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Our ref: HP17/13741

HPCA LEGAL CASE NOTE

Medical Council of New South Wales v Lee [2017] NSWCA 282

Background

Dr Lee's registration had been suspended by the Medical Council of NSW under s.150 of the Health Practitioner Regulation National Law (NSW) (the National Law). Dr Lee appealed that suspension to the Civil and Administrative Tribunal of NSW (NCAT) and also sought a stay of the suspension. The Tribunal granted the stay of the suspension pending the determination of the appeal.

The Council appealed the stay order to the Court Of Appeal on 2 grounds:

1. That in circumstances where it is dealing with an appeal under s.159 of the National Law the Tribunal does not have the power to stay a suspension, and
2. That the Tribunal had erred in granting the stay in that it had failed to consider its protective jurisdiction under s.3A of the National Law¹ by not considering whether the stay was in the public interest.

Decision

The Court found that the Tribunal's power under s.43(3) of the Civil and Administrative Tribunal Act 2013 (the CAT Act) to grant a stay whilst an appeal is heard does not extend to appeals under Part 8 of the National Law. Section 165L(2) of the National Law establishes the only circumstances in which the Tribunal may stay an order which is the subject of an appeal being where the appeal is brought under s.159B on a point of law. The Court also considered that s.161B of the National Law did not give the Tribunal an unqualified power to stay the effect of a decision being appealed.

The Court refused leave to appeal on ground 2 on the basis that the Tribunal did consider the public interest and s.3A and that the Council's argument on this ground was not strong enough to justify granting leave.

Analysis

All references are from the judgement of Sackville AJA who prepared the substantive judgement of the Court.

¹ 3A Objective and guiding principle [NSW]

In the exercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration.

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Section 43 of the CAT Act

Importantly the Court recognised that the National Law is designed to, and does, establish a comprehensive regime for the regulation of registered health practitioners including appeals to the Tribunal. The Court noted that “*..the National Law [NSW] is intended to deal comprehensively with the matters it addresses*” (at 94) and “*..the National Law [NSW] should be construed as intended to deal exhaustively with the circumstances in which a decision by the Council to suspend a medical practitioner can be stayed or terminated*” (at 96).

Section 161B and 165L(2) of the National Law

The Court recognised that the National Law gives the Councils exclusive power to vary or revoke suspension decisions (at 111) (subject of course to the Tribunal’s power to allow an appeal) and that in this respect the National Law “*..reflects a legislative judgement that the Council is best placed to assess whether the interim measure of suspending the registration of the medical practitioner should remain in place, having regard to the paramount consideration of protecting the health and safety of the public.*” (at 112)

Finally the Court concluded that “*..the only case in which the Tribunal has power to stay a suspension decision is where the medical practitioner has appealed against the suspension decision with respect to a point of law.*” (at 113)

Consequences

The Court of Appeal has clarified that the only basis on which the Tribunal can stay a Council’s decision to suspend a practitioner’s registration under s.150 of the National Law is where the appeal is brought on a matter of law and not where it is brought on the merits of the decision. The Court’s reasoning turns on the proper construction of the National Law and its interaction with the CAT Act and not on considerations of the type of decision being appealed.

Therefore the Court’s decision is equally relevant to appeals from decisions of the following bodies:

- A Professional Standards Committee
- A Performance Review Panel
- A Council Inquiry
- A Council decision under s.150
- A Council decision to suspend a practitioner’s or student’s registration or to impose conditions on that registration following the report and recommendation of an Impaired Registrants Panel
- A Council decision on an application to lift a suspension or to lift or vary conditions (including following a s.150 process and an impairment process or s.150A or s.150C reviews)
- A National Board decision concerning an application for registration.

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In the context of pending appeals under s.159 of the National Law the Tribunal has previously relied upon s.43(3) of the CAT Act and the relevant case law to distil relevant principles supplemented by an acknowledgement of the Councils' protective jurisdiction as set out in s.3A of the National Law. In granting the Medical Council's appeal the Court has now recognised that in this area the National Law provides a comprehensive structure and that in terms of stay applications the CAT Act does not operate to fill what may previously have been seen as gaps in that structure.

The full text of the decision can be found at:

[Medical Council of New South Wales v Lee \[2017\] NSWCA 282](#)

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