

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF AGGRIEVED PERSON
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF CHAIRPERSON OR OF THE TRIBUNAL
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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2013] NZHRRT 40

Reference No. HRRT 008/2013

UNDER SECTION 50 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994

BETWEEN DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND ESTHER MAREE CANDISH

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr A Martin, Director of Proceedings

Ms C Humphrey for Defendant

DATE OF DECISION: 14 November 2013

DECISION OF TRIBUNAL

[1] These proceedings under s 50 of the Health and Disability Commissioner Act 1994 (HDC Act) were filed on 1 May 2013 and the statement of reply was received on 28 June 2013. This was outside the thirty days permitted by Regulation 15 of the Human Rights Review Tribunal Regulations 2002 but there being no opposition

from the Director we grant leave pursuant to Regulation 15(3) for the statement of reply to be filed out of time.

[2] The plaintiff and defendant have since agreed to a resolution of these proceedings and on 13 September 2013 filed with the Tribunal the following documents on a consent basis:

[2.1] A Consent Memorandum dated 11 September 2013.

[2.2] An Agreed Summary of Facts, a copy of which is annexed and marked "A".

[3] The Consent Memorandum is in the following terms:

MAY IT PLEASE THE TRIBUNAL

1. The plaintiff and defendant have agreed upon a summary of facts, a signed copy of which is filed with this memorandum.
2. The plaintiff requests that the Tribunal exercise its jurisdiction in respect of the following matters:
 - (a) A declaration pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 ("the Act") that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 ("the Code") in respect of Right 4(1) by failing to provide services to the [aggrieved] person with reasonable care and skill, and Right 4(2) by failing to provide services to the aggrieved person that complied with legal, professional, and ethical standards.
3. In relation to the declaration being sought in paragraph 2(a) above, the parties respectfully refer to the agreed summary of facts. The parties are agreed that it is not necessary for the Tribunal to consider any other evidence for the purpose of making the declarations sought. The parties request that the agreed summary of facts is [to be] published by the Tribunal as an addendum to the decision.
4. The defendant consents to the Tribunal making the above declarations based on the facts set out in the agreed summary of facts.
5. In the statement of claim the plaintiff also sought the following relief:
 - (a) Damages pursuant to s 57(1)(c);
 - (b) Such other relief as the Tribunal thinks fit pursuant to s 54(1)(e); and
 - (c) Costs.
6. These other aspects of the relief claimed by the plaintiff have been resolved between the parties by negotiated agreement.
7. There is no issue as to costs.
8. The plaintiff seeks a final order prohibiting publication of the name of the aggrieved person in this matter The defendant consents to such a final order being granted.

[4] Having perused the Agreed Summary of Facts the Tribunal is satisfied on the balance of probabilities that an action of the defendant was in breach of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 (the Code of Rights) and that a declaration should be made in the terms sought by the parties in paragraph 2 of the Consent Memorandum.

[5] We turn now to the application by the defendant for an order suppressing her name and identity.

WHETHER NAME SUPPRESSION FOR DEFENDANT

The application

[6] By application dated 10 October 2013 the defendant sought an order that her name and identity not be published:

[6.1] The defendant is not named by the Health and Disability Commissioner in his Opinion 11HDC00596. In addition the Commissioner's policy document *Naming Providers in Public HDC Reports* (operative from 1 July 2008) at p 4 states:

Individual providers have the strongest privacy interest in protecting their professional reputation and livelihood. These interests must be weighed carefully against any relevant public interest considerations. The policy set out below means that in practice individual providers found in breach of the Code will rarely be named by the Commissioner.

The policy document goes on to note that the public interest is only likely to support naming if one or more of the three following criteria apply: public safety concerns, non-compliance with HDC recommendations and frequent breaches. It is submitted none of these circumstances apply on the present facts.

[6.2] As to public safety concerns, the defendant is subject to an order concerning competence made by the Midwifery Council of New Zealand on 25 May 2012. That competence order has approximately six further months to run but can be extended. The defendant works under supervision and the Midwifery Council is best placed to determine whether, at the end of that six months, there remains any risk of harm or any competence questions.

