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HPCA LEGAL CASE NOTE

Health Care Complaints Commission v Bainbridge [2018] NSWCATOD 169

Background

Bainbridge involved a nurse that had repeatedly breached conditions imposed on her registration due to her opiate dependency. Following a considerable number of proceedings under the Council's health program, urine drug testing (UDT) was made a critical impairment condition (CIC) on the practitioner's registration. The practitioner's subsequent breach of the CIC resulted in an automatic referral to the HCCC. The HCCC consequently prosecuted complaints of unsatisfactory professional conduct, professional misconduct, impairment and lack of competency to practice her profession.

Ultimately, the Tribunal made a decision in favour of the HCCC and cancelled the practitioner's registration after findings of lack of competence flowing from her impairment.

Analysis

Assessment of impairment

The factual scenario in this case was unusual in that the practitioner admitted to struggling with her addiction which resulted in repeated breaches of conditions on her registration over a significant period of time between 2014 and 2017.

The Tribunal found that the evidence clearly showed that the practitioner had a "*longstanding and continuing*"¹ opiate dependency. Relevant professional reports confirmed that the practitioner had not been able to abstain and had not asked for help when at risk of a relapse, despite the support offered to her under the Council's health program. This led the Tribunal to find that the practitioner's impairment resulted in her lack of competence to practice. The Tribunal expressed concern at [85] that "*... the public is placed at real risk when drug dependent or otherwise impaired health practitioners do not strictly comply with protective conditions.*"

Importantly the Tribunal was also conscious of the overall impact of this type of matter on the regulatory system and the Council's ability to perform its statutory functions. Specifically the Tribunal noted at [87] that:

"The ability of the Council to support and monitor impaired practitioners to ensure that they practise safely is severely strained in a case such as this, which has extended for over four years. The Council has committed very substantial resources to trying to ensure that the practitioner could continue to practise safely, and has in effect, offered more than one 'second chance' based upon the practitioner's assurance of future compliance."

¹ See [88]

Misconduct vs unprofessional conduct

Untypically, the findings of misconduct in this case did not flow from any unethical, dishonest or immoral behaviour. It was made based on a cumulative effect of repetitive breaches of the conditions. This conduct was seen by the Tribunal as inherently serious because of its public health and safety implications. The Tribunal also recognised that the repetitive nature of the non-compliances had burdened the regulator's resources in monitoring and supporting the impaired practitioners.

The Tribunal looked at the contraventions 'as a whole' to determine if they were of 'a sufficiently serious nature'² to warrant findings of professional misconduct. The Tribunal stated at [84] that:

"This is not a case in which a finding of misconduct flows from a finding of unethical conduct, moral turpitude or other form of denunciation of the practitioner. Nonetheless, the Tribunal determines that the proved and admitted unprofessional conduct must cumulatively amount to professional misconduct by reason of both its repetition and inherent seriousness."

Significance of conditions imposed

The HCCC argued that a practitioner must view conditions imposed on their registration with great seriousness because the purpose of such constraints are to ensure public health and safety. The HCCC relied on *Prakash v HCCC* [2006] NSWCA 153 at [45] where the Court of Appeal stated that:

"Any practitioner whose registration is subject to conditions could not reasonably hold any view of those conditions other than that they must be scrupulously observed."

Ultimately, the Tribunal took the view that the practitioner's proposed order of suspension followed by continuation of practice under more stringent conditions would be insufficient to ensure the safety and protection of the public. It would amount to the Tribunal applying a method that had previously failed would not accomplish "*lasting change in the practitioner's conduct*".³

Request for suppression order

Regarding the practitioner's application for suppression of her name, the Tribunal held a strong view about the purpose of disciplinary proceedings being one of preserving health and safety of public and that providing access to information about proceedings enhances that protection. The Tribunal stood firmly by this purpose as there was no evidence to suggest the practitioner would be the subject of a heightened risk. However, it acknowledged that there would be no public interest in the disclosure of personal and health information previously disclosed during regulatory processes and made relevant protective orders to ensure the file remains inaccessible to the public.

Conclusion

The Tribunal's findings underline that compliance with health conditions must be viewed very seriously. The decision places emphasis on the importance of preserving public health and safety, where the cancellation of an impaired practitioner's registration was seen as appropriate without findings of any unethical or dishonest behaviour.

² *HCCC v Perroux* [2011] NSWDC 99 at [18]

³ See [92]-[94]

In the context of this case the Tribunal acknowledged that:

- the practitioner was struggling to overcome her addiction and making a genuine attempt to comply with her conditions;
- the breaches were linked to the practitioner's family and financial circumstances; and
- the practitioner had shown insight into the impact of her impairment and personal circumstances on her ability to practice her profession.

Nevertheless, when balanced against the seriousness of her conduct, the Tribunal found that it was in the public interest to maintain professional standards and signal disapproval for repeated breaches of conditions.

The Tribunal's comments at paragraph [87], about the adverse effect on public resources of multiple "second chances", sends a strong message to both regulators and practitioners.

The full text of the decision can be found at:

<https://www.caselaw.nsw.gov.au/decision/5bbd3089e4b0b9ab40210228>