

**IN THE DISTRICT COURT
AT WELLINGTON**

**CIV-2016-085-000750
[2016] NZDC 21788**

UNDER	the Health Practitioners Competence Assurance Act 2003
IN THE MATTER	of an appeal under s 106 against a decision of an authority to suspend the appellant from practice as a registered doctor
BETWEEN	MUSHFIQ AHMAD Appellant
AND	MEDICAL COUNCIL OF NEW ZEALAND Respondent

Hearing: 2 November 2016

Appearances: P Wicks QC for Appellant
K Feltham for Respondent

Judgment: 28 November 2016

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] This is an appeal against the decision of the Medical Council made on 8 September 2016 to suspend Dr Ahmad's practising certificate on an interim basis pursuant to s 69(2)(a) of the Health Practitioners Competence Assurance Act 2003 (the Act).

Background

[2] Dr Ahmad is a registered medical practitioner aged 61. For the last several years he has practised at his medical clinic in Otahuhu. On 8 August 2014 he was

charged with 11 charges of indecent assault on different female patients in the course of separate medical examinations.

[3] On 2 June 2016, following a lengthy judge-alone trial in April, Dr Ahmad was convicted in the District Court at Manukau on six of those charges. On 11 August 2016 he was sentenced to 12 months home detention. The start date of the sentence was deferred until 29 August 2016. Dr Ahmad has appealed against the convictions, but no date has been fixed for the hearing of his appeal.

[4] The Medical Council was informed of the charges immediately after they were laid. On 4 September 2014, the Council resolved not to exercise its powers under s 69(2) of the Act, but to accept a voluntary undertaking previously given by Dr Ahmad mirroring bail conditions imposed on him by the Court. Dr Ahmad continued to practise subject to those bail conditions and his voluntary undertaking until 29 August 2016 when the home detention sentence took effect. Since then he has not practised.

[5] On 4 July 2016 (after conviction but before sentence), Dr Ahmad was advised that the matter of his convictions had been referred to a professional conduct committee pursuant to the Act¹. By letter dated 12 August 2016, Dr Ahmad was advised that the Council had resolved to propose to interim suspend his practising certificate under s 69(2)(a) and invited submissions on the proposal.

[6] Dr Ahmad's counsel made written submissions opposing interim suspension on the basis that an expanded voluntary undertaking would provide adequate protection to the public and maintain public confidence in the medical regulatory system. The submissions were accompanied by a psychological report on Dr Ahmad and a large bundle of references and letters of support, including a petition signed by approximately 800 of the doctor's patients.

[7] On 8 September 2016, the Council resolved to confirm its decision to interim suspend Dr Ahmad's practising certificate. Although unstated, it is understood by all

¹ This information was provided from the Bar.

concerned that the interim suspension is intended to continue until the conclusion of the disciplinary process. I was advised by counsel that the disciplinary process is “*on hold*” pending that appeal.

The Law

[8] The Council’s power to suspend the practising certificate of a doctor is contained in s 69 of the Act which provides:

69 Interim suspension of practising certificate pending prosecution or investigation

- (1) This section applies if a practitioner is alleged to have engaged in conduct that—
 - (a) is relevant to—
 - (i) a criminal proceeding that is pending against the practitioner; or
 - (ii) an investigation about the practitioner that is pending under the Health and Disability Commissioner Act 1994 or under this Act; and
 - (b) in the opinion of the responsible authority held on reasonable grounds, casts doubt on the appropriateness of the practitioner’s conduct in his or her professional capacity.
- (2) If this section applies, the responsible authority may order that—
 - (a) the practising certificate of the health practitioner be suspended; or
 - (b) 1 or more conditions be included in the health practitioner’s scope of practice.
- (3) The authority may not make an order under subsection (2) unless it has first—
 - (a) informed the health practitioner concerned why it may make an order under that subsection in respect of the health practitioner; and
 - (b) given the health practitioner a reasonable opportunity to make written submissions and be heard on the question, either personally or by his or her representative.
- (4) The authority must revoke an order under subsection (2) as soon as practicable after—

- (a) the authority is satisfied that the appropriateness of the practitioner's conduct in his or her professional capacity is no longer in doubt; or
 - (b) the criminal proceeding on which the practitioner's suspension is based is disposed of otherwise than by his or her conviction; or
 - (c) if the criminal proceeding on which the practitioner's suspension is based results in his or her conviction, the authority is satisfied that no disciplinary action is to be taken or continued in respect of that conviction under the Health and Disability Commissioner Act 1994 or under this Act; or
 - (d) if the investigation on which the practitioner's suspension is based has been completed, the authority is satisfied that the practitioner will not be charged as a result of the investigation.
- (5) An order under subsection (2) or subsection (4) takes effect immediately, and the authority must ensure that the practitioner is notified as soon as practicable.

[9] The right to appeal the Council's decision to suspend a doctor's practising certificate is given by s 106(1)(d) of the Act. Section 109 of the Act provides that any such appeal is by way of rehearing.

[10] Section 109(3) provides:

109 Procedure on appeal

...