[6.3] The public interest in knowing the name of the defendant is outweighed by the damage to her reputation, privacy and livelihood by unbalanced reporting of the case.

[6.4] There would be no educational gain or value were publication to be permitted, particularly as the Commissioner has already published his Opinion on the case (albeit with the defendant's name suppressed).

[6.5] The defendant promptly settled matters to the satisfaction of the aggrieved person following referral of the case to the Director of Proceedings. Publication would discourage such prompt settlements and increase the tendency for defended hearings.

[7] These grounds are developed further in the supporting submissions filed by Ms Humphrey.

The opposition

[8] In opposing the application the Director has submitted:

[8.1] No affidavit has been filed in support of the defendant's application. It follows that there is no evidence of any potential adverse impact of publication on the defendant or anyone associated with her. The defendant has not sought to distinguish her situation from that of any other health professional coming before the Tribunal as a defendant.

[8.2] In the absence of evidence of adverse impact on the defendant's interests that might arguably displace the presumption of open justice, the application for a non-publication order cannot succeed.

[8.3] The defendant's reliance on the Commissioner's naming policy is misplaced. The Commissioner and Tribunal have separate and distinct functions and jurisdictions under the HDC Act.

[8.4] Ongoing regulatory supervision by the Midwifery Council is not relevant to the question of name suppression.

DISCUSSION

[9] The Tribunal's most recent discussion of name suppression in the context of proceedings under the HDC Act is to be found in *Director of Proceedings v Emms* [2013] NZHRRT 5 (25 February 2013) at [115] to [124]. The relevant principles were summarised at [117] to [119]:

[117] The granting of name suppression is a discretionary matter for the court or tribunal: *R v Liddell* [1995] 1 NZLR 538 (CA). The starting point when considering suppression orders is the presumption of open judicial proceedings, freedom of speech (as allowed by s 14 of the New Zealand Bill of Rights Act 1990) and the right of the media to report. However, in *Liddell* it was recognised at 547 that the jurisdiction to suppress identity can properly be exercised where the damage caused by publicity would plainly outweigh any genuine public interest. The decision in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) underlines that in determining whether non-publication orders should be granted, the court or tribunal must identify and weigh the interests of both the public and the individual seeking publication.

[118] In his submissions the Director drew attention to *S v Wellington District Law Society* [2001] NZAR 465 (Tompkins, Salmon and Paterson JJ) and the discussion at 469 to 470 of the principles to be applied when suppression orders are sought by law practitioners. Those principles have subsequently been applied in the medical disciplinary context. See *F v Medical Practitioners Disciplinary Tribunal* HC Auckland AP21-SW01, 5 December 2001, Laurenson J at [90] and [121]. It was submitted the same principles apply in contexts such as the present. The principles are:

[118.1] The public interest referred to is the interest of the public, including members of the profession, who have a right to know about proceedings affecting a practitioner. The interests of any person, includes the interests of the practitioner being disciplined.

[118.2] The proceedings before a disciplinary tribunal are not criminal proceedings. Nor are they punitive. Their purpose is to protect the public and the profession.

[118.3] In considering the public interest the tribunal is required to consider the extent to which publication of the proceedings would provide some degree of protection to the public or the profession. It is the public interest in that sense that must be weighed against the interests of other persons, including the appellant, when exercising the discretion whether or not to prohibit publication.

[118.4] The exercise of the discretion should not be fettered by laying down any code or criteria, other than the general approach dictated by the statute.

[118.5] The issue will generally be determined by considering whether the presumption in favour of publication, in all the circumstances of the case, is outweighed by the interests of the appellant or the public interest.

[118.6] Often the answer to that question will be to consider if the interests of the public, including the profession, will be adequately protected if a suppression order is made. In many cases the issue is whether or not the balance is in favour of protecting the public by means of publication, as against the interests of the appellant in carrying on his profession uninhibited by any adverse publicity.

[119] We agree that these principles do have application in cases such as the present.

[10] In the present context we add only the following:

[10.1] The purpose of the HDC Act is to promote and protect the rights of health consumers and disability services consumers. See s 6:

6 Purpose

The purpose of this Act is to promote and protect the rights of health consumers and disability services consumers, and, to that end, to facilitate the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights.

