

IN THE MATTER of the Veterinarians Act 2005

BEFORE The Judicial Committee

**BETWEEN THE COMPLAINTS ASSESSMENT
COMMITTEE** of the Veterinary Council

Complainant

AND A of , Veterinarian
Respondent

Judicial Committee: Mr J Morrison (Chair)
Dr J Hellstrom
Ms P Mudford
Dr P Wiseman

Appearances: Mr M McClelland for Complainant
Mr G Turkington for Respondent

Hearing: 31 August and 1 September 2010

Decision: 1 September 2010

DECISION OF JUDICIAL COMMITTEE

1 Background

- 1.1 On 18 July 2006, a worker on X Farm owned by X Limited telephoned practice Y at Y. She sought assistance in respect of a cow that had been down for five days. She was told she should contact the farm's veterinarian, Dr A, but apparently did not know how to. Dr B of practice Y did so for her.
- 1.2 Dr A was at a conference in Lincoln. Initially he suggested Dr B "better go and see it" but, on being informed of Dr B's reluctance, Dr A said, "leave it with me".
- 1.3 Dr B and his practice Y colleague became concerned about the ethical responsibility of vets called to attend where no emergency cover had been agreed to. He therefore telephoned the Complaints Assessment Committee ("CAC") for advice. The advice was to send a letter to the client spelling out that it was the responsibility of Dr A to make arrangements for 24 hour cover.

- 1.4 On 12 August 2006 the related practice Z at Z received an after hours service call from the owner of X Farms, Mr J. He sought emergency calving assistance. There was an exchange about Dr A's role, following which practice Y's on call veterinarian attended. X Farms, a client of practice Y, was subsequently invoiced for the service.
- 1.5 On 24 August 2006, Dr B sent a letter to the CAC. It variously referred to or alleged unethical prescribing of PARs by Dr A, work it had undertaken for X Farms, Dr A's inability to offer 24 hour service despite supplying PAR products, the 18 July and 12 August incidents, and a concern for the welfare of the cow that was down. It also referred to ethical responsibilities and concluded:

"The CAC have requested to hear about these types of cases. Hence, we are informing you and seeking clarification of our position."

2 The CAC's Investigation

- 2.1 Dr B's letter of 24 August was construed as a complaint. By letter of 4 September 2006 the CAC sought a response accordingly from Dr A. The response of 14 September by solicitors on behalf of Dr A was legalistic. It took issue with whether there was a complaint or not.
- 2.2 There followed an exchange of correspondence between the CAC and the solicitors, in the course of which certain assertions were made on behalf of Dr A. These were relayed to, but not accepted by, Dr B who by letter of 28 October 2006 confirmed:

"We are making a formal complaint given the information received from the correspondence".

The letter went on to deal specifically with the apparent absence of back up care being provided by Dr A, referring to the 18 July and 12 August incidents.

- 2.3 This letter of 28 October was not construed as a complaint but as part of a continuum of the correspondence already referred to. The CAC continued to request and press its entitlement to information from Dr A to assist its

investigation. Materially for this narrative, it made formal request by letter of 14 November 2008 referring to section 41 of the Veterinarians Act 2005 (“the Act”) and by letter dated 9 April 2009 issued a formal notice pursuant to that section.

2.4 Responses via Dr A's solicitors variously sought further time and took legal objection, including absence of a complaint. Only in the face of the threat of summons, and on receipt of advice from counsel, did Dr A modify his position.

2.5 His eventual response of 5 October 2009 was fulsome and apparently satisfied the CAC, subject to two qualifications:

2.5.1 It was not considered an answer to the complaint about the lack of continuity of service on 18 July; and

2.5.2 Dr A did not accept professional responsibility for his initial failure to provide information and resultant delay in doing so compounded by an unsatisfactory answer at a meeting with the CAC on 1 March 2010.

3 Charges

3.1 As a consequence, the CAC gave notice of two charges, notice being dated 21 June 2010. They are reproduced in the following sections:

3.2 Charge 1: *Over the period up to and including 18 July 2006 Dr A provided veterinary services to X Farm which at all relevant times was owned by X Ltd and which was one of a group of farms referred to as X Group. Dr A failed to provide continuity of clinical services in terms of clause 6.5 of the Veterinarians Code of Professional Conduct 2006.*

Particulars

1.1 *Dr A failed to make arrangements for veterinary services to be available to X Farm on 18 July 2006 when he was in the South Island, contrary to clause 6.5 of the Code of Professional Conduct; and*

