

File No. CN / .

IN THE DENTISTS DISCIPLINARY TRIBUNAL

IN THE MATTER of the Dental Act 1988

AND

IN THE MATTER of a complaint by **MS A** against **NEVILLE JAMES GIBSON** of Auckland, Dentist

TRIBUNAL Dr D Bambery (Chair)
Dr P A C Coote
Ms W Davis

LEGAL ASSESSOR Mr G D Pearson

TRIBUNALS OFFICER Mrs S D'Ath

COUNSEL Ms K McDonald (for Ms A)
Mr A Woodhouse (for Dr Gibson) to 4 September 2002
Dr Gibson (in person) from 4 September 2002

DATE OF HEARING 22 July 2002 to 23 July 2002

DATE OF DECISION 23 July 2002

DATE OF DECISION ON PENALTY 11 November 2002

DECISION OF THE TRIBUNAL

CONSIDERATIONS

The Tribunal received and considered:

- Submissions from Ms K McDonald QC on behalf of the complainant
- A victim impact statement from the complainant.
- Dr Gibson's application for non-publication of the decision of the Tribunal.
- An application from Dr Gibson for a rehearing.
- A Submission from Dr Gibson as to Penalty and costs received by the Tribunal on 10 November 2002.
- A letter from Mr D B Hickson, solicitor, containing a request to delay the Tribunal making a decision on penalty, and a letter from Mr Hindle, a barrister making a similar request.
- Advice of Mr G Pearson, legal assessor.

ISSUES

The Tribunal considered the following issues:

- An application for a rehearing,
- An application for name suppression,
- An application for an adjournment, and
- Penalty and costs.

THE APPLICATION FOR REHEARING

Dr Gibson's request for a rehearing was informal. In it he asserts that he has found the file concerning Ms A's treatment. The Tribunal's view is that this is consistent with the finding that Dr Gibson probably deliberately failed to search for the records or withheld them. There is no evidence of what is contained in the file, or how it would have assisted his case.

Ms McDonald raised the issue of the Tribunal now being *functus officio* with no statutory power to order a rehearing. The Tribunal's decision is not to order a rehearing. This decision would stand even if it did have the power to do so.

Although there has been adequate time the Tribunal has received no information or submissions which justifies granting a rehearing. The Tribunal is not satisfied either:

- that the information was not reasonably available when the hearing took place, or
- that the information assists Dr Gibson.

The most that can be said is that Dr Gibson has made such claims, but not substantiated them with information, reasoning, or formal evidence.

NAME SUPPRESSION

After carefully weighing the public interest against the interests of Dr Gibson the Tribunal makes no order regarding name suppression. In reaching this decision the Tribunal considered:

- The hearing proceeded with no name suppression and in fact the Tribunal understands that some information regarding the case has already been published.
- Although Dr Gibson is not practising at the moment it is quite possible he may do so in the future.

- There is no evidence before the Tribunal on how further publication of the decision of the Tribunal will affect any High Court Civil litigation that Dr Gibson may be involved in. Dr Gibson has said this is a relevant matter, but not explained why.
- The issues raised in Dr Gibson's application in respect of name suppression such as factual errors and inconsistencies, bias, errors in law, natural justice, and the misdirection of the Tribunal may be relevant to an appeal of the substantive decision of the Tribunal, but not to name suppression.
- There is no evidence before the Tribunal on how further publication of the decision of the Tribunal will disadvantage Dr Gibson. He is not practicing at the present time, so the concerns at least need explanation if they are to be regarded as more significant than the inevitable discomfort that publication of disciplinary proceedings causes.

These matters taken individually, and together, were not compelling enough to outweigh the public interest and the basic requirement of openness of the disciplinary process.

