

Miles Roger Wislang

Appellant

v.

Medical Council of New Zealand and others

Respondents

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 16th December 2004

Present at the hearing:-

Lord Hope of Craighead

Lord Rodger of Earlsferry

Baroness Hale of Richmond

Lord Carswell

Lord Brown of Eaton-under-Heywood

[Delivered by Lord Brown of Eaton-under-Heywood]

1. The appellant, Dr Wislang, is a registered medical practitioner specialising in hair transplants. From 1994 to 1998 he practised without a current practising certificate. He has not, in the event, practised since.

2. In May 1999, following a patient's complaint, he was charged by the third respondent, the Complaints Assessment Committee (the CAC), with professional misconduct, the practice of medicine without a current practising certificate being deemed to be professional misconduct by section 109(2)(b) of the Medical Practitioners Act 1995 (the Act).

3. That charge, initially admitted by Dr Wislang, but subsequently denied, came twice before the second respondent (the Medical Practitioners Disciplinary Tribunal): first on 7 October 1999 when the matter was adjourned (Dr Wislang's registration

meanwhile being suspended by order made pursuant to section 104(1)(a) of the Act), and finally on 11 November 1999 when the Tribunal determined that Dr Wislang be censured, that his registration be suspended for two months, that he pay a fine of \$8,500, and that he pay 35% of \$52,288.97 (such being the total costs and expenses of and incidental to the CAC's inquiry into and prosecution of the charge, and the hearing by the Tribunal).

4. Meantime, on 27 August 1999, Dr Wislang had applied to the first respondent (the Medical Council of New Zealand) for an annual practising certificate, an application which the Council on 2 March 2000 indicated that it proposed granting conditionally, and which on 20 September 2000, following a hearing on 10 August 2000, the Council finally resolved to grant subject to two conditions: (i) "that you restrict your independent practice to hair transplants and the teaching of anatomy and bio-surgical research", and (ii) "that you nominate a general overseer who will also agree to be your mentor".

5. A month later, on 18 October 2000, Dr Wislang issued judicial review proceedings challenging each of those three decisions: the Tribunal's interim suspension order of 7 October 1999, the Tribunal's final order of 11 November 1999 (save as to censure), and the Council's decision to impose conditions upon Dr Wislang's practicing certificate, in particular the second condition as to oversight.

6. That challenge failed before Wild J on 21 June 2001. It failed again before the Court of Appeal (Richardson P, Blanchard and Tipping JJ) on 4 March 2002. This further appeal to the Board is brought as of right, the quantum of the Tribunal's disputed fine exceeding \$5,000.

7. Before turning to consider the substance of Dr Wislang's appeal, their Lordships note that all three of the decisions under challenge were amenable to statutory appeal to a district court pursuant to section 116(1)(a) of the Act (subject only, in the case of the interim suspension order, to Dr Wislang having first sought, unsuccessfully, its revocation under section 105) – an appeal which by virtue of section 118 of the Act is unrestricted in scope – and, if necessary, a further appeal in point of law by case stated to the High Court (section 121). Their Lordships note too that in respect of the Tribunal's costs order Dr Wislang did in fact appeal to a district judge, an appeal which was heard on 11 April 2000 and dismissed by Judge Cadenhead in a reserved judgment dated 27

April 2000. Dr Wislang chose not to appeal against any other aspect of the Tribunal's determination, nor did he appeal against the Council's imposition of conditions, nor did he further appeal against the district judge's decision on the costs appeal.