- 1.2 *On 18 July 2006 X Farm sought assistance from another veterinary practice, practice Y, at Y in respect of a cow that had been down for five days.*
- 3.3 Charge 2: *Over the period November 2008 to August 2009 the Committee was investigating a complaint dated 24 August 2006 about Dr A which had been referred to it pursuant to s38(3) of the Act. In the course of its investigation Dr A, contrary to his obligations under clause 5.1 of the Code of Professional Conduct failed to comply with requests by the Committee that he provide it with certain specified information.*

Particulars

- 2.1 *In a letter dated 14 November 2008 the Complaints Assessment Committee requested certain information from Dr A by 8 December 2008; and*
- 2.2 *Dr A failed to provide that information by 8 December 2008 or thereafter;*
- 2.3 *By letter dated 9 April 2009 the Committee issued a notice pursuant to section 41 of the Act requiring Dr A to provide certain specified information within 20 working days from the date of that letter.*
- 2.4 *Dr A failed to comply with the section 41 notice dated 9 April 2009 and did not provide the information within 20 working days of 9 April 2009 or thereafter until 23 November 2009.*

4 Hearing

- 4.1 The charges came before a hearing of a duly appointed Judicial Committee on 31 August. Initially it comprised five members but, as a result of disclosure of prior association and objection being taken, one member withdrew. The remaining members, who between them fulfilled the requirements of section 83 of the Act, continued to hear the charges.
- 4.2 Evidence was called by both parties and submissions were made.

5 The CAC's Case

- 5.1 For the CAC, Mr McClelland referred to provisions of the Code of Professional Conduct for Veterinarians ("the Code"). Specifically, with reference to the first charge, he referred to article 6.5:

"6.5 Continuity of clinical services

If a veterinarian undertakes to provide clinical services then all of the following must also exist:

- (i) Provision for, or arrangements for, the service to be available to bona fide clients at all times;*
- (ii) Demonstrable competency and capacity to provide such a service;*
- (iii) A willingness to refer, when appropriate, to colleagues with additional expertise.*

Veterinarians engaged in providing a direct service to the public for the treatment of one or more animals must make proper provision at all times for the relief of pain or suffering in those animals, and for further treatment, either personally or by colleagues.

For those circumstances when service cannot be provided, either at night, weekend or other off duty periods, or by reason of holidays, sickness or emergencies of any kind, specific prior arrangements must be made with colleagues for an emergency service to be provided.

The public must be informed about the availability of emergency services by means of a telephone answering service or any other means and, as appropriate, by notices in newspapers or at the unattended clinic.

The obligation on the veterinarian is not, therefore, to remain constantly on duty but to ensure that, when off duty, clients can obtain help from another member of the profession with whom prior arrangements have been made. The redirection of out of hours calls to other veterinarians without their prior knowledge and consent is unacceptable.”

And the definition of clinical services:

“Clinical Services: This term refers to professional services delivered by veterinarians to bona fide clients whereby examinations, diagnoses, prophylactic, medical and surgical services for animals are provided.”

5.2 Then with reference to the second charge, he referred to article 5.1:

“5.1 Promotion of the profession

The best promotant is a public perception of a profession composed of veterinarians who are trustworthy, competent, and conduct themselves with integrity and a high sense of social responsibility.

Promotion of the profession should follow the principles that:

- (i) It informs*
- (ii) the reputation and integrity of the whole profession is maintained or enhanced;*
- (iii) information provided is accurate, useful and unbiased and not in any way likely to mislead or deceive;*
- (iii) any opinions given are discerning and impartial.*

It is in the interest of the public and the profession that the services, skills and information offered by the profession are promoted within

the community. Publication of technical and other articles, demonstrations, lectures and radio and television programmes are encouraged. Well-devised and delivered promotion and extension activities have the potential to increase awareness of the services the veterinary profession provides. Veterinarians must ensure that the material presented, and its method of presentation, maintains or improves the reputation of the profession.”

(Underlining indicates the particular parts relied on).

- 5.3 Mr McClelland also referred to the provisions relating to professional misconduct at section 50(1)(b) and (c) of the Act and to the definition of professional misconduct to be found in the Code:

“Professional misconduct: In general, misconduct can be defined as non-compliance with this Code. It is conduct which fails to reach, by a substantial degree, the prevailing standard of professional conduct maintained within the profession and expected of a member of the profession of good repute and competency.

Negligence in any given circumstances is the failure to exercise that reasonable care which the circumstances demand and which can reasonably be expected.

