IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2012-419-001735
[2013] NZHC 933

IN THE MATTER OF	the Health Practitioners Competence Assurance Act 2003
BETWEEN	DR ALBERT MANAHAI KEWENE Appellant
AND	A PROFESSIONAL CONDUCT COMMITTEE OF THE DENTAL COUNCIL CONSTITUTED UNDER THE HEALTH PRACTITIONERS COMPETENCE ASSURANCE ACT 2003 Respondent

Hearing: 24 April 2013

Counsel: R Harrison for the Appellant
A Miller for the Respondent

Judgment: 1 May 2013

[RESERVED] JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 1 May 2013 at 11.30 am
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Distribution:
R Harrison: richard@harrisonstone.co.nz
A Miller: anita.miller@clarolaw.co.nz

Introduction

[1] The appellant, Dr Kewene, has appealed a decision of the Health Practitioners Disciplinary Tribunal ("the Tribunal") declining an application made by him for permanent name suppression. The decision is dated 21 December 2012.

[2] The respondent, the Professional Conduct Committee of the Dental Council of New Zealand ("the Committee"), opposed Dr Kewene's application for permanent name suppression before the Tribunal. It has sought to uphold the Tribunal's decision on this appeal.

Background

[3] Dr Kewene has been a registered dentist since 25 June 1965. He is now 73 years old and he has practised as a dentist for the last 47 years. He was the first Māori dentist.

[4] Dr Kewene is a member of the Tainui Tribe.

[5] On 1 July 2006, Dr Kewene was employed by Raukura Hauora O Tainui ("Raukura"). Raukura is a charitable trust, which provides affordable dental services to Māori and low income earners. This service is provided at a number of locations, including Hamilton. Dr Kewene is based in Hamilton

[6] On 30 September 2011, Dr Kewene's annual certificate, entitling him to practice as a dentist, was due to expire. It required renewal. The Dental Council posted out renewal applications on 2 September 2011. It also sent an email reminder to all dentists on 20 September 2011. Despite this, Dr Kewene did not renew his practising certificate promptly.

[7] On 6 October 2011, the Deputy Registrar of the Dental Council wrote to Dr Kewene, reminding him that he needed to renew his practising certificate, and noting that his practising certificate had expired at midnight on 30 September 2011. On 17 October 2011, a Dental Council staff member rang Dr Kewene about the

renewal and on 19 October 2011, Dr Kewene sent an email to the Council advising that the renewal would be forwarded to the Council on 19 October 2011.

[8] On 25 October 2011, the Dental Council received a cheque from Raukura in payment of the fees payable for Dr Kewene's new practising certificate. The application form for renewal had been completed by Dr Kewene, and it was ready to send, but for some reason, it was not sent with the cheque. On 26 October 2011, the Dental Council acknowledged receipt of the cheque, but advised that the application form itself had not been included. Raukura forwarded the application form to the Dental Council on 3 November 2011.

[9] On 8 November 2011, Dr Kewene was informed that delay in renewing the practising certificate had been referred to the Dental Council, so that it could decide whether to refer it to the Committee. It did so, and on 17 April 2012, Dr Kewene attended a hearing of the Committee by telephone. Following that hearing, on 13 July 2012, a charge was laid by the Committee. The charge was laid pursuant to s 91(1)(b) of the Health Practitioners Competence Assurance Act 2003. It was alleged that Dr Kewene, as a registered dentist, had practised the profession of dentistry between 1 October 2011 and 7 November 2011, when he did not hold a current practising certificate. This is a ground on which a health practitioner, including a dentist, can be disciplined under s 100(1)(d) of the Act.

[10] The charge was heard by the Tribunal in Hamilton on 23 November 2012. Dr Kewene appeared. He was represented by counsel and he defended the charge. He had filed a written brief of evidence. He gave oral evidence and he was cross-examined. Evidence was also given in support by a Mr McClean, representing Raukura as Dr Kewene's employer. There was no dispute as to the basic facts. Indeed, there was an agreed summary of facts. It did not constitute an admission of the charge however. It was denied by Dr Kewene.

