

THE MEDICAL TRIBUNAL  
OF NEW SOUTH WALES  
AT SYDNEY

No. 40030 of 2009

BETWEEN

Medical Board of NSW

Applicant

Dr Jason Jefferson Martin

Respondent

Deputy Chair: Judge A M Ainslie-Wallace

Members: Dr Irene Rotenko  
Dr Michael Diamond  
Ms Anne Deveson AO

**Reasons for determination**

- 1 Pursuant to *section 66(2)(b)* of the *Medical Practice Act 1992*, the NSW Medical Board (the '**Board**') referred a complaint dated 25<sup>th</sup> August 2009 to the Medical Tribunal.
- 2 The complaint alleges that Dr Martin (the '**respondent**') had breached a Critical Compliance Condition.

**The legislative Framework**

- 3 *Section 61(3)* of the *Medical Practice Act* concerns the powers of a Committee or Tribunal in Disciplinary Proceedings:

*Where a Committee or the Tribunal acting under this section makes an order or directs that any condition be imposed on a person's registration, the Committee or Tribunal may order that a contravention of the order or condition will result in the person being deregistered. The order or*

*condition concerned is then a critical compliance order or condition under this section.*

4 Where the Medical Board is satisfied that a person has contravened a critical compliance condition, it must refer the matter to the Tribunal as a complaint. (section 66(2))

5 Section 64(1A) provides that if the Tribunal is satisfied that a person has contravened a Critical Compliance Condition, the Tribunal must deregister the person. The terms of this section are mandatory. If the Tribunal finds that there has been a contravention of a Critical Compliance Condition it must order that the person be de-registered.

### **Background**

6 In 2003, the respondent became addicted to codeine. He was prescribing codeine tablets in his wife's name and collecting them from various pharmacies in his local area. This was reported to the Pharmaceutical Services Branch of the NSW Department of Health and notified to the NSW Medical Board. As a result of the notification, an Impaired Registrants Panel was convened which met with the respondent who admitted the conduct and that he was addicted to codeine.

7 On 4<sup>th</sup> August 2004, the respondent agreed to 17 conditions being imposed on his registration.

8 The respondent breached some of the health conditions and the Health Care Complaints Commission complained to the Medical Tribunal particularising the breaches of conditions and alleging that the respondent was impaired.

9 On 26<sup>th</sup> March 2009, the Medical Tribunal considered the complaint.

10 It was alleged that the respondent had breached three of those conditions;

11 **Health Condition 3:** that he not administer any Schedule 4 or 8 drugs or drugs listed in *Schedule 1* of the *Drug Misuse and Trafficking Act*, that he not self administer any narcotic derivative, non prescription compound analgesic or cold

medication which was only to be taken at the direction of or prescription of his treating doctor, the respondent was to notify the Board nominated psychiatrist and the Board of any illness requiring the administration of any of those medications.

12 **Health Condition 9.** That he attend for thrice weekly urine drug testing in accordance with the Board's protocol and to send the test results to his treating and Board appointed doctors and to the Board.

13 **Health Condition 10.** That he have blood taken monthly for measuring carbohydrate deficient transferrin levels and that the test results be sent to his treating and Board appointed doctors and to the Board.

14 **Health Condition 3.** The respondent admitted that on 17 occasions between December 2004 and September 2007 he had self-medicated and administered narcotic derivative non-prescription compound analgesic and/or cold medications.

15 When asked by the Board about urinalyses that showed traces of morphine and pseudoephedrine, the respondent said that the results were because of his ingestion of poppy seeds and he had taken Nurofen Plus for migraine. However in his evidence before the Tribunal, the respondent said that he had lied to the Board when he referred to poppy seeds and said that he had taken both Nurofen Plus and Panadol Sinus tablets for sinus headaches. The respondent did not notify the Board of any illness that required him to take those tablets.

16 In August 2004 the respondent returned four urinalyses that were positive for temazepam. He told the Tribunal that he had taken temazepam before the samples were taken. The drug had been prescribed by his general practitioner. The respondent did not notify the Board of any illness requiring the administration of the benzodiazepines. No written confirmation of the illness was provided.

17 **Health Condition 9.** Between December 2004 and February 2007 the respondent provided 72 urine samples that were dilute or very dilute. These samples were thus invalid for testing. The respondent told the Board that he drank several litres of water each day to explain the dilution of the samples and said that he would reduce his liquid intake. There were several more dilute

samples and the respondent continued to assure the Board that he would make sure that his intake of liquid was reduced. The respondent admitted in the Tribunal that he had deliberately misled the Board and had not intended to reduce his liquid intake and continued to drink large quantities of fluid. He denied this was to avoid detection of codeine phosphate in his urine.

- 18 The respondent had failed to attend for 78 urinalyses. For 62 of those occasions he provided a medical certificate but not for the balance. The respondent failed to forward the test results to the Board nominated psychiatrist.

