

CITATION: *Medical Board of Australia v Rall (No 2)* [2016] QCAT 229

PARTIES: Medical Board of Australia
(Applicant)
v
Deon Rall
(Respondent)

APPLICATION NUMBER: OCR090-14

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Hon JB Thomas, Judicial Member**
Assisted by:
Dr David Evans
Dr Heather Parker OAM
Mr Brad Taylor

DELIVERED ON: 5 May 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The respondent Deon Rall is ordered to pay one half of the applicant Board's costs of and incidental to the proceedings on the standard basis on the District Court scale of costs, to be assessed by a costs assessor appointed by the Board**
- 2. The respondent Deon Rall must pay such costs within 28 days of notification to him of the assessment**

CATCHWORDS: HEALTH PROFESSIONAL – DISCIPLINARY PROCEEDINGS – COSTS – where doctor found guilty of unsatisfactory professional conduct – factors influencing costs orders in disciplinary proceedings – cases in which legislation has removed former unfettered discretion – restricted discretion available under QCAT Act - whether Medical Board entitled to costs under enabling legislation – form of order

Health Ombudsman Act 2013 (Qld) ss 321, 326(50)
Health Practitioners (Disciplinary Proceedings) Act 1999 (Qld) ss 243(2)(b)(v), 255
Health Practitioner Regulation National Law Act 2009 (Qld) ss 195, 289(2)
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 32, 100, 102

APPEARANCES & REPRESENTATIONS:

APPLICANT: McInnes Wilson Lawyers for the applicant Board

RESPONDENT: In person by written submissions

This matter was heard and determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ('QCAT Act').

REASONS FOR DECISION

[1] On 12 April 2016, this Tribunal made the following orders:

- a) A finding is recorded that in the months of March and May 2009, Dr Rall was guilty of unsatisfactory professional conduct in that his professional conduct was of a lesser standard than that which might reasonably be expected of a registrant by the public or by his professional peers;
- b) Under section 289 of the *Health Practitioner Regulation National Law Act 2009 (Qld)* and under section 243(2)(b)(v) of the *Health Practitioners (Disciplinary Proceedings) Act 1999 (Qld)*, it is ordered that Dr Rall refrain from reapplying for registration as a health practitioner in any jurisdiction in Australia for a period of three years from the date of this order.

[2] Submissions have now been received from both parties on costs.

[3] The Tribunal found that allegations against Dr Rall of sexually motivated internal examinations of two female patients were not established to the required standard of proof, but that the examinations were so inadequately conducted as to justify a finding of unsatisfactory professional conduct.

Jurisdiction

- [4] The Board received the relevant notifications leading to these proceedings prior to the commencement of the *Health Practitioner Regulation National Law Act 2009* (Qld) ('the National Law').¹
- [5] Under section 289(2) of the National Law, such notifications continue to be dealt with pursuant to the Act under which they were made.
- [6] The original notification was made under the *Health Practitioners (Disciplinary Proceedings) Act 1999* (Qld) ('the Disciplinary Proceedings Act'),² and the present proceeding purports to be a reference under section 126 of that Act. Such a reference was clearly authorised by section 289 of the National Law.
- [7] The Disciplinary Proceedings Act has now been repealed by section 321 of the *Health Ombudsman Act 2013* (Qld) ('the HO Act').³ That section and its repeal of the Disciplinary Proceedings Act have been effective since 1 July 2014.⁴
- [8] At that time, the present matter had already been referred to QCAT but had not been decided. Sections 314 and 315 of the HO Act provide that QCAT may continue to hear and decide the matter in accordance with the Disciplinary Proceedings Act.
- [9] The maintenance of these proceedings under the repealed act is therefore authorised and required by the above legislation.

Discretion to award costs

- [10] Until fairly recently,⁵ QCAT's discretion to award costs in disciplinary proceedings concerning health practitioners was readily identifiable in the enabling acts. For all references under the National Law, s 195 conferred a general discretion to '*make any order about costs it considers appropriate for the proceedings*,⁶ and a similarly untrammelled discretion was conferred by section 255 of the Disciplinary Proceedings Act for proceedings to which it applied.
- [11] However, a serious problem was created by what appears to have been an accidental removal of section 195 from the National Law by the HO Act., and, as yet, any failure to reinstate it for National Law referrals. (See sub-para 50 of s 326 of the HO Act, effective from 1 July 2014). The effect of this is that instead of the former untrammelled discretion to award costs

¹ Commencement date 1 July 2010.

² National Law s 289(2)(b); cf *Health Practitioners (Professional Standards) Act 1999* (Qld) s 405N(2).

