EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2018-004-000889
[2018] NZDC 14237

IN THE MATTER OF	AN APPEAL AGAINST THE DECISION OF THE MEDICAL COUNCIL OF NEW ZEALAND IMPOSING A CONDITION ON THE APPELLANT'S PRACTISING CERTIFICATE UNDER SECTION 69(2)(B) OF THE HEALTH PRACTITIONERS COMPETENCE ASSURANCE ACT 2003
UNDER	SECTION 106(1)(f) OF THE HEALTH PRACTITIONERS COMPETENCE ASSURANCE ACT 2003
BETWEEN	[AMAR KAMAL] Appellant
AND	THE MEDICAL COUNCIL OF NEW ZEALAND Respondent

Hearing: 2 July 2018

Appearances: Mr AH Waalkens QC and Ms H Stuart for the Appellant
Ms K Feltham for the Respondent

Judgment: 18 July 2018

DECISION OF JUDGE G M HARRISON

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[1] [Dr Kamal] appeals against a decision of The Medical Council of New Zealand (the Council) of 27 April 2018 whereby the Council, at its meeting held on 10 and 11 April 2018, resolved to place the following condition on [Dr Kamal]'s scope of practice pursuant to s 69(2)(b) Health Practitioners Competence Assurance Act 2003 (the Act):

> You are required to have a chaperone present for all consultations with female patients.

The allegation

[2] [Dr Kamal] practises from [a medical care facility] which has one of its premises at [location deleted].

[3] On 4 November 2017, [the complainant] saw [Dr Kamal] complaining of a sore shoulder and seeking a prescription for Norflex, a muscle relaxant. [Dr Kamal] examined her and could not ascertain any limitation in the range of movement of the shoulder, and initially prescribed Ibuprofen, although this was later corrected to Norflex, and nothing turns upon that.

[4] On Sunday 19 November 2017 [the complainant's general practitioner], sent an email to the Council the relevant part of which read:

> A patient of mine has just consulted me over concerns of another doctor's inappropriate sexualised behaviour.

He requested advice on what further action should be taken.

[5] On Wednesday 22 November 2017 [the complainant] emailed the Council as follows:

> On the 4th November 2017, I went to [a clinic] to get a sore shoulder checked, and get a prescription for Norflex as recommended by my physiotherapist. I was seen by [Dr Amar Kamal]. I explained what I was there for and [Dr Kamal] briefly examined my shoulder while telling me off for not going to see my usual GP. After checking my shoulder, he also asked to check my heart. Thinking this is a bit strange, but thinking that it may have something to do with getting Norflex, I agreed. In the process of listening to my heart, [Dr Kamal] grabbed and squeezed one of my breasts.
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> I got out of his office as fast as I could, after he gave me a script. On getting home I found the script was for Ibuprofen, not Norflex, so rang back to see why I wasn't given Norflex. A couple of hours later, the receptionist/nurse rang to say that I could pick up another script, this time for Norflex.
>
> As I said I thought it rather unusual and wasn't happy with his actions, but decided to check it with my GP later. My GP confirmed that checking my heart was not standard practice when it came to prescribing Norflex. I believe [Dr Kamal]'s act of grabbing and squeezing my breast is/was inappropriate and an assault and accordingly I wish to lay a complaint.

[6] The Council's personnel commenced action by referring the complaint to [Dr Kamal] and requesting an explanation. This was duly supplied, with [Dr Kamal] advising that he had no memory of the consultation at all and had to refer to notes made at the time. He emphatically denied the allegation.

[7] The Council referred the response to its complaints triage team (CTT) to consider further action.

[8] At its meeting on 22 December 2017 the CTT firstly referred the complaint to the Health and Disability Commissioner. Secondly it referred the matter to the full Council. Thirdly it requested that in the interim [Dr Kamal] sign a voluntary undertaking to have a chaperone present for all female consultations. [Dr Kamal] responded on 7 February 2018, again denying any inappropriate action on his part and suggesting [the complainant] may have misinterpreted an innocent touch occurring in the course of his examination. He indicated that he was willing to provide a voluntary undertaking provided what was sought was reasonable. He accepted that it would be reasonable to have a chaperone present for any intimate examination of a female patient but regarded the proposal to have a chaperone present on every occasion he was consulted by a female patient to be unreasonable because of the cost and logistical difficulty of implementing such a procedure.