8. With that brief introduction their Lordships turn in a little more detail to the facts of the case although by no means as fully as they are to be found in the various judgments below, in particular that of Wild J to which any interested reader is referred. First, it is necessary to say a word as to why the disciplinary proceedings came to be adjourned on 7 October 1999. Put briefly, this was because, shortly before that hearing, the CAC misguidedly chose to amend the charge to include an allegation that, by carrying on his business without a practising certificate, Dr Wislang had practised medicine outside the extent permitted by the conditions of his registration contrary to section 109(1)(f) of the Act – an allegation which, unlike that of professional misconduct, exposed him to the risk of an order under section 110(1)(a) that his name be removed from the Register. In the event, a week before the resumed hearing, the Tribunal notified Dr Wislang that it would itself re-amend the charge to delete the fresh allegation made under section 109 (1) (f), whereupon Dr Wislang decided to contest even the charge of professional misconduct originally brought.

9. Turning to the Tribunal determination of 11 November 1999, the subject of a fully reasoned twenty page decision dated 10 December 1999, their Lordships think it unnecessary to recount most of this. For reasons which will appear, however, paragraph 6.3 of the decision is of some importance and should be set out in full:

“6.3 it must be borne in mind that Dr Wislang practised without a practising certificate for more than four years. He was aware that he did not have a practising certificate but for a variety of reasons simply failed to obtain one. Notwithstanding, throughout that period he held himself out as a medical practitioner properly qualified and entitled to claim that status. He continued to treat patients and, most worryingly, to obtain, prescribe and administer drugs. He admitted that he was aware that all persons, including patients, pharmacists and drug companies, entered into their dealings with him on the basis that he was entitled in all respects to carry on his practice as a hair transplant surgeon and that aspect of his offending and the potential

consequences for innocent third parties has already been referred to in this Decision.”

The Tribunal had earlier in its decision pointed to:

“the jeopardy in which [Dr Wislang] placed other persons . . . For example, the pharmacists and drug companies who filled the prescriptions and/or supplied him with the medicines he required to carry on his practice, all in the belief that he was a ‘practitioner’ within the terms of the relevant legislation, i.e. the Medicines Act, the Misuse of Drugs Act and the Medical Practitioners Act and therefore legally entitled to obtain the medicines he required to carry on his medical practice.”

10. Two of Dr Wislang’s main contentions relate to the Tribunal’s decisions respectively to suspend him from practice for two months and as to costs and to these their Lordships will return. Meantime, however, it is convenient first to indicate the basis on which the Council on 20 September 2000 came to specify the conditions upon which it was prepared to issue Dr Wislang with a practising certificate (a certificate which in the event Dr Wislang chose not to take up).

11. The first of the conditions (see paragraph 4 above), originally proposed by the Council was simply that Dr Wislang “restrict your independent practice to hair transplants” (a restriction which Dr Wislang has always accepted was correctly imposed). That condition, however, was widened in response to representations made by Dr Wislang and his counsel, Mr Taylor. As the Council’s letter of 20 September 2000 explained:

“The Council accepted that you have been involved in bio-surgical research and anatomy teaching in the past and that you intend to resume work in these areas in the future. The Council does not want to restrict you from doing this and determined that the scale of practice of your annual practising certificate be widened to enable you to do that.”

12. Now Dr Wislang contends that this widening of the condition was both unnecessary and inappropriate: such academic pursuits, he submits, were in any event open to him without the requirement for any practising certificate. So be it. This is hardly a reason for now quashing a condition, the terms of which Dr Wislang had himself sought, least of all upon a ground never previously advanced.

13. It is, however, the second condition to which Dr Wislang takes the strongest exception: “That you nominate a general overseer who will also agree to be your mentor”. This condition, Dr Wislang submits, was beyond the Council’s powers to impose. In examining this submission it is necessary to have in mind the statutory framework under which conditional practising certificates may be issued. The central provisions of the 1995 Act are these:

“3(1) The principal purpose of this Act is to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practise medicine.

(2) Without limiting the generality of subsection (1) of this section, this Act seeks to attain its principal purpose by, among other things, ... (b) Providing for the registration of medical practitioners and the issue of annual practising certificates ...”

