DENTAL COUNCIL OF NEW ZEALAND
Te Kaunihera Tiaki Niho o Aotearoa

· DENTISTRY · DENTAL HYGIENE · CLINICAL DENTAL TECHNOLOGY · DENTAL TECHNOLOGY · DENTAL THERAPY ·

Level 13, Mid City Tower, 139 Willis Street Wellington 6011
PO Box 11649, Manners Street, Wellington 6142, New Zealand
Telephone: 64 4 381 6816 Facsimile: 64 4 802 4831
Email: gayfraser@hpdt.org.nz

DECISION NO.: 03DC08/01C

IN THE MATTER of the Dental Act 1988

AND

IN THE MATTER of disciplinary proceedings against

DR G, Dentist of XX

BEFORE THE DENTISTS DISCIPLINARY TRIBUNAL

TRIBUNAL: Dr Philip Coote (Chair)
Dr Warwick Ross, Dr Cathrine Lloyd, Ms Moana Avia (Members)

Mr John Upton QC (Legal Assessor)

Ms Gay J Fraser (Executive Officer)

Introduction

1. On 27 May 2009 the Complaints Assessment Committee ("CAC") laid a disciplinary charge against Dr G with the Tribunal under the Dental Act 1988 alleging that he excessively sedated and sexually abused three female patients while treating them.

2. In Decision No 02/DC08/01C dated 22nd day of April 2010 the Tribunal found the charge proved in respect of one patient, Ms N and as a result found Dr G guilty of professional misconduct.

3. The Tribunal's substantive decision should be referred to for the full context and the findings.

4. Written submissions as to penalty and name suppression have been filed and were considered by the Tribunal on 9 September 2010.

Penalties available to the Tribunal

5. The penalties available to the Tribunal for a finding of professional misconduct are set out in s55(1) of the Dental Act 1988:

   5.1. The removal of the name of the dentist from the Register.

   5.2. The registration of the dentist may be suspended for a period not exceeding 12 months.

   5.3. The dentist may practise subject to the conditions specified in the Tribunal's order. Such conditions may be imposed for a period not exceeding 3 years.

   5.4. The dentist may be fined.

   5.5. The dentist may be censured.

Submissions for the Complaints Assessment Committee:

6. Counsel for the CAC submitted:

6.1. That the offending was at the top end of possible offending of this nature. The conduct was predatory as Dr G had over-sedated the patient to enable him to touch the patient to satisfy his own sexual needs. It was more serious conduct than the other decided cases involving sexual misconduct and excessive sedation, which did not involve actual contact with the practitioner's body.

6.2. Consistency with other cases indicated that removal of Dr G's name from the register is the appropriate penalty to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.

6.3. Dr G's conduct was aggravated by the breach of trust, the vulnerability of the patient, the nature of the offence and the means of offending which reduced the chance of detection. In the CAC's view there were no mitigating factors, and it noted that Dr G had not accepted the offending.

Submissions for Dr G:

7. Counsel for Dr G submitted:

7.1 Removal of Dr G's name from the Register is neither reasonable nor appropriate. The purpose of such an order is to protect the public but Dr G is no longer a risk to the public as:

7.1.1. There have been no other complaints since Ms N complained.

7.1.2. Dr G stopped administering sedation immediately following Ms N's consultations. He does not intend ever using sedation again. Since then he has always had a chaperone present with female patients.

7.1.3. References show the offending to be completely out of character.

7.1.4. A psychiatric report shows that he poses no risk to the public.

7.2 An order for removal is not required for the purposes of maintaining standards, or deterrence. Even without considering any other penalties, an adverse finding of this nature is sufficient to maintain standards as well as deter Dr G and any other professionals from engaging in this behaviour.

7.3 A penalty falling short of erasure will be sufficient to maintain consistency with decided cases.

7.4 Lesser penalties, such as suspension with conditions and a censure would achieve the purposes intended by the law.

Legal Principles as to Penalty

8. In determining the appropriate penalty, the Tribunal has borne in mind that disciplinary proceedings in a professional context serve a variety of purposes, which the Tribunal summarises as follows:

8.1 Protecting the public is the central focus of any disciplinary proceedings[1]. In *Z v Complaints Assessment Committee* the Supreme Court said that:

> *"It [a disciplinary proceeding] is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interests, such standards are met in the future"*[2].

