ACT CIVIL & ADMINISTRATIVE TRIBUNAL

MEDICAL BOARD OF AUSTRALIA v DHAIMAT (Occupational Discipline) [2018] ACAT 64

OR 1/2015

Catchwords: **OCCUPATIONAL DISCIPLINE –** Health Practitioner National Law **–** medical practitioner address unknown – application to dispense with service refused – substituted service by public advertisement – non-publication orders in relation to patient details

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 9, 27, 38, 39, 56
Health Practitioner Regulation National Law ss 193, 198
Health Practitioner Regulation National Law (ACT) Act 2010 s 8

Subordinate Legislation: *ACT Civil and Administrative Tribunal Procedural Directions 2010 (No 1)* cl 10.1

Cases cited: *Kioa v West* (1985) 159 CLR 550
Minister for Immigration and Ethnic Affairs v Bhardwaj (2002) 209 CLR 597
Psychologists Board of Australia v Sullivan [2017] ACAT 104

Tribunal: Presidential Member M-T Daniel

Date of Orders: 22 June 2015
Date of Reasons for Decision: 19 June 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) OR 1/2015

BETWEEN:

MEDICAL BOARD OF AUSTRALIA
Applicant

AND:

AMMAR DHAIMAT
Respondent

TRIBUNAL: Member M-T Daniel

DATE: 22 June 2015

ORDER

The Tribunal being satisfied that the practitioner has on 14 September 2011 and on 25 April 2013 behaved in ways that constitute professional misconduct, it is ordered that:

1. The registration of Dr Ammar Dhaimat is cancelled.

……*Signed*……..
Member M-T Daniel

REASONS FOR DECISION

Background

1. On 5 January 2015 the Medical Board of Australia (**Board**) applied to the Tribunal for orders cancelling the registration as a medical practitioner of Dr Ammar Dhaimat.

2. The Board alleged that on 14 September 2011, during a consultation, Dr Dhaimat engaged in inappropriate comments and inappropriate touching of a female patient, and inappropriately disclosed information about that patient to a third party. The Board further alleged that on 25 April 2013 during a consultation with another female patient, he placed his hands on her bottom, forcefully pulled her towards him and kissed her on the lips. In relation to the 25 April 2013 incident, Dr Dhaimat had been charged, and on 12 March 2014 he was convicted in the ACT Supreme Court on two counts of committing an act of indecency.

3. Ultimately, after an ex-parte hearing on 22 June 2015, orders were made cancelling Dr Dhaimat's registration as a medical practitioner. I was satisfied on the material filed by the Board that Dr Dhaimat had behaved as alleged, that the behaviour constituted professional misconduct, and that the appropriate order to make was to cancel his registration.

4. Procedurally, this matter raised issues around service, substituted service, and whether certain non-publication orders sought by the Board should be made. At the time of making the final orders, I indicated I would publish short reasons specifically addressing those procedural matters. These are those reasons.

The legal framework

5. Section 9 of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**) permits a person to make an application to the Tribunal if an authorising law provides for this to occur. The application for disciplinary orders was brought under 193(1)(a)(i) of the *Health Practitioner Regulation National Law* (**National**

Law) which required the Board to refer the matter involving Dr Dhaimat to the Tribunal as the 'responsible tribunal'.[1]

6. The National Law and the ACAT Act each contain provisions addressing matters of procedure and substance.[2] Where these provisions conflict, it is the National Law that prevails.[3] If the National Law is silent on a procedural issue, one must turn to the legislation establishing the responsible Tribunal. This alone provides the potential for a divergence of procedures in different jurisdictions. Further, there are differences in the text of the National Law as applied in each local jurisdiction. Accordingly, parties to proceedings under the National Law should be prepared to address the Tribunal on matters of procedure and substance by reference to both local and interstate authorities, and with an awareness of the interstate differences in the legislation.

