECISION NO: 638/Den 13/240P

IN THE MATTER of the Health Practitioners Competence Assurance Act 2003

-AND-

IN THE MATTER of a Charge laid by pursuant to Section 91(1)(b) of the Act against **Dr MWAFFAK RABIH** of Wellington, registered dentist

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

PENALTY DECISION ON THE PAPERS

TRIBUNAL: Mr D M Carden (Chair)

Dr C Lloyd, Dr P Luteru, Dr S Salis and Ms J Huria (Members)

Miss D Gainey (Executive Officer)

REPRESENTATION: Dr J Coates and Ms A Miller for the Professional Conduct Committee

Mr H Waalkens QC for the practitioner, Dr Mwaffak Rabih

INDEX

Introduction

1. The Tribunal has reached a decision on the penalty to be imposed in this matter. Reference is made to the substantive decision of the Tribunal finding the Charge made out dated 20 February 2014.

2. In that decision the Tribunal found the Charge was established. The detail is set out in the decision but essentially the Tribunal found misconduct on the part of Dr Rabih and as conduct bringing, or tending to bring, discredit to the dental profession. This was separately in relation to certain (but not all) particulars of the Charge and cumulatively.

3. The Charge had been denied by Dr Rabih and the Tribunal's findings were based on its assessment primarily of the credibility of the evidence presented by the Professional Conduct Committee (PCC) on the one hand and Dr Rabih on the other.

4. The essential facts of the Charge were that on the day in question, 29 May 2012, Dr Rabih was visited at his professional rooms after hours by the salesperson of a dental supply company. This was by arrangement. There were no other persons on the premises at the time. The salesperson demonstrated the equipment that Dr Rabih had earlier purchased and after the demonstration had concluded there were advances made by Dr Rabih to the salesperson which included words of a personal nature, physical contact and overt sexual contact. The behaviour ceased and the salesperson left the premises in a distressed state. She did not refer the matter to the Police until some days later. No official formal complaint was laid by the salesperson with the Police. No charge was laid by the Police against Dr Rabih.

5. The Tribunal found the Charge made out, having weighed up the evidence for the PCC against that of Dr Rabih and his witnesses.

6. Written submissions were made by the parties as to penalty. Neither party requested a hearing to advance submissions or present evidence. The Tribunal has considered the penalty question on the papers.

Penalty – the PCC

7. Having canvassed various principles the PCC referred to various cases said to be helpful in assessing the range of penalty that should be considered. The PCC submitted that on the facts as found this was not a case that warranted an order for removal of the name of Dr Rabih from the register but "*invited*" the Tribunal to consider a period of suspension.

8. Reference was made to protection of the public and the necessary messages to be sent and that this would give Dr Rabih time to ensure that any on-going risk was identified and managed. The incidental consequence of an order for suspension as a punishment was said to be appropriate and the period of between 4 and 6 months was suggested.

9. The PCC also sought an order for fine in the range of $7,500.00 to $15,000.00. It was said that such a fine was "*fair, reasonable, and proportionate*" having regard to all relevant factors.

10. Conditions on Dr Rabih's on-going practice were suggested, namely undertaking an assessment of risk as directed by the Dental Council of New Zealand (DCNZ); the completion of any training or rehabilitation as directed by the DCNZ following that assessment; and practice only in accordance with conditions the DCNZ considered appropriate to address any risk of further offending as identified by the assessment.

11. Censure of Dr Rabih was also sought.

Penalty – submissions for Dr Rabih

12. For Dr Rabih it was submitted that the appropriate penalty should be censure, fine, and continuation of name suppression details. Reference was made to Dr Rabih's character and the evidence of this, not only from witnesses who had already given evidence but also various referees whose references were submitted by counsel. Emphasis was placed on the extracts from those references to Dr Rabih's integrity and honesty, his close-knit family, his being well-principled and thoroughly likeable, the wide appreciation that his patients had for him, and the value of his community contributions. References obtained after the determination of the Charge spoke of the behaviour found by the Tribunal as having been completely out of character for Dr Rabih, Dr Rabih's standing as a citizen and his contribution to aspects of human rights, there being no risk of his offending in the future, and of his dedication and standards of professionalism.

13. It was said that Dr Rabih's behaviour was a one-off event and there was an undertaking that there would be no prospect of repeat (although the Tribunal notes that this undertaking is given by counsel on his behalf, not Dr Rabih himself).