[9] At its meeting on 13/14 February 2018 the Council adopted the CTT proposal and indicated its intention to impose that as an interim condition on [Dr Kamal]'s scope of practice, but requesting him to sign such an undertaking voluntarily.

[10] On 10 March 2018 counsel for [Dr Kamal] emailed the Council advising it had only just learned of a report to the Health and Disability Commissioner of 9 March 2018 by [the medical centre director]. He is a director of [the medical centre], and also [identifying medical credentials removed]. His report referred to interviews with the charge nurse, medical director and practice manager, who all confirmed that they had never had cause to question [Dr Kamal]'s professional integrity and were shocked and extremely surprised that the allegation in question had been made against him. [The medical centre director] also interviewed [Dr Kamal], who confirmed that he had no memory of the consultation and referred to his notes made at that time. He

explained how he went about excluding referred pain, that is from the neck, chest, abdominal or systemic causes, and his rationale was concise and clinically appropriate. [The medical centre director] detected nothing in this interview which caused him any concern, noting that he had been involved in similar reviews for several years and had some expertise in assessing complaints against general practitioners including those of a sexual nature. He concluded by not recommending that a female chaperone was required, and did not detect any element of patient risk at that time.

[11] Further submissions were made to the Council. In addition to the report of [the medical centre director] those submissions also included references from [Doctor 1], who had been a professional colleague of [Dr Kamal] at [the medical centre] for three years, which was wholly supportive of him, even concluding that [Doctor 1] would trust [Dr Kamal] with her own family. There was a further reference from [the business manager] of [the medical centre], to the effect that she had held that position for two and a half years and her observations of [Dr Kamal] over that time confirmed his complete professionalism, and her belief that the voluntary undertaking [Dr Kamal] was then offering the Council was more than sufficient to cover any possible concerns. There was a further reference from [Doctor 2] of 21 March 2018 where she also confirmed his high standard of professionalism and her opinion that the voluntary undertaking offered by him would be more than sufficient to protect the public interest. Indeed, she did not regard [Dr Kamal] as a risk to the public at all.

[12] A further report was prepared by [Doctor 3] for the Health and Disability Commissioner. His report was dated 27 March 2018 and available for consideration by the Council. [Dr Kamal] had agreed that he had auscultated [the complainant]'s chest with his stethoscope to check if there could be any referred pain from her lungs to the shoulder. [Doctor 3] in particular did not regard this "as being a departure from expected standards of physical assessment". Although [the complainant] in her complaint described [Dr Kamal] as checking her heart, he denies that he ever did so and was checking her lungs for the reason stated.

[13] The Council was unmoved. At its meeting on 10/11 April 2018 it resolved to impose the condition on [Dr Kamal]'s practice of having a chaperone present for all

consultations with female patients. That decision was notified to him by email of 27 April 2018.

The complaint to the police

[14] The incident complained of occurred on 4 November 2017. [The complainant's GP] complained to the Council on 20 November 2017, some 16 days later.

[15] On 24 November 2017, the Council's team manager acknowledged the complaint and advised that the Council "may decide at any point to refer this matter to the New Zealand Police".

[16] On 7 December 2017, the Council's professional standards co-ordinator inquired of [the complainant] whether she had lodged any complaint with the Police.

[17] In her report to the Council in March 2018 the professional standards co-ordinator advised in paragraph 19 of that report that on 18 December 2017 the CTT decided to "refer the complaint to the Police".

[18] In the Council's letter to [Dr Kamal] of 22 December 2017, reporting on the CTT meeting on 18 December 2017, no mention is made of its decision to refer the matter to the police.

[19] The police filed their report of 21 May 2018. That report records that [the complainant] presented at the Manukau station on 15 January 2018 "after she had received some encouragement from her counsellor and disclosed to police in a formal written statement what had occurred".

