SUPREME COURT OF QUEENSLAND

CITATION:	*Nursing and Midwifery Board of Australia v HSK* [2019] QCA 144
PARTIES:	**NURSING AND MIDWIFERY BOARD OF AUSTRALIA** (appellant) **v** **HSK** (respondent)
FILE NO/S:	Appeal No 13319 of 2018 Appeal No 603 of 2019 QCAT No 200 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2018] QCAT 355; [2018] QCAT 418 (Sheridan DCJ)
DELIVERED ON:	26 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2019
JUDGES:	Morrison and McMurdo JJA and Boddice J
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the appellant appeals two separate decisions of the Queensland Civil and Administrative Tribunal – where both decisions were made in the course of a single proceeding in which the respondent, a registered nurse, sought an administrative review of a decision of the appellant to impose conditions on the respondent's registration on the grounds that the respondent had an impairment within the definition of the *Health Practitioner Regulation National Law* 2009 – whether the Tribunal erred in law in holding that there was no power, in the course of determining the administrative review, to direct that the respondent to undergo a further health assessment *Health Practitioner Regulation National Law Act* 2009 (Qld), s 169, s 178 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 17, s 19, s 20, s 24, s 62, s 17 *Alder v Khoo* [2010] QCA 360, cited *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67, cited *Jardin v Metcash Ltd* (2011) 285 ALR 677; (2011) 214 IR 448;

[2011] NSWCA 409, cited
People With Disability Australia Inc v Minister for Disability Services [2011] NSWCA 253, cited
Rintoul v State of Queensland & Ors [2015] QCA 79, considered
S v S [1972] AC 24, cited

COUNSEL: S A McLeod QC, with C Wilson, for the appellant
G W Diehm QC for the respondent

SOLICITORS: Minter Ellison Lawyers for the appellant
Hall Payne Lawyers for the respondent

[1] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the order his Honour proposes.

[2] **McMURDO JA:** I agree with Boddice J.

[3] **BODDICE J:** The appellant appeals two separate decisions of the Queensland Civil and Administrative Tribunal (***"QCAT"***). Both decisions were made in the course of a single proceeding in which the respondent, a registered nurse, sought an administrative review of a decision of the appellant to impose conditions on the respondent's registration on the grounds that the respondent had an impairment within the definition of the *Health Practitioner Regulation National Law* 2009 (***"the National Law"***).

[4] At issue on the appeals is whether QCAT erred in law in holding there was no power, in the course of determining the administrative review, to direct that the respondent undergo a further health assessment.

Background

[5] The appellant has regulatory responsibility for registered practitioners in the health profession comprising nursing and midwifery. A guiding principle in the performance of its regulatory functions is the protection of the public by ensuring that only suitably trained and qualified practitioners remain registered in that health profession.

[6] The respondent, a 24 year old nurse, was registered by the appellant on 22 January 2016. Her first employment as a registered nurse was at an Acute Mental Health Unit in regional Queensland. Within six months of commencing that employment, the respondent engaged in inappropriate behaviour with a male patient at that facility.

[7] The appellant's decision, the subject of the administrative review before QCAT, arose out of that inappropriate relationship. The respondent's behaviour involved boundary violations with a male patient of the unit. The boundary violations included the consumption of alcohol and engaging in sexual conduct with that patient. The respondent admitted that conduct.

[8] Upon notification of that boundary violation, the Health Ombudsman imposed conditions upon the respondent's registration. Subsequently, the appellant removed those conditions but imposed further conditions on the respondent's registration, on the basis the respondent has or may have an impairment within the meaning of s 178(1)(a)(ii) of the National Law.

[9] The basis for that conclusion was evidence that the respondent had been diagnosed with depression in 2012, whilst in her final year at school and at a time when her parents were experiencing marital difficulties. Thereafter, the respondent had, from time to time, been prescribed antidepressant medication. She had ceased taking that medication shortly prior to the events constituting the boundary violation. At and around that time, the respondent was also experiencing stressors in her life.

[10] In determining to impose conditions on the basis of impairment, the appellant relied on the contents of a health assessment undertaken by a psychiatrist, Dr Prior, pursuant to a requirement of the appellant issued pursuant to s 169 of the National Law.

[11] Dr Prior opined that the respondent had a major depressive disorder (recurrent) and a substance abuse disorder (mild). He recommended ongoing treatment and the imposition of conditions on the respondent's registration.

[12] At the time it imposed those conditions, the appellant also had a report from a psychiatrist, Dr Chung, who examined the respondent at the request of her legal representatives. Dr Chung formed a different opinion. In doing so, Dr Chung noted that a factual basis for Dr Prior's opinion was erroneous, on the history given to Dr Chung.

