In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No 214

In the matter of an appeal pursuant to Order 55 of the Rules of the Supreme Court

BETWEEN:-

DR FGH

Appellant

-and-

(1) THE CHAIRMAN OF THE BERMUDA DENTAL BOARD
(2) THE PERMANENT SECRETARY OF THE MINISTRY OF HEALTH AND SENIORS

Respondents

JUDGMENT

(In Court)

Disciplinary proceedings under Dental Practitioners Act 1950 – whether fair hearing – whether Board had jurisdiction to consider allegations relating to management and administration of dental practice

Date of hearing: 7th April 2017
Date of judgment: 8th May 2017

Mr Eugene Johnston and Ms Dawn Johnston, J2 Chambers, for the Appellant
Ms Shakira J Dill-Francois, Attorney General's Chambers, for the Respondents

Introduction

1. By notice of motion dated 1st June 2016, the Appellant appeals against: (i) the decision of the Bermuda Dental Board ("the Board") to strike him off the Register of Dental Practitioners ("the Register"); and (ii) the decision of the Permanent Secretary of Health ("the Permanent Secretary") to notify him of the Board's decision. He seeks an order that the decision to strike the Appellant from the Register should be set aside.

2. The disciplinary proceedings giving rise to this appeal were brought pursuant to the Dental Practitioners Act 1950 ("the 1950 Act"). The Register is maintained by the Permanent Secretary under section 6 of the 1950 Act.

3. At the hearing, the Appellant's appeal coalesced into two grounds: (i) that the Board and the Permanent Secretary deprived him of a fair hearing in that they failed to follow the disciplinary procedure prescribed by the 1950 Act; and (ii) that the Board acted unlawfully in that it took into account irrelevant matters which it had no jurisdiction to consider. These grounds go to both the findings on liability and to the penalty imposed.

The statutory scheme

4. By way of background, it will be helpful to give a short description of the disciplinary scheme under the 1950 Act. All references to sections of a statute in this judgment are references to sections of the 1950 Act.

5. Section 12C provides that a Dental Professions Complaints Committee shall be established ("the Committee"). Their functions include receiving and investigating, or causing to be investigated, reports and complaints against any registered person, including registered dental practitioners. These include (at section 12C(2)(a)(ii)) any allegation that the person is guilty of professional misconduct.

6. Professional misconduct is defined at section 1. It includes, amongst other things, "*incompetence or negligence in the practice of dentistry*" and "*improper or unethical conduct in relation to professional practice*".

7. Section 12D provides that if, after investigation, the Committee conclude that the allegations or evidence against the registered person are sufficiently serious, or that it is otherwise appropriate to do so, the Committee shall refer the matter to the Board for determination.

8. The Board was established under section 5. Their general function is to ensure high standards of professional competence and conduct in the practice of dentistry in Bermuda. They consist of seven members, one of whom is required to be a barrister and attorney admitted and enrolled to practice in Bermuda and appointed by the relevant Minister.

9. Section 13 governs the hearing of a complaint by the Board. It provides in material part:

> "(1) If, pursuant to an investigation under section 12D, the Committee place the matter before the Board for determination, the Board shall as soon as may be enquire into the matter and in respect of any such enquiry the succeeding provisions of this section shall have effect—
>
> (a) the Board may take evidence on oath, and for that purpose the chairman of the Board may administer an oath;
>
> (b) the Board shall afford the registered person and the Committee every facility—
>
> (i) to appear before the Board at all stages of the enquiry;

(ii) to be represented by counsel;

(iii)to call or cross-examine witnesses; and

(iv)generally to make a full defence or explanation in the matter;

(c) the Board shall, in the case of a registered dental practitioner, inform the Permanent Secretary of the Department of Health, of their findings and the Permanent Secretary of the Department of Health, shall inform the registered dental practitioner accordingly;".

10. Section 14 provides in material part that where a registered person is found by the Board to be guilty of professional misconduct then it shall be the duty of the Board, after giving the registered person every opportunity to give an explanation, to decide as soon as may be whether the name of the person should be struck off the Register.

11. If the Board decide that the name should be struck off, then they must inform the Permanent Secretary, who shall in turn cause the registered person to be informed by written notice of the Board's decision.

12. Section 16 provides for suspension in various circumstances, including where a registered person is inefficient or negligent in carrying out his professional functions. Section 17A provides for a range of lesser sanctions.

13. Section 25 gives a registered person a right of appeal to the Supreme Court against a finding of professional misconduct or a decision that he should be struck off the Register. The section provides that the Supreme Court shall determine the appeal and make such order as appears to the Court just. An appeal is regulated by Order 55 of the Rules of the Supreme Court 1985 ("RSC"), which provides that it shall be by way of rehearing.