APPLICATION TO ADJOURN CONSIDERATION OF PENALTY AND COSTS

The decision of the Tribunal is to proceed with the determination of penalty and costs. In reaching this decision the Tribunal considered:

- Letter from Dr Gibson dated 26 September 2002 requesting a delay of a month. In fact more time was allowed for Dr Gibson to make submissions (Dr Gibson was informed that they could have been received up until 8 November 2002)
- Submissions from Dr Gibson were received on 10 November 2002, they were available for consideration in The Tribunal's deliberation, and were in fact considered.
- Adequate time has been given for Dr Gibson to arrange representation and submissions on penalty; from the time of the Tribunal's decision on 23 July 2002 until 8 November 2002,

At this point, in terms of providing the opportunity for legal representation, Dr Gibson has said that he seeks to have legal representation, and he expects issues to be resolved by the "Legal Aid Services Agency". However, it is now some two months since submissions should have been made and longer still since the decision on 23 July 2002. Mr Hindle who is potentially counsel for Dr Gibson presented a rather less optimistic picture in his letter of 8 November 2002 than Dr Gibson's claims, Mr Hindle stated:

"I have been trying to assemble the papers required to allow me to estimate what would be involved in conducting a detailed review of the situation and then advise Dr Gibson. Regrettably, I do not yet have all the materials, and as a consequence there is no grant of legal aid even for the preliminary purpose of allowing me to evaluate the situation properly.

It also follows that I am not yet acting for Dr Gibson. Certainly I am not in a position to address submissions to any of the topics ..."

Given the series of instances where Dr Gibson has not been ready to proceed in the course of these proceedings, including the two months since submissions on penalty and costs were due, the Tribunal can have no confidence either that Dr Gibson will be represented, or that there is any clear time-frame when the position will be resolved. Considerable latitude has already been allowed, but it is not obvious that Dr Gibson has advanced the position.

Certainly, the possibility of counsel providing submissions appears more remote than it did in early September 2002, when Dr Gibson terminated the services of his former counsel. Mr Woodhouse, Dr Gibson's former counsel, wrote to the Tribunal on 4 September 2002 and stated:

“Mr Gibson has informed me that he is engaging other Counsel to deal with the issue as to penalty and costs, and on this basis, I am no longer instructed to act on the matter.”

The Tribunal certainly respects Dr Gibson's right to engage counsel of his choice. However, when deciding to terminate the services of counsel provided under a grant of legal aid, Dr Gibson must have known:

- He was not able to instruct other counsel for financial reasons,
- That alternative counsel would suffer the disadvantage of not having attended the hearing, and
- His decision had potentially adverse consequences for his representation.

It is neither appropriate, nor necessary, for the Tribunal to delay its processes indefinitely to insulate Dr Gibson from the inevitable or likely consequences of his choice to terminate the services of his existing counsel.

The Tribunal considers that the delay of two months already allowed is sufficient, having regard to the interests of Dr Gibson, the complainant, and the public. Counsel for the CAC has consistently advanced the position that Ms A wishes to have these proceedings resolved, and that delays add to her discomfort and distress.

PENALTY

In its decision on penalty the Tribunal considered:

- The level of misconduct in Dr Gibson's treatment of Ms A.
- Aspects of the misconduct were deliberate.
- There was grossly inadequate professional treatment which left the complainant in a seriously compromised position.
- Dr Gibson's inappropriate communications.
- The failure to provide records was a serious breach of Dr Gibson's professional responsibilities.
- It is necessary to have an element of protection of the public
- A penalty is required to reflect the seriousness of the conduct in question.
- Previous adverse findings in a Tribunal hearing in 1991 in which a charge of professional misconduct was established.
- References to Dr Gibson's conduct during the hearing were not considered by the Tribunal in relation to its deliberations on penalty.

Under Section 55(1)(b) Dr Gibson is suspended from practising for 4 months from 1 January 2003

Under Section 55(1)(c) The Tribunal orders that Dr Gibson practise under the following conditions:

1. Dr Gibson to render accounts for treatment only at the end of treatment.
2. On recommencing practice Dr Gibson be subject to supervision under the following protocol:

Introduction

This protocol has been established by the Dentists Disciplinary Tribunal to be adopted in the supervision of Dr Gibson in accordance with the decision of the Tribunal following the hearing of the complaint by Ms A held on 22 and 23 July 2002. The Tribunal's intention is that the supervision be educative in nature

Supervisor:

To be appointed by the Chairman of the Dental Council of New Zealand in consultation with the Chairman of the Tribunal. It shall be the responsibility of Dr Gibson to ensure that he has the appropriate supervision if he wishes to undertake work of the kind that requires supervision. Dr Gibson's responsibility in that regard extends to meeting the costs of the supervisor.