Under s50 of the Veterinarians Act 2005, the term “professional misconduct” includes any act (including an unethical act or omission) that requires disciplinary sanction or brings discredit to the profession.”

- 5.4 Evidence in support of the charges was called from Dr B and Dr C who were available for cross-examination and for questioning by the Committee. In addition, the written brief of evidence from CAC's Executive Officer, Ms Black, was taken as read.
- 5.5 That evidence was clear enough in establishing that Dr A did not have any specific prior arrangement in place with a colleague or colleagues to provide cover for clinical services in circumstances where they could not be provided by him. It also established that his failure to provide information to the CAC was wilful, albeit on advice.

6 The case for Dr A

- 6.1 At the conclusion of the CAC's case, Mr Turkington for Dr A submitted no case to answer based on three grounds:
- 6.1.1 Procedural error or miscarriage of process. Essentially, this was a challenge to the categorisation of Dr B's letter of 24 August 2006 as a complaint. If upheld, there was no statutory basis for the CAC's subsequent investigation and laying of charges.
 - 6.1.2 No or insufficient evidence of misconduct warranting disciplinary action.
 - 6.1.3 No or insufficient evidence of conduct bringing or likely to bring discredit to the profession.
- 6.2 The Committee, having declined to rule on that submission, but reserving it for later consideration, invited Mr Turkington to call evidence. He did so from Dr A and Mr D who were cross-examined and available for questioning by the Committee. In addition, the written brief of evidence of Mr E, the solicitor formerly advising Dr A, was taken as read.
- 6.3 Broadly, and without resiling from his submissions summarised above, Mr Turkington's case in relation to the first charge was that article 6.5 of the Code had not been breached because there had been no disruption to the continuity of services provided by Dr A, such that a prior arrangement needed to be put in place.
- 6.4 In relation to the second charge, "for better or worse" he asserted Dr A's solicitor was right in resisting the CAC's request or demands for information for want of statutory authority, being a reference to the status of Dr B's letter of 24 August.

7 Preliminary Issue: complaint or not?

- 7.1 We turn now to address the preliminary point, complaint or not. In the Committee's view, Dr B's letter of 24 August was not a complaint as contemplated by section 38 of the Act. It was not addressed to the Council, it was descriptive of matters of concern, it was equivocal, and on its own terms it responded to a CAC request and sought clarification of the author's position.

- 7.2 The Committee is reinforced in this view by the clear and emphatic evidence of Dr B. He did not intend his letter to be a complaint and, even at the time of giving evidence, did not regard it as having been a complaint. He had sought the intervention of his professional body to facilitate resolution of an ethical problem he felt he had vis-a-vis Dr A and only when that did not eventuate did he make a complaint by his later letter of 28 October.
- 7.3 It is accepted that the subjective views of the author of a document may not be determinative of, or even admissible as to, its meaning. But by equal measure, the Committee does not accept it can be bound to the CAC's construction of that document, as urged by Mr McClelland. This is particularly so when the document is a material component to the second charge where its status as a complaint is expressly alleged.
- 7.4 The Committee records that in the High Court's review of the decision in *CAC v Dr Knight* a procedural error in the laying of charges invalidated the Judicial Committee's later findings against Dr Knight. In light of that decision, it would be strange if the Judicial Committee was to be denied the jurisdiction to deal with such a procedural defect if drawn to its attention as it has been here.
- 7.5 On Mr Turkington's first no case point, then, the Committee considers that Dr B's letter of 24 August was not a complaint and that the steps that the CAC took thereafter, including the laying of charges, were without requisite statutory authority. On this basis they should be dismissed.
- 7.6 However, lest that be wrong, the Committee goes on to consider the charges as if the letter was a complaint and the CAC's processes were fully mandated.

8 **First Charge**

- 8.1 The first charge arises out of Dr A's contract to provide a broad range of services to dairy farms owned by the X family or companies under their control. This contract recognised that the client farming enterprise was a quantum shift away from the traditional one owner single herd operation, and made extensive use of inexperienced and unskilled labour. It sought to make up the knowledge gap in tandem with the provision of more traditional veterinary services.

