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MEDICAL TRIBUNAL OF NEW SOUTH WALES

DEPUTY CHAIRPERSON: JUDGE MARGARET SIDIS

MEMBERS: PROF GLOVER A0

DR ABRAHAMS

5 DR GLEESON

THURSDAY 28 APRIL 2005

RE DR PREM RATTAN NANDA UNDER SECTION 146 OF THE

MEDICAL PRACTICE ACT 1992 (AS AMENDED)

10 NON-PUBLICATION ORDER MADE IN RELATION TO MS B AND IN
RELATION TO ANY INFORMATION THAT MIGHT IDENTIFY HER OR
ANY OTHER PERSONS WHO ARE THE SUBJECT OF THE INQUIRY

JUDGMENT - On application for stay

15 DEPUTY CHAIRPERSON: In this matter, a number of
complaints were issued by the Health Care Complaints
Commission on 8 May 2004 against the practitioner
Dr Nanda. Complaint 2 related to allegations of sexual
20 misconduct in respect of a young woman identified as
Ms B. The practitioner has applied to the Tribunal for
a stay in respect of the complaint concerning Ms B.

I have explained to the practitioner's legal
representative that this court does not have a practice
25 of staying matters; thus, were the Tribunal to be
persuaded to do so, the order would be one of
dismissal.

The application was supported by the affidavit of
the practitioner's solicitor, Mr Mineo. In response,
30 the Commission relied upon an affidavit of Ms Breuer.

The basis of the application was twofold. Firstly,
in respect of the delay from the time the complaint was
made by Ms B in July 1996; and, secondly, on the basis

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of the decision of the Medical Board made on 23 August 1996 to take no further action in respect of the complaint.

In a letter to Ms B on that date, it was stated
5 that this decision had been taken for the reason that the complaint was being handled by the Human Rights Commission.

It was further stated that the decision was in accordance with a policy of the Medical Board that if a
10 complaint was being reviewed satisfactorily by another appropriate body and it did not raise issues of unsatisfactory professional conduct that warranted investigation or disciplinary action under the provisions of the Medical Practice Act or the Health
15 Care Complaints Act, the Medical Board did not intend to take the matter further and the file would be closed.

The practitioner was informed, on 23 August 1996, simply that the issues raised by the complaint did not
20 warrant further investigation.

On 12 April 1999, an inquiry was conducted by a Commissioner of the Human Rights and Equal Opportunities Commission. The practitioner did not appear at this inquiry. An extempore decision was
25 given which involved a finding against the practitioner, who was ordered to pay compensation to Ms B.

On 28 April 1999, the Medical Board referred the matter to the Health Care Complaints Commission for

inquiry based upon press reports which followed the publication of the decision of the Human Rights Commission.

5 On 17 May 1999, the practitioner was informed of this fact.

Over a period of eight or nine days in 2000, Mr Justice Moore, in the Federal Court of Australia, heard an action brought by Ms B against the practitioner under the Sex Discrimination Act 1984 (Cth). The practitioner appeared and was represented at this hearing. Justice Moore's reasons were published on 11 April 2001.

15 He found against the practitioner and ordered him to pay compensation to Ms B for sexual harassment and discrimination.

The proceedings before the Federal Court of Australia were brought under section 83A of the Sex Discrimination Act 1984. Moore J, at paragraph 106 of his reasons, set out the provision of section 28A of the Sex Discrimination Act which defined, for the purposes of the Act, the term "sexual harassment". It is apparent from that definition that his Honour, in the proceedings before him, dealt with questions of unwanted sexual harassment in an employment context.

25 On 27 July 2001, the New South Wales Medical Board conducted a section 66 inquiry, which dealt with a number of complaints brought against the practitioner including the complaint made by Ms B.

Following the inquiry, the Board imposed stringent employment-related conditions upon the practitioner's continued right of practice. Some of those conditions have subsequently been modified. There is no evidence
5 that the conditions have not been complied with.

On 29 November 2001, the practitioner was informed by the Health Care Complaints Commission of the nature of the complaint brought by Ms B and invited him to respond.

10 On 30 May 2002, further complaints were referred to the practitioner for response.

On 5 June 2002, there was a file note of a conversation between an officer of the Commission and the solicitor for the practitioner raising the question
15 of whether the Commission intended to deal with all of the matters raised against the practitioner together.

On 14 December 2002, the Commission received a peer review.

On 3 April, 2003, the practitioner's solicitor
20 wrote to the Commission stating that the practitioner denied the allegations of Ms B and rejected the findings of the Federal Court of Australia. Objection was also taken in respect of the delay and the right to apply for a stay was reserved.

25 I have already noted that the complaint in this matter was issued by the Commission on 8 May 2004.

In the course of argument for and against the application today, the Tribunal has been referred to a

number of authorities which set out the principles to be applied in determining whether the stay or dismissal sought should be granted.

5 It is apparent from those authorities that the principles are to be applied according to the circumstances of each case. Relevant to this case are the principles which go to questions of prejudice. In this case, it is not claimed by the practitioner that he will suffer any actual prejudice. It is claimed, 10 however, that the presumptive prejudice arising from the inevitable consequences to the quality of evidence with the passing of time would apply. It was also argued that the principles relating to oppression, injustice or fairness are applicable.

15 In this respect, the authorities direct the Tribunal to weigh the purposes of the functions of the Tribunal of a public protective nature against the rights of the practitioner to an expeditious hearing of the complaints against him. The Tribunal has been 20 considerably persuaded by the reference to the comments of Mason CJ, to which our attention has been drawn, in *Jago v the District Court of New South Wales and Others* 87 ALR 577 at 583, to the following effect:

25 "The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of 30 criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused."

His Honour went on to refer to a number of authorities.

He then stated:

5 "In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare."

10 The Board's decision not to pursue Ms B's complaint in 1996 appeared to have been based upon its understanding that it involved an employer/employee relationship only and that, at that stage, it was unaware that Ms B was also a patient of the practitioner. The practitioner
15 has been aware of the Board's change of attitude since he was informed in May 1999.

 The practitioner has dealt with Ms B's complaints in the Federal Court of Australia in the year 2000. He has also dealt with those complaints in the section 66
20 inquiry in July 2001 and in subsequent reviews before the Medical Board.

 The Medical Board has imposed conditions based upon a number of complaints that included those of Ms B. In the Tribunal's view, it is appropriate that the
25 complaints continue to be dealt with in this fashion.

 The Tribunal has concluded, therefore, that this is not the kind of rare or extreme case that warrants a stay or dismissal of any part of the complaint.

 As to as the evidence to be brought before the
30 Tribunal when the complaints are dealt with in full, it is noted that the Federal Court dealt with the Sex

Discrimination Act in the context of the employer/employee relationship. The Tribunal would be considering different issues from a different perspective.

5 The Tribunal would expect the parties to consider whether it would, in fact, be necessary to revisit the issues that were dealt with in the Federal Court proceedings, but it is not persuaded that it should restrict the right of either party to a full airing of
10 the issues raised by the complaint if either party considered it necessary.

 In those circumstances, the Tribunal is not persuaded to limit the practitioner's rights by reference to the findings of the Federal Court of
15 Australia.

 The application is dismissed. The practitioner is to pay the Commission's costs of the application.

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