



THE PRESIDENT: The applicant has appealed from the decision of the Health Practitioners' Tribunal of 25 July 2003, which suspended the applicant's registration as a medical practitioner for a period of 12 months. He applies under s 351 Health Practitioners (Professional Standards) Act 1999 (Qld) for a stay of that decision until the determination of the appeal. That section relevantly provides:

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"1. If an appellant files, or has filed, a notice of appeal and makes an application to the Court of Appeal for a stay of the appealable decision to secure the effectiveness of the appeal, the Court may grant the stay if it considers it appropriate.

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2. The stay may be granted on conditions the Court considers appropriate and has the effect for the period stated by the Court."

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The applicant's admitted conduct leading to the decision appealed from related to the commencement and maintenance of a sexual relationship with a female patient between 1 August 1996 and 31 January 1997.

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The Court has an unfettered discretion to grant a stay and the applicant bears the onus of showing that it is an appropriate case for a stay to be granted: Crony v Nand (1992) 2 QdR 342, 348.

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One of the relevant factors is whether, in the event the appeal succeeds and no stay is granted, the appeal will be fruitless.

The applicant's solicitor has deposed that the applicant's surgery is the only surgery in Yungaburra. The nearest surgery is in Atherton, over 11 kilometres away. The applicant bulk bills for the Medicare rebate only as many of his patients are elderly or unemployed people. To the applicant's knowledge, doctors in Atherton do not bulk bill. Many patients will be inconvenienced, it seems, by the closure of the applicant's surgery. He has previously suffered financial loss as a result of the suspension of his registration in respect of these proceedings for four months and six days in 2002. During this period, the applicant engaged a doctor on a locum tenens basis but the surgery ran at a loss. The respondent set aside that notice of suspension and the applicant has conducted his practice in Yungaburra since September 2002 whilst complying with certain conditions set out by the respondent. The efforts he has made to rebuild his practice will be lost if he is unable to work pending the hearing of the appeal.

The second matter relied on by the applicant relevant to the granting of the stay is that he has an arguable case. This is not a matter about which this Court should speculate, but it is relevant in considering whether the appeal has simply been lodged to delay an inevitable outcome: Crony v Nand at 349.

The respondent neither consents to nor opposes the granting of a stay but submits that, if a stay is granted, it should be on the conditions previously entered into by way of an undertaking by the registrant, accepted by the Health Practitioners' Tribunal, on the terms set out in paragraph 3 in the affidavit of James Patrick O'Dempsey, sworn 7th of August 2003. In addition, the respondent now seeks a condition that the registrant bear the Board's costs of undertaking the monitoring of his compliance with these conditions.

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The applicant is content to meet the conditions originally required by the respondent but submits that it is unnecessary that there be a physical monitoring of those conditions.

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The respondent concedes, for the purposes of this application only, that the applicant has an arguable case as to whether the penalty imposed was manifestly excessive. I have made enquiries of the appeals registry as to when this matter is likely to be heard and I am told that, without making any special arrangements, the matter could be heard in about mid October of this year. I am not satisfied that during this relatively short period, on the material before me, it is necessary to have actual physical monitoring by an inspector of the applicant's compliance with the respondent's conditions which he has, it seems, met to date.

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In the circumstances, weighing the competing interests here, the applicant has established that a stay is appropriate:

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there is a real possibility that in the event the appeal succeeds and no stay is granted, the appeal will be fruitless, as the applicant's practice may have fallen away; additionally, for the purposes of this application it is conceded there is an arguable case. The stay should, however, be on the conditions previously entered into in the applicant's undertaking to the respondent.

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I order that the decision of the Health Practitioners' Tribunal made on 25 July 2002 be stayed until this Court decides the appeal, conditional upon the five conditions set out in paragraph 3 of the affidavit of James Patrick O'Dempsey filed on the 7th of August 2003.

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THE PRESIDENT: The costs of this application are reserved for the Court of Appeal hearing the appeal.

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