

DCC147 TXN-D

MEDICAL TRIBUNAL OF NEW SOUTH WALES

DEPUTY CHAIRPERSON: JUDGE PUCKERIDGE

WEDNESDAY 22 MARCH 2006

**40030/05 - IN RE IAN LEIGH FERGUSON****PRECLUSION PERIOD ORDER**

DEPUTY CHAIRPERSON: I have discussed the matters raised with the other members of the Tribunal, together with the submissions which have been put. As I stated in the reasons for the order, there was no objective evidence before the Tribunal that there has been a change in attitude in relation to drug prescribing. There was no objective evidence before the Tribunal in respect of the Applicant seeking to address the defects in his conduct which were noted and referred to in a previous decision of a Medical Tribunal. This Tribunal considers that a period of eighteen months ought to elapse before the Applicant could bring an application for reinstatement. Such a period the Tribunal considers, would enable the Applicant to obtain the objective evidence referred to in the reasons for refusing the application for reinstatement.

DEPUTY CHAIRPERSON: Yes?

YOUNG: Your Honour I just want it placed on record that it will be the Applicant's admission that there has been a denial of procedural fairness in relation to this order. The Applicant has not been heard by the Tribunal in relation to this order. The matter has only been heard by your Honour and your Honour has passed on certain matters. Now it is the Applicant's submission that he was entitled to be heard by the Tribunal in relation to this order and that he was not. So that I simply want to place on record that that is the Applicant's position in relation to this, and as I said on Friday, it was a matter that could have been ventilated before the Full Tribunal and the Respondent chose not to do that.

DEPUTY CHAIRPERSON: Just in relation to that application it should be noted that when it was raised by the

Respondent of the matter, it was indicated that the Tribunal as at Friday had not considered the question of an appropriate time. Submissions were made and indicated by the Respondent and submissions were also made by yourself. The submission made by yourself, which was a matter which I took up with the other members of the Tribunal, as I indicated I would, was that an order that the Applicant be precluded from making an application for reinstatement for a period, would have been punitive. That was the submission that was made. As I recollect, and I could check the transcript, there was no application made as at that stage that the Applicant be recalled to give evidence. Certainly the submission by yourself that by imposing a period of time in which the Applicant would be precluded from making a further application was punitive, and was referred to all the other members of the Tribunal, and was a matter taken into account in relation to the period which the Tribunal determined should be 18 months. I just wanted that to be on the record Mr Young.

YOUNG: The Applicant's position on Friday was that the matter was one that could have been raised, was not raised and the Applicant had not been able to make submissions to the Tribunal in relation to that matter. Now the Applicant was never given the opportunity of making submissions to the Tribunal in relation to the matter of an order precluding him from making a further application.

DEPUTY CHAIRPERSON: All I wish to state is that the Applicant was not precluded, and in fact a submission was made by you as to the punitive nature of any preclusion order. As I have stated, it was taken into account that submission. There was certainly no application that the Applicant be allowed to give further evidence in relation to that matter. As I have again stated today it was stated in the reasons for its determination that there was no objective evidence before the Tribunal as to the matters which the Tribunal considered the onus was on the Applicant to prove, and the period of time of 18 months, the preclusion period was a period determined by the members of the Tribunal in relation to a period of time needed to have and adduce to any future Tribunal the necessary objective evidence, that's all. Ms Eastman do you have any matters to put?

EASTMAN: I do. For the purpose of the record, your Honour is aware that section 94 of the Medical Practice Act is the relevant provision dealing with powers on review, subsection 4 contemplates that the Tribunal on a review application, if it decides not to make a reinstatement order, may also specify a period of time before which further review can be made. I indicated when my learned friend raised his objection to our application that some time frame be indicated for the purpose of relevant protective orders, that that hadn't been raised at an earlier stage. I made it very plain that the reasons it had not been raised at an earlier stage was that the application couldn't be made until the Tribunal

had made its decision and given its reasons. Your Honour indicated in a discussion with my learned friends, when I raised the question about how long might be appropriate, your Honour indicated, well it may be 12 months. My learned friend agreed with that proposition. He said "Naturally" or words to that effect. So it should come as no surprise that it would be appropriate in light of the Tribunal's reasons that it would be in the interests of all parties and most importantly the Applicant, to identify a particular period of time.

Now in light of section 94(4), that would have been a matter well known to the Applicant, who is represented by experienced counsel, and if there had been any concern on the part of the Applicant that his application will be unsuccessful, and he knew full well that the Respondent opposed his application, then it was also open to him to make a submission with respect to a particular period of time, and that wasn't done. So the Applicant can't have any cause for complaint, that the Respondent appropriately raises the matter and seeks the guidance of the Tribunal that an appropriate order be made, bearing in mind the Tribunal's reasons. I'd like that matter to be recorded.

DEPUTY CHAIRPERSON: It will be recorded on the transcript.

EASTMAN: Thank you your Honour.

DEPUTY CHAIRPERSON: As I said, when the matter was raised by yourself, in fairness to everyone I had indicated a period or any preclusion period had not been determined by the members of the Tribunal and the matter was stood over today for that specific purpose, for me to raise that period with the members of the Tribunal. It is clear and it should be clear that I have raised it with all members of the Tribunal, and that is the period, again I repeat, because of the objective evidence that would be required, it is considered to be adduced before any future Tribunal that a determination was made that the appropriate preclusion period would be 18 months.

Mr Young what's the position in relation to the exhibits? Do the exhibits remain, or what is the position?

YOUNG: I thought that was dealt with on Friday.

DEPUTY CHAIRPERSON: I don't know.

YOUNG: Well your Honour asked whether the exhibits were to remain, and as I recall it was that the exhibits were to remain. I don't know why anything would have changed since Friday in that respect.

DEPUTY CHAIRPERSON: I am just wishing to clarify the position Mr Young. You say the exhibits are to remain?

YOUNG: Yes your Honour.

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DEPUTY CHAIRPERSON: Very well. The exhibits to remain with the Court for a period of 28 days.

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