14. An order for suspension was resisted as were the reasons advanced by the PCC why this should be considered.

15. Other cases relied on by the PCC were referred to, as were cases on which Dr Rabih relied.

16. It was submitted that this was not a case where the imposition of conditions was appropriate but a possible condition might refer to the presence of a chaperone for consultations with female patients.

17. An order for censure and an order for fine were accepted as being appropriate.

18. Both parties made reference to costs with the PCC seeking orders and this is referred to below.

19. Dr Rabih sought permanent suppression of his name and identifying details also referred to below.

Penalty – principles

20. The available penalties for the Tribunal are:[1]

20.1. That registration be cancelled.

20.2. That registration be suspended for a period not exceeding 3 years.

20.3. That the health practitioner be required, after commencing practice following the date of the order, for a period not exceeding 3 years, to practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise specified.

20.4. Censure.

20.5. A fine of up to $30,000.00 (but not if he or she has been convicted of a relevant offence or damages have been awarded against him (which does not apply here).

20.6. Costs.

21. The eight factors normally taken into account on the basis of authorities[2] are:

21.1. What penalty most appropriately protects the public.

21.2. The important role of setting professional standards.

21.3. A punitive function.

---

1 Section 101 of the HPCA Act

2 Roberts v Professional Conduct Committee of the Nursing Council of New Zealand [2012] NZHC 3354 - Wellington HC; CIV -2012-404-3916; 12/12/12; Collins J; Katamat v Professional Conduct Committee [2012] NZHC 1633 at [49] and Joseph v Professional Conduct Committee [2013] NZHC 1131 at [65] and [66]

21.4. Rehabilitation of the health professional.

21.5. That any penalty imposed is comparable to other penalties imposed upon health professionals in similar circumstances.

21.6. Assessing the health practitioner's behaviour against the spectrum of sentencing options that are available and trying to ensure that the maximum penalties are reserved for the worst offenders.

21.7. An endeavour to impose a penalty that is the least restrictive that can reasonably be imposed in the circumstances.

21.8. Whether the penalty proposed is fair, reasonable and proportionate in the circumstances presented.

22. In *A v Professional Conduct Committee*[3] the High Court said that four points could be expressly and a fifth impliedly derived from the authorities namely:

> *"First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element'. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practise which may or may not be amenable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish."*

23. The Court went on:[4]

> *"Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: B v B (HC Auckland, HC 4/92, 6 April 1993) Blanchard J. Moreover, as was said in Giele v The General Medical Council [2005] EWHC 2143, though ' ... the maintenance of public confidence ... must outweigh the interests of the individual doctor', that is not absolute – 'the existence of the public interest in not ending the career of a competent doctor will play a part."*

---

3 A v Professional Conduct Committee [2008] NZHC 1387 at [81] per Keane J

4 Para 82

24. In *Katamat v Professional Conduct Committee*[5] the High Court included:

> *"[53] In summary, the case law reveals that several factors will be relevant to assessing what penalty is appropriate in the circumstances. Some factors, such as the need to protect the public and to maintain professional standards, are more intuitive in their application. Others, such as the seriousness of offending and consistency with past cases, are more concrete and capable of precise evaluation. Of all the factors discussed, the primary factor will be what penalty is required to protect the public and deter similar conduct. The need to punish the practitioner can be considered, but is of secondary importance. The objective seriousness of the misconduct, the need for consistency with past cases, the likelihood of rehabilitation and the need to impose the least restrictive penalty that is appropriate will all be relevant to the inquiry. It bears repeating, however, that the overall decision is ultimately one involving an exercise of discretion."*

Penalty – discussion

25. The PCC did not seek the removal of Dr Rabih's name from the register and the Tribunal does not consider that that would be an appropriate outcome. The circumstances do not call for this.

26. The Tribunal is of the view that a period of suspension should be ordered.

27. In reaching that decision the Tribunal has taken careful account first of all of the cases to which the Tribunal was referred by both counsel. Other cases are helpful but each must be considered on its own merits and no two cases are the same.