- (3) On hearing the appeal, the appropriate court—
- (a) may confirm, reverse, or modify the decision or order appealed against; and
 - (b) may make any other decision or order that the person or body that made the decision or order appealed against could have made.

...

[11] It is by now reasonably well-established that an appeal of this sort is a general appeal to which the principles in *Austin Nicols & Co v Stichting Lodestar*²

² [2008] 2 NZLR 141 (SC)

apply³. The appellant is entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. The consideration and weight to be given to the reasoning and decision of the tribunal appealed from is a matter for the judgment of the appeal court. The appeal court has the responsibility of arriving at its own assessment of the merits of the case.

The Council's Decision

[12] In its letter of 8 September 2016, the Council listed the information which was before it in making its decision:

- Summary of Facts.
- Email from Mr P Wicks office with updated VU, dated 19 August 2014.
- Court judgment, dated 2 June 2016.
- Submissions (with enclosures) provided by Mr Wicks, dated 18 August 2016.

[13] The reasons given for its decision were:

- You have been convicted on six charges of indecent assault, and Council notes the Judge's key finding that your manner in carrying out examinations of female patients was not justified or appropriate.
- As you have been convicted and sentenced regarding the charges, the assumption of your innocence has been superseded.
- Council notes the Judge's comments about your altering medical records, which Council considers indicates a preparedness to avoid or minimise responsibility.
- Council was not assured that you have insight into the offending or was fully prepared to take responsibility for his actions.
- Council does not believe that the conditions on your scope of practice that Mr Wicks QC proposed, are practicable or could effectively protect the health and safety of the public; Council is concerned that you may manipulate a chaperone requirement and by not undertaking a necessary examination of a casual female patient, the patient may be at risk.

³ *Lim v Medical Council of New Zealand* [2016] NZDC 2149 implicitly approved an appeal on this point in *Lim v Medical Council of New Zealand* [2016] NZHC 485

- The assaults you have been convicted of occurred at your place of work, whilst practising medicine and Council does not believe that any condition could be practicably applied to ensure public safety is protected.
- Council notes that you have appealed your sentence, however Council did not consider that a decision less than suspension was appropriate in order to protect the health and safety of the public at this time.

Dr Ahmad's Submissions

[14] Mr Wicks identified a number of specific aspects of the decision in respect of which he submitted the Council erred in:

- failing to give any, or sufficient weight to the fact Dr Ahmad's convictions were in respect to a very narrow category of patient, namely young women who were visiting his clinic on a one-off basis for workplace medical assessments;
- failing to give sufficient weight to the appellant's proposed conditions of practice and expanded voluntary undertaking;
- finding that Dr Ahmad may manipulate a proposed chaperone condition; and not giving him the opportunity of being heard about the issue;
- failing to give sufficient weight to demonstrated compliance with a chaperone condition since about 19 August 2014;
- finding that the trial judge's comments regarding altered medical records indicated a preparedness to avoid, or minimise responsibility; and not giving Dr Ahmad the opportunity of being heard about that issue;
- failing to consider, or give sufficient weight to a clinical psychologist's report of 1 August 2016;
- failing to consider or give sufficient weight to a petition from Dr Ahmad's patients.

The Council's Submissions

[15] In her submissions, Ms Feltham addressed each of the points raised on behalf of Dr Ahmad as recorded in paragraph [15] although in a slightly different order. I have summarised and rearranged them in the order set out in that paragraph.

[16] She submitted that the common characteristics of the patients who were indecently assaulted should be defined in a different way to that adopted on behalf of Dr Ahmad, which would expand rather than confine the potential risk of allowing him to continue practising. The common factor identified was the opportunistic nature of the offending as demonstrated by the fact that the victims were casual patients, unaware of the nature of their medical examination and the offending took place when the other doctor at the practice was on unplanned leave. The opportunistic nature of the offending also meant that effective conditions to prevent reoffending could not be formulated because it is impossible to guard against all possible future circumstances in which opportunities to offend could arise.

[17] As to the proposed conditions, particularly those related to a chaperone, Ms Feltham drew attention to the trial judge's finding that Dr Ahmad had offended against one victim despite the presence of her cousin as a support person. She submitted that the possibility of manipulation or non-compliance with a chaperone condition was too great despite the absence of evidence of non-compliance with such a condition prior to suspension.

[18] Ms Feltham disagreed that the Council had erred in the view it took of the trial judge's comments regarding alteration of the medical notes. She supported her submission by detailed reference to the relevant portions of the judgment.

[19] As to the psychologist's report, Ms Feltham submitted that while it indicated that the risk of sexual reoffending was relatively low, it by no means excludes it, particularly as regards vulnerable female patients. The degree of acceptable risk must also be balanced against the significant potential harm which would be caused by any reoffending.

