

IN THE MEDICAL TRIBUNAL OF NEW SOUTH WALES

DEPUTY CHAIRPERSON: HIS HONOUR JUDGE McGUIRE

MEMBERS:

DR S HOWLE

DR M PASFIELD

MS A DEVESON, AO



6TH DECEMBER, 2005

DR STUART ROGER ANDERSON

REASONS FOR DETERMINATION AND ORDERS

This is an application by Stuart Roger Anderson made pursuant to Section 92 of the Medical Practice Act, 1992 (the Act) for a review of an order of the Medical Tribunal of New South Wales made on the 13th February, 2004.

Mr Anderson seeks an order that he be readmitted to the Register as a Medical Practitioner.

The grounds of his application are:

- 1) Through professional help, self-development with the support of family and friends, and through serving the community through his employment with the NSW Motor Accident Authority, Mr Anderson has demonstrated that since deregistration on 13 February, 2004 his character is fully re-established.

- 2) Mr Anderson has complied with the order of the Tribunal that he not apply for review of the order in relation to his deregistration for a period of 12 months.
- 3) A position has become available in which, if an order for reinstatement is made, Mr Anderson will be able to serve the Central Coast community with a team of other general practitioners in general practice at Lisarow.

There is an onus on the applicant to satisfy the Tribunal that he is now a person of good character whose name ought to be restored to the Register of Medical Practitioners as he is now a fit and proper person to be registered.

Legal Principles

The test to be applied in decided whether the applicant has overcome his defective character is as stated by Walsh, JA in **Ex parte Tziniolis** (1966) 84 WN9 (Part 2) page 275 at page 2986:

“Reformations of character and of behaviour can doubtless occur, but their occurrence is not the usual but the exceptional thing. One cannot assume that a change has occurred merely because some years have gone by and it is not proved that anything of a discreditable kind has occurred. If a man has exhibited serious deficiencies in his standards of conduct and his attitudes, it must require clear proof to show that some years later he has established himself as a different man. The positions is somewhat similar to that which exists when application is made by a barrister or a solicitor who has been found guilty of serious misconduct exhibiting a lack of proper standards, seeking reinstatement on the ground that, after a lapse of time, he has become a fit and proper person to be a member of a profession which requires qualities and standards in which he is known to be deficient. In such cases it has been

frequently said that a heavy onus lies on the applicant – see Ex parte Clyne [1962] SR NSW 436 at 441 and cases there cited.

This Tribunal also applied the principles as stated in the unreported judgment of Mahoney JA in **Bannister v Walton** of the 30th April, 1992. At page 12 His Honour stated:

“The right to practice [medicine] affords to a practitioner privileges and opportunities which are not available to others. He is expected to maintain a relationship with patients who are affected by his character. The relationship is one which touches matters such as trust, confidence, confidentiality and right conduct. Clinical capacity is by no means the only consideration to which regard is to be had in determining whether a person is appropriate to practise medicine. It is necessary that the public be protected against those who, though having the appropriate skills do not have the character for the opportunities and privileges which the right to practise gives.”

Standard of Proof

The standard of proof to be applied by this Tribunal is that referred to in **Rejtek v McElroy** (1965) 112 CLR 517 at 521. That standard was applied in **Bannister v Walton** (1993) 30 NSWLR 699 where it was held that the requirement is that the Tribunal be “comfortably satisfied on the balance of probabilities”.

This Tribunal must have regard to the gravity and importance of the matters which it is deciding in accordance with the principles stated in **Briginshaw v Briginshaw** (1938) 60 CLR 336 at 360-363. At pages 361 and 362 Sir Owen Dixon stated:

“Except upon criminal issues to be proved by the Prosecution it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. But reasonable satisfaction is not a state of mind that is obtained or established independently of the nature or consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question, whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters “reasonable satisfaction” should not be proved by inexact proofs, indefinite testimony, or indirect inferences”.

When considering the onus and the obligation cast upon the applicant to satisfy this Tribunal that he is now a fit and proper person to be registered regard was had to what was said by the Tribunal in **Shariff**, Medical Tribunal, 2 October, 1990.

“The principal issue to be determined by this Tribunal is whether the Applicant has proved that he is now of that good character which befits a person to practise medicine. The onus lies on him to establish that he now bears such good character. As a person whose name has been removed from the Register he has to accept that it has been found that he was guilty of conduct which showed a defect of character incompatible with membership of a self-respecting profession. It is necessary for the Applicant to satisfy this Tribunal that the defect which led to the conduct requiring such adverse finding has been overcome. Clear proof is required to satisfy the onus which lies on the applicant; one cannot rely merely on the effluxion of time”.