14. In summary, the statutory scheme provides for an investigation carried out by the Committee followed, where appropriate, by a hearing before the Board. The hearing is analogous to a trial or a hearing before a statutory tribunal. It consists of a liability phase and, where a registered person is found to be guilty of professional misconduct, a penalty phase. Thus the

hearing is a relatively formal affair. To ensure fairness, the registered person is afforded a number of procedural safeguards. He has the right to be present throughout.

First ground

15. The Appellant complains that the hearing before the Board was unfair as they did not follow the requirements of section 13. He claims that he was therefore denied the procedural safeguards to which he was entitled under the 1950 Act.

16. What happened was this. The Committee sent the Appellant a letter setting out a number of complaints made against him by two former employees, E1 and E2. The letter was undated but was served on the Appellant via the receptionist at his dental practice on or about 10th July 2015.

17. The complainants alleged that the Appellant had: (i) failed to comply with various statutory requirements regarding the administration of his practice; (ii) failed to pay wages owed to E2; (iii) permitted employees to perform without direct supervision dental work which they were not qualified to undertake; and (iv) requested an employee to file insurance claims for work which was in one case only partially completed and which was in another never commenced. However the complaint did not allege in express terms that the Appellant had acted fraudulently. The complaint from E1 and witness statements from E1 and E2 were enclosed.

18. The letter asked for the Appellant's response to the allegations within 21 days. It explained that the Committee would try to determine the likely validity of the complaints and that the procedure for doing so might involve interviewing the Appellant and the complainants. The Appellant was asked to indicate in his response whether he wished to appear before the Committee to present his views. The letter stated that unless the Appellant responded within 21 days the Committee would refer the matter to the Board without further notice.

19. The Appellant did not respond within 21 days. The Committee nonetheless carried out an investigation. Following their investigation, they decided to refer the matter to the Board. The referral was by way of an email dated 10th August 2015 from the Chairman of the Committee, Keren Lomas, to the Chairman of the Board, Dr Ronda James. The email stated:

> "*All committee members are satisfied by the evidence that the Appellant has behaved in an unprofessional manner and that he has transgressed the provisions of the Act and the code*".

20. The email should not have done. The role of the Committee is to investigate a complaint and determine whether it ought to be placed before the Board. If the complaint is placed before the Board then the subsequent role of the Committee is to prosecute the complaint. The determination of the complaint is not a matter for the Committee but for the Board. It was therefore not proper for the Committee to express a view to the Board as to the merits of the complaint.

21. On 25th September 2015 the Committee forwarded to the Appellant a statement containing a complaint by a former employee, E3, regarding non-payment of wages. The statement corroborated some of the allegations of breach of statutory duty made by E1 and E2. The covering letter from the Committee said that the statement was provided "*by way of courtesy*" in the matter of the complaints of E1 and E2. Thus it had not been referred to the Board as a fresh complaint. However its provision was a matter not of courtesy but of right: It is an elementary precept of natural justice that the Appellant was entitled to know the case against him, including the evidence upon which the Committee relied. Absent such evidence, he could not meaningfully exercise his right under section 13 to make a full defence or explanation of the matter.

22. By a letter dated 26 October 2015 Dr James wrote to the Appellant in the following terms:

"***Re: Professional Conduct Investigation***

Since notification on July 10, 2015 you have had the opportunity to respond, but neither the dentistry complaints committee nor the dentistry board has received any response from you with regards to the patient and staff complaints related to your professional practices. We are now formally writing again to give you the opportunity to respond prior to our final determination.

The Dental Board is providing you this opportunity to present any information in person or in writing and you are entitled to bring representation or witnesses relevant to your case.

The Board asks that you provide a response to this correspondence within ten business days of receipt otherwise the matter will move to determination."

23. The letter confuses the investigation stage and the hearing stage. The confusion may have arisen in part because the 1950 Act refers to the hearing as an "*enquiry*". The Appellant was given an opportunity to make representations to the Committee at the investigation stage. The decision for the Committee, taking any such representations into account, was whether the complaint ought to be placed before the Board. The Appellant had not previously been given any opportunity to make representations to the Board, which was seised with a different question, namely whether, based on the complaint, they were satisfied that he was guilty of professional misconduct.

24. In order to decide this question, and irrespective of whether the Appellant chose to engage with the proceedings, the Board was required to hold a hearing at which it heard evidence, including any evidence that the Appellant wished to adduce. How the Appellant was to avail himself of this right when he had not been given a hearing date the letter did not say. What the letter should have done was to notify him of a hearing date.