Chand[6]

The PCC referred primarily to this case. Mr Chand, a registered nurse, faced four charges, two of behaving in an unprofessional manner towards a colleague, one of improperly accessing records, and one of compromising the safety and wellbeing of a patient. First, in 2003 Mr Chand attempted to kiss a colleague nurse. Later that year he said inappropriate things and behaved inappropriately and sexually towards a

---

5 Katamat v Professional Conduct Committee [2012] NZHC 1633

6 106/Nur06/49P

patient. Then in 2006 Mr Chand inappropriately accessed a patient's records and then acted towards her in an improper manner including hugging her and telephoning. The Tribunal placed emphasis on the fact that the inappropriate conduct in question continued over a period of three years. No insight was shown to have been present nor any response to attempts by Mr Chand's employers to educate him in relevant matters.

28. Submissions for Dr Rabih emphasised that *Chand* was not a "one–off" case at all, involving three separate complaints and involving access to clinical records. It was said that the facts in the *Chand* case were "*grossly more serious and prolonged and with more aggravating features*" than in respect of Dr Rabih.

29. There are certainly a number of factors in the *Chand* case which distinguish it from the present one, particularly that there were several charges, some of which involved Mr Chand's professional contact with his patients and that the offending occurred over a period of time.

30. The Tribunal considers that cases involving a health professional's relationship with a patient are significantly different from those involving a colleague as in this case. A patient is often, if not invariably, in a position of dependency, trust and reliance on the health professional which places the health professional in a position of dominance and authority over the patient. Such a relationship is normally not present in a professional collegiate connection.

31. Other cases referred to by the PCC were

    31.1. *Singleton*[7] – the case of a physiotherapist who sent inappropriate texts of a sexual nature to a former patient and counselled her when he was not

---

[7] 373 and 398/Phys10/158P

qualified to do so. His name was ordered to be removed from the register and he was censured.

31.2. *Ms O*[8] – a nurse who was treating an inmate in a prison became involved in inappropriate intimate, but not sexual, relationship with him and was ordered to have her registration cancelled.

31.3. *Dr Nuttall*[9] – where a doctor inappropriately entered into a sexual relationship with a patient who was vulnerable and then continued to treat her despite that relationship. When the patient became the patient of another doctor, Dr Nuttall continued to treat her and failed to keep adequate notes. Dr Nuttall's registration as a doctor was ordered to be removed.

32. The PCC referred to the case of *S*[10] where a psychologist was ordered suspended for 18 months on charges involving inappropriate boundaries with his patient, visiting her at home, sessions of inappropriate duration, climbing into the patient's house and going into her bedroom, confusing behaviour and inappropriate physical contact. Conditions on his practice were also imposed and he was censured.

33. Counsel for Dr Rabih pointed to distinct distinguishing factors in the cases referred to where they had been an order for removal of registration. The Tribunal has taken those distinguishing factors into account.

34. In support of a submission that there should be no suspension, the submissions for Dr Rabih referred to the following cases:

Dr K[11] This case concerned a doctor who entered into an inappropriate personal relationship with a person who had very recently been a patient of his and was very vulnerable. The relationship included texting on a multitude of occasions with

---

8 47/Nur05/25P
9 8/Med04/03P
10 188/Psy08/86P
11 349/Med10/157P

sexualised content. The aggravating features found by the Tribunal included the vulnerability of the patient; the harm that was caused to the patient and her relationship with another man; the type of work carried out by the doctor which required him to be consulted by vulnerable women; a lack of insight particularly in the context of communications he had had with a colleague; and the inappropriate way in which the relationship developed. Mitigating factors included that there had been no previous complaint; that the doctor admitted to the charge; that the doctor had voluntarily consulted a psychologist; that the doctor had by the time of the hearing demonstrated appropriate insight; references that were supplied; the support of the doctor's wife; and the need for the doctor to be subject to recertification. The Tribunal decided against suspension (which had been sought) on the grounds of endeavour to rehabilitate and imposed on-going conditions on his practice, a fine of $15,000.00, censure and costs.

B v B[12] In this case a dentist had been found to have acted inappropriately by his sexual contact with young patients. This was done under the guise of his performing X-rays and involved sexually inappropriate contact. Conditions on his practice were imposed, the dentist was fined and an order for permanent name suppression was made.

Dr G[13] Again this case involved a dentist in his relationship with a patient. To satisfy his own sexual needs he over-sedated the patient and molested her. The dentist was suspended for 9 months with conditions, censured and an order for costs was made. The submission was made that that case was "*plainly substantially more serious*" than that involving Dr Rabih.