A similar statement was made by the Tribunal in **Prakash**:

“The onus is on the Applicant to satisfy the Tribunal on the balance of probabilities that he is now a fit and proper person to be registered. This onus requires him to prove that he is of good character and that he has overcome the defect in his character as shown by his previous dishonest and fraudulent conduct. It is a heavy onus as it is not easy of proof and one cannot rely merely on the effluxion of time.”

On the 13th February, 2004 the Medical Tribunal (the 2004 Tribunal) determined a complaint that the applicant was guilty of professional misconduct and/or unsatisfactory professional misconduct within Section 36 and Section 37 of the Medical Practice Act (the Act) in that he,

- (i) has engaged in conduct which demonstrates a lack of adequate knowledge, skill, judgment or care in the practice of medicine, and/or
- (ii) has been guilty of other improper or unethical conduct relation to the practice of medicine.

Particulars

1. From about 6 October, 1995, the practitioner failed to maintain appropriate professional boundaries in the professional relationship with Patient A in that:
 - a) he held hands with Patient A;
 - b) embraced Patient A;
 - c) placed one hand on Patient’s A buttock;
 - d) frequently had telephone conversations with Patient A of a personal nature; and

- e) permitted a personal and sexual relationship to develop with Patient A.
2. From about October/December 1995 until the end of 1999, the practitioner inappropriately engaged in a sexual relationship with Patient A, in circumstances where:
- a) he continued to treat the patient, including for depression; and
 - b) he continued to treat Patient A's husband and children without disclosing the personal and sexual relationship with the patient to the husband.”

The relevant findings and orders of that Tribunal were:

1. That Dr Stuart Anderson is found guilty of professional misconduct.
2. That the name of Dr Anderson be removed from the Register of Medical Practitioners.
3. That pursuant to Section 64(3) of the Act there be no application for review of the above order for a period of 12 months.

Evidence Before the Tribunal

In considering the application, this Tribunal has taken into account the material before the 2004 Tribunal, the statement and sworn evidence of the Applicant, various statements filed in support and the medical reports of Dr Newman and Dr Westmore, together with the oral evidence of Dr Darcy, Dr Schultz and Dr Lucas.

It is the effect of the Applicant's evidence that he has faithfully complied with the orders of the Tribunal and that he has had no further contact with the complainant since his deregistration.

After he confessed his infidelity and misconduct to his wife, his marriage was under great strain, however, he has reconciled his differences with his wife who supports him and he continues to reside with her and their five children aged between 5 and 21.

He closed down his practice and after a lengthy search for employment, commenced work on the 3rd August, 2004 as a Project Officer – Injury Management Project with the Central Coast Division of General Practice. This involves inter alia improving the knowledge of GPs and encourages best practice to optimise the outcomes of patients who have suffered serious injuries in traffic accidents. This employment has enabled him to maintain contact with medical practitioners on the Central Coast where he formerly practised.

An active member of the Baptist Church, the Applicant is involved in a men's group within the church to which he has disclosed details of his misconduct. He has revealed his actions to a wide circle of friends, neighbours and former patients to whom he made candid disclosure. He experienced shame and humiliation, however he has gained support from his friends, former patients and the said Baptist Church men's group.

In addition to extensive reflection and self examination, the Applicant sought assistance from Dr Darcy, psychiatrist, with whom he consults on

a monthly basis for counselling. He and the doctor have discussed the circumstances of his reprehensible conduct.

The Applicant has continued to read medical publications issued by the AMA, in particular with regard to boundary violations. Additionally, he has attended seminars in the course of maintaining continuing education to equip himself to return to practice. He has attained the required continuing professional development points.

Following the extended course of psycho-therapy he administered, Dr Darcy was of the opinion that the Applicant would not be a risk to patients if he was allowed to return to medical practice and he felt confident that the Applicant would be extremely valuable in his profession. He formed this view over time and considered that the Applicant now demonstrates insight into his behaviour with regard to the inappropriate relationship with his patient. He believed that there had been a change in the Applicant over the time that he had treated him. The psycho-therapy treatment is ongoing.

Dr Louise Newman, psychiatrist, examined the Applicant on behalf of the HCCC and provided a report in which she indicated that the Applicant had gained partial insight into the inappropriateness of his conduct towards his patient – it was apparent that he had reflected on his behaviour and was remorseful. She believed that Dr Darcy was conducting appropriate psycho-therapy and that he was making progress with this intervention. Further progress would occur if the treatment continues and this will improve his self understanding.

She went on to say “It is not possible in my opinion to state with any certainty that ‘all risk’ of re-offending has been eliminated. I note however that Mr Anderson has no major risk factors for re-offending and has improved his self understanding. The issue is one of managing any beneficial low risk of further misconduct.”

In commenting upon Dr Newman’s opinion as to the Applicant’s only partial insight, Dr Darcy stated “At the beginning I think that was the case. I think that Mr Anderson’s insight has grown and I think he is fairly well aware of the whole situation at this moment”.