Objectives:

- To ensure the practitioner is aware of, and using, techniques and treatment methods for bridgework consistent with the safety and well being of patients in relation to crown and bridge restorations.
- To ensure the practitioner is aware of his obligation to provide treatment that is cost effective, and ensure that treatment plans are provided to patients to give them appropriate choices in terms of dental outcome and cost.
- To ensure procedures meet the standards of a competent general dental practitioner experienced in crown and bridge restorations.

Scope of Supervision:

- Bridge procedures with a complexity of, or greater than, a three unit bridge.
- Treatment planning including radiographs, study models and periodontal assessment (and cost indications given to patients).
- The keeping of adequate records

Method:

- Case presentations. For supervision cases, involving a similar or greater complexity than a three unit bridge, the treatment plan, radiographs, study models and restoration design are to be forwarded to the supervisor prior to the preparation of teeth.
- Restorations on working models are to be approved by the supervisor prior to fitting.
- All other procedures and processes, including record keeping and communication with patients to be supervised within the discretion of the supervisor.

Duration:

The supervision is to be for the first 12 months after recommencing practice.

Reporting:

The supervisor will report to the Chairperson of the Dental Council of New Zealand at six monthly intervals following the appointment.

The Tribunal records that an important element this proceeding is that Dr Gibson has shown little or no understanding, insight, sympathy or regret regarding the position in which his patient has been left. Ms A has suffered considerable pain and distress due to the outcome of her treatment by Dr Gibson. While, despite the Tribunal's findings, it is understandable that Dr Gibson should advance arguments to lessen his responsibility for the outcome, it does not explain or justify his lack of professional responsibility, or even concern, displayed in respect of Ms A circumstances. It is an important element of the supervision program that Dr Gibson should demonstrate he understands, and will honour, his professional responsibilities to patients.

Under Section 55(1)(d) Dr Gibson to pay a fine of \$5000

Under Section 55(1)(e) Dr Gibson is censured

COSTS

The Tribunal orders that Dr Gibson meets 45% of the costs of and incidental to the Dentists Disciplinary tribunal process. In reaching this decision on costs the Tribunal considered: Dr Gibson's behaviour during the Tribunal hearing, the behaviour included delays, disrespect, and attempts to extend the hearing unnecessarily.

LEGAL AID

The Tribunal was informed that Dr Gibson was in receipt of legal aid. There are two issues, one being Dr Gibson's ability to pay a fine, the other legal issues relating to costs.

In relation to Dr Gibson's ability to pay a fine the Tribunal has not been informed of Dr Gibson's true financial position. The extent of the information provided, and it was only provided incidentally during the course of the hearing, is that:

Dr Gibson presently has very limited financial resources, but apparently he has been awarded a substantial judgment in Court proceedings, though that judgment is apparently under some challenge. The Tribunal based on this limited information has taken the view that:

- Dr Gibson may not have the means to pay a fine immediately, but
- He is likely to be able to do so in the short to medium term.

In relation to costs, the Tribunal received advice from the Legal Assessor as to the significance of Dr Gibson being in receipt of legal aid and the application of s.40 of the Legal Services Act 2000, in relation to the award of costs. The Legal Assessor indicated it is not clear legally whether s.40 applies to costs before this Tribunal or not, and also that the Tribunal has not been informed as to what contribution, if any, Dr Gibson has been required to make under s.15(1) of the Legal Services Act. The Legal Assessor did however point out that s.40(3) of the Legal Services Act permits an order for costs to specify the amount that the legally aided person would have been required to pay irrespective of

s.40(2). The costs order has been made on that basis. The award of costs is the ordinary award that would have been made had Dr Gibson not been legally aided, the Tribunal has not been satisfied on the information before it that s.40(2) of the Legal Services Act applies, or if it does what the relevant contribution was.

However, if s.40(2) of the Legal Services Act does apply, the Tribunal considers that there are exceptional circumstances in this case by reason of Dr Gibson's delays, disrespect, and attempts to extend the hearing. Dr Gibson's conduct significantly extended the time of the hearing, and the costs. The Tribunal accordingly determines that there are exceptional circumstances, and the amount Dr Gibson should pay for costs should not be limited to any contribution he may have been required to make under section 15(1). Accordingly, the exception in s.40(2) arises in this case, if the section does in fact apply.

APPEAL

Attached to, and forming part of this order, is the sheet headed "Notes", which states the Practitioner's right to appeal against the orders made, and the time within which notice of such appeal must be given.

Dexter Bambery
(Chairperson, Dentists Disciplinary Tribunal)