[10.2] The Code of Rights confers a number of legal rights on all consumers of health and disability services in New Zealand and places corresponding obligations on providers of those services:

1 Consumers have rights and providers have duties

- (1) Every consumer has the rights in this Code.
- (2) Every provider is subject to the duties in this Code.
- (3) Every provider must take action to—
 - (a) inform consumers of their rights; and
 - (b) enable consumers to exercise their rights.

[10.3] Proceedings under ss 50 and 51 of the HDC Act are not civil proceedings in the sense of a claim between litigants similarly situated. Rather they are proceedings brought with a view to establishing a breach of a statutory code of consumer rights and the obtaining of remedies of far reaching and potentially serious proportions such as a declaration of breach, a restraining order, specific performance and finally, damages, including punitive damages.

[10.4] It follows inescapably that the weight to be given to the public interest will in most cases be substantial, if not determinative as against the interests of the individual. The public has a clear interest in knowing about proceedings involving a health care provider, particularly one who, as here, admits to being (or is found to be) in breach of one or more of the rights in the Code of Rights. As noted by Baragwanath J in the nursing context, there is also public interest in the accountability of the provider, so that as a practical matter the provider's interest is likely in many cases to be limited: *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360 at 382-383. This judgment emphasises the need for the decision-maker to take into account the importance of the transparency of and resulting confidence in the complaint process, the safety of the public and the need to educate and inform the public including other health care providers.

[10.5] In the present case the defendant has provided no evidence of any potential adverse consequence which might follow should her name be published. She has not established that damage potentially caused to her by publicity would outweigh any genuine public interest.

[10.6] While an investigation by the Health and Disability Commissioner into a complaint is conducted in private, proceedings before the Tribunal under ss 50 and 51 of the HDC Act are required to be held in public other than in

limited circumstances prescribed by statute. See s 107 of the Human Rights Act 1993 which is incorporated into the HDC Act by s 58 of that Act.

[10.7] As recently explained in *Gravatt v Auckland Coroner's Court* [2013] NZHC 390, [2013] NZAR 345 at [71], a power to order suppression of identity must, as far as possible, be applied consistently with the right to free speech and the principle of open justice. Concern or fear about being named cannot of itself provide a justifiable basis for limiting freedom of speech:

[61] I accept that publication of names might be very distressing to those named, especially when combined with wide media coverage of an inherently sensitive subject matter. But a concern or fear held by other health professionals about being named cannot by itself provide a justifiable basis for limiting freedom of speech. More specifically, to the extent that this fear deters participation in the health system by health professionals, it reflects an unreasonable intolerance to free speech that could not possibly have been contemplated by Parliament as a relevant impact on "public order". The position might be different had the speech involved heavy and disputed criticism, or breach of privacy or confidence. But a generalised fear about being named is not a sufficient condition under this head.

[10.8] In the present case there cannot be any suggestion that the consent orders the Tribunal has been asked to make will in any way unfairly impugn the defendant. The suggestion that there may be unfair media criticism of the defendant is entirely speculative.

[10.9] Equally speculative is the submission that publication of the defendant's name will discourage prompt settlement of proceedings brought by the Director. There is no evidence to support the point. In any event to yield to the submission would, to paraphrase *Gravatt* at [61], reflect an unreasonable intolerance to the presumption of open judicial proceedings, the right of health consumers to information, freedom of speech and the right of the media to report.

[10.10] The Commissioner's policy document *Naming Providers in Public HDC Reports* is in the present context irrelevant as the powers and function of the Commissioner and the Tribunal are distinctly different. In these circumstances we are not required to determine whether we agree with the terms of the policy set out in this document.

[10.11] The fact that the defendant is subject to ongoing regulatory supervision by the Midwifery Council is not in the present context of any material relevance to the issues the Tribunal must address.

[11] For these reasons the application by the defendant for a non-publication order is declined.

DECISION

[12] By consent the decision of the Tribunal is that:

[12.1] A declaration is made pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 in respect of Right 4(1) by failing to provide services to the aggrieved person with reasonable care and skill, and

Right 4(2) by failing to provide services to the aggrieved person that complied with legal, professional, and ethical standards.