---

[12] B v B HC 4/92, 06 April 1993 per Blanchard J
[13] Dentists Disciplinary Tribunal, 02/DC08/01C 20 April 2010

Mc Donald v PCC[14] In this case of a doctor having entered into a sexual relationship with a patient, the patient also worked for him. The doctor continued the medical management of the patient despite having purported to refer the patient to another doctor and made no medical record of management or medication. The patient died of a drug overdose shortly thereafter and the doctor was suspended for 5 months after an appeal to the High Court.

Dr Gray[15] Although reference was made to this case the Tribunal has not found it helpful in that an order suspending the suspension ordered for a period of 6 months has since been ruled as an order not available to this Tribunal.

35. The Tribunal has considered these cases carefully in assessing the appropriate penalty.

36. The Tribunal considers further that cases of inappropriate consensual connection or behaviour are distinguished from the present case where there was no consent on the part of the complainant.

37. Regard must also be had to the level of seriousness of the behaviour. In this case Dr Rabih's behaviour as found was serious involving words spoken and actions taken, but did not lead to any more significant outcome.

38. The submissions for Dr Rabih were that the facts in this matter were "*exceptionally unique*" in that the conduct in question did not involve a patient and occurred outside of conventional working hours. It was further noted that this was a "*one-off*" encounter whereas almost all of the other cases involving such conduct had been repeated or occurred over a period of time.

---

[14] Macdonald v Professional Conduct Committee HC Auckland CIV-2009-404-1516 10 July 2009 per Lang J
[15] MPDT 182/01/72D 22 November 2001

39. The Tribunal does not accept the description of the events as "*exceptionally unique*" except perhaps in the context of comparison to other cases. The basic facts are that there was a professional person in his professional rooms outside of office hours at a time when a member of the opposite sex attended for business purposes and was then subjected to personal insult and distress by words and conduct on the part of Dr Rabih which were quite inappropriate in any context and certainly a professional one.

40. The Tribunal has taken account of the references that Dr Rabih has provided. They are summarised above. The Tribunal has had to weigh up what is said about Dr Rabih in those references against the facts of the matter and how these speak for themselves about Dr Rabih's behaviour, his attitude toward professional colleagues, his lack of self-restraint, and the facts as found that he treated the complainant in a compromising sexual manner and in a way which caused her distress.

41. Criticism was levelled by submissions on behalf of the PCC that much of what the referees had said about Dr Rabih, and particularly any risk of re-offending, was said by them without foundation. Attention was drawn to the fact that there was no professional assessment or evidence given by Dr Rabih about risk of offending (particularly in the context of an extension of time that had been sought on his behalf for that very purpose). The Tribunal can only take into account such evidence as is submitted but it does note that there is no evidence concerning any absence of risk of re-offending on the part of Dr Rabih; and it must give such weight to the views of the referees as is appropriate.

42. The Tribunal places little weight on the undertaking given on Dr Rabih's behalf by counsel that there was "*no prospect whatsoever of a repeat*" or that Dr Rabih "*is truly regretful.*" The Tribunal is of the view (as submitted on behalf of the PCC) that the apology that was supplied to the complainant by Dr Rabih "*lacked sincerity*

in the context in which it was sent"; it was not sent until some two months after the event; and was only sent in conjunction with Dr Rabih's response to the complaint and in the context of his denial of her complaint in any event. Dr Rabih has, of course, continued certain of the denials in the conduct of this case and any evidence he gave to the Tribunal.

43. The Tribunal rejects the submission that an order for suspension is not required "*whether to protect the public interest or otherwise.*" It takes into account those matters said to be "*contrary to the public interest*" the number of permanent and "*enrolled*" patients who would be affected in having to find the services of another dentist, that the staff would also be adversely affected, and that there would be a detrimental effect on the family through Dr Rabih's inability to earn an income. Although it was said that "*obtaining a locum is known to be notoriously difficult,*" there was no evidence tendered on this.

44. The Tribunal is very mindful of the consequence that suspension of Dr Rabih will have on his ability to earn an income, his ability to pay staff, and his ability to render services to his existing patients. There may be compromise measures that he may have to take, such as endeavouring to find and employ a locum. The Tribunal is of the view that the patients who cannot avail themselves of Dr Rabih's services during the period of suspension will not be compromised in that they will be able to seek dental assistance elsewhere.

45. The financial impact on Dr Rabih is a consequence and one which the Tribunal has taken into account. This includes the staff wages he may need to pay and any other overheads that he may need to meet.