[20] In her statement to the police of 15 January 2018 [the complainant] described the incident and said:

> [Dr Kamal] is someone that is in a place of trust and I should feel safe when I go to the doctor's. I now feel unsafe and dirty about what he has done. This has also opened up old wounds, and has raised further issues with anxiety and increased stress.

[21] In his statement to the police of 4 April 2018, [the complainant's GP] stated:

> She talked to her [daughter], about this doctor, on the same day, and she mentioned that that doctor gives her the creeps as well.

[22] The police decided not to commence a formal prosecution. The report stated:

> A reasonable prospect of conviction does not exists (sic) as there is not credible evidence which the prosecution could adduce before a Court and upon which evidence an impartial jury, properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

[23] The Council was disconcerted to receive this advice. Its solicitors wrote to the police on 14 June 2018 challenging the police decision not to prosecute and in particular their decision that the Solicitor-General's Prosecution Guidelines had not been met. The police response of 18 June 2018 noted a salient fact that had been omitted from the report – "that being that the victim was adamant she didn't want to go to Court". The police decided that the matter should be filed.

[24] In an affidavit of 2 July 2018 Aleyna Hall, the deputy registrar of The Medical Council, referred to a file note of a conversation she had with [the complainant] on 20 June 2018. Ms Hall had called her to discuss the police report. She asked [the complainant] if it was correct that she had advised the police that she did not want to go to Court. [The complainant] confirmed that "that was initially her view but that she would reconsider her position as the investigation went on."

[25] The note of the conversation included the following:

> [The complainant] became very upset and told me that it had bought (sic) up old memories for her and her history. I asked her whether she would like me to call her back and said she was fine and apologised. I told her not to apologise and that I was sorry if our discussion was upsetting.

[26] The police investigation is relevant for reasons I will address shortly. What concerns me is that the allegation by [the complainant] is the sole allegation faced by [Dr Kamal]. [The complainant], although having made the statements I have referred to, has never given evidence on oath nor been cross-examined on the incident.

[27] Matters of concern I have are:

(a) The time that passed before [the complainant] complained to the police, some two and a half months after the alleged incident;

(b) The complaint may have been instigated at the behest of [the complainant]'s counsellor, or from the CTT, rather than being spontaneous;

(c) [The complainant]'s reference to the incident bringing up "old memories" and that the "doctor gives her the creeps as well". This raises the possibility that something in [Dr Kamal]'s appearance, or manner, triggered in [the complainant] the recollection of some historic distressing event.

The statutory criteria

[28] Section 69 of the Health Practitioners Competence Assurance Act 2003 provides:

> (1) This section applies if a practitioner is alleged to have engaged in conduct that-
>
> (a) is relevant to-
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> (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
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> (b) in the opinion of the responsible authority held on reasonable grounds, cast 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:
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> (a) the practising certificate of the health practitioner be suspended; or
>
> (b) one 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) … or

(d) …

(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.

(Emphasis added)

[29] I interpret subs (4)(b) as meaning that a criminal proceeding is commenced against the practitioner by a charge being laid in Court which is subsequently disposed of either by an acquittal or by being withdrawn, or perhaps by a discharge without conviction. In any of those circumstances the authority must revoke any order previously made imposing one or more conditions on the health practitioner's scope of practice.

[30] In this case, the police investigation did not even reach the stage of becoming a criminal proceeding. The police determined that no jury properly instructed would find the charge proved, and maintained that view despite the Council's protestations.

[31] I then question how the Council can persist in imposing the condition requiring a chaperone on the scope of [Dr Kamal]'s practice when, if a criminal proceeding had

been commenced and disposed of without conviction, the Council was obliged as a matter of law to revoke the order imposing that condition.