8.2 Disciplinary proceedings are also important in the maintenance of professional standards as outlined in cases such as *Taylor v General Medical Council*[3] and *Ziderman v General Dental Council*[4].

8.3 Although the CAC submits that punishment is not a purpose of disciplinary proceedings, the Tribunal considers otherwise. A number of cases confirm the punative aspect of disciplinary proceedings, for example *Patel v CAC* [5], *Taylor*

---

[1] [2009] 1 NZLR 1 (SC).
[2] Ibid at para 128.
[3] [1990] 2 All ER 263.
[4] [1976] 2 All ER 344.
[5] CIV 2007 404 1818, HC Auckland, Lang J, 13/8/07, at para 26.

v General Medical Council[6], *Re a Medical Practitioner*[7], and *E*[8]. The deterrent effect of such punishment on the practitioner and others in the profession is important[9].

8.4 Where appropriate, to rehabilitate the practitioner, as referred to in *E*[10].

9. Following the guidance provided by cases such as *E*[11] the Tribunal should consider any alternative short of cancellation, if such would be appropriate in all of the circumstances of the case. In *E*[12], the Health Practitioners Disciplinary Tribunal ("HPDT"), also cited with approval *A v PCC*[13], where the Court discussed the range of sanctions available particularly cancellation and suspension and stated that four points could be expressly derived from the authorities, and implicitly a fifth:

> *"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."*

10. In *Patel v CAC* Lang J emphasised that alternative options should be explored before an order of removal from the register was imposed[14]. Lang J said this was "particularly in relation to cases involving allegations of clinical incompetence rather than outright dishonesty or moral turpitude", *Patel v CAC* having involved incompetent practice.

11. It should be borne in mind that although the penalty in many sexual offences will be the removal of the practitioner's name from the register, the sanction imposed must

---

[6] Supra at note 3, at p 266.
[7] [1959] NZLR 784 at p 164 – 165.
[8] HPDT 245/Nur09/116P, at para 28.3.
[9] Supra at note 5, at para 27.
[10] Supra at note 8, at para 28.4. Also see *Re Fernando* HPDT 1681 Med 108/89P, 2/7/2008.
[11] Supra at note 8, at para 31.
[12] Supra at note 8, at para 31.
[13] CIV 2008 404 2927, HC, Keane J, at para 81.
[14] Supra at note 5, at para 29.

fit all the circumstances. In *Re Patel*[15], the HPDT cited *Giele v The General Medical Council*[16] noting Collins J's statement that:

> *"The GMC has always regarded improper sexual relations with patients as misconduct which is very serious indeed...In the past, erasure was virtually automatic and was almost always upheld by the Privy Council on appeal*[17].
>
> ...
>
> *I do not doubt that the maintenance of public confidence in the profession must outweigh the interests of the individual doctor. But that confidence will surely be maintained by imposing such sanction as is in all the circumstances appropriate. Thus in considering the maintenance of confidence, the existence of a public interest in not ending the career of a competent doctor will play a part"*[18].

12. However, greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual[19]. Similarly, allowing a medical professional to practise under suspension and conditions must not be at the expense of public protection. In *B v B* the High Court held:

> *"A Disciplinary Tribunal should not permit continuance of professional practice, even under supervision and subject to conditions and counselling, if it believes that existing and future patients are at risk of a repetition of the former offending"*[20].

13. In reaching any penalty the Tribunal should have some regard to maintaining consistency with other cases to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large,[21] although, Randerson J noted that "absolute consistency is something of a pipe dream" and that cases are "necessarily fact dependent"[22].

