Health Professional Councils Authority

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Our Ref: HP16/986

HPCA LEGAL CASE NOTE

Burton v Osteopathy Council of NSW [2015] NSWCATOD 150

Background

The practitioner held general registration as an osteopath and a chiropractor. He conducted his practice from his home and with his wife, also a registered health practitioner. The Council had taken urgent interim action to suspend his registration based on its concerns following an interview and a performance assessment of his professional practise.

The practitioner appealed to the Tribunal against the suspension. A range of arguments were raised during the appeal about the nature of the appeal, the admissibility of evidence, and in particular, the characterisation to be given to the performance assessment report.

The Council had filed evidence in the appeal, which included but was not limited to, the documents which had been before the Council in determining to take urgent interim action. The appellant filed no evidence in support of the appeal before the commencement of the hearing and objected to the Council's documents on various bases including relevance, hearsay, lack of independence and prejudice.

Ultimately, the appellant was unsuccessful, the appeal was dismissed and the suspension was confirmed. Although the appeal was dismissed, the technical arguments presented about the nature of the section 159 appeal, the objections to the evidence before the Council in first instance and the treatment of the Performance Assessment report were novel and as such warrant comment.

Findings and comments of the Tribunal

Nature of the appeal against urgent interim action

The appellant argued that that the nature of the appeal under section 159 of the *Health Practitioner Regulation National Law (NSW)* [the National Law (NSW)] was a *de novo* appeal in its fullest sense and that the documents which were before Council under section 150 were not relevant to the Tribunal's determination of the appeal under section 159.

The respondent Council argued that the practical effect of accepting this view would be that an appellant could stop the Tribunal from considering the evidence that had been before the Council whose decision was the subject of the appeal.

The respondent saw the appeal as a statutory hybrid. Irrespective of the nature the appeal, the Tribunal was entitled to receive fresh evidence, or evidence, in addition to or in substitution for, the evidence which was before the Council. The characteristics of the immediate action proceedings had been recognised in the case law both in NSW and elsewhere and the principles were well summarised in *WD* v *Medical Board of Australia* [2013] QCAT 614.

The Tribunal accepted the respondent's submissions and, aside from specific objections referred to below, admitted all the documents relied upon by the Council including those that had been considered when the Council had taken urgent interim action under section 150 of the National Law (NSW).

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Objections to the Performance Assessment report and related notes

The practitioner objected to the performance assessment report which had been commissioned by the Council and considered by it during its deliberations under section 150.

Under the National Law (NSW) a Council may decide to have a practitioner's performance assessed if it is concerned that any aspect of the practitioner's performance is, or may be, unsatisfactory. Once an assessor is engaged by Council he or she is obliged to conduct an assessment of the practitioner's professional performance and furnish a written report to Council [s.155B of the National Law (NSW)].

The appellant attempted to characterise the performance assessment report as expert evidence before the Tribunal. Consequently, objections to the report were taken on the basis that:

a. The report failed to comply with the Tribunal's procedural direction for experts and should not be admitted,
b. The report had been undertaken by the performance assessor for the Council and as such it lacked independence,
c. The report was opinion evidence and in accordance with ss. 76 and 79 of the *Evidence Act* 1995 ought to be rejected as inadmissible. Although the rules of evidence are not applicable the Tribunal should be guided by the *Evidence Act* principles.

The appellant argued that irrespective of the purpose of the original performance assessment report, if the report is from an expert but not an expert witness in terms of the procedural direction, it must be rejected because the procedural direction had not been observed. This argument was based on the decision of the Supreme Court in *Cahill* v *Kenna* [2014] NSWSC 1763.

The respondent characterised the report as a statutory report commissioned to assess the practitioner's performance and as a step in the Council making further inquiries regarding a complaint. Statements of opinion in the report were related to the specific performance assessment being undertaken. The report was not sought as an expert report for the purposes of Tribunal proceedings and so the procedural direction did not apply.

Tribunal's consideration of objections to the Performance Assessment report

a. Failure to comply with the Tribunal's procedural direction regarding expert evidence

The Tribunal rejected the view that the purpose of the performance assessment Report did not matter observing at paragraph 48:

> ……the fundamental issue here is that the performance assessment was before the council when it made its decision to suspend Dr Burton's registration. As noted above, it is not appropriate that Dr Burton, who is the appellant bringing the appeal, could prevent the Tribunal from considering the evidence which was before the Council whose decision was the very subject of his appeal.

The Tribunal examined the statutory framework regarding the obtaining of performance assessment reports on a practitioner's professional performance and concluded that there was no requirement for the Performance Assessor to comply with the Tribunal's procedural directions regarding expert evidence. The report was not obtained for the purposes of putting expert evidence before the Tribunal but for the purposes of informing Council about the practitioner's professional performance. The Tribunal also relied on the scope of the procedural direction, which at clause 7 states that it does not extend to *"treating doctors, other health professionals or hospitals (who might otherwise fall within the definition of expert witness), unless the Tribunal otherwise directs."*

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b. Lack of independence

The Tribunal viewed this ground as not pertinent to the admission of the report but a question of weight. However, the Tribunal found that the performance assessor (Dr Grace) was an entirely creditable witness saying *"[the Tribunal] does not accept that her lack of independence impugns her veracity,* [or] *the credibility of her evidence in a material way."* [Paragraph 66]

c. Assessment report as opinion evidence and guidance from rules of evidence

The Tribunal rejected the view that the rules of evidence and principles of the *Evidence Act* 1995 provided guidance in this context. Earlier objections to the Council's documents had been taken on the basis of hearsay, prejudice and relevance. The Tribunal referred to the provisions of the National Law (NSW), indicating the Tribunal was not bound by the rules of evidence and could inform itself as it thinks fit in having regard to the paramount public protection guiding principle in such proceedings. This view was reinforced by section 38(2) of the *Civil and Administrative Tribunal Act* 2013 and the case law, including Sudath's case [2012] NSWCA 171 and *Smith* v *Nursing and Midwifery Board of Australia* [2013] NSWNMT 10. The latter case had indicated that the procedural flexibility given to the Tribunal in this context was tempered by the need for the material to be "rationally probative".

Accordingly, the Tribunal determined that it was appropriate for it to consider the subject performance assessment report as evidence in the appeal.

Conclusion

This case is instructive in highlighting how the Tribunal perceives its role, its protective jurisdiction and the reception of evidence in appeals against urgent interim action taken by a health professional council. Ultimately, the technical arguments confining the nature of the appeal and the evidence to be received were rejected by the Tribunal. The Tribunal affirmed its procedural flexibility in dealing with such appeals and that it is concerned with assessing risk to public health and safety in this context. Evidence in such matters is generally admitted by the Tribunal provided it is rationally probative and with the caveat that the Tribunal is able to determine what weight is to be given to the evidence.

Here the Tribunal focused on the risk to the public posed by the practitioner as evidenced in the material before it. The Tribunal found the performance assessment report and the Council's interview report persuasive in assessing risk to the public. Coupled with this evidence was the fact that the practitioner had not complied with the registration standard regarding continuing professional development. The Tribunal looked at the practitioner holistically and was not confident that he would comply with appropriate practice standards. Consequently, the Tribunal confirmed the suspension of the practitioner.