General assessment

[32] Mr Waalkens' submission with which Ms Feltham concurred was that the Council's order must be fair, reasonable and proportionate to the conduct complained of. A further matter advised to the Council in the Professional Standards Co-ordinator's report of March 2018 was that in 2008 a charge had been brought against [Dr Kamal] on which he was found guilty in November 2008 by the Health Practitioners Disciplinary Tribunal. However, this finding was later overturned by the High Court on appeal in March 2010. That means of course that there could be no extant finding of misconduct against [Dr Kamal] because that finding had been quashed on appeal. I find it extraordinary that, despite that, the Professional Standards Co-ordinator should still make reference to it in the report to the Council.

[33] There is no indication in its decision that it took into account the report of [Doctor 3] of 27 March 2018 to the Health and Disability Commissioner, nor the references I have referred to. [The medical centre director]'s report was attached to submissions made by [Dr Kamal]'s counsel which I assume was considered by it in reaching the decision it did.

[34] [Dr Kamal] has offered a voluntary undertaking to have a chaperone present when intimate examinations are required to be made of female patients. The Council rejected this on the basis that a requirement for a chaperone was necessary for all consultations with female patients because the allegation made in this case related to a clothed patient.

Approach on appeal

[35] Counsel were agreed that the approach dictated by the Supreme Court in *Austin Nichols and Co v Stichting Lodestar* [2008] 2 NZLR 141 – [16] was correct. The Court said:

> Those exercising general rights of appeal are 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. If the Appellate Court's opinion is different from the conclusion of the Tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[36] An important consideration in this case is that the police report of 21 May 2018 was not before the Council when it reached its decision in April. While I perceive shortcomings in that decision by reason of possible weaknesses in the complainant's statements, the taking into account of irrelevant material such as the reference to the charge laid in 2008 that was dismissed in the High Court, and the seeming failure to take into account the reports of [the medical centre director] and [Doctor 3] and the references, I am persuaded that the decision of the police not to lay a charge is a compelling factor. If a charge had been laid and later no conviction had been entered, s 69(4) dictates that the Council must revoke any condition imposed on the scope of [Dr Kamal]'s practice. The decision of the police not even to lay a charge must surely lead to a similar conclusion. The efforts of Council personnel to have the matter referred to the police will be recalled and it must now accept the police decision that a charge is not warranted.

Conclusion

[37] On 8 May 2018 in this Court Judge P Cunningham made an interim order staying the decision of the Medical Council until further order of the Court.

[38] Section 109 of the Act provides that on hearing the appeal this Court may confirm, reverse, or modify the decision or order appealed against.

[39] I am of the view that the condition imposed by the Council is not fair, reasonable or proportionate to the complaint. [Dr Kamal] emphatically denies the complaint. He is supported by his medical colleagues who are unanimous in their view that there is no risk to the public, as is [the medical centre director]. Consequently, the decision of the Council is modified to the extent that the voluntary

undertaking now offered by [Dr Kamal] in terms that follow are substituted for the condition imposed by the Council on [Dr Kamal]'s scope of practice.

[40] The voluntary undertaking to be provided by him is as follows:

> [Dr Kamal] must have a chaperone present for:
>
> (a) All consultations with patients under the age of 16 who are unaccompanied by a parent;
>
> (b) All breast, rectal and pelvic examinations on female patients; and
>
> (c) As requested by the patient or another health professional.

[41] I note that [the medical centre] has a chaperone policy that [Dr Kamal] says he has observed at all times. In the circumstances of this case, however, where I perceive little if any risk to the public, it is appropriate for [Dr Kamal] to provide this personal undertaking. Leave is granted for the parties to agree to a modification of the undertaking as set out above if that is sought by either party, or, failing agreement, by further reference to me.

[42] It is appropriate that the Council should pay costs to [Dr Kamal] on the basis that the condition imposed by the Council on the scope of his practice has been modified by discharging that condition, but by imposing an obligation on [Dr Kamal] to provide the voluntary undertaking I have referred to, which he offered from the outset of the complaint investigation process. In the absence of agreement, leave to file memoranda is reserved.

[43] At the commencement of the hearing I made a suppression order without opposition from the Council. I confirm that order to the effect that the names of [Dr Kamal] and [the complainant] and of any other detail that might identify them are suppressed, until further order of the Court.

G M Harrison
District Court Judge