

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *AMS v Medical Radiation Practice Board of Australia (No 3)* [2021] QCAT 89

PARTIES: **AMS**  
(applicant)

v

**THE MEDICAL RADIATION PRACTICE BOARD OF AUSTRALIA**  
(respondent)

APPLICATION NO/S: OCR147-19 and OCR401-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 24 March 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President

ORDERS: **Each party must bear the party's own costs of the proceedings.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – COSTS – regulation of health practitioner – where a registered health practitioner succeeded in an application to review a decision of his professional Board to place conditions on his registration – where the health practitioner seeks an order for costs – whether the interests of justice require an order for costs

Health Practitioner Regulation National Law (Queensland), s 178  
*Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 19, s 20, s 48, s 100, s 102, s 103, s 106

*AMS v Medical Radiation Practice Board of Australia* [2019] QCAT 400  
*AMS v Medical Radiation Practice Board of Australia (No 2)* [2019] QCAT 401  
*Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 77  
*Legal Services Commissioner v McLeod* [2020] QCAT 371  
*Magill v Queensland Law Society Inc (No 3)* [2020]

QCAT 327  
*Marzini v Health Ombudsman (No 4)* [2020] QCAT 365  
*Medical Board of Australia v Wong* [2017] QCA 42

REPRESENTATION:

Applicant: Susan Moriarty & Associates

Respondent: Clayton Utz

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

**REASONS FOR DECISION**

**Introduction**

- [1] AMS<sup>1</sup> (applicant) has held registration with the respondent Medical Radiation Practice Board of Australia Board) as a medical radiation practitioner since 2008.
- [2] On 12 April 2019 the Board made two decisions concerning the applicant. One decision, referred to in reasons for decision as the “conduct decision”, was a decision to impose conditions on the applicant’s registration pursuant to s 178(1)(a)(i) of the Health Practitioner Regulation National Law (Queensland) (“National Law”). Such decision was the subject of the applicant’s application to review the decision in proceeding OCR147-19 and the decision of the Tribunal in *AMS v Medical Radiation Practice Board of Australia (No 2)*.<sup>2</sup> The other decision, referred to as the “impairment decision”, was a decision to impose conditions pursuant to s 178(1)(a)(ii) of the National Law. Such decision was the subject of the applicant’s application to review the decision in proceeding OCR401-19 and the decision of the Tribunal in *AMS v Medical Radiation Practice Board of Australia*.<sup>3</sup> The applicant’s applications to review both decisions were heard and decided together pursuant to s 55 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (*QCAT Act*).
- [3] Following a hearing on 9 December 2019, on 13 December 2019, the Tribunal delivered *ex tempore* reasons and made orders in both proceedings. The Tribunal set aside the conduct decision and set aside the impairment decision except for the decision to impose certain conditions that were not opposed by the applicant. Following the delivery of reasons and orders, I enquired of both parties’ legal representatives whether there were any other matters that needed to be addressed. Both legal representatives, neither of whom who had appeared at the substantive hearing on 9 December 2019, answered in the negative.
- [4] Subsequently, the applicant’s legal representatives filed an application seeking an order that the Board and the Board’s legal representatives pay the applicant’s costs.

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<sup>1</sup> These reasons are anonymised in accordance with a non-publication order made by the Tribunal on 13 December 2019 pursuant to section 66 of the *Queensland and Civil Tribunal Act 2009* (Qld).

<sup>2</sup> [2019] QCAT 401.

<sup>3</sup> [2019] QCAT 400.

The application annexed written submissions of the applicant's legal representatives, such submissions annexing further documents. The Board's legal representatives filed written submissions and supplementary written submissions. The applicant filed written submissions in reply and an affidavit of the applicant.

### **Legislation**

The following provisions of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld) (QCAT Act)* require consideration:

#### **48 Dismissing, striking out or deciding if party causing disadvantage**

(1) This section applies if the tribunal considers a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including by –

- (a) not complying with a tribunal order or direction without reasonable excuse; or
- (b) not complying with this Act, an enabling Act or the rules; or
- (c) asking for an adjournment as a result of conduct mentioned in paragraph (a) or (b); or
- (d) causing an adjournment; or
- (e) attempting to deceive another party or the tribunal; or
- (f) vexatiously conducting the proceeding; or
- (g) failing to attend conciliation, mediation or the hearing of the proceeding without reasonable excuse.