46. The Tribunal accepts the PCC submission that the misconduct "*involved a significant breach of professional boundaries with a woman [with] whom Dr Rabih had a strictly professional relationship.*"

47. The period of suspension is required to enable Dr Rabih to reflect on the matters which have led to the suspension in question. He may need to take some counselling or guidance on factors in his life such as self-control, sexual discipline, or professional treatment of others. As was submitted for the PCC by reference to the passage from *A v Professional Conduct Committee* referred to above, Dr Rabih may or may have not have a propensity to act towards others in the way he acted towards the complainant and the propensity, if there is one, may or may not be amenable to cure. A period of suspension will enable that assessment to be made and any steps towards cure, if needed, taken.

48. Accordingly the decision of the Tribunal is that Dr Rabih should be suspended for a period of 3 months.

49. Dr Rabih requested that there be a period of 2 months before the suspension takes effect first to enable him to make arrangements for his patients and explore the possibilities involved in running his practice in the meantime and secondly so far as any exercise of appeal rights by him is concerned. The Tribunal accedes to that request and the decision is that the suspension should run 2 months from the time when this written decision is provided to the parties, which will be 4 days after it is posted to them.

50. The Tribunal does not consider that any further order for conditions on resumption of Dr Rabih's practice after the period of suspension should be imposed. The period of suspension should be sufficient time for him to have reflected on matters and taken such advice and assistance as he needs.

51. This is an appropriate case where an order for censure should be made. This expresses the Tribunal's significant disquiet about the facts of the matter and Dr Rabih's behaviour; along with his on-going denial of the events that occurred.

52. The Tribunal is further of the view that there is no need for an order for fine. The period of suspension will have its monetary impacts on Dr Rabih and there is no need for further financial penalty for him.

Costs

53. The PCC sought an order for costs submitting that the charges had been appropriately laid; costs should reflect that the charge was defended in full with all witnesses, including the complainant, having been cross-examined; that it was not appropriate that the profession should have to bear the total costs involved; and that there was no fault on the part of any party that the hearing originally planned for July 2013 could not proceed.

54. The PCC said that its costs totalled some $67,883.03 and gave some detail of this. In addition to this, the Tribunal must consider its own costs totaling some $44,538.73. This brings the total cost in this matter to over $112,000.00.

55. In reply, submissions on behalf of Dr Rabih first submitted that the quantum of costs claimed was excessive (although there was no such submission made in respect of the Tribunal's costs as indicated).

56. Reference was made to the fact that the first hearing was adjourned by the then Deputy Chair despite the parties and counsel having been ready to proceed; to an objection raised by Dr Rabih about the then Deputy Chair; and to the successful objection to evidence proposed to have been called by the PCC; with the submission that Dr Rabih should not be required to contribute to costs in those regards.

57. The normal approach for the Tribunal based on the authorities[16] is to start with a 50% contribution. That, however, is a starting point and other factors may be taken

---

[16] Including *Cooray v Preliminary Proceedings Committee HC* Wellington AP 23/94, 14 September 1995 per Doogue J

into account to reduce or mitigate that proportion. The balance of costs of the prosecution after the orders for costs must be met by the profession itself. As was said in *O'Connor v Preliminary Proceedings Committee* [17]

> *"It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs."*

58. The following factors are often relevant to a reduction:

58.1. The hearing being able to proceed on an agreed statement of facts.

58.2. Co-operation of the practitioner.

58.3. The attendance of the practitioner at the hearing.

58.4. Consistency with the level of costs in previous decisions.

58.5. Costs not paid by the practitioner would fall on the profession as a whole.

59. The Tribunal has taken into account all matters and has decided that the appropriate contribution to be ordered should be $50,000.00. This allows a discount of over $12,000.00 in respect of matters which may have been outside of the strict costs involved in the prosecution or by the PCC. The Tribunal does not make any allowance in respect of matters under the control of another Deputy Chair. It is not appropriate to inquire into orders that were made concerning the adjournment of the hearing.

60. The order for costs also reflects the fact that the starting point of 50% is approximately the right percentage (after the deduction for ancillary matters mentioned), given that this was a fully defended hearing and that none of the criteria mentioned applies in respect of Dr Rabih.