25. It would have been helpful if the first hearing was a short hearing at which Dr James, as the person chairing the hearing, gave directions for the filing of written evidence. Consistent with the interests of fairness, each party should have been supplied in advance with copies of the written evidence upon which the other party intended to rely at the hearing. The substantive

hearing of the complaint would have followed at a later date. Alternatively, Dr James could have issued directions in writing.

26. The Committee should have drawn up charges based on the complaint. These are important because they inform the registered practitioner and the Board in precise terms of the allegations against him. The Committee will seek to prove the charges by calling witnesses to give evidence, and the Board will decide whether the charges have been proved. It is concerned only with whether those charges have been proved. It is not concerned with any other, hypothetical, charges which might have been brought but were not. I was not addressed as to the applicable standard of proof, and shall defer that question, should it prove controversial, to a future hearing.

27. In the present case no charges were drafted. The Board appears to have treated the summary of complaints in the July 2015 letter as the charges. That would have been acceptable as long as the Board did not go on to consider any allegations which were not made in the letter. The Appellant was never informed in express terms, as he should have been, that he was charged with professional misconduct – the term does not appear in either the Committee's July 2015 letter or the Board's October 2015 letter. However that was not necessarily a fatal defect in the proceedings as the allegation of professional misconduct was implicit in the July 2015 letter.

28. The Appellant replied to the Board's October 2015 letter by a letter dated 6th November 2015. He: (i) admitted the breaches of statutory requirements, but stated that the breaches were intended to help his employees during tough economic times; (ii) admitted that there had been a delay in paying E2's wages as at the time the business had no money but stated that these had now been paid in full; (iii) denied that he permitted employees to perform without direct supervision dental work which they were not qualified to undertake: in one case he appeared to accept that the employee had undertaken the dental work but asserted that she was qualified to undertake it; and (iv) denied that he had requested an employee to file insurance claims for work which was in one case only partially completed

and which was in another never commenced. The Appellant (who was evidently also confused about the distinction between the Committee and the Board) ended the letter by stating:

"*I am eagerly looking forward to present my side of the events before the committee in person*".

29. By a letter dated 1st February 2016, Dr James acknowledged receipt of the Appellant's reply and requested clarification as to one of his responses. In my judgment that request was permissible, save that it should have been made at the oral hearing required by section13. However on 25th February 2016 Dr James wrote to the Appellant requesting the dental records of one of his patients, C1, and enclosing a release form. In my judgment that request was not permissible. The Board's proper role was to preside over a hearing as an impartial arbiter, not to conduct a further investigation or gather evidence.

30. The background to the 1st February 2016 letter was that C1 had made a complaint against the Appellant. The Committee relied upon it as corroborating the allegations made by E1 and E2 about insurance claims. The complaint contained a separate allegation of botched root canal surgery. However the Committee had not placed that allegation before the Board for determination. Notwithstanding the seriousness of the allegation, it should therefore have played no part in the Board's deliberations.

31. I have seen no record that the Appellant was supplied with a copy of C1's complaint. But he seemed to be aware of it because he responded to it by a letter to the Board dated 9th March 2016. He accepted that the root canal surgery was poorly done and explained that he had used a new technique which he had not perfected. The Appellant complained that he was the victim of a smear campaign by disgruntled former employees.

32. Dr James contacted the Appellant again by a letter dated 17th March 2016. It was expressed to be written "*in relation to the ongoing investigation*", although there was no ongoing investigation: the investigation had come to

an end when the matter was referred to the Board. After summarising the history of the matter up to the Appellant's letter of 6th November 2015, Dr James continued:

"*We have since spent considerable time collecting information and reviewing files and indeed asked you for further files and information. You have responded with admissions of fault in some parts while other issues have been denied but again with no evidence or supporting documentation.*

We therefore are making one last attempt to outline your rights so that you can let us know if there is anything further you wish to disclose or whether you wish to have the opportunity to appear before the Board, call or cross examine witnesses and/or complainants, or to make any additional defence or explanation in addition to having counsel represent you during this process as per section 13(1)(b) of the Act.

The Board wishes to conclude this matter and therefore are giving you a deadline of 23rd March to advise the Board as to whether you wish to invoke any provision of 13(1)(b) of the Act. If we do not hear from you on or before this date, we will conclude our findings and you will be notified accordingly."

33. Dr James failed to appreciate that the Board's function was adjudicatory and not investigatory, and that, pursuant to section 13, holding a hearing on notice to the registered person was an obligation of the Board and not an optional extra at the behest of the dental practitioner. The Appellant had in any case indicated in his 6th November 2015 letter that he did want an oral hearing.