The application for non-publication orders

7. The National Law does not prescribe whether the hearing of an application pursuant to that Act should be open to the public or not. One must turn to the legislation establishing the responsible tribunal. Section 38 of the ACAT Act gives effect to the open justice principle by requiring that hearings in the tribunal be public unless the tribunal orders otherwise:

> ***38 Hearings usually in public***
>
> *(1) The hearing of an application by the tribunal must be in public.*
>
> *(2) However, this section does not apply to a hearing, or part of a hearing, if the tribunal makes an order under section 39 in relation to the hearing, or part.*

8. Section 39 of the ACAT Act gives the Tribunal the power to make orders for non-publication of certain evidence or information contained in documents before the Tribunal:

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[1] The ACT Civil and Administrative Tribunal was declared to be the responsible tribunal for the ACT jurisdiction by section 8 of the *Health Practitioner Regulation National Law (ACT) Act 2010*

[2] For example, the parties to a proceeding are listed in section 194 and section 200 of the National Law, and section 29 of the ACAT Act, costs are dealt with in section 195 and section 200 of the National Law, section 48 and section 49 of the ACAT Act. Orders that may be made in an occupational discipline matter are listed in section 66 of the ACAT Act, the National Law covers this in section 196

[3] Section 198 of the National Law and section 27 of the ACAT Act

39 Hearings in private or partly in private

(1) This section applies in relation to an application, or part of an application, if the tribunal is satisfied that the right to a public hearing is outweighed by competing interests.

Note See s (5) in relation to competing interests.

(2) The tribunal may, by order, do 1 or more of the following:

(a) direct that the hearing of the application, or part of the hearing, take place in private and give directions about the people who may be present;

(b) give directions prohibiting or restricting the publication of evidence given at the hearing, whether in public or private, or of matters contained in documents filed with the tribunal or received in evidence by the tribunal for the hearing;

(c) give directions prohibiting or restricting the disclosure to some or all of the parties to the application of evidence given at the hearing, or of a matter contained in a document lodged with the tribunal or received in evidence by the tribunal for the hearing.

(3) The tribunal may make an order under subsection (2) on application by a party or on its own initiative.

(4) A person must not contravene an order under subsection (2) (b) or (c).

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(5) For this section, the right to a public hearing is outweighed by competing interests if the tribunal is satisfied that the application, or part of the application, should be kept private—

(a) to protect morals, public order or national security in a democratic society; or

(b) because the interest of the private lives of the parties require the privacy; or

(c) to the extent privacy is strictly necessary, in special circumstances of the application, because publicity would otherwise prejudice the interests of justice.

9. In this case, the Board sought orders pursuant to section 39 for:

(a) the hearing to take place in private;

(b) the publication of evidence and documents including names of complainants or witnesses to be prohibited;

(c) the names of the complainants to be redacted from all documents filed in the proceedings;

(d) the names of the witnesses to be redacted from all documents filed in the proceedings; and

(e) the names of members of the Board to be redacted from all documents filed in the proceedings.

10. In fact, the application and supporting documents filed by the Board already redacted the names of complainants, witnesses, and Board members.

11. In *Psychologists Board of Australia v Sullivan*[4] the Tribunal considered sections 38 and 39, in the context of an application for non-publication of medical records and identifying information in relation to a client of a health practitioner:

> *101. Proceedings before the Tribunal are required to be public,*[5] *unless legislation provides otherwise*[6] *or the Tribunal orders otherwise. In the usual course of events any member of the public can attend an occupational discipline hearing, and the written reasons for the decision will be published online. As a concomitant of the obligation to provide a public hearing, documents which were before the Tribunal for the hearing are usually able to be viewed by the public should a request be made to inspect the Tribunal's file. With limited exception*[7]*, the names of parties to an occupational discipline matter are also available to the public through the daily lists, the reasons for decision, or upon inspecting a file.*
>
> *102. Although there is an important public interest served by this transparency, competing private and public interests can in some cases outweigh the public interest served by a public hearing. Section 39 of the ACAT Act provides the mechanism by which specified competing interests are weighed up, and gives the Tribunal power in appropriate cases to make orders for a private hearing or restricting publication of information in relation to the hearing: …*
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> …
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> *103. In this matter, on 9 November 2015 after a short hearing, the Tribunal made orders under section 39 of the ACAT Act restricting public access to the documents filed with the Tribunal until further order. The parties consented to those orders. When the substantive hearing commenced on 3 February 2016 the Tribunal made further orders that the hearing would take place in private, and that there be no access by the public to the audio or transcript of the hearing. Those orders were not opposed by the parties.*