(2) The tribunal may –

...

- (c) make an order under section 102, against the party causing the disadvantage, to compensate another party for any reasonable costs incurred unnecessarily.

....

(3) In acting under subsection (2), the tribunal must have regard to the following –

- (a) the extent to which the party causing the disadvantage is familiar with the tribunal's practices and procedures;
- (b) the capacity of the party causing the disadvantage to understand, and act on, the tribunal's orders and directions;
- (c) whether the party causing the disadvantage is acting deliberately.

...

**100 Each party usually bears own costs**

Other than as provided under this Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceeding.

...

**102 Costs against party in interests of justice**

- (1) The tribunal may make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the tribunal considers the interests of justice require it to make the order.
- (2) However, the only costs the tribunal may award under subsection (1) against a party to a proceeding for a minor civil dispute are the costs stated in the rules as costs that may be awarded for minor civil disputes under this section.
- (3) In deciding whether to award costs under subsection (1) or (2) the tribunal may have regard to the following –
  - (a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g);
  - (b) the nature and complexity of the dispute the subject of the proceeding;
  - (c) the relative strengths of the claims made by each of the parties to the proceeding;
  - (d) for a proceeding for the review of a reviewable decision –
    - (i) whether the applicant was afforded natural justice by the decision-maker for the decision; and
    - (ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;
  - (e) the financial circumstances of the parties to the proceeding;
  - (f) anything else the tribunal considers relevant.

**103 Costs against representative in interests of justice**

- (1) If the tribunal considers a representative of a party to a proceeding, rather than the party, is responsible for unnecessarily disadvantaging another party to the proceeding as mentioned in section 102(3)(a), the tribunal may make a costs order requiring the representative to pay a stated amount to the other party as compensation for the unnecessary costs.

- (2) Before making a costs order under subsection (1), the tribunal must give the representative a reasonable opportunity to be heard in relation to making the order.

...

### **106 Costs awarded at any stage**

If the tribunal may award costs under this Act or an enabling Act, the costs may be awarded at any stage of a proceeding or after the proceeding has ended.

- [5] Section 100 of the *QCAT Act* states the *prima facie* position that each party, whatever the outcome of proceedings, will bear their own costs of the proceedings. That *prima facie* position is subject to the exercise of the discretion of the Tribunal, pursuant to section 102 of the *QCAT Act*, to order otherwise if the Tribunal “considers the interests of justice require it to make the order”.

- [6] As to the factors relevant to the exercise of that discretion specified in section 102(3) of the *QCAT Act*:

The factors listed in s 102 are a guide to the considerations the Tribunal may take into account in deciding whether this is an appropriate case in which to award costs. In any given case, the relative importance of each criterion will vary. Further, their significance may relate to what stage the proceedings have reached. For example, questions about the relative strengths of the parties’ cases may assume less significance upon an initial hearing, yet loom large when it comes to the costs of an application for leave to appeal.<sup>4</sup>

These factors, individually and collectively, are not determinative, and go only to informing the exercise of a broad discretion, the touchstone of which remains the Tribunal’s assessment of the interests of justice in a particular case. The discretion to award costs will only be exercised when the interests of justice in a particular case outweigh the *prima facie* “no costs” position under s 100.<sup>5</sup>

- [7] In the context of disciplinary proceedings, other relevant factors may include a legislative obligation upon a regulatory authority to refer a matter to the Tribunal<sup>6</sup> and the parties’ entitlement to legal representation.<sup>7</sup>

### **Applicant’s submissions**

- [8] I will not detail the contents of all the written submissions on behalf of the applicant nor the contents of the applicant’s affidavit. The applicant makes extravagant, scandalous claims alleging bad faith on the part of the Board in their decision making and on the part of the Board and the Board’s legal representatives in their conduct of proceedings in the Tribunal. I suspect that the true author of the material filed on behalf of the applicant is the applicant himself, without the moderating filter of an editing lawyer. It is curious that the written submissions are signed off in the name of the applicant and his lawyers’ firm name. I am left with

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<sup>4</sup> *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 77 at [10] per Deputy President Kingham DCJ.

<sup>5</sup> *Magill v Queensland Law Society Inc (No 3)* [2020] QCAT 327 at [7] per Daubney J, President.