34. He did not get one. By a letter dated 31st March 2016, Dr James wrote to the Permanent Secretary to inform her of the Board's findings. To make any findings at all without holding a hearing on notice to the Appellant was a breach of both natural justice and the requirements of section 13. The Board found that the Appellant had breached the Standards of Practice for Dentists and had put patients' health in serious jeopardy in addition to placing the "*Dental Professional Body*" on the island in disrepute. The Board did not, however, address in express terms the underlying question which it was required to decide, namely whether the Appellant was guilty of professional

misconduct, although I accept that it would necessarily follow from the Board's findings (subject to appeal) that he was.

35. The Board made a number of findings of fact about the allegations contained in the July 2015 letter. But they also made findings of fact about allegations which were not contained in that letter and with which, because the Committee had not placed them before the Board for determination, the Appellant was not charged.

36. The Board found that "*he is accused (with good evidence) of numerous fraudulent insurance claims*", which I read as indicating that there was evidence of fraud which was accepted by the Board. The July 2015 letter certainly contained allegations which were consistent with fraud. But it did not state that such conduct was alleged to constitute fraud. It should have done so if that was the allegation. As Lord Hoffmann, giving the judgment of the Privy Council, stated in Salah v GNC [2003 UKPC 80; [2004] ECDR 12 at para 14:

> "*It is a fundamental principle of fairness that a charge of dishonesty should be unambiguously formulated and adequately particularised*".

That did not happen in the present case.

37. The Board further found:

> "*In addition to the written evidence of the patients who have complained through the Complaints Committee, we have taken oral evidence from two dentists whom have 'fixed' [the Appellant's] patients. This evidence has been supported by x-rays and photographic evidence and the Board Members all agreed that there was no question of interpretation and the evidence was more than sufficient to support the complaint. We are aware of Dr. Fay presently 'fixing' a patient whom has a root canal conducted by [the Appellant]. … the root canal was far from complete and the patient has suffered significantly from the work done. The canal was not filled … the cap placed on the tooth was (in the opinion of the dentist and agreed by the Board) either the wrong patient's cap or put on backwards and so badly that there were grossly unacceptable gaps filled with cement.*"

38. This was a finding that the Appellant was guilty of a matter with which he was not charged, because the Committee had not placed the allegation before the Board for determination, based upon evidence which was not disclosed to him, some of which was taken at a secret hearing of which he had had no notice. It was a text book example of unfairness. As Lord Denning, giving the judgment of the Privy Council, stated in Kanda v Govt of Malaya [1962] AC 322 at 337 – 338:

> "*If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in Board of Education* v. *Rice [1911] AC 179 down to the decision of their Lordships' Board in Ceylon University* v. *Fernando [1960] 1 WLR 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice, Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.*"

39. Dr James concluded:

> "*I trust that you will find our decision to have [the Appellant] struck off pursuant to the Dental Practitioners Act 1950, section 14(1)(b)(ii) satisfactory …*"

40. The conclusion was premature. Assume, for the sake of argument, that the Board had in substance found that the Appellant was guilty of professional misconduct. Pursuant to 14(1)(ii) they should have written to him informing him of their findings and invited his response before deciding on the appropriate penalty.

41. Upon advice from the Attorney General's Chambers, the Permanent Secretary or one of her colleagues at the Ministry suggested that the Board remedy this omission. Accordingly, Dr James wrote to the Appellant on 29th April 2016, stating:

"*The Bermuda Dental Board has concluded our findings to date and are considering advising the Permanent Secretary to strike your name off the Dental Practitioners Register. Before any such decision is made, we wish to give you the opportunity to make representations as to why your name should not be struck off.*"

42. There are two difficulties with this letter. First, the Appellant was unaware of the facts in relation to which he was invited to make representations as the Permanent Secretary had not, as was required by section 13(1)(c), informed him of the Board's findings. Second, the Board appears by its letter of 31st March 2016 to have prejudged the issue of striking off. This impression is reinforced by an email dated 29th April 2017 which Dr James sent to E1 which alludes to the advice from the Attorney General's Chambers and states:

"*The concern is that if we don't do everything by the law, then we may not be able to get the appropriate result*".

43. The decision to strike off the Appellant from the Register was therefore tainted by apparent bias. As Lord Hope stated in Porter v Magill [2002] 2 AC 357 HL at 103:

"*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*"

A decision made with apparent bias is liable to be set aside.