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[4] [2017] ACAT 104

[5] ACAT Act section 38

[6] See for example the *Mental Health Act 2015*, section 194

[7] Section 423A of the *Legal Profession Act 2006* specifies that disciplinary proceedings in the Tribunal in relation to lawyers are de-identified until all appeal processes are finalised

104. The non-publication and private hearing orders were precipitated because the vast majority of the information contained in the documents before the Tribunal consisted of personal health information of the client, interspersed with personal information relating to the practitioner and the notifiers. Most of the personal health information, in particular, fell within the operation of the Health Records (Privacy and Access) Act 1997 which would oblige a person in possession of that information to maintain its confidentiality except in specified circumstances.

105. Subsection 39(5) of the ACAT Act does not expressly provide for the private interests of third parties such as the client to be taken into account as outweighing the public interest served by a public hearing.

106. In this case, the Tribunal was satisfied that the right to a public hearing, and specifically the interest served by public access to the documents filed with the Tribunal and public attendance during the hearing, was outweighed by the prejudicial effect that public access to the information contained in those documents and discussed during the hearing would have on the interests of justice. The Tribunal was satisfied that it was contrary to the interests of justice for private health information relating to named third parties, normally subject to statutory confidentiality obligations, to become publicly available as an incident of the bringing of disciplinary proceedings against a practitioner. Not only does such an approach undermine the objectives of the Health Records (Privacy and Access) Act 1997, the inevitable consequence of such disclosure routinely occurring would be a reluctance on the part of clients to notify regulatory bodies of inappropriate conduct, or to participate in subsequent disciplinary proceedings.[8] Conducting the hearing publically, but with adjustments to de-identify the client or minimise the amount of personal health information being openly discussed, would be cumbersome, lengthen the hearing and become administratively inefficient, contrary to the objectives set out in section 7 of the ACAT Act.

107. Accordingly, in advance of the hearing the Tribunal ordered that there be no public access to the file pending further order, that the hearing of the disciplinary application take place in private, and that there be no public access to the transcript or audio recording of the hearing.

108. After an occupational discipline hearing, in the ordinary course of events, a decision would be made with written reasons provided to the parties and also published. The written reasons would ordinarily name the practitioner, and witnesses, and set out findings of fact together with the evidence on which those findings were made.[9] The Board would then, in accordance with its obligations under the National Law[10], record in the public register outcomes such as any reprimand issued by the Tribunal,

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[8] See the principles set out in *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* [2004] NSWCA 324

[9] Section 60 of the ACAT Act and section 179 of the *Legislation Act 2001*

[10] Sections 222 and 225 of the National Law

> *suspension of practice or conditions imposed upon the practitioner's registration.*
>
> *...*
>
> *116. The Tribunal considers that there is an overwhelming public interest in the reasons for a disciplinary decision, setting out the findings of fact, conclusions as to characterisation of the conduct and orders which are appropriate, being published. ...*
>
> *117. However, the Tribunal is concerned that some information on which findings integral to this decision are based is private health information of the client. There is little public interest served by the disclosure of such information to the public. The Tribunal is satisfied that the interests served by maintaining confidentiality of such information can be addressed by issuing reasons for decision to the parties which contain such information as an annexure which is provided only to the parties.*
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> *118. These reasons for decision, without the annexure, will be published. Orders will be made at the time of publication of the reasons for decision, restricting publication of the annexure. ...*