Discussion

---

[15] 59/Med06/36D at paras 70 and 71.
[16] [2005] EWHC 2143.
[17] Ibid at para 21.
[18] Ibid at para 29.
[19] *Patel v The Dentists Disciplinary Tribunal*, HC Auckland, AP 77/02 Randerson J, at para 71.
[20] HC Auckland, AP 77/02 Blanchard J, 6/04/93, at p.99
[21] Supra at note 18, at para 31.
[22] Supra at note 18, at para 31.

14. The Tribunal considers that there were the following aggravating factors in the present case:

14.1. That the offending was serious sexual misconduct.

14.2. It was a breach of trust as it occurred during the course of Dr G's practice as a health professional.

14.3. The means of offending reduced the chance of detection and placed Ms N in a vulnerable position.

14.4. Dr G does not accept that the offending took place.

15. The Tribunal considers that there were the following mitigating factors:

15.1. It has been almost 10 years since the offending took place and there have been no further complaints since that time.

15.2. Dr G has changed his practice as he no longer practises sedation and does not intend practising it again, and he has a chaperone present during his treatment of female patients.

15.3. The Tribunal gives some weight to the many excellent references Dr G has provided from a number of colleagues and one patient saying that the offending is out of character for Dr G.

16. For the sake of completeness the Tribunal records that it has not taken into account the CAC's contention that six other women had made complaints against Dr G. The topic was introduced in cross examination in the substantive hearing where the CAC sought details of the percentage of cases that Dr G had where hallucination may have been an explanation. The Tribunal agrees with Mr Upton's memorandum that the questioning that took place on this topic elevated it to more significance than is justified.

Removal from the Register or suspension?

17. The Tribunal deliberated carefully about whether or not Dr G's name should be removed from the Register. The most significant aspect of penalty is that the public should be protected. After having regard to all the circumstances of the case a majority of the Tribunal was satisfied that removal from the Register is not warranted in this case. The Tribunal places significant weight on the following factors:

17.1. Had this case been decided soon after Ms N's complaint, Dr G's chances of having his name removed from the Register would have been significantly higher as there would have been no evidence to suggest the public would be safe. No matter the reasons for the delay in hearing this matter, the fact is that the time lapse has worked in Dr G's favour as no new complaints have been made.

17.2. As sedation was the method that enabled him to offend, the fact that he no longer provides sedation to patients indicates that he no longer has the means to offend. A psychiatric report provided by Dr Phil Brinded confirms this. After interviewing Dr G, Dr Brinded concludes that the changes Dr G has made to his practice means that Dr G is not in a position to replicate the offending[23]. As a result Dr Brinded considers that Dr G poses no material risk to the public[24].

17.3. Dr G has a chaperone when treating female patients. The presence of the third party must mean that the chances of this happening again are very, very low indeed. This is particularly so when examined in light of the factors outlined in 17.1 and 17.2.

18. A majority of the Tribunal considers that an order of suspension with conditions will be sufficient to protect the public given the reasons outlined in 17.1 to 17.3. Taking its cue from *A v PCC*, the Tribunal considered that suspension is a penalty more

---

[23] Appendices attached to Dr G's submissions at p 13, paras 3 and 4.
[24] Supra at note 22 at p 14, para 1.

proportionate to the offending given that a charge against only one patient has been proved and that Dr G has taken considerable steps to ensure that this does not happen again.[25] In these circumstances, removal from the register would have been disproportionate.

19. Further the penalty serves to maintain professional standards as it discourages practitioners from falling short of an appropriate standard of professional conduct.

20. The Tribunal also considers that suspension in these circumstances is appropriate to maintain consistency when it reviewed decided cases.

21. The Tribunal considered the cases raised by both counsel that involved over-sedation to be relevant: *Re Gillen*[26] and *General Dental Council Conduct Committee v Gaukrodger*[27]. However, the Tribunal does not accept that either of these cases should mean that Dr G's name should be removed from the register.