“54(1) When an application for an annual practising certificate has been referred to the Council by the Registrar, the Council shall not decide that the certificate should be issued unless it is satisfied that the applicant is competent to practise medicine in accordance with his or her registration (or, if the Council imposes conditions on the annual practising certificate, that the applicant is competent to do so if he or she complies with those conditions).

(2) If the Council, after considering any application for an annual practising certificate, decides that ... (b) The applicant should be issued with an annual practising certificate, but subject to conditions specified by the Council, the Council shall so order ...”

14. Section 54 is in Part IV of the Act under the heading “Practising Certificates”; Part V of the Act is entitled “Competence” and provides among other things for the review of a practitioner’s competence; Part VII is entitled “Condition Affecting Fitness to Practise Medicine” and is concerned with the practitioner’s mental or physical condition.

15. The Council’s reasons for imposing the oversight conditions were as follows:

“4.3 A medical practitioner’s competence includes not only whether a doctor is practising safely and has an acceptable

level of knowledge and skills (including procedures and communication) but also the doctor's attitudes and judgment ...

4.4 During the period April 1994 to April 1998, notwithstanding that you were aware that you had not obtained a practising certificate, you carried on your medical practice.

4.5 Since the [Act] came into force in 1996 the APC [annual practising certificate] is seen as an important tool for monitoring a doctor's competence. The Registrar has powers to decline to issue a doctor with an APC if she has reasonable grounds to believe that there are concerns about that doctor's professional competence. Your lack of insight and lack of awareness of the potential harm to the public (in the terms expressed by the [Tribunal] in paragraph 6.3 of its decision and the admissions set out in paragraphs 7 and 8 of the submissions prepared by your counsel) by practising outside the formal statutory structure of the medical profession is a serious concern to the Council.

4.6 The Council considers that your attitude and lack of judgment and, in particular, not giving any thought to the jeopardy in which you placed persons with whom you had dealings during the period that you were practising without an APC (again as discussed by the [Tribunal] in its decision) evidences a deficiency in your competence as a medical practitioner as described in paragraph 4.3.

4.7 You have demonstrated to the Council a lack of overall ability to organise your affairs. You have failed on a number of occasions to notify the Council of your change of address, you have failed to make arrangements with the [Tribunal] to pay the costs awarded against you in December last year, and when asked by the President where you intended to work from with your APC you advised that that was yet to be determined.

4.8 The Council decided that your knowledge and skills of procedure and communication and your attitudes and judgment is not of an acceptable level and it felt that it could only be satisfied that you were competent to practise if the Council imposed conditions on your APC and that you complied with those conditions.

4.9 The Council decided that the deficiencies will not be remedied simply by putting in place administrative systems. The Council has concluded that you require guidance and support to ensure that you continue to use, maintain and improve your systems. The Council needs to be satisfied that your newly acquired learning and awareness of the responsibilities of medical practitioners becomes an integral part of your practice.

4.10 The Council is of the view that the best way to ensure ongoing competence to practise is for you to be subject to supervision. The supervision should be in the nature of general oversight.”

16. Paragraphs 7 and 8 of counsel’s submissions referred to in paragraph 4.5 of the Council’s reasons stated:

“7. [The Tribunal’s] decision identifies several matters seen as failings in Dr Wislang’s actions. These are:

(a) Administrative organisational failure in not obtaining annual practising certificates from 1994 to 1998. [In the course of his evidence before the Tribunal Dr Wislang had admitted that ‘my bookkeeping was hopeless’, ‘my failure to get a practising certificate was reprehensible’, and ‘my practice has, in the administrative sense, been chaotic’.]

(b) Unawareness of the implications for patients in regard to the Accident Rehabilitation and Compensation Insurance Act 1992 of his failure to maintain a current practising certificate. [The implication being that patients would not be covered under that Act for personal injury resulting from any failures on Dr Wislang’s part.]

(c) Unawareness of the representation in law that he held a current practising certificate when he treated patients and dealt with wholesale and retail pharmacists.

(d) ...