44. The 29th April 2016 letter gave the Appellant a deadline of two weeks in which to make representations. No representations were received within that timeframe. On 20th May 2016 the Board advised the Permanent Secretary that they wished to proceed with striking the Appellant from the Register. By letter dated 20th May 2016 the Permanent Secretary wrote to the Appellant advising him of the Board's decision that he should be struck off. Thus he was informed of the penalty without ever having being informed of the Board's findings as to liability.

45. As against the Board, the first ground of appeal is therefore allowed. The Board failed to follow the disciplinary procedure prescribed by the 1950

Act. In consequence, the Appellant was not only deprived of a fair hearing but of any hearing at all.

46. As against the Permanent Secretary, the first ground of appeal is allowed in that she failed to notify the Appellant of the Board's findings on liability, thereby depriving him of the opportunity to make informed representations about the appropriate penalty. However the Permanent Secretary cannot properly be criticised for notifying the Appellant of the Board's decision that he should be struck off the Register. She was required to notify him by section 14(2) and had no discretion in the matter.

Second ground

47. The Appellant complains that the Board had no jurisdiction to consider the complaints that he had: (i) failed to comply with various statutory requirements regarding the administration of his practice; and (ii) failed to pay wages owed to E2 as these, he maintains, had no bearing on his conduct as a dental practitioner. He relied upon the statement of Lord Hope, giving the judgment of the Privy Council in Nwabueze v General Medical Council [2000] WLR 1760 at 1777 F:

"*A charge or part of a charge which contains an allegation which has no bearing on the practitioner's conduct as a medical practitioner is irrelevant to a charge that he is guilty of serious professional misconduct. As such it is objectionable on grounds of law, and it should be deleted from the notice of inquiry.*"

48. The objectionable allegation in that case was that the practitioner had had sexual intercourse with a former patient who had ceased to be a patient more than a year previously. Lord Hope related his statement to this context at G – H:

"*Their Lordships do not wish to be taken as suggesting that the conduct which was alleged … could not under any circumstances have a bearing on a practitioner's conduct as a medical practitioner. But what was lacking in this case … was any explanation to show that there were any circumstances which would have entitled the committee to hold*

that this alleged act of intercourse was improper from the professional point of view and thus relevant to the charge of serious professional misconduct."

49. The facts were far removed from the present case. Professional misconduct, as noted earlier in this judgment, is defined in section 1 of the 1950 Act to include "*improper or unethical conduct in relation to professional practice*". In my judgment, "*professional practice*" includes not only carrying out dental work but also the management and administration of a dental practice. The 1950 Act would be a paper tiger if it did not. Non-compliance with statutory requirements and non-payment of wages are undoubtedly capable of amounting to improper or unethical conduct in relation to professional practice.

50. It is nothing to the point that a complainant might, as the Appellant pointed out, have an alternative remedy against a practitioner accused of these things under the Employment Act 2000. A complainant might also have an alternative remedy in tort or contract against a dental practitioner accused of incompetence or negligence in the practice of dentistry. But these are private law remedies for the benefit of the individual complainant. Disciplinary proceedings under the 1950 Act are public law proceedings which serve a different purpose: to maintain professional standards in the interest of the profession and the public as a whole, pursuant to the Board's function, as stated in section 5(1):

"*to ensure high standards of professional competence and conduct in the practice of dentistry in Bermuda*".

51. The second ground of appeal is therefore dismissed.

Summary and conclusion

52. I accept that Dr James and the other members of the Board were acting in good faith and I can understand their concern at the serious allegations made against the Appellant. However the way in which the Board went about determining those allegations was very seriously flawed. The failure of the

Permanent Secretary to notify the Appellant of the Board's findings as to liability prior to the penalty phase of the disciplinary proceedings compounded the procedural unfairness.

53. The findings as to liability made by the Board against the Appellant and the penalty which they imposed, namely that he should be struck off the Register, are therefore quashed. The matter is remitted to a differently constituted Board for rehearing.

54. The Board may wish to consider instructing a lawyer with experience of disciplinary tribunals to act as a clerk to the hearing who would advise them as to the correct procedure. This would help to ensure that the hearing was fair. One might have thought that the requirement in section 5 that the Board shall include at least one barrister and attorney would have been sufficient to ensure a fair hearing but regrettably it was not.

55. All the allegations contained in the July 2015 letter were properly before the Board, including those relating to the management and administration of the Appellant's practice. I reject his submission to the contrary. However the Board cannot consider any additional allegations unless they are placed before the Board by the Committee for determination.

56. I shall hear the parties as to costs.

DATED this 8th day of May, 2017

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Hellman J