22. In *Re Gillen*, Dr Gillen had his name removed from the register for similar offending. However, Dr Gillen had already been found guilty of sexual misconduct on a previous occasion, whereas this is the only charge of sexual misconduct of which Dr G has been found guilty. The Tribunal considers the circumstances of the previous case to be much more comparable with the current situation. It involved Dr Gillen placing his penis in the hand of a partially conscious patient[28]. The Ontario Court of Appeal had upheld the decision of the Divisional Court to suspend Dr Gillen for nine months as a result of the misconduct. It was not until a second charge was heard against Dr Gillen that his name was finally removed from the register.

23. Similarly in *Re Fernando* Dr Fernando's removal from the register for conduct reflecting adversely on his fitness to practise involved sexual misconduct against many complainants[29]. *Re Chand*[30], *Doshi v Southend-on-Sea Primary Care Trust*[31]

---

[25] Supra at note 12.
[26] The Discipline Committee of the College of Physicians and Surgeons of Ontario, 20./06/02.
[27] March 2006, Registration no 76434.
[28] *College of Physicians and Surgeons of Ontario v Gillen*, Ontario Court of Appeal No C8344, 3/5/93.
[29] HPDT 1681 Med 108/89P, 2/07/08.
[30] HPDT 109/Nur06/49P, 11/06/07.
[31] [2007 EWHC 1361 (Admin).

and *Dr Chyc v General Medical Council*[32] also involved either multiple offending or offending against more than one person.

24. In *Gaukrodger* the practitioner concerned had already been found guilty of a criminal assault and did not attend the disciplinary hearing, whereas Dr G has not been found guilty of criminal charges and provided comprehensive submissions on penalty.

25. In *B v B* a dentist who sexually touched four patients had conditions imposed on his practice but was neither suspended nor removed from the register[33]. Dr B's offending involved four patients over a period of time. Perhaps it is because the Tribunal is, in 2010, reviewing a case decided 17 years ago; nevertheless the Tribunal is surprised that suspension was not imposed in *B v B*, given the gravity of the offending.

26. The over-sedation in this case means that suspension as well as imposing conditions on Dr Gs' practice is inevitable as it rendered the patient more vulnerable during the treatment. However, given the factors already outlined, the Tribunal considers that going one step further and removing Dr G's name from the register would be a disproportionate penalty.

27. The Tribunal took into account whether it should consider a penalty less than removal from the register (given Lang J's statement in *Patel v The Dentists Disciplinary Tribunal* that removal from the register should be a penalty of last resort) applied particularly to cases of clinical incompetence rather than cases involving "moral turpitude". However, the Tribunal considers that this principle should be extended and applied in Dr G's case. First, the Court did not bar the Tribunal in considering a penalty less than removal from the register in cases other than clinical incompetence and secondly and very importantly, like Dr Patel, Dr G has taken significant steps to prevent the previous misconduct from occurring.

28. Although a rather minor consideration, the Tribunal has also borne in mind there is some public interest in allowing a competent health professional to remain on the

---

[32] [2008] EWHC 1025 QB.
[33] Supra at note 19.

register particularly when the risk of reoffending is low[34]. While Dr G's competence as a dentist was not under discussion, the Tribunal considers that Dr G is likely to be a competent practitioner given the references from other colleagues, especially from the two orthodontists who both made particular comment about his competency.

29. The Tribunal has already found that punishment is a factor that the Tribunal should take into account in its decision and suspension in this case is a sufficient and proportionate penalty when all the circumstances of the case are taken into account.

30. The Tribunal debated the length of suspension. Given the factors outlined in 17.1 to 17.3, it determined that the maximum of 12 months was too long a period but even though a suspension will have a grave effect on Dr G, the 6 months proposed by Dr G is too short.

31. Therefore the Tribunal orders that Dr G is suspended for 9 months to take effect from Thursday 20 January 2011, which is three months from the date of this order. This enables Dr G to organise his affairs, particularly in relation to organising a locum.

32. A minority view was expressed by the Chairperson, Dr Coote, who would have had Dr G's name removed from the register, particularly in view of the seriousness of the offending.