[11] The Tribunal was satisfied that Dr Kewene had practised his profession between 1 October 2011 and 4 November 2011 when he did not hold a current practising certificate. In particular, the Tribunal found as follows:

(a) That Dr Kewene had supervised dental students between 1 October 2011 and 27 October 2011. This supervision extended to reviewing X-rays and treatment plans, signing prescriptions, and on occasion, working on patients, to show students what to do. The Tribunal was satisfied that Dr Kewene was "involved in sufficient activity of supervision to have fallen within the definition of the Scope of Practice which required that he had the current [annual practising certificate] while he was doing this".

(b) Further, the Tribunal found that Dr Kewene had practised for a three-day period, from 31 October 2011 to 2 November 2011 as a dentist. He had seen patients, and provided treatment to those patients, at a clinic in Thames.

[12] Following submissions as to penalty, the Tribunal ordered Dr Kewene to pay a fine of $500, and $5,000 towards the costs and expenses of the investigation, inquiry and prosecution of the charge.

Name Suppression

[13] Dr Kewene made an application for permanent suppression of his name, and the name of his employer, pursuant to s 95(2) of the Act. There was no separate application in this regard by Raukura.

[14] The Tribunal dealt with this matter in its decision. It referred to s 95, and noted the presumption created by that section that its hearings are to be in public. It considered that this endorsed the principle of open justice. It went on to observe that s 95(2) gave it a discretion to grant name suppression. It referred to the wording of the section, and noted that the test is whether it is desirable to prohibit the publication of the name of the dentist in question, and that this required it to consider the interest of any person and the public interest. It recorded that the public interest generally required that the name of the practitioner be published in the majority of cases. It cited various authorities in this regard. It then referred to various matters advanced on Dr Kewene's behalf. It noted that the only evidence put forward to

support the application was that in the affidavits of Dr Kewene and of Mr McClean. It did not accept that there was sufficient evidence of any detrimental effect on Dr Kewene's position as a role model, or on his standing in the community. Nor did it accept a submission made that its decision might be misinterpreted. It recorded that its decision must speak for itself. It noted that Dr Kewene had not renewed his annual practising certificate when he should have, but weighed against this finding, the significant mitigating factors that it had referred in its decision. It suggested that any publication of the decision should refer to those important matters.

[15] The Tribunal recorded that Dr Kewene had served the community and his profession well over many years of practice, and that a small lapse in relation to the renewal of his annual practising certificate should not interfere with his reputation. It emphasised that any publication of the decision should emphasise in a balanced way the decision of the Tribunal and the reasons behind it. It noted as follows:

> Other members of the profession, both senior and respected or junior and new to the profession, will learn that annual practising certificates must be renewed in a timely way and that there are consequences for failure to do so. This offending is very much at the lower end of the scale and the decision and any publication of it should reflect that.

[16] The Tribunal declined Dr Kewene's application for permanent name suppression.

Submissions

[17] Mr Harrison for Dr Kewene emphasised the following:

(a) Dr Kewene's conduct was very much at the lower end of the scale;

(b) If his name is published, disproportionate harm will be caused to Dr Kewene both personally and professionally;

(c) Dr Kewene is in the twilight of a very successful career. To date, that career has been unblemished. Publication would detract from his unblemished career, and mean that it would end on a sour note;

(d) Dr Kewene is of Kaumatua status within Tainui, and is very much seen as a role model by his people;

(e) Any publication is unlikely to reflect the fact that the offending is very much at the lower end of the scale. Any headline and accompanying byline could focus on the harmful aspects of the decision;

(f) The level of offending in Dr Kewene's case is lower than that in any reported decision of the Tribunal to date. Non publication has been ordered in respect of others who have practised for periods without having the requisite annual practising certificate;

(g) There could be adverse consequences for Raukura, given media interest in Tainui and its affairs generally. This could affect the work it is doing;

(h) There is nothing to be gained by publication of Dr Kewene's name. His offending does not call into question either his competence or his professionalism. There is no benefit in the public knowing Dr Kewene's name;

(i) There can be no suggestion that any other practitioner would be unfairly impugned by non publication;

(j) The deterrent effect of the decision will remain, whether or not Dr Kewene's name is published.