---

[17] O'Connor v Preliminary Proceedings Committee HC Wellington AP 280/89, 23 August 1990 at [13] per Jeffries J

Suppression of name

61. Dr Rabih sought a permanent order for suppression of his name and identifying particulars.

62. Section 95 of the HPCA Act includes:

> "***95 Hearings to be public unless Tribunal otherwise orders***
> *(1) Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section or unless section 97 applies.*
>
> *(2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:*
>
> ...
>
> *(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person*."

63. The presumption in section 95(1) of the Act that the Tribunal's hearings shall be in public are the primary principle and endorse the principle of open justice; but section 95(2) does give the Tribunal discretion to grant name suppression.

64. The test is whether it is "*desirable*" to prohibit the publication of the name or any particulars of the affairs of the person in question and the Tribunal must consider both:

64.1. The interest of any person and

64.2. The public interest.

65. There have been many public interest factors identified by other Tribunal decisions. These include:

65.1. Openness and transparency of disciplinary proceedings.[18]

---

[18] *M v Police* (1991) 8 CRNZ 14; *R v. Liddell* [1995]1 NZLR 538; *Lewis v Wilson & Horton Ltd*. [2000] 3 NZLR 546; *Director of Proceedings v I* [2004] NZAR 635

65.2. Accountability of the disciplinary process.[19]

65.3. Public interest in knowing the identity of a health practitioner charged with a disciplinary offence.[20]

65.4. Importance of speech and the right enshrined in section 14 New Zealand Bill of Rights Act 1990.[21]

65.5. Unfairly impugning other practitioners.

66. There are also these statements of principle:

Panckhurst J in *Tonga v Director of Proceedings*:[22]

> *"[F]ollowing an adverse disciplinary finding more weighty factors are necessary before permanent suppression will be desirable. This, I think, follows from the protective nature of the jurisdiction. Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases. Thus, the statutory test of what is "desirable" is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may incline in favour of the private interests of the practitioner. After the hearing, by which time the evidence is out and findings have been made, what is desirable may well be different, the more so where professional misconduct has been established."*

Blanchard J in *B v B*:[23]

> *"In normal course where a professional person appears before a disciplinary tribunal and is found guilty of an offence, that person should expect that an order preventing publication of his or her name will not be made. That will especially be so where the offence found to be proved, or admitted, or admitted, is sufficiently serious to justify striking off or suspension from practice."*

Gendall J in *Anderson v PCC*:[24]

---

19 *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360

20 *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360; *F v Medical Practitioners Disciplinary Tribunal* HC Auckland AP21–SW01 5 December 2001 per Laurenson J

21 *R v. Liddell* [1995] 1 NZLR 538; *Lewis v. Wilson & Horton Ltd* [2000] 3 NZLR 546

22 *Tonga v Director of Proceedings* HC Christchurch CIV 2005-409-2244 21 February 2006 at [42] per Panckhurst J

23 *B v B, above at n 12, at [99]*

24 Anderson v Professional Conduct Committee HC Wellington CIV-2008–485–1646 14 November 2008 at [36] and [37] per Gendall J

> *"Private interests will include the health interests of a practitioner, matters that may affect a family and their wellbeing, and rehabilitation. Correspondingly, interest such as protection of the public, maintenance of professional standards, both openness and "transparency" and accountability of the disciplinary process, the basic value of freedom to receive and impart information, the public interest knowing the identity of a practitioner found guilty of professional misconduct, the risk of other doctors' reputations being affected by suspicion, are all factors to be weighed on the scales.*
>
> *"Those factors were also referred to at some length in the Tribunal. Of course publication of a practitioner's name is often seen by the practitioner to be punitive but its purpose is to protect and advance the public interest by ensuring that it is informed of the disciplinary process and of practitioners who may be guilty of malpractice or professional misconduct. It reflects also the principles of openness of such proceedings, and freedom to receive and impart information."*

67. Emphasis was placed by submissions on Dr Rabih's behalf on the exceptionally wide discretion that the Tribunal has in the reference in section 95(2) to the word "*desirable.*" Reference was again made to the circumstances as having been "*unique and exceptional*" and that the case was "*unique and distinguishable from others.*"

68. In an affidavit in support of an earlier application for interim name suppression Dr Rabih referred to matters that were relevant to the interim situation. In support of the permanent suppression application counsel referred to the personal circumstances of Dr Rabih with his wife and two children and the fact that Dr Rabih's name was not a common name, with reference to the schooling community for the children and sensitivity on the part of one of them.