³ *Health Ombudsman Act 2013* (Qld) s 321.

⁴ Subordinate Legislation 2014 No.15 made under the *Health Ombudsman Act 2013* (Qld).

⁵ Commencement date of most provisions of the HO Act, 1 July 2014.

⁶ National Law s 195.

in such cases, the generally restrictive costs provisions of the QCAT Act are all that remain.

- [12] The costs provisions governing QCAT Tribunals stipulate that each party to a proceeding must bear its own costs unless otherwise provided in the QCAT Act, or by an enabling act, or unless the interests of justice require it.⁷
- [13] However, matters relating to professional discipline differ markedly from general civil disputes in QCAT. The Tribunal's unqualified power to award costs is an important cog in the maintenance of a sound disciplinary system. Under the new system of the HO Act the preparation and conduct of many matters with which QCAT will have to deal will be performed by the Health Ombudsman's office, but there will remain a significant number of matters where the running will continue to be made by the relevant Board. These will include any referral under s 193B of the National Law. In such matters the Board is entrusted with the maintenance of appropriate conduct by its practitioners, and it may incur considerable expense in investigating and prosecuting. They are funded by their practitioner members. The jurisdiction to award costs against an erring practitioner in favour of a Board that owes a duty to the public to maintain high standards should not be fettered.
- [14] Many previous cases in this jurisdiction have recognised that it is undesirable that professionals of good standing bear the full burden of costs arising from the unprofessional conduct of others. The primary objective of proceedings of the present kind is to protect the public and to help maintain appropriate standards of practice and public confidence in the profession. The Board has a duty to pursue such matters. Consequently, costs follow the event, and a practitioner against whom a disciplinary charge is established will usually be ordered to pay the Board's costs unless some other telling factor or consideration emerges. Factors against an award of costs, or which support a reduction of costs, may include the conduct of the parties during the litigation, or the failure of the applicant Board on particular issues.
- [15] I leave for another day the question of the proper approach under current legislation to awards of costs in referrals by Boards under section 193B of the National Law. However, the above considerations may well lead to determinations in individual cases that it is in the interests of justice that costs be awarded.⁸
- [16] In the present matter, the enabling act is the Disciplinary Proceedings Act, which displaces the QCAT general costs rules. I am therefore able to approach the present matter with reference to section 255 of the Disciplinary Proceedings Act.

⁷ QCAT Act ss 100, 102.

⁸ QCAT Act s 102(1) empowers the Tribunal to make a costs order "if the tribunal considers the interests of justice require it to make the order".

Discussion

- [17] In the present matter, the Board contends that "*the disciplinary grounds against Dr Rall were substantiated*" and that "*costs should follow the event.*" This overlooks the fact that the Board failed to establish the principal charge that it brought, namely "*infamous conduct*" or "*misconduct in a professional respect*".⁹ That charge depended upon proof of the allegation that the examinations of the female patients were sexually motivated.
- [18] I do not suggest that the Board should be deprived of costs merely because the highest of a series of charges fails. However, in the present case, the sexual gratification issue dominated the litigation and the eventual finding was essentially a residual conclusion that on two occasions Dr Rall's medical performance was substandard. It is clearly a case where some substantial reduction should be made from the costs that the Board might otherwise be awarded.
- [19] Dr Rall's submissions on costs were based mainly on personal hardship. He also referred to collateral disadvantage as a result of the Australian Medical Board having informed the South African Medical Board of the investigation. Neither of these points is persuasive in the present context. In the long history of awards of costs in litigation, hardship has not often been recognised as a telling factor and the subject notifications would appear to have been perfectly regular and necessary.
- [20] However, the real point in the present matter is that a very serious allegation of sexual impropriety was made and was not able to be proven to the required standard. I imply no fault on the part of the Board or its advisers, all of whom appear to have acted impeccably throughout. Indeed, the Board would have been remiss if it had failed to act as it did.
- [21] The Board should be awarded some costs because it has established unsatisfactory professional conduct and, in order to obtain the necessary resolution of the matter, it was entitled to come to this Tribunal.
- [22] In all the circumstances, it should be awarded one-half of its costs to be assessed.

Orders

- [23] The Tribunal's orders are as follows:
- a) The respondent Deon Rall will be ordered to pay one half of the applicant Board's costs of and incidental to the proceedings on the standard basis on the District Court scale of costs, to be assessed by a costs assessor appointed by the Board;

⁹ I.e. the charges based on subparagraphs (c) and (d) of the definition of "unsatisfactory professional conduct" in the Disciplinary Proceedings Act.

- b) The respondent Deon Rall must pay such costs within 28 days of notification to him of the assessment.