[18] Ms Miller for the Professional Conduct Committee, supported the Tribunal's decision. She argued as follows:

(a) The starting point is s 95 of the Act;

(b) The Tribunal had regard to the possibility that its decision might be misinterpreted, and it was entitled to reach the view that its decision had to speak for itself;

(c) The Tribunal had regard to the possibility of a detrimental effect on Dr Kewene's standing, and on his position as a role model. It was entitled to reach the conclusion that the lapse the subject of the charge should not interfere with his reputation;

(d) There was no evidence before the Tribunal as to the nature and extent of any detrimental effect on Dr Kewene, his family, or his employer, if publication occurs. The weight to be given to these various factors was a matter for the Tribunal. There is no tenable basis for challenging its decision;

(e) Distress and embarrassment associated with disciplinary charges is not uncommon. More is necessary before permanent suppression can be seen as desirable. The factors identified by Dr Kewene cannot be regarded as being anything more than that which might ordinarily be expected in the circumstances;

(f) The accountability of the disciplinary process is important. The publication of a person's name is generally a part of the transparency of the disciplinary process;

(g) The Tribunal did not fail to consider any of the various matters raised by Dr Kewene. It did not consider any irrelevant matters and it cannot be said that its decision was plainly wrong.

Analysis

The appropriate basis on which to consider the appeal

[19] Any order in relation to name suppression is made under s 95(2) of the Act. Section 106(2) of the Act provides for a right of appeal to this Court from any such order, and s 109(2) confirms that any appeal is by way of rehearing.

[20] The appropriate approach to appeals by way of rehearing was discussed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[1] The following principles can be derived from that decision:

(a) The appellant bears the onus of satisfying the appellate Court that it should differ from the decision under appeal;

(b) It is only if the appellate Court considers that the appeal decision is wrong that it is justified in interfering with it;

(c) The appellate Court has the responsibility of arriving at its own assessment on the merits of the case;

(d) No deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because, for example, credibility is important; and

(e) The appellate Court is entitled to use the reasons of the first instance decision maker to assist it in reaching its own conclusions, but the weight the Judge places on them is a matter for the Court.

[21] The position is summarised in the judgment of Elias CJ as follows:[2]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the

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1 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
2 Ibid, at [16].

> appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence**,** rather than forming its own opinion.

[22] A general appeal by way of rehearing is to be distinguished from an appeal against a decision made in the exercise of a discretion. In the latter case, the criteria against which an appeal is determined is stricter. An appellant must show an error of law or principle, or that the Tribunal or Court whose decision is challenged took into account irrelevant considerations or failed to take into account relevant considerations, or that its decision was plainly wrong. This limited basis for appellate review of a discretionary decision was articulated by the Court of Appeal in *May v May*.[3] This decision predated *Austin, Nichols*, but the principle that appeals from the exercise of a discretion should be approached more strictly than general appeals was recognised in *Austin, Nichols*. It has subsequently been confirmed both by the Court of Appeal[4] and by the Supreme Court.[5] It has, however, been acknowledged that the distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. The fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary.[6]

[23] Counsel differed as to the appropriate test to be applied in considering the present appeal:

(a) Mr Harrison for Dr Kewene argued that the Supreme Court's decision in *Austin Nichols* is applicable, and that it suffices if I consider that the decision reached by the Tribunal was wrong, notwithstanding that the Tribunal's decision was in relation to a matter on which reasonable minds might reasonably differ.

(b) Ms Miller for the Committee argued that the *May v May* approach applies. She submitted that the Tribunal's decision whether or not to

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3 *May v May* [1982] 1 NZFLR 165 at 170 (CA).
4 *Blackstone v Blackstone* (2008) 19 PRNZ 40 (CA).
5 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.
6 Ibid, at [32].

> suppress Dr Kewene's name involved the exercise of the discretion, and the decision should not be overturned, unless it can be demonstrated that the Tribunal made an error of principle, considered irrelevant matters, failed to consider relevant matters, or was plainly wrong.

