

COLAGRANDE V HEALTH OMBUDSMAN (NO. 2) [2017] QCAT 406

MARCH 27, 2018 | HEALTH SECTOR

Consideration of an application for costs to be paid by the Health Ombudsman arising out of a decision of the Tribunal on 18 and 21 April 2017. Delivered on 30 November 2017.

FACTS

In the substantive proceedings, brought pursuant to section 63 of the *Health Ombudsman Act 2003 (Qld)*, the respondent sought a review of the decision of the Health Ombudsman, to take immediate action under section 59(4) of the *Health Ombudsman Act*.

In these proceedings, the respondent submitted that the Health Ombudsman should be ordered to pay the respondent's costs of the proceedings.

DECISION

The *Health Ombudsman Act* is silent on the question of costs. Costs are therefore to be determined pursuant to the provisions the *QCAT Act*. Pursuant to the *QCAT Act*, the Tribunal can only make a costs order against a party "if the Tribunal considers the interest of justice require it to make that order".^[1]

In the substantive proceedings, the position taken by the Health Ombudsman was that, given the practitioner's history of dishonest conduct, the use of a chaperone in seeing female patients would not have been sufficiently effective preventing the respondent's conduct. In that regard, the Health Ombudsman referred to matters that had taken place some 13 years prior.

The Tribunal commented that it was difficult to put too much weight on events which occurred 13 years ago. The Tribunal also did not accept that it was constrained by the recommendations contained in a review commissioned by AHPRA and the Medical Board of Australia on the use of a chaperone to protect patients in Australia, without having regard to the merits of the case.

Following action taken by the Health Ombudsman, to impose a prohibition on the respondent seeing female patients, the respondent provided detailed submissions on 23 February 2017. In those submissions, he proposed that he should be able to see female patients but in the presence of a chaperone. In response, the Health Ombudsman made it clear that it would not enter into any negotiation regarding the imposition of any chaperone conditions as *"I do not consider you to be a suitable candidate for chaperone conditions, taking into account your history of misleading and deceptive conduct"*.

It was following that response that the respondent filed an application for review. Given the effect of the conditions, a truncated timetable was agreed to and the matter was set down for hearing on 11 April 2017. Compliance with the timetable required a degree of cooperation between the parties.

Her Honour, Sheridan J noted that the attitude which appeared to have been displayed by the Health Ombudsman at that time to any proposal regarding the possible use of chaperones was important. In his submissions on costs, the respondent said that if the Health Ombudsman had been *"more open to consideration of appropriate chaperone conditions and had regard to the merits of the review, litigation would not have been necessary or as drawn out"*.

On 7 April 2017, an affidavit had been filed by the Business Development Manager of Carestaff Nursing Services Pty Ltd, annexing an executed terms of business agreement between the respondent and Carestaff. The terms detailed the basis upon which Carestaff would provide independent nursing staff to the respondent to act as chaperones. This did not change the position of the Health Ombudsman.

The matter proceeded to hearing on 11 April 2017. On 18 April 2017, the Tribunal gave its decision which included draft chaperone conditions substantially adopting the position proposed on behalf of the respondent just prior to the hearing. After delivering its decision, the Tribunal gave the parties an opportunity to make oral submissions on the draft conditions. The Tribunal was reconvened on 20 April 2017 for that purpose.

The submissions made on behalf of the Health Ombudsman at the hearing on 20 April 2017 essentially sought to re-litigate the substantive matter with particular reliance upon the review of the use of chaperones. Her Honour noted that *"the attitude of the Health Ombudsman towards the draft conditions proposed by the Tribunal and the unnecessary presentation of an entirely new set of conditions would seem to be indicative of the uncompromising and litigious approach of the Health Ombudsman to the whole matter."*^[2]

While the initial conditions proposed by the respondent did not go far enough, those provided just prior to the hearing were substantially accepted by the Tribunal and “*were probably conditions which, if the Health Ombudsman had been willing to discuss the matter, could have resulted in an agreed position.*”

The respondent referred to the position of the Health Ombudsman, as being “*a blind refusal to contemplate the use of chaperones*”. While the Health Ombudsman relied upon the report commissioned by AHPRA and the Board, the Tribunal noted that the Health Ombudsman “*cannot approach its task by simply adopting the recommendations contained in such a report without regard to the merits of the case*”.

ORDERS

The conduct on the part of the Health Ombudsman in refusing to accept and have regard to the merits of the case, amounted to a sufficient countervailing factor to warrant a departure from the default position.

The Tribunal ordered that it was in the interests of justice to make an order that the Health Ombudsman pay the respondent’s costs of the proceedings, from the date the offer regarding the use of Carestar Nursing Services was made.

[1] See section 102(1)

[2] See paragraph 27

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