[12.2] A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of the aggrieved person. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

[12.3] The application by the defendant for an order that her name and identity not be published is declined.

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Mr RPG Haines QC	Ms GJ Goodwin	Mr BK Neeson
Chairperson	Member	Member

"A"

This is the Agreed Summary of Facts marked with the letter "A" referred to in the annexed decision of the Tribunal delivered on 14 November 2013.

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

HRRT No. 008/13

UNDER Section 50 of the Health and Disability Commissioner Act 1994

BETWEEN **DIRECTOR OF PROCEEDINGS**, designated under the Health and Disability Commissioner Act 1994

Plaintiff

AND **ESTHER MAREE CANDISH** of Palmerston North, registered midwife

Defendant

AGREED SUMMARY OF FACTS

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1 THE PARTIES

- 1.1 The plaintiff is the Director of Proceedings exercising statutory functions under ss 15 and 49 of the Health and Disability Commissioner Act 1994 (“the Act”). The aggrieved person is “Ms A”.
- 1.2 At all material times the defendant was a registered midwife practising in Palmerston North where the aggrieved person was then living.
- 1.3 At all material times the defendant was a healthcare provider within the meaning of s 3 of the Act and was providing health services to the aggrieved person.
- 1.4 The aggrieved person complained to the Health and Disability Commissioner (received 1 June 2011) about services provided to her.
- 1.5 On 21 February 2013 the Health and Disability Commissioner (appointed under s 9 of the Act) finalised his opinion that the defendant had breached the aggrieved person’s rights under the Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996 (“the Code”) and, in accordance with s 45(2)(f) of the Act, referred the defendant to the plaintiff.
- 1.6 On 8 April 2013 the plaintiff decided to institute a proceeding before this Tribunal.

2 BACKGROUND

- 2.1 In April 2011 Ms A was pregnant with her first child, due 25 April 2011.
- 2.2 On or about 13 April 2011 Ms A’s Lead Maternity Carer (LMC) went on leave and the defendant took over Ms A’s care.
- 2.3 Ms A’s pregnancy had been progressing normally.
- 2.4 On or about 18 or 19 April 2011 (at approximately 39 weeks gestation) Ms A sent the defendant a text message indicating concerns about a lack of fetal movement and increased vaginal discharge with black spots.
- 2.5 This was Ms A’s first contact with the defendant.
- 2.6 The defendant replied to Ms A by text message advising Ms A that she should drink ice cold water and sit quietly on the couch to feel the baby move.

- 2.7 The defendant did not follow up her text with any further communication. In particular, the defendant did not ascertain whether Ms A had understood and followed her advice or ensure that Ms A was reassured and/or had felt fetal movement.
- 2.8 On or about 20 April 2011 Ms A met with the defendant for the first time for a clinic visit. The defendant was accompanied on this visit by a student midwife who had previously met Ms A.
- 2.9 The defendant and the student midwife assessed Ms A.
- 2.10 After some discussion about what fetal movement was expected, the student midwife recorded that the movements were not as hard as they had been previously.
- 2.11 Ms Candish and the student midwife both experienced difficulty detecting the fetal heart rate (FHR). However, the defendant said she eventually heard it.
- 2.12 At around 3am on 21 April 2011 Ms A began experiencing contractions.
- 2.13 At about 2.20pm on 21 April 2011 the defendant and the student midwife visited and assessed Ms A at her home.
- 2.14 By this time Ms A was in established labour.
- 2.15 The defendant and the student midwife again had difficulty finding the FHR. However, the defendant again said she eventually heard it.
- 2.16 The defendant and the student midwife left Ms A, advising her to call them when she felt bowel pressure.
- 2.17 At about 7.35pm on 21 April 2011, after being informed that Ms A was feeling bowel pressure, the defendant and the student midwife returned to Ms A's home and undertook further assessment.
- 2.18 By this time Ms A was fully dilated and was therefore in stage 2 labour. Ms A was found on examination to be close to birthing her baby. The defendant recorded that the FHR was difficult to find due to contraction.
- 2.19 Ms A's mother drove Ms A to the hospital which was a short distance from Ms A's home and the defendant and the student midwife travelled to the hospital separately.
- 2.20 Ms A's mother became lost en route to the hospital and Ms A did not arrive at the delivery suite until approximately 8.22pm, approximately twenty minutes after leaving her home.
- 2.21 At approximately 8.27pm Ms A gave birth to Baby A.
- 2.22 Sadly, Baby A was born with no heart beat or respiratory effort and resuscitation was unsuccessful.