[24] Unfortunately, there is conflicting High Court authority as to the appropriate standard of scrutiny to be applied in appeals from decisions of the Tribunal on name suppression. In essence, these authorities turn on the Court's assessment of whether a deliberative judgment was required, or whether the Tribunal has exercised a discretion.

[25] Prior to *Austin Nichols*, the Courts generally considered that the *May v May* approach defined the appropriate standard of appellate review in name suppression appeals from the Tribunal. By way of example, in *Director of Proceedings v C*,[7] Clifford J reviewed the authorities as they then stood and adopted the *May v May* approach. He noted that the Court on appeal should not interfere if it is simply a matter of giving different weight to the factors required to be considered, and observed that an appellate Court should not substitute its own views for those of the Tribunal. He commented that the threshold for a finding that a decision is plainly wrong has been set relatively high.[8]

[26] Following *Austin, Nichols*, the approach endorsed there by the Supreme Court has been followed in a number of appeals from the Tribunal or from similar bodies not involving name suppression, but rather, challenges to findings of misconduct.[9]

[27] In *Anderson v The Professional Conduct Committee of the Medical Council of New Zealand*,[10] Gendall J took the view that the grant of a name suppression order is "a sentencing exercise", requiring deliberative judgment, rather than the exercise

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7 *Director of Proceedings v C* HC Wellington CIV 2007-485-810, 24 October 2007.

8 Ibid, at [59]–[61].

9 See, for example, *Dr E v Director of Proceedings* (2008) 18 PRNZ 1003 (HC) at [16]-[20]; *A v Professional Conduct Committee* HC Auckland CIV 2008-404-2927, 5 September 2008 at [65].

10 *Anderson v Professional Conduct Committee of the Medical Council of New Zealand* HC Wellington CIV 2008-485-1646, 14 November 2008.

of a discretion.[11] He noted that the Tribunal has to be satisfied under s 95(2) that it is desirable to order suppression. He adopted the *Austin, Nichols* approach, and stated that if the Court concludes that the Tribunal was wrong to decline name suppression, then it should intervene. This approach was followed in another name suppression appeal — *Davey v Professional Conduct Committee of the New Zealand Nursing Council*.[12]

[28] In another context, the *May v May* approach was endorsed in a name suppression appeal by the Supreme Court in *Rowley v Commissioner of Inland Revenue*.[13] The Court was there faced with an application for leave to appeal a decision of the Court of Appeal in relation to name suppression made under the Crimes Act. The Court of Appeal had adopted the *May v May* approach. So had the High Court. The Supreme Court declined leave to appeal and commented that there was no occasion to revisit the conclusion reached on the proper approach in the Court of Appeal and the High Court.[14]

[29] Subsequent appeals against name suppression decisions have generally followed the *May v May* approach.[15] These cases however were not appeals under ss 106(2) and 109(2) of the Health Practitioners Competence Assurance Act.

[30] The competing authorities were considered in some detail by Collins J in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*.[16] The appeal in this case was under the Health Practitioners Competence Assurance Act. However, it was in relation to the penalty imposed and not in relation to name suppression. Collins J considered the various conflicting High Court judgments, not all of which were name suppression appeals. He noted that the Supreme Court in *Austin, Nichols* cautioned that a different approach may be justified where the decision on appeal involves the exercise of a discretion. He noted that bail appeals and name suppression appeals both involve the exercise of a

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11 At [31].
12 *Davey v Professional Conduct Committee of New Zealand* [2012] NZHC 765 at [7].
13 *Rowley v Commissioner of Inland Revenue* [2011] NZSC 76.
14 Ibid, at [5].
15 See, for example, *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [16]; *J R v Police* [2012] NZHC 3091 at [7].
16 *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

discretion, and preferred the view that in such cases, the obligation is on an appellant to establish that the decision appealed from is plainly wrong. He held that a decision which involves the exercise of a discretion can only be overturned on appeal if the *May v May* criteria are satisfied.[17]