Conditions

33. To ensure there is no repetition of the misconduct, the Tribunal imposes a number of conditions on Dr G's practice as follows:

33.1. That for a period of three years following the end of the suspension, Dr G:

33.1.1. Must not administer sedation in any form to any patients.

---

[34] See *Giele v The General Medical Council*, cited in *Re Patel* supra at note 14 and 15. This is in contrast to *B v B* supra at note 19 where Blanchard J said that competency should not be taken into account if the Tribunal believes that existing and future patients are at risk of a repetition of the former offending.

33.1.2. Must ensure that a chaperone or third person is present at all consultations and at all times, including emergencies with female patients. Although Dr G asked that there be an exception for emergencies, the Tribunal considers that if Dr G cannot find a chaperone in an emergency, he is to refer the patient elsewhere.

33.2. Dr G must undertake counselling or therapy with such counsellor or therapist no later than Friday 19 November 2010 date (one month from the date of the order) as is approved by the Chairperson of the Dental Council. The course of counselling or therapy is to be for a period of no more than six months. The counsellor or therapist is to report to the Dental Council within three months and again at the end of the period as to whether Dr G has attended counselling as required and whether in the counsellor's or therapist's opinion counselling has been unsuccessful to such an extent that there is a significant risk of a repetition of the conduct of which the Tribunal has found Dr G guilty.

34. Dr G may consider the imposition of conditions for three years on his practice to be excessive. When considering the imposition of conditions the Tribunal was of the opinion that Dr G should never sedate patients again and should always have a chaperone present when he undertakes treatment of patients. However, the Tribunal cannot impose permanent conditions on Dr G's practice, and so determined that it should impose them for the maximum period of time it was able.

Censure

35. The Tribunal orders that Dr G be censured. The Tribunal is bound to express its strong disapproval of Dr G's conduct.

Costs and expenses

36. The conventional starting point in any award is 50% of the total reasonable costs,

with a discretion then to be exercised, increasing or decreasing that amount depending on the particular circumstances of the case[35].

37. The costs associated with this matter have been very high, $293,249.29. This includes the CAC's costs.

38. The Tribunal has determined that Dr G should pay 30% of the costs, that is say, $87,975.00. It has taken the following into account:

38.1. The offending against Ms N was serious. Nevertheless, it should be noted that what has been proved is one incident of sexual misconduct, and no more than that.

38.2. Most significantly, the Tribunal has found the particular in respect of only one of the three complainants proved. As a result, the Tribunal considers that an award of 50% is too high and that the award of costs should be reduced. Had a charge involving only the one particular in respect of Ms N been brought, the costs may well have been somewhat reduced.

38.3. The Tribunal has no information about Dr G's financial situation. However, the xx dental practice is the G family's sole source of income. Clearly then, the term of suspension will have a significant impact on Dr G's income and his family situation. Weighing the considerable cost of prosecution as well as all the other factors, the Tribunal considers that 30% is a proper contribution to costs.

Name suppression

39. Dr G had his name suppressed throughout these proceedings. The issue for the Tribunal to consider is whether that order for his name suppression should be lifted.

40. The starting point is the statutory presumption in s62(1) of the Dental Act 1988 that the Tribunal's hearings are normally to be held in public.

---

[35] *Cooray v Preliminary Proceedings Committee*, AP 23/94, HC Wellington, Doogue J, 14/09/95.

41. The Tribunal must take into account a number of public interest considerations which are helpfully set out in *Zimmerman v Director of Proceedings*[36]:

41.1. Openness and transparency of the disciplinary process. This is a very important consideration as the starting point in health disciplinary proceedings was the principle of open justice;

41.2. Accountability of the disciplinary process;

41.3. The public interest in knowing the name of a health professional charged with a disciplinary offence;

41.4. The importance of freedom of speech and the right enshrined in s14 of the New Zealand Bill of Rights Act 1990; and

41.5. The extent to which other dentists might be unfairly impugned if Dr Zimmerman's application for permanent name suppression were granted.[37]

42. Weighed against that are the factors set out by Dr G's counsel supporting continued name suppression:

42.1. The harm that would result to Dr G and his extended family as the G family is well known in the South Island, and is the only xx family bearing the surname "G". Further, reputation is highly important in the xx community and publication will cause irreparable harm to the G family name.