Dr Darcy went on to say “I think that first of all boundary violations in the future I think would be extremely unlikely after the process that he has been through. Secondly, I think that he understands the necessity to actually talk about his feelings more to colleagues and to his family and I think that he understands that talk about his feelings and share them with other people”.

Dr James Lucas has practised as a GP for some 30 years. He has known the Applicant for some 25 years as a fellow practitioner in the same district. Having become aware of the Applicant’s inappropriate relationship with his patient, Dr Lucas became his mentor. He has been seeing the Applicant on a regular basis over the last two years and in the course of discussions with him he has dealt with issues such as the doctor/patient relationship when there is a risk involved and boundary issues with female patients.

Dr Lucas was of the opinion that he had a good and proper understanding of where he went wrong. He had observed changes in the Applicant’s

capacity to analyse and express “what’s going on inside himself”. When asked “Do you feel any doubt about him returning to practice?” He responded “No, not at all”

Dr Lucas was aware of the Medical Board guidelines on being a mentor and he was agreeable to act as such and to have monthly meetings with the Applicant.

He was satisfied that the Applicant had a full appreciation of the consequences of his action and felt that he would not contemplate similar conduct in the future. Further, that he had demonstrated total remorse and regret for his actions towards his patient. He had never attempted to blame anyone but himself and had assumed complete responsibility for his conduct.

In summary, it was the opinion of Dr Lucas that the applicant’s character is fully reformed and that he held no doubt that he posed absolutely no risk to patients.

Dr John Robert Schultz practises on the Central Coast and has known the Applicant for approximately 20 years as a fellow medical practitioner. He is fully aware of the circumstances of the Applicant’s deregistration and has discussed with him the findings of the previous Medical Tribunal. He considers the Applicant has a full understanding of what occurred and why it occurred and he is satisfied that the Applicant has taken steps to ensure there will be no repetition of his conduct. Dr Schultz has received expressions of contrition and remorse from the Applicant and such is his confidence in his future conduct that, subject to his re-registration, he has offered the Applicant a position as a General

Practitioner in a new practice he has recently formed on the Central Coast. He and the other doctors in the practice have discussed the Applicant's conduct and situation and they have agreed that they want him to join them.

In his own interests, Dr Schultz has made such enquiries as were necessary to satisfy himself as to whether there was a risk of the Applicant repeating his behaviour and thus bringing the practice into disgrace. He has formed the opinion that the Applicant has gained an insight into his behaviour and would be highly unlikely to re-offend.

Dr Schultz considered himself to be in a position to deal with any problem which the Applicant might have with a patient. He would speak to him about it and would be able to take appropriate action including finding alternate care for the patient should that prove necessary.

In addition to his willingness to include the Applicant in the practice of which he was the principal, Dr Schultz readily agreed to act as the Applicant's supervisor. He was aware that this involved monitoring and reviewing the Applicant's clinical practice and ensuring his compliance with any conditions contained in the Medical Board's guidelines.

Leanne Taylor, the Applicant's wife of 23 years, described her distress when learning of the Applicant's misconduct and infidelity. In her statement she spoke of the discussions held with her husband and of their efforts to understand what had happened and as to how they could deal with the situation. At the time she initially became aware of his conduct, she was 8 months pregnant with her fifth child. She detailed the difficulties that she had in discussing the situation with her family,

friends and the Applicant's former patients. She considered that he has a clear understanding of how improper his behaviour was and what enormous harm it caused.

She expressed confidence that he would not repeat his misconduct in the future.

To her observation, the Applicant has changed positively as a result of what occurred and she is confident that he has done as much as he could to redeem himself.

The Tribunal had before it statements by responsible witnesses who told of their long contact with the Applicant as a member of a Baptist Church group. He made full disclosure of his extra marital affair. The makers of those statements observed the Applicant to be genuinely sorrowful and repentant and considered that he has realised the enormity of his mistake and misconduct.

A matter standing to the Applicant's credit is his frankness before the previous Tribunal in acknowledging his clandestine sexual relationship with the patient over some four years. He freely admitted his knowledge that contact between himself as a medical practitioner and a patient was completely inappropriate. He did not seek to excuse his misconduct and recognised that it was wholly his responsibility to ensure that no impropriety occurred.

Such frankness and his continuing acceptance of complete responsibility for his misconduct enables this Tribunal to approach with reasonable confidence his claims as to his insight and realisation of how his conduct

constituted such a gross betrayal of his obligations as a medical practitioner.

This Tribunal accepts:

- (a) His utterances of remorse, regret and contrition to it and to others as being genuine;
- (b) The firm expressions of opinions from those well qualified to express them, that he is unlikely to re-offend and constitutes no risk to patients.