[13] The factual basis related to an account Dr Prior said the respondent had given concerning a prior sexual relationship with her cousin. Dr Prior's opinion was based on that sexual relationship being long-standing and consensual. Dr Chung recorded a very different account from the respondent. Dr Chung's account was of a sexual assault upon the respondent by that cousin.

Decisions

[14] In the review of the appellant's decision, a central issue was the appellant's acceptance of Dr Prior's opinion. Having regard to the opinion of Dr Chung as the history relied upon by Dr Prior, the appellant made application for a direction that the respondent undergo a further health assessment by Dr Prior. A further health assessment would provide Dr Prior with an opportunity to assess changes in the respondent's condition and differences in the respondent's recollections as to the event in dispute.

[15] The appellant submitted a further assessment was important because both psychiatrists had concluded that the respondent suffered a major depressive disorder. Their different opinions as to the need for ongoing conditions was dependent upon an acceptance or rejection of the disputed history. The respondent, who had refused to attend a further health assessment voluntarily, submitted there was no power to compel such an examination in a review.

[16] On 31 October 2018, QCAT dismissed the appellant's application for a direction that the respondent attend a further health assessment. QCAT found it did not have power under the National Law to require a health practitioner to attend a medical examination. Further, QCAT's very broad power to make directions was procedural in nature. It did not give QCAT a power to direct attendance for a medical examination (***"the first decision"***).

[17] The review itself was heard by QCAT on 12 December 2018. Both Dr Prior and Dr Chung gave evidence at that hearing. On 19 December 2018, QCAT ordered the conditions imposed on the respondent's registration by the appellant be set aside

(***"the second decision"***). In doing so, QCAT accepted the evidence of the respondent that the history relied upon by Dr Prior was erroneous, and concluded it was impossible to rely to any significant extent upon the opinions expressed by Dr Prior as to the respondent's ongoing impairment. Those opinions were based on an acceptance of that erroneous history.

Preliminary issue

[18] At the hearing of the appeal, the appellant did not press the appeal against the second decision. The appellant sought only to pursue the appeal against the first decision, on the basis it involved a question of law as to QCAT's power to direct a further health assessment as part of hearing a review of a reviewable decision.

[19] The appellant accepted that such a course meant there was no longer a live controversy between the parties as to the outcome of the proceedings commenced by the appellant against the respondent. The appellant also accepted that in those circumstances an issue arose as to whether this Court should entertain the appeal.

[20] The appellant submitted that notwithstanding those circumstances, it was appropriate for this Court to entertain the appeal. The appeal had been regularly commenced and whilst a change in circumstances meant the outcome would be moot so far as a particular controversy between the parties was concerned, there was a practical utility in the appeal proceeding. Whether QCAT had power to order a health assessment as part of an administrative review was likely to affect other cases.[1]

[21] As a general rule, this Court should be slow to entertain an appeal where the issue which was in dispute between the parties has become moot. To do otherwise is to engage in a determination of legal rights in a circumstance where one party to the controversy has no interest in advancing a particular outcome.

[22] There are, however, circumstances where a determination serves a practical point. The present circumstances is one such case. Whether QCAT, in conducting an administrative review of a decision of the appellant to impose conditions for the protection of the public, has power to order that the respondent practitioner undergo a further health assessment is a matter which can impact upon the conduct of review proceedings by QCAT generally. A determination of this issue is also relevant to the public interest in ensuring that administrative reviews are decided on a consideration of all relevant material.

[23] If there be power to order a further health assessment, it is in the public interest for an erroneous determination that there is no such power to be set aside.

Applicable legislation

[24] A decision to impose a condition on a registered practitioner's registration may be appealed by that registered practitioner.[2] The responsible tribunal to determine that appeal is QCAT. Upon such an appeal being lodged, the decision to impose conditions becomes a reviewable decision.[3]

[25] In undertaking that review jurisdiction, QCAT must decide the review in accordance with both the *Queensland Civil and Administrative Tribunal Act* 2009

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1 *People With Disability Australia Incorporated v Minister for Disability Services* [2011] NSWCA 253 at [12]-[15]; *Jardin v Metcash Ltd* [2011] NSWCA 409; (2011) 214 IR 448 at [31]-[32].

2 *Health Practitioner Regulation National Law Act* 2009 (Qld), s 199.

3 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 17.

(Qld) (***"the Act"***) and the National Law. QCAT has "all the functions of the decision-maker".[4] The term "function" is defined as including power.[5]

[26] The purpose of the review is to produce the correct and preferable decision. QCAT must hear and decide the review by way of a fresh hearing on the merits.[6] QCAT may confirm or amend the decision, set aside the decision and substitute its own decision, or set aside the decision and return the matter for reconsideration to the original decision-maker.[7]

The appeal

[27] Section 62 of the Act provides that in determining the review of a reviewable decision, QCAT may give a direction at any time in the proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding.[8] The appellant relies on this broad directions power to support its contention that QCAT had power to direct the respondent to attend a further health assessment.