### **The Tribunal decision of March 2009**

- 19 The respondent admitted the alleged breach of conditions in the Tribunal hearing.
- 20 The respondent has been diagnosed with a very severe generalised anxiety disorder, social phobia, a major depressive disorder and opiate and alcohol abuse. He has been engaged with a treating psychiatrist since 2004, a treating psychologist and the respondent was, at the time of the Tribunal hearing attending a Doctors in Recovery group.
- 21 From February 2008 the respondent began undergoing thrice weekly urinalyses on legal advice. Up to the date of the Tribunal hearing, he had returned only one dilute sample and no positive results.
- 22 The Tribunal was mindful that despite the "*significant improvement*" attributed to the respondent by his treating doctors, he had lied to the Board during 2007 and had provided dilute urine samples. Dr Wodak, an expert in the treatment of alcohol and drug dependence qualified by the complainant, said that the respondent's compliance over the 11 months preceding the Tribunal hearing gave a very positive prognosis for the respondent.
- 23 As a result the Tribunal found that the respondent had demonstrated a significant change in behaviour and attitude in the previous 12 months, that he had complied with the conditions of his registration and there were no positive urinalyses.

- 24 **Impairment:** There was an issue as to whether the respondent's substance abuse, anxiety and depression was such as to amount to impairment as that is defined in the Act. The Tribunal found that the respondent's condition was likely to detrimentally affect his capacity to practise medicine and that he suffers from an impairment.
- 25 The Tribunal was satisfied that the respondent's breaches of condition were deliberate, frequent and over a protracted period. His conduct was aggravated by his deceptive statements to the Board and his misleading the Board nominated psychiatrist in not providing him with the urinalyses results. The Tribunal found that in this way, the respondent had hampered the Board nominated psychiatrist in assisting the Board to make informed decisions about the management of the respondent. The Tribunal was not comfortably satisfied that the respondent deliberately failed to attend for urine testing nor that he deliberately diluted his urine samples to thwart testing but found that his deliberate conduct prevented the Board from properly monitoring his compliance with conditions.
- 26 The Tribunal was satisfied that the respondent's conduct was sufficiently serious to amount to professional misconduct. The Tribunal however declined to remove the respondent's name from the register of practitioners.
- 27 The Tribunal determined to allow the respondent to continue to practise subject to conditions and in making that determination noted that while the respondent was in the Impaired Registrants Program, by his abuses of the conditions, had prevented the program from monitoring his health and protecting the public.
- 28 The Tribunal ordered that the respondent's right to practise be subject to conditions both as to his practice and his health. It was further ordered that a breach of Practice condition 1 and Health-Conditions 1, 3 and 10 will result in the respondent's deregistration.
- 29 This form of order amounted to a "*Critical Compliance Condition*".
- 30 Relevantly to this matter, Health Condition 10 is in the following form:

10(a) To attend for thrice weekly Urine Drug Testing in strict accordance with the NSW Medical Board's protocol (a copy of which is included in the Participant's Handbook). Results of Urine Drug Testing to be forwarded to the Board nominated and treating practitioners and to the NSW Medical Board. Such Urine Drug Testing to be at Dr Martin's expense."

31 The Board's Protocol covers the circumstances of both random and non-random testing.

32 The relevant sections of the Board's Protocol are:

*Thrice Weekly Testing*

3.2 Testing is conducted on Monday, Wednesday and Friday of each week. It is not acceptable to present on other days in lieu of routine collection days without prior approval.

*Absence from Testing*

3.4 Doctors are required to advise the Board in writing at least five business days before any anticipated absence.....Doctors are required to provide evidence of their absence...

*Missed Tests*

3.5 If a doctor is aware that he or she has missed a test, he/she must immediately notify the Board in writing and provide an explanation. The doctor may also be contacted by the Board and asked to provide a written explanation. Explanations may be considered by the Health Committee which may view the matter as a breach of conditions and recommend disciplinary action.

33 On 31<sup>st</sup> March 2009 the Board wrote to the respondent noting the imposed conditions and exhorting him to pay particular attention to the critical compliance conditions and added;

*"This means the Tribunal has ordered that contravention of these conditions will result in you being deregistered. In the event that the Board is ever satisfied that you have contravened a critical compliance condition, the Board must suspend you from practising medicine until a complaint concerning the matter is dealt with by the Tribunal."*

34 The Board wrote again to the respondent on 8<sup>th</sup> April 2009 in which it set out the terms of section 61(3) of the Act, the terms of the Critical Compliance Conditions and contained the following;

*The protocols for urine drug testing with which you are familiar will be the same for the purposes of this condition. However as the condition is now a Critical Compliance Condition, **you must ensure that you comply with each component of the protocol....**"*

35 A copy of the Protocol was also enclosed.

### **Circumstances of alleged breach**

36 It was undisputed that from the date of the imposition of the conditions by the Tribunal in March 2009 until the 29<sup>th</sup> July 2009, the respondent complied with the conditions on his registration. In particular he had attended for thrice weekly urine drug tests and had not recorded a positive result.