42.2. There are many G family members who are in various medical professions including an uncle and cousin who are dentists. Further, there is a dental technician in xx who has the same first and last name.

42.3. Irreparable harm will be caused to Dr G's immediate family in the event that the name suppression order is not continued. In addition, Dr G has a brother whose ill health may be exacerbated by the publication of Dr G's name.

---

[36] HC Wellington CIV 2006 485 0000761 29 May 2007
[37] Ibid at paras 11 to 13.

42.4. **Suppressed by order of the Tribunal.**

43. **Suppressed by order of the Tribunal**

44. The Tribunal finds that Dr G's present interim name suppression should be lifted. Dr G's misconduct was serious and there is a very real interest in having this misconduct out in the open so that the public knows the identity of the practitioner. The Tribunal acknowledges the very real effects that this will have on Dr G and his immediate family; however, the Tribunal considers that this does not outweigh the openness and accountability that should govern the disciplinary process.

45. There is the possibility that publication may mean there is confusion with other health professionals with the same surname. However, retaining suppression continues to cast suspicion on xx dental practitioners in general. The Tribunal considers that should Dr G's name be published, this will clarify which dental practitioner in xx is the person guilty of the offence the subject of the present charge. The Tribunal considers this benefit outweighs the possible confusion with other Gs in health professions. The Tribunal considers that any confusion is possible but not likely.

46. No matter the ethnicity of a health professional named G (as G is also a xx as well as xx surname) the publicity the case has received has focussed on the fact that the health professional concerned is a dentist. Therefore there should be no confusion with anybody by the name of G not practising dentistry.

47. The Tribunal understands that Mr G's brother is a dentist. However, he practises in xx not xx.

48. There is a dental technician in xx with the same name. The likelihood of confusion is higher, but the Tribunal notes that the other person is a Mr G not a Dr G, and even if he is in a related profession he does not practise as a dentist. Further the likelihood of confusion is not outweighed by the other factors: the openness of the proceedings and the lifting of suspicion from xx dentists in general.

49. **Suppressed by order of the Tribunal.**

50. **Suppressed by order of the Tribunal.**

51. **Suppressed by order of the Tribunal.**

52. **Suppressed by order of the Tribunal.**

53. The Tribunal orders that paragraphs 42.4, 43, 49, 50, 51 and 52 of this decision are not for publication.

Conclusion

54. The penalties imposed by the Tribunal are:

54.1. Dr G is suspended from practice for a period of nine months from 20 January 2011 with the following conditions to apply for three years thereafter:

54.1.1. Dr G must not administer sedation in any form to any patients.

54.1.2. Dr G must ensure that a chaperone or third person is present at all consultations and at all times, including emergencies with female patients.

54.1.3. Dr G must undertake counselling or therapy with such counsellor or therapist as approved by the Chairperson of the Dental Council. The course of counselling or therapy is to begin no later than Thursday 19 November 2010 date (one month from the date of the decision) and to be for a period of no more than six months. The counsellor or therapist is to report to the Dental Council within three months and again at the end of the period as to whether Dr G has attended counselling as required and whether in the counsellor's or therapist's opinion counselling has been unsuccessful to such an extent that there is a significant risk of a repetition of the conduct of which the Tribunal has found Dr G guilty.

54.2 Dr G is censured.

54.3 Dr G is to pay 30% of the total costs of the hearing amounting to $87,975.

54.4 An interim order suppressing Dr G's name for a further period of one month is made so that Dr G may protect his position in this regard with any necessary application to the High Court. At the end of one month, that is, Friday 19 November at 5.00 pm, the interim order will expire should Dr G take no further action on this issue, and the order prohibiting permanent publication of Dr G's name is to be lifted at that time.

55. Permanent suppression orders are made in relation to all other people referred to in the previous interim suppression order.

DATED at Wellington this 20th day of October 2010

.....

PAC Coote
Chairperson
Dentists Disciplinary Tribunal