8. Dr Wislang accepts the correctness of the first three matters and their relevance to his present application for a practising certificate ...”

17. Dr Wislang's argument before the Court of Appeal was that any condition on a practising certificate has to relate to the practitioner's competence to practise medicine, a concept confined to his or her clinical skills: the ability to diagnose adequately, to identify appropriate treatment or procedure, and then to undertake it. Administrative inadequacies cannot properly be the subject of conditions unless they impinge directly upon those skills, for example a failure to keep proper patient's notes which may adversely affect diagnosis or the identification of suitable treatment.

18. The Court of Appeal rejected this argument, holding (at paragraph 40):

“In our view, the concept of competency in the 1995 Act is related to the principal purpose of protecting the health and safety of members of the public and encompasses any conduct of a practitioner which the Council reasonably considers may directly or indirectly affect their health and safety. ... For instance, the administrative mismanagement of a practice which leads to financial problems for the practitioner, perhaps pushing him towards bankruptcy, may so distract him that it results in a deterioration of his health and, as a consequence, his clinical abilities may be affected. It must therefore surely be permissible for the Council when considering the issuance of a certificate to interest itself in the applicant's ability to administer his or her practice.”

19. The Court of Appeal found support for that view in section 60 (2) (b) of the Act which directs the Council to consider, on a review of a practitioner's competency, not merely whether the practitioner has the necessary skill and knowledge, but also whether “the practitioner's practice of medicine meets the standard reasonably to be expected”. The Court stated its conclusion in paragraph 42:

“The Council is therefore given a broad power to determine competency but there are two potentially overlapping controls on its exercise of its power to determine competence, namely (a) the matter of concern must relate to public health and safety and (b) that the Council's determination and the action taken in consequence must not be unreasonable in the circumstances.”

20. Although at one point in his submissions Dr Wislang appeared to accept that an oversight condition can properly be imposed (albeit not, he submitted, on the particular facts of his case), his final contention was that, even assuming a practitioner's

administrative failure is such as to endanger the public, still this does not go to his competency and cannot properly be made the subject of a condition; rather it goes to his fitness to practise and accordingly falls to be dealt with exclusively under Part VII of the Act.

21. Their Lordships unhesitatingly reject this argument. Part VII of the Act is concerned solely with a practitioner's unfitness to practise by reference to his or her "mental or physical condition". Administrative chaos such as to endanger the health and safety of the public may or may not result from the practitioner's mental or physical condition. Generally speaking the practitioner could be expected to dispute this. Even, however, if it is such a case, this would not avail Dr Wislang: under section 81(2) of the Act, the Council, if satisfied that the practitioner is not fit to practise medicine because of some mental or physical condition, "may order that the practitioner's registration be suspended, *or that conditions be placed on the practitioner's registration or practising certificate.*" (emphasis added). In short, the Board endorses the approach taken by the Court of Appeal below.

22. As for Dr Wislang's challenge to the oversight condition on the facts of the case, their Lordships cannot improve upon the Court of Appeal's rejection of this contention in paragraph 43 of its judgment. Having noted that his main argument was directed against paragraph 4.7 of the Council's decision – that Dr Wislang had demonstrated a lack of overall ability to organise his affairs – the Court of Appeal continued:

"In context this remark was clearly related to his professional affairs. We accept that the three specific criticisms which followed – change of address, payment of costs and indecision about a place from which to work – may not have been soundly based. Dr Wislang was able to give explanations. But these were merely examples of the Council's more general concern about the way in which Dr Wislang approached the conduct of his practice and there was abundant evidence, including Dr Wislang's own admissions, to sustain the conclusion of a lack of overall ability to organise a medical practice. Disorganisation in this respect would clearly impact upon the health and safety of his patients. The Council was entitled to consider that Dr Wislang's inadequacies might well indirectly affect his clinical performance. The imposition of the conditions was a valid exercise of the Council's power under section 54."