3 RELEVANT STANDARDS

3.1 Relevant standards of care include:

- (a) New Zealand College of Midwives 2008 *Midwives Handbook for Practice* (3rd Edn). New Zealand College of Midwives, Christchurch.
- (b) Maternity Services Notice Pursuant to Section 88 of the New Zealand Public Health and Disability Act 2000.
- (c) Midwifery Council of New Zealand guidance statement under section 3 (Professional behaviour) in the Council's 'Code of Conduct' in relation to text messaging:

Text messaging can be an unreliable method of communication, with message transmission delayed at times or messages open to misinterpretation. While women may use texting to contact a midwife, midwives must consider the appropriateness of using text communications and ensure that their communication with women occurs through reliable methods such as telephone. All communication with women should be appropriately documented.

4 THE CODE

4.1 Right 4 of the Code relevantly provides:

RIGHT 4

Right to services of an appropriate standard.

- (1) Every consumer has the right to have services provided with reasonable care and skill.
- (2) Every consumer has the right to have services that comply with legal, professional, ethical and other relevant standards.

....

5 FIRST BREACH – RIGHT 4(1) – REASONABLE CARE AND SKILL

5.1 The defendant has breached Right 4(1) of the Code by failing to provide services to the aggrieved person with reasonable care and skill.

IN PARTICULAR:

- (a) The defendant's use of text messaging to advise Ms A on either 18 or 19 April 2011 was not appropriate in the circumstances; and/or
- (b) The defendant failed to follow up her text message to Ms A to ascertain whether Ms A had understood and/or followed the defendant's advice and/or to ensure that Ms A was reassured and/or had felt fetal movement; and/or
- (c) Given that it is extremely unusual for a midwife to have difficulty detecting the FHR in a full term pregnancy the defendant should have checked the maternal pulse and/or arranged for a cardiograph (CTG) on:
 - (i) 20 April 2011; and/or
 - (ii) 21 April 2011; and/or
- (d) The defendant left Ms A for approximately five hours when Ms A was in established labour and in circumstances when the defendant should have remained with Ms A to monitor Ms A and her baby's wellbeing; and/or
- (e) The defendant should not have left Ms A without midwifery support for the short drive to the hospital given that Ms A was in advanced labour.

6 SECOND BREACH – RIGHT 4(2) – FAILURE TO COMPLY WITH LEGAL, PROFESSIONAL, ETHICAL AND OTHER RELEVANT STANDARDS

- 6.1 The defendant breached Right 4(2) of the Code by failing to provide services to the aggrieved person that comply with legal, professional, ethical and/or other relevant standards.

IN PARTICULAR:

- (a) The defendant's use of text messaging to advise Ms A on either 18 or 19 April 2011 was not appropriate in the circumstances; and/or
- (b) The defendant failed to follow up her text message to Ms A to ascertain whether Ms A had understood and/or followed the defendant's advice and/or to ensure that Ms A was reassured and/or had felt fetal movement; and/or

- (c) Given that it is extremely unusual for a midwife to have difficulty detecting the FHR in a full term pregnancy the defendant should have checked the maternal pulse and/or arranged for a cardiograph (CTG) on:
- (i) 20 April 2011; and/or
 - (ii) 21 April 2011; and/or
- (d) The defendant left Ms A for approximately five hours when Ms A was in established labour and in circumstances when the defendant should have remained with Ms A to monitor Ms A and her baby's wellbeing; and/or
- (e) The defendant should not have left Ms A without midwifery support for the short drive to the hospital given that Ms A was in advanced labour.

Aaron Martin
Director of Proceedings

I, Esther Maree Candish agree that the facts set out in this Summary of Facts are true and correct.

Esther Maree Candish

Date