[31] A different conclusion was reached by Chisholm J in *ABC v Complaints Assessment Committee*.[18] This case involved a name suppression appeal under the Health Practitioners Competence Assurance Act. Chisholm J referred to the statutory provision which is in issue in Dr Kewene's case. It requires the Tribunal to ask itself whether it is satisfied that it is desirable to make an order prohibiting the publication of a practitioner's name. If it is so satisfied, then the section provides that the Tribunal may make one of the orders detailed in the section, including an order permanently suppressing the offender's name. Chisholm J considered that the section requires a two-step approach, and that on appeal, the first step falls to be considered by reference to the *Austin, Nichols'* principles. He cited Gendall J's decision in *Anderson*, and agreed with him that the "desirable" component in the statutory provision requires deliberative judgment rather than the exercise of a discretion. He held that it is only if that threshold can be met, that the truly discretionary component comes into play. He rejected a submission advanced by counsel that the two steps effectively merge into one, and held that there are two discrete steps.

[32] I agree with Chisholm J in *ABC*, and with Gendall J in *Anderson.*

[33] In my view, it is necessary to focus on the statutory provision in question. Section 95(2) provides as follows:

> **95 Hearings to be public unless Tribunal orders otherwise**
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> …
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> (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:

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17 Ibid, at [40]–[42].

18 *ABC v Complaints Assessment Committee* [2012] NZHC 1901, [2012] NZAR 856.

(a) an order that the whole or any part of a hearing must be held in private:

(b) an order prohibiting the publication of any report or account of any part of a hearing, 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 a hearing:

(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person.

…

[34] This provision can be contrasted with the statutory provision which the Supreme Court, the Court of Appeal and the High Court were dealing with in *Rowley* . They were dealing with an appeal from a decision made under s 140(1) of the Criminal Justice Act 1985. It stated simply that a Court could make an order prohibiting publication.

[35] Under s 95(2) of the Health Practitioners Competence Assurance Act, the Tribunal is required first to consider whether or not it is desirable to make an order under the section, having regard to the interests of any person and to the public interest. It is then given a discretion to make an order prohibiting the publication of the name of any person. The section requires a two-stage approach.

[36] In my judgment, the *Austin, Nichols* principles apply to the deliberative judgment necessary in relation to the threshold requirement of desirability, and the *May v May* approach applies to the discretionary component, which only comes into play if the threshold requirement of desirability is first met.[19]

[37] Ms Miller submitted to me that the threshold requirement of desirability is inevitably subsumed into the overall exercise of the discretion by the Tribunal. She

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[19] I note the decision of Collins J in *JR v New Zealand Police*, above n 14, referred to me by Ms Miller. In this case, the Court was considering an appeal in relation to name suppression under s 200 of the Criminal Procedure Act 2011. That section provides that the Court may make an order forbidding publication of the name of any person who is charged with, or acquitted of an offence, but that it can only make such an order, if it is satisfied that publication would be likely to cause or lead to various matters detailed in the section. Collins J held at [7] that the *May v May* approach applied. I note that this decision was dealing with an appeal under the Criminal Procedure Act 2011, and not under the Health Practitioners Competence Assurance Act. Moreover, the decisions in *Anderson* and *ABC* are not referred to by Collins J.

argued that it is artificial to draw a distinction between that which is deliberative, and that which is the exercise of a discretion under s 95(2).

[38] I do not accept that submission. It seems to me that the section requires that a decision in relation to name suppression be broken down into two distinct parts. While the matters to be considered may well overlap, the threshold question focuses more on matters of general principle, for example, the public interest and the interests of others, including complainants, and the discretionary element to the decision will focus more on matters personal to the applicant and arising out of the charge, and the Tribunal's findings in relation to it.

[39] Accordingly, in dealing with this appeal, I have considered the threshold question by reference to the *Austin, Nichols* principles, and the exercise of the discretion by reference to the *May v May* principles.

Desirability

[40] The Tribunal did not make an express finding as to the desirability or otherwise of considering a non publication order. Rather, it dealt with the application made by Dr Kewene in the round, and treated the two-step process as one and as involving the exercise of a discretion. It is, however, implicit from its decision that the Tribunal considered that it was desirable to go on to consider whether it should make an order prohibiting the publication of Dr Kewene's name.