37 On 29<sup>th</sup> July 2009, the respondent's wife was confined and gave birth to their third child. She had been admitted to the Sydney Adventist Hospital in Wahroonga on the 28<sup>th</sup> July late in the evening. Early on the morning of the 29<sup>th</sup>, the respondent's wife was delivered of a baby. The respondent's wife suffered from a post-partum haemorrhage and required medical intervention. The respondent left the hospital at 9 pm on that evening and returned home. The respondent wrote in his statement that it was when he went to bed at about 11pm that he realised he had missed the urine drug test of that day.

38 The next day, 30<sup>th</sup> July, he attended Hornsby Hospital and provided a urine sample. He knew that "*the Board will not accept an 'in-lieu of' UDT*".

39 His wife was discharged from hospital on 2<sup>nd</sup> August and he returned to work on the 7<sup>th</sup> August. It was on this day that the respondent notified the Board of the missed urine test.

40 The respondent said that he had been preoccupied with the new baby, his wife and caring for their two children and said that it did not occur to him to write to the Board until 9 days had passed from the missed test.

41 After the missed test, the respondent attended for the other regular tests and has continued to do so. The test of the 30<sup>th</sup> and all subsequent tests have been negative.

42 The respondent made some arrangements in anticipation of his wife's confinement. He had arranged for his mother or a neighbour to attend and look

after the other children when he needed to take his wife to hospital. He had not made any plan or arrangement in the event that the birth took place on a day on which he was required to attend for urinalysis. He had a number of portable urine collection kits at his home in case he ever forgot to attend for testing. He had used the last of these some weeks beforehand and had not replaced them. He had not made any application to the Board to be absent from testing in the event that his wife was confined on or about a testing day.

### **Discussion**

- 43 The respondent contended that he had not breached the condition because he had notified the Board that he had missed an appointment. It was argued on his behalf that the meaning and intention of section 3.5 is that if a test is missed and the doctor immediately informs the Board, there is a discretion in the Board to consider whether the circumstances in which the test was missed constitute a reasonable excuse for missing the test, in which event, there is no breach of the protocol.
- 44 For the Board, it was argued that the respondent breached the protocol twice – the first time in failing to attend for testing on the nominated day and secondly in not immediately notifying the board of the missed test. It was argued that the true meaning of section 3.5 is to confer on the Board an option to “*take no action*” on the breach.
- 45 Having regard to section 3.5 in its terms and in the context of the Protocol as a whole, the Tribunal is of the view that it does not confer a discretion on the Board as to whether a breach of the protocol has occurred. However, it does permit the Board to take no action if the conditions referred to in the section are met, that is, immediate notification. Of course, where the breach of the terms of the Protocol amounts to a breach of a Critical Compliance condition, by the operation of *section 66(2) of the Act*, there appears to be no discretion to take no action in relation to the breach. The breach must be placed before the Tribunal by complaint.

- 46 It is to be borne in mind that the notification by the respondent was some 9 days after the missed test and it was not submitted that it could be regarded as *"immediate"*.
- 47 The Tribunal finds that in failing to attend for the test on the 29<sup>th</sup> July 2009 and again in failing to notify the Board immediately after becoming aware of the missed test, the respondent has breached the provisions of the Protocol and, as a result has breached the Critical Compliance Condition being Health Condition 10.
- 48 It was not argued that there the Tribunal could make an order other than to order that the respondent be de-registered if it found that the Critical Compliance Condition on his registration has been breached. The Tribunal will order that the respondent's name be removed from the Register of Medical Practitioners.
- 49 The Tribunal considers it appropriate to impose a period of time before which the respondent may re-apply for registration.
- 50 In considering that period, the Tribunal is mindful that the objects of the Act are to ensure the protection of the health and safety of the public and that medical practitioners are fit to practise medicine. The purpose of imposing the Critical Compliance Condition requiring urine testing on the respondent's registration was to ensure that he was not abusing drugs and was therefore fit to practise and did not pose a threat to the health and safety of the public.
- 51 The Tribunal observes that the breach of the condition did not indicate relapse but a failure to adhere strictly to the obligations imposed on the respondent that permitted him to continue to practise his profession. It speaks of disorganisation, failure to anticipate and inappropriate response but not relapse.
- 52 The most recent medical reports on the respondent's progress indicate continuing improvement in his condition, an engagement in the therapeutic process and compliance with treatment. Those with whom he works say that he seems fitter and healthier this year than before.

53 The Tribunal is satisfied that the respondent has been doing well on his current treatment and therapeutic regimes and is continuing to improve.

54 In determining what period of de-registration should be imposed, the Tribunal while acknowledging the seriousness of the breach of the condition, takes into account the continued improvements in the respondent's health and fitness. The Tribunal will order that the respondent not apply to be re-registered for a period of 4 months from the date of this order.

**Orders:**

1. The name of the respondent forthwith be removed from the Register of Medical Practitioners and he not apply for re-registration for a period of 4 months from the date of this order.
2. The respondent pay the complainant's costs.



**Dr Michael Diamond**

Member

**Dr Irene Rotenko**

Member

**Anne Deveson AO**

Member

**A Ainslie-Wallace J.**

Deputy Chair