- 8.2 From the outset, it was a relationship incapable of providing personal attendance at each and every clinical crisis which might arise. The distances were too great and the numbers too large. Instead, Dr A developed a system for training and upskilling those engaged on the X farms to recognise and report problems and to act on resultant advice.
- 8.3 The services so provided were not to the exclusion of other veterinarians. Indeed, Dr B's practice provided veterinary services to X Farms, including X Farm, until it elected not to do so unless an arrangement in relation to prescribing PARs was also entered into it. The short point, though, is that Dr A's services to X farm were not exclusive and they were sometimes, perhaps often, remotely conducted through the observations of and consultations with trained persons he felt able to rely on.
- 8.4 It is of some significance to note three other matters.
- 8.4.1 Although the link between prescribing PAR veterinary medicines and providing clinical services was of concern to Dr B, and the subject of CAC investigation, it was not a matter pursued to the point of a charge.
- 8.4.2 There was no charge directed to the quality of clinical services provided generally by Dr A. The charge was directed to continuity of such services.
- 8.4.3 There was no complaint by the client as to the quality of those services generally, nor about the continuity or availability of them on 18 July 2006 or at any other time.
- 8.5 So, what was different on 18 July 2006 when the X Farm worker rang Dr B's practice? Nothing, save she apparently didn't know of Dr A's identity and contact details. Dr A could not fairly be made responsible for that ignorance.
- 8.6 The fact that Dr A was in H rather than F or G did not mean the clinical services he was providing to X Farm, apparently satisfactorily, was unavailable to it. They were and, as Dr B acknowledged, Dr A took responsibility ('ownership') for the emergency on 18 July 2006, having been told Dr B was unwilling, on this occasion, to do so.

8.7 In short, Dr A's general arrangements for clinical services to X Farm on 18 July 2006 were unaffected by his absence from the immediate locality, and this is not contradicted by the fact that the farm worker sought assistance from another veterinary practice.

8.8 Accordingly, we would not uphold the first charge.

9 **Second Charge**

9.1 Turning to the second charge, the Committee regards it as an integral and necessary component of any profession that its members are responsive to its representative body. This is particularly so when that body, as is the case with the Veterinary Council, is charged with responsibility for protecting the public interest, which includes monitoring competency and performance.

9.2 Dr B's letter of 24 August is referred to in the body of the charge as a "complaint" and we have concluded it wasn't, referring to section 38 of the Act. It could have been made the subject of "information" referred by the Council to the CAC for investigation pursuant to section 39 of the Act, but it wasn't.

9.3 If, however, the letter could properly be regarded as a complaint (or had been a matter referred for investigation) the Committee would have had no hesitation in concluding that Dr A's failure to co-operate with that investigation would have been professional misconduct requiring disciplinary sanction. Further, the fact that it went beyond oversight and was deliberate would have been an exacerbating factor.

9.4 However, as the failure was internal to the profession and unlikely to be a matter of public knowledge, it could not be regarded as professional misconduct of a type which would bring discredit to the profession.

9.5 In mitigation, it would have to be acknowledged that Dr A was acting on legal advice as plainly reflected by the tenor of his solicitor's correspondence and the evidence of Mr E. But that is mitigation only to a degree because, vis-a-vis his professional body, Dr A must take responsibility for his actions.

9.6 In further mitigation, on receiving advice from counsel Dr A made good his earlier failure, though without abandoning his contention that absence of a complaint meant he did not have to. It is unfortunate that he did not follow

through on this and adopt a more conciliatory , indeed apologetic, demeanour when meeting with the CAC on 1 March 2010.

9.7 Accordingly, we would have upheld the second charge if the letter of 24 August had been a complaint.

10 **Sanction**

10.1 In relation to sanction, if the preliminary point was to be decided against Dr A, the Committee would set alongside Dr A's delayed response the delays in the CAC's processes. They are not explained and not entirely explicable by reference to the correspondence provided in evidence. Complainants, and practitioners the subject of complaint, are entitled to speedier resolution than is evident here.

10.2 Accordingly, but for the preliminary point whereby we have held the "complaint dated 24 August 2006" as referred to in the second charge was not a complaint, the Committee would have ordered Dr A be censured.

11 **Result**

11.1 However, and for the reasons set out in section 7, the charges are dismissed.

11.2 At Mr Turkington's request he has until Friday 3 September 2010 to pursue an application for costs by memorandum if he wishes, though the memorandum will need to address two matters:

11.2.1 As to whether or not this Committee has any power to make an order for costs in favour of Dr A;

11.2.2 The Committee's preliminary view that it might not be appropriate to order costs in favour of Dr A even if there is power to do so because if he had been more responsive to the CAC at the outset much of the costs that he has incurred could have been avoided.

11.3 Mr Turkington has until Friday 3 September 2010 to make any such application and, if he does, Mr McClelland will have until 8 September 2010 to respond.

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J M Morrison
Chairman, Judicial Committee