[41] In addressing the threshold requirement of desirability, the statute directs attention to the interests of any person, including without limitation the privacy of any complainant, and the public interest.

[42] The starting point when considering an application for name suppression is openness. There is a clear public interest in the transparency of disciplinary proceedings, in the accountability of the disciplinary process, in the public knowing the identity of a health practitioner charged with a disciplinary offence, in the risk of unfairly impugning other health practitioners, and in the rights enshrined in s 14 of the New Zealand Bill of Rights Act 1990.

[43] These matters were appropriately identified and considered by the Tribunal in its decision.

[44] The statutory test of what is desirable is flexible. The interests of any person will include the interests of complainants, or other health professionals whose integrity or practice could be impugned if there is to be permanent name suppression. The statutory expression, "the interests of any person" can also extend to the interests of the applicant health practitioner. The interests of the applicant will also be considered in the second stage of the inquiry, namely whether or not the Tribunal should make an order permitted by s 95(2).

[45] Once an adverse finding has been made against a practitioner, the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases.[20] This will particularly be the case where the offence proved or admitted is sufficiently serious to suffice striking off or suspension from practice.[21]

[46] In the present case, the privacy of complainants was not in issue. The interests of other dentists were considered. So were Dr Kewene's interests.

[47] I am not persuaded that I should differ from the Tribunal's implicit conclusion that it was desirable for it to go on to consider whether or not to make an order prohibiting the publication of Dr Kewene's name. I do not consider that the Tribunal's decision was wrong in this regard.

Was it appropriate to decline to make an order prohibiting the publication of Dr Kewene's name?

[48] The Tribunal considered all of the various matters which were advanced on Dr Kewene's behalf. These included potential harm to his reputation, his position as a role model to Māori, the submission that the detriment arising from publication was disproportionate to the charge, Dr Kewene's standing in the community, the submission that there was no public interest outweighing the prejudicial effects on

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20 *Tonga v Director of Proceedings* HC Christchurch CIV 2005-409-2244, 21 February 2006 at [42].
21 *B v B* HC Auckland 4/92 6 April 1993 at 99.

Dr Kewene and Raukura, and the submission that the interests of the public were not advanced by publication. It noted that there had been an earlier application for interim name suppression and it recorded the concerns expressed on Dr Kewene's behalf at that stage.

[49] It cannot be said that the Tribunal failed to take into account relevant considerations or that it took into account irrelevant considerations.

[50] The Tribunal noted that there was limited evidence to support the application, and it did not accept that there was sufficient evidence of any detrimental effect that might arise in respect of Dr Kewene's position as a role model or his standing in the community. That was a conclusion which was open to it. I have read the affidavits filed. There was very little, other than bald assertion, to support the application for permanent name suppression.

[51] The Tribunal accepted that Dr Kewene had made but "a small lapse" in relation to the renewal of his practising certificate. It is clear from the Tribunal's decision that it did not consider that the offence was particularly serious, and that Dr Kewene's offending was very much at the lower end of the scale. It nevertheless reached the conclusion that publication of his name would not interfere with the reputation he has built up over the years.

[52] The Tribunal did not accept the assertion that its decision might be misinterpreted. It held that its decision, which clearly identified the various mitigating factors relied on, and emphasised the relatively low level of offending had to speak for itself.

[53] I am not persuaded that there was any error of law or principle by the Tribunal, or that its decision was plainly wrong in relation to any of these matters. The conclusion reached by the Tribunal was open to it, on the materials which were before it.

[54] In the circumstances, the appeal is dismissed.

Costs

[55] The Committee seeks costs.

[56] I would invite the parties to try and reach agreement in this regard. The appeal has already been classified as category 2 for costs purposes. It is my preliminary view that costs should be assessed on a 2B basis.

[57] In the event that the parties cannot agree on costs, I direct as follows:

(a) A memorandum as to the costs sought is to be filed and served within 10 working days of the date of this judgment.

(b) Any memorandum in response is to be filed and served within a further 10 working days.

(c) Memoranda are not to exceed five pages.

I will then deal with the issue of costs on the papers, unless I require the assistance of counsel.

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Wylie J