The Board respectfully agrees.

23. Returning to Dr Wislang's other main complaints, respectively against the order suspending him from practice and against the costs order, their Lordships can take these very shortly.

24. Explaining its interim suspension the Tribunal stated:

“Dr Wislang has demonstrated a lack of insight, judgment and ability to organise his affairs such that it is necessary and/or desirable having regard to the health or safety of members of the public that Dr Wislang's registration be suspended pending the determination of the disciplinary proceedings against him.”

25. Amongst the Tribunal's reasons for the subsequent two months' suspension order, was that:

“The legislation clearly intended that practising without a practising certificate constitutes a serious offence both by making it an offence of strict liability and deeming it to be an offence at the level of professional misconduct. This is not a case where Dr Wislang's failure to obtain a practising certificate was a mere oversight on his part and, whilst the Tribunal accepts his submission that it was not 'intentionally anarchistic', nevertheless it cannot disregard the fact that the period of the offending and the potential consequences for others, and for the public generally, are not insignificant.”

26. Before the Court of Appeal Dr Wislang unsuccessfully contended, as to the interim order, that the Tribunal had wrongly had regard to the inappropriately amended charge then before it, and, as to the final suspension order, that the Tribunal erred in law in regarding Dr Wislang as having placed his patients, pharmacists and drug companies in jeopardy by practising without a certificate. Before the Board, he advanced rather different arguments. As to the interim suspension he submitted that this was quite simply unnecessary given that there was no question of his returning to practice at least until the disciplinary proceedings had been concluded. As to the final suspension order he argued that the Tribunal were wrong to criticise his judgment and that they took into account irrelevant factors, “generated principally by the Tribunal's entertainment of the invalid amended charge”. Their Lordships can find nothing of substance in any of these criticisms and see no possible basis for disturbing either of the suspension orders, even had both of them not long since run their course.

27. The appeal in respect of the Tribunal's costs order is if anything even more hopeless. As their Lordships have already noted, and as the Court of Appeal itself observed, Dr Wislang had already exercised his statutory right of appeal before seeking judicial review. He makes no complaint about the conduct of his costs appeal, quarrelling only with the district judge's exercise of discretion. He claims that the district judge was wrong in saying that he was not disputing the assessment of the percentage of the costs to be awarded, an error repeated in the Court of Appeal's own judgment. That, however, cannot avail him. The Tribunal's original decision had explained that 35% was at the bottom of the usual bracket for Tribunal costs orders (as much as two thirds having been ordered on a previous occasion). The critical question for the district judge on appeal was as to the fairness of the costs order as a whole having regard to the extra costs undoubtedly incurred as a result of the CAC's misguided amendment of the original charge. All this Judge Cadenhead clearly appreciated. The Board can find no fault with his admirable reserved judgment.

28. Costs orders are always amongst the most difficult to appeal, costs being par excellence a matter for the Court's discretion. More particularly is this so when the dispute is simply as to the quantum of costs. More difficult still will be a judicial review challenge to such an order. To succeed in such a challenge after an unsuccessful (though properly conducted) appeal is almost inconceivable. There is nothing in the present case which begins to suggest that such a result is appropriate here.

29. It is evident from the voluminous papers before the Board, and not least the appellant's lengthy written submissions, that Dr Wislang feels greatly aggrieved by the course that events have taken here. He invokes the Board's judgment in *Phipps v Royal Australasian College of Surgeons* (Privy Council Appeal No. 33 of 1999) (unreported) 13 April 2000 and invites us on a like basis to interfere with the determinations reached in the present case. In *Phipps*, however, the Board concluded (at p 12) that the decision was "flawed by serious procedural irregularity". That is simply not the case here. This whole challenge has been from first to last misconceived. It is regrettable that it was ever the subject of judicial review, let alone appeal to the Board. Their Lordships will humbly advise Her Majesty to dismiss the appeal with costs.