[20] As to the petition from Dr Ahmad's patients, Ms Feltham submitted that the extent to which the patients were informed of the nature and circumstances of the offending, was not clear. She also submitted that the petition itself was not evidence that the patients' needs would not be adequately met during the suspension. It was pointed out that Dr Ahmad is in any event, serving a sentence of home detention. Finally it was submitted that there are wider public interest considerations which must be taken into account than the interests of the doctor's current patients, including the maintenance of professional standards and broader public confidence in the medical profession.

[21] With regard to that latter aspect, Ms Feltham pointed out that unless the convictions are overturned on appeal, the almost inevitable outcome of the disciplinary process will be suspension or cancellation of registration.

[22] With regard to the criticisms that Dr Ahmad had not been given the opportunity to comment on the issues of the altered medical records and the possibility of a chaperone being manipulated, Ms Feltham pointed out that at the time it advised Dr Ahmad of the proposed suspension it had not received the judge's written reasons for verdicts in which both issues were raised. Dr Ahmad, however, must have known that both the convictions and the reasons for them were the basis for the proposed suspension.

[23] In any event, it was submitted that any procedural error in these respects could be cured through the appeal process.

Discussion

[24] The salient factor bearing upon both the decision of the Council and the appeal to this Court is that Dr Ahmad has been convicted of six charges of indecent assault carried out on six individual female patients in the course of medical examinations. This distinguishes this case from other interim suspensions, such as that of Dr Lim⁴, which were imposed prior to trial when the doctor was first charged with sexual offending against patients.

[25] The legal effect of the convictions is that they are conclusive proof on this appeal that Dr Ahmad committed the offences in question⁵. The fact that Dr Ahmad has filed an appeal against those convictions does not change that position, as Mr Wicks properly recognised. All that it means is that there is a possibility that the convictions might be overturned in the future, although that possibility seems fairly slight in view of the detailed reasoning of the trial judge and his findings on credibility.

[26] So the Court must consider the issue of interim suspension on the basis that Dr Ahmad has been conclusively proven to have committed the offences in question. Although the reasons for verdict of the trial judge do not have the same legislative imprimatur as the convictions themselves, it seems to me proper that they are accepted by both the Council and this Court on appeal when considering the issue of interim suspension of Dr Ahmad. Indeed, that seems to have been implicitly accepted by both parties.

[27] The principal factor relevant to interim suspension decisions is the need to protect the safety of the public. The maintenance of professional standards is an integral aspect of the protection of public safety. Of course any decision made should be fair, reasonable and proportionate in the circumstances.⁶

[28] Given the nature and number of the convictions for indecent assault against Dr Ahmad, I consider that the need to protect the safety of the public requires interim suspension.

[29] I accept that as far as is known the voluntary conditions imposed on Dr Ahmad since September 2014 have been effective in ensuring that no further offending has taken place and the proposal is that they should be strengthened in the interim. I also acknowledge the risk assessment in the clinical psychologist's report.

⁴ See *Lim v Medical Council* (supra)

⁵ Section 47 Evidence Act 2006

⁶ *Lim v Medical Council* [2016] NZHC 485 at paragraph [29]

[30] Nevertheless, I do not think that the risk of reoffending is entirely mitigated by any such conditions. This is not a case of denied and unproven allegations. I consider the trial judge's findings do indicate that Dr Ahmad acted in a premeditated way which was calculated to conceal the offending. Conditions dependent on chaperoning can never be fail-safe if a person is intent on manipulating them.

[31] This is particularly so where the potential targets of reoffending are particularly vulnerable. I accept that a significant proportion of Dr Ahmad's female patient base is likely to be particularly vulnerable by reason of socio-economic and cultural characteristics.

[32] The wishes of Dr Ahmad's patients and the effect on them of his suspension from practice must also be given consideration. Those factors might have more weight in a case where allegations of this nature are unproven. Where they are conclusively proven, as here, they can be given only limited weight. While a large number of Dr Ahmad's patients obviously would like to have him continue as their doctor, there is no evidence that their medical needs will be left unmet if he remains suspended.

[33] I also consider that the maintenance of professional standards is a factor which needs to be considered in the context of convictions for indecent assault on a number of patients during medical examinations.

[34] I was not surprised to hear from counsel that in all previous cases where a member of a health profession has come before the Tribunal after a conviction for indecent assault, the outcome has been suspension or cancellation of registration. Although wider considerations apply at the penalty phase, it is apparent that convictions of this nature are generally seen as inconsistent with continued clinical practice, a view with which I concur.

[35] For completeness, I record that I agree that the nature of a general appeal of the present kind is that it provides a cure for any breach of the obligation to give notice of the reasons for a proposed suspension. The appellant has a full opportunity to make any necessary submissions to the appeal court which must make its own

decision on the merits. This was pointed out by Toogood J in *Lim v Medical Council*⁷ and also more recently by this Court in *Grott Zanicotti v Medical Council*⁸.

Result

[36] For the reason set out above, the appeal is dismissed and the interim suspension imposed by the Council is confirmed. If the parties are unable to agree on costs, they have leave to file memoranda by 23 December 2016.

C N Tuohy
District Court Judge

⁷ (supra at Paras [31] and [32])

⁸ [2016] NZDC 14809