69. It was emphasised in support of the application that publication of Dr Rabih's name would have a significant effect on the family members and particularly the children in that context.

70. Reference was made to cases where name suppression had been granted in circumstances where it was said the facts were significantly more serious than in the present case. These were the cases of *Mr S, B* v *B* and *Dr K* referred to above.

Reference was also made to the case of *Dr C,*[25] a case involving a doctor having entered into a sexual relationship with a vulnerable young patient to whom she had provided counselling services. A significant factor was that the events had occurred some 20 years earlier. Reference was also made to *Mr L.*[26] That case concerned a patient at a forensic mental health ward and inappropriate behaviour towards him by the nurse in question. An order for permanent suppression of name was made with particular reference to the nurse's distressed state and medical evidence given concerning him.

71. In opposing the application the PCC referred to the normal principles and submitted that the evidence did not provide a sufficient basis to disturb the well-established principles of openness and transparency. Reference was made to the complainant's concern to ensure that this sort of thing did not happen to anyone else and the submission was made that naming Dr Rabih would enable members of the public to make an informed decision about the choice of Dr Rabih as their dentist.

72. It was said that publication of Dr Rabih's name was directly relevant to the accountability of the disciplinary process; and reference was made to the likelihood that the few other dentists working in the area may be unfairly impugned.

73. The Tribunal has considered the submissions carefully in the light of the other cases when orders have and have not been made.

74. The Tribunal has decided that there should be no order suppressing the name or identifying details of Dr Rabih. The principles of open justice and other matters referred to above outweigh the personal circumstances that Dr Rabih has advanced. There has been no real evidence provided about any significant effect that

---

[25] MPDT 342/02/95C
[26] 505/Nur12/222P

publication of Dr Rabih's name will have on members of his family other than Dr Rabih's own personal assessment of the position.

75. Any consequences for Dr Rabih in his professional capacity or his business or staff as a consequence of the publication of his name will be a consequence that he must face given the events that have been found by the Tribunal to have occurred. It is in the interests of Dr Rabih's present patients and any future potential patients to know of the findings of the Tribunal, the facts of the matter and the reasons behind the penalty that has been imposed.

76. There is a risk that, if Dr Rabih's name and identifying details are suppressed, other practitioners would be unfairly impugned by the process. Although the submission was made that that could be overcome by also suppressing details which might indicate the location of the practice or the like, that is not, in the view of the Tribunal, where the emphasis should lie. There should be no impugning of other practitioners and the best way to achieve this is by publication.

77. The question of rehabilitation is important and the cases where this has been emphasised have been noted. The case of *S* referred to above resulted in name suppression but only because there was significant medical evidence about the effect that publication of name would have on former patients; along with evidence concerning the vulnerability of family members.

78. The Tribunal does not consider that the time that has passed since the events in any way mitigates against publication of Dr Rabih's name and details.

79. The Tribunal has decided that the interim order for suppression of name and identifying details should continue for the same period that applies to the commencement date of the suspension order and for the same reasons.

Result and orders

80. Dr Rabih is censured pursuant to section 101(1)(d) of the Health Practitioners Competence Assurance Act 2003.

81. The Tribunal orders, pursuant to section 101(1)(b) of the Health Practitioners Competence Assurance Act 2003, that the registration of Dr Rabih as a dental practitioner be suspended for 3 months from the date 2 months after this decision is notified to the parties, that is 4 days after it is posted to them .

82. The Tribunal orders pursuant to section 101(1)(f) of the Health Practitioners Competence Assurance Act 2003 that Dr Rabih pay a contribution towards the costs and expenses of the investigation, inquiry and prosecution of the Charge and the hearing in the sum of $50,000.00 to be divided equally between the PCC and the Tribunal.

83. The Tribunal declines the application for permanent suppression of the name and identifying particulars of Dr Rabih but extends the interim order until the date 2 months after this decision is notified to the parties, that is 4 days after it is posted to them.

84. The Tribunal directs that a copy of this decision and a summary of it be published on the Tribunal's website. The Tribunal further directs that a notice stating the effect of the Tribunal's decision be published in the newsletter of the Dental Council (section 157 of the HPCA Act).

Dated at Auckland this 11th day of August 2014

.....

David M. Carden
Chairperson
Health Practitioners Disciplinary Tribunal