<sup>6</sup> *Medical Board of Australia v Wong* [2017] QCA 42.

<sup>7</sup> *Marzini v Health Ombudsman (No 4)* [2020] QCAT 365 at [37] per Judicial Member D J McGill SC.

the distinct impression that the applicant's legal representatives have merely acted as a "mouth piece" for their client and left the content of the applicant's submissions and evidence to his lay judgment, unmoderated by proper professional judgment. The content of the material filed on behalf of the applicant reflects poorly on the applicant and his legal representatives.

- [9] The unreasonableness of the applicant's submissions is exemplified by his submissions seeking costs in proceeding OCR401-19. The application was only filed with the Tribunal's leave on the morning of the day listed for hearing of proceeding OCR147-19. The applicant and his legal representatives had overlooked the need to apply for review of the impairment decision, which imposed identical conditions on the applicant's registration as the conduct decision, despite this issue being drawn to their attention by the Board's legal representatives. The Board did not seek to take advantage of the applicant's error and did not oppose the application being filed and heard immediately along with the application in proceeding OCR147-19.
- [10] I have considered all the submissions and evidence of the applicant and the reasons why the applicant contends that the Board and the Board's legal representatives should pay all of the applicant's costs on the indemnity basis in relation to both applications (OCR147-19 and OCR401-19) and his application for costs. I will not repeat them.

#### **Respondent's submissions**

- [11] The Board submits that the applicant, by his legal representative's conduct on 13 December 2019, abandoned any entitlement to apply for costs. Section 106 of the *QCAT Act* does not act to override such abandonment. Alternatively, the applicant's conduct on 13 December 2019 ought to be considered a discretionary factor weighing strongly against an order for costs.
- [12] The Board made detailed written submissions addressing the terms of sections 48, 100, 102 and 103 of the *QCAT Act* and their application to the circumstances of the proceedings. I need not repeat them other than to note as follows.
- [13] The Board and its legal representatives rejected the applicant's allegations of bad faith in the strongest possible terms.
- [14] The Board submitted that it had not unnecessarily disadvantaged the applicant in the proceedings within the terms of section 48 of the *QCAT Act*. There was no basis for an award of costs, let alone indemnity costs, against the Board or, pursuant to section 103 of the *QCAT Act*, against the Board's legal representatives.
- [15] The fact that the Tribunal, after hearing further evidence during the hearing, reached different decisions to those of the Board, was not evidence of improper or unreasonable conduct on the part of the Board at first instance. The mere fact the applicant was broadly successful in both applications does not displace the presumption against costs pursuant to section 100 of the *QCAT Act*.
- [16] The Board submitted that the applications for costs ought to be dismissed.

#### **Consideration**

- [17] I consider that section 106 of the *QCAT Act* permits consideration of the application for costs. In all the circumstances, the applicant should not be regarded as having abandoned his entitlement to apply for costs. I have considered the application on its merits, without regard to anything said by the applicant's legal representative on 13 December 2019.
- [18] In determining the substantive applications, the Tribunal conducted hearings *de novo*, conducting a fresh hearing on the merits, including considering evidence not before the Board at the time of the original decisions.<sup>8</sup> The fact that the Tribunal reached different decisions to that of the Board at first instance does not mean that the decisions of the Board, at the time they were made, were "wrong". It does not follow from the decisions of the Tribunal that it was not open to the Board, at the time of its decisions, to form a reasonable belief that the way the applicant practised his profession may be unsatisfactory and that the applicant may have an impairment and that it was necessary to impose conditions on his registration. Notwithstanding the detailed submissions of the applicant to the contrary, I do not find that the decisions of the Board were so unreasonable as to justify an order for costs.
- [19] Notwithstanding the detailed submissions of the applicant to the contrary, I do not find that the Board's conduct of proceedings unnecessarily disadvantaged the applicant within the terms of section 48 of the *QCAT Act*.
- [20] After considering all the circumstances of the matter and the considerations in section 102(3) of the *QCAT Act*, I do not consider that the interests of justice require an award of costs, let alone indemnity costs, against the Board or, pursuant to section 103 of the *QCAT Act*, against the Board's legal representatives.
- [21] The order of the Tribunal will make it clear that the default position, pursuant to section 100 of the *QCAT Act*, will apply.

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<sup>8</sup> See *QCAT Act*, ss 19 and 20.