There is of course the practical considerations in this case that if the Applicant joins the practice of Dr Schultz he will be under the watchful eye of Dr Schultz who will doubtless be careful to ensure that the reputation of his practice is not sullied by any further misconduct on the part of the Applicant.

He will not be a sole practitioner and will be surrounded by other doctors in the practice. He will of course be subject to the supervision of his mentor and supervisor.

The Tribunal finds it appropriate that an order for re-registration be subject to the conditions proposed by the HCCC.

In discharging its function, this Tribunal must have regard to the protection of the public and the protection of the medical profession in making any order as to the Applicant's re-registration.

This Tribunal is comfortably satisfied that the Applicant has demonstrated "that the defect which led to the conduct requiring the

adverse findings leading to his deregistration has been overcome”. He has fulfilled the onus cast upon him to satisfy this Tribunal that on the balance of probabilities that he is now a fit and proper person to be registered. See **PRAKASH**. It is considered that he has expressed a genuine willingness to comply with the conditions proposed by the HCCC.

It is satisfied that the Applicant has demonstrated that an order for his re-registration is consistent with the protection of the public and the protection of the medical profession.

Orders of the Tribunal

- (1) The Tribunal orders that the name of Stuart Roger Anderson be reinstated to the Register of Medical Practitioners kept under (the Act);
- (2) The Tribunal orders that his registration be subject to the following conditions;
 - a) The Applicant is to work only in a position approved by the NSW Medical Board (“the Board”);
 - b) The Applicant is to advise and to seek approval of the Board prior to changing his place of practice for a period of two years;
 - c) The Applicant is not to undertake solo general practice work for two years or for such period as the Applicant is required to undertake supervised medical practice in accordance with clauses (d) – (g) below.
 - d) The Applicant is to be subject to supervision by a registered practitioner for a period of two years.

- e) The Applicant is to nominate a supervisor before recommencing clinical practice and the Applicant cannot recommence practice until the Board has approved the supervisor.
- f) The supervisor is to monitor and review the Applicant's clinical practice and compliance with any conditions in accordance with Level 2 supervision of the Board's Guidelines. The approved supervisor is to be provided with a copy of these Guidelines for supervision, a copy of this decision and a copy of the Medical Tribunal decision of 13 February 2004. The cost of the supervision and any reports is to be borne by the Applicant. The Applicant and the supervisor are to:
 - i) Meet on a monthly basis, in person.
 - ii) Meetings must address doctor/patient boundary responsibilities;
 - iii) At each meeting the supervisor is required to complete a record of matters discussed at each meeting in a format, which is approved by the Board.
 - iv) The supervisor is required to provide to the Board, initially on a monthly basis, a report in a format approved by the Board;
 - v) The supervisor is required to inform the Board immediately if there is any concern in relation to the Applicant's compliance with the supervision requirements, compliance with any other conditions of registration, clinical performance, or if the supervisor relationship ceases. The Applicant is to authorise the supervisor to provide such information to the Board.

The Board may extend a period of supervised practice for 12 months if at the end of the period of supervised practice the Board determines that the Applicant has not complied with this or other conditions of his registration and/or the Board is not satisfied with the level of his clinical performance and/or the period of supervision has not been sufficiently continuous.

- g) In the event that the supervisor is no longer willing or able to provide the supervision required by this order, another practitioner is to be nominated by the Applicant for approval by the Board within one month of the cessation of supervision by the Applicant's previous supervisor.
- h) The Applicant is to notify the Board of the name and professional address of a registered medical practitioner who has agreed to act as his professional mentor within fourteen days of commencement of clinical practice.
- i) The nature and frequency of the contact between the Applicant and the Mentor is to be determined by the Mentor in accordance with the Board's Guidelines for Mentors. The mentor is to be provided with a copy of the Guidelines for Mentors, a copy of this decision and a copy of the Medical Tribunal decision of 13 February 2004.
- j) The Applicant is to authorise the Mentor to notify the Board when the Mentor is of the view that professional mentoring is no longer required.
- k) The Applicant is to continue to attend for psychotherapy by a psychiatrist of the Applicant's choice, at his own cost, at a frequency to be determined by the treating psychiatrist. The

Applicant is to authorise the treating psychiatrist to inform the Board of failure to attend for treatment, termination of treatment or if there is a significant change in health status (including a significant temporary change).

l) The Treating Psychiatrist is to notify the Board when the Applicant is no longer required to attend psychotherapy.

m) These conditions may be varied at the discretion of the Board following a request by the Applicant.

(3) The Tribunal orders that the Applicant pay the costs of the HCCC

_(Signed)_____

JUDGE J C McGUIRE

_(Signed)_____

DR S HOWLE

_(Signed)_____

DR M PASFIELD

_(Signed)_____

MS A DEVESON, AO