[28] Alternatively, the appellant relies on s 169 of the National Law. That provision gives the appellant the power to require a registered practitioner to undergo a health assessment. The appellant submits QCAT has the functions, and therefore the powers of the appellant in determining the review.

[29] While s 62 of the Act contains a broad power, the power is to be exercised in the context of what is necessary for a speedy and fair conduct of the proceeding in question. That context supports a conclusion that the power is procedural.

[30] In *Rintoul v State of Queensland*, Holmes JA (as the Chief Justice then was) observed in respect of s 62:

> "Section 62(1) of the Act confers on the Tribunal a number of powers, which include the power to "give a direction at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding". That power is sufficiently broad to encompass an order which dismisses a proceeding in the event of non-compliance with a direction."[9]

[31] Dismissal of a proceeding for non-compliance with a direction involves the exercise of a power necessary for the speedy and fair conduct of the proceeding. Staying a proceeding until compliance with a direction similarly involves the exercise of a power in that context. Such directions are classically procedural in nature. They may be contrasted against a direction compelling the involuntary attendance of a registered practitioner for a health assessment. Compliance with that type of direction involves an interference with the liberty of an individual litigant.

[32] A power to compel an interference with the liberty of an individual litigant is not generally considered a direction necessary for the speedy and fair conduct of a proceeding. Other directions, procedural in nature, can address what is necessary for the speedy and fair conduct of a proceeding. For example, if a registered

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4 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 19(c).
5 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), sch 3.
6 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20(2).
7 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 24(1).
8 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 62(1).
9 [2015] QCA 79 at [10].

practitioner refused to voluntarily consent to a further health assessment, procedural directions could include staying the proceeding until the registered practitioner voluntarily attended upon a health assessment.

[33] As Widgery LJ observed in *Edmeades v Thames Board Mills Ltd*:

> "I can see the objections that would be raised if it were sought to give the court power to make a direct order for medical examination with, presumably, power to commit the plaintiff for contempt if he refused. But none of those objections, to my mind, arise where it is sought to give the plaintiff a right to elect between not going on with his action, or submitting himself to medical examination, especially where his refusal to be examined is based on no reason and will result in the defendants being unable to prepare their defence, and will thus result in the court being unable to do justice towards the defendants."[10]

[34] A direction requiring an interference with the liberty of an individual litigant has generally been viewed as requiring specific statutory authority.[11] The need for a specific statutory power to make directions involving a compulsory act which interferes with an individual's liberty has been recognised in legislation concerning claims for the recovery of damages as a consequence of the sustaining of personal injuries.[12]

[35] There was no error of law in QCAT's finding that s 62 of the Act did not authorise the making of a direction that a registered practitioner undergo a further health assessment as part of a review of a reviewable decision.

[36] QCAT also correctly concluded that s 169 of the National Law did not provide a power to order a further health assessment as part of the determination of a reviewable decision. A reading of that section, in the context of the National Law as a whole, supports the conclusion that the power given to the appellant to require a registered practitioner to undergo a health assessment is limited to the investigative phase of the appellant's concern that a registered practitioner has, or may have, an impairment.

[37] Section 171 of the Act provides that when a registered practitioner is required by the appellant to undergo an assessment pursuant to s 169, an assessor chosen by the appellant must be appointed to carry out that assessment with written notice being given to the registered practitioner. Further, the appointed assessor must, as soon as practicable after carrying out the assessment, give the appellant a report about the assessment with a copy of a report being given to the registered practitioner.[13]

[38] Section 176(3) of the Act requires that after the registered practitioner has been given a copy of that report, a person nominated by the appellant "must discuss the report with the practitioner" and, if the report makes a relevant adverse finding, "discuss with the practitioner ways of dealing with that finding". It is only after considering the assessor's report and the discussions held with the registered practitioner that the appellant may decide to take no further action, take necessary and appropriate action or refer the matter to another entity.[14]

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10 [1969] 2 QB 67, 72-72; See, for example, *Alder v Khoo* [2010] QCA 360.
11 *S v S* [1972] AC 24, 46-47.
12 *WorkCover Queensland Act* 1996 (Qld), s 286.
13 *Health Practitioner Regulation National Law (Queensland) Act* 2009 (Qld), ss 175 and 176.
14 *Health Practitioner Regulation National Law (Queensland) Act* 2009 (Qld), s 177.

[39] That structure is consistent with the power given by s 169 being limited to the investigation phase. Such a structure is entirely inapplicable to the process of a hearing of a reviewable decision by QCAT.

Conclusions

[40] QCAT correctly concluded that neither s 62 of the Act, nor s 169 of the *National Law* gave power to compel a registered practitioner to attend a further health assessment as part of a hearing of the review of a reviewable decision.

[41] There was no error of law in the first decision.

Order

I would order that the appeal be dismissed.