12. In this case, I was similarly satisfied that the publication of the identity of the complainants and other witnesses, together with the personal health information contained in the documents filed by the Board, would have a prejudicial effect on the interests of justice. It would undermine the non-publication orders made by the Supreme Court in the criminal trial and act as a disincentive to the reporting of misconduct. On 10 April 2015 I made orders that:

> *1. The hearing of the application take place in private.*
>
> *2. The publication of evidence given at the hearing, and documents filed in the proceedings, that may identify the complainants or witnesses is prohibited.*
>
> *3. The names of complainants and other witnesses may be redacted from documents filed in the proceedings.*

13. I declined to make orders for the identity of members of the Board to be redacted from the documents filed with the Tribunal. The application for that order was pressed, but no particular submissions in support were made. Given the public nature of appointment to a national board, and the nature and role of a national board in making decisions under the National Law, it is difficult to see how an argument could be sustained that the identity of those Board members involved in making a decision should not be publically known.

The application to dispense with service

14. As earlier noted, these proceedings were commenced by way of a referral to the Tribunal under section 193 of the National Law. In practical terms, the document filed to achieve the referral is the approved form entitled 'application for disciplinary action'. The ACAT Act does not specifically require service of the application upon the practitioner, that requirement is implicit in the obligation imposed on the Tribunal by section 7 of the ACAT Act to observe natural justice and procedural fairness. Clause 10.1 of the *ACT Civil and Administrative Tribunal Procedural Directions 2010 (No 1)* provides that an applicant in proceedings before the Tribunal must serve the respondent with a copy of the application no less than seven days before the first return date. In most jurisdictions of the tribunal, the registry serves the respondent with a copy of the application either by post or by email. However in occupational discipline matters service remains the responsibility of the applicant. Additionally, section 37 of the ACAT Act requires that notice of the time and place for the hearing of an application must be given to the parties.

15. On 19 January 2015 when the matter first came before the Tribunal for directions Ms Tomlins for the Board advised the Tribunal that the Board had been unable to effect service upon Dr Dhaimat at his previous addresses in O'Malley[11] and Isaacs.[12] She proposed to issue subpoenas to ACT Corrective Services and ACT Health to identify a more current address. The matter was adjourned to allow this to occur.

16. When the matter came back before the Tribunal on 18 March 2015, Ms Tomlins advised the Tribunal that although documents had been produced, there had been no success in finding a current address for Dr Dhaimat. The Board proposed to file an application to dispense with service. The matter was adjourned for the anticipated application to be filed and heard.

17. The Board filed an interim or other orders application on 25 March seeking orders that the application for disciplinary action proceed without service of that

[11] The address given by Dr Dhaimat on 27 April 2013 in the Magistrates Court

[12] The address provided by Dr Dhaimat to the Australian Health Practitioner Regulation authority for the register of practitioners

application on the respondent. That application was heard on 15 May 2015. The Board sought that either the requirement to serve Dr Dhaimat with the application be dispensed with, or that substituted service orders be made allowing for service to be effected by post to the most recent residential and practice addresses of Dr Dhaimat.

18. The Board relied upon affidavits of Ms Tomlins which detailed the extensive efforts undertaken to locate Dr Dhaimat in order to effect service of the application for disciplinary action upon him:

    (a) Personal service had been attempted at both the O'Malley and Isaacs addresses, ineffectively. The process server advised that Dr Dhaimat was not known at those addresses.

    (b) Attempts to serve by post at the Isaacs address, resulted in mail being returned to sender.

    (c) An attempt to serve by post to Dr Dhaimat's last professional address resulted in the practice advising that it had no contact with Dr Dhaimat and could not provide the documents to him.

    (d) Contact was made with Dr Dhaimat's lawyers for the criminal trial, they had no current instructions and referred to a more recent solicitor. Contact with that solicitor was also unsuccessful, he had no instructions and no current contact with Dr Dhaimat.

    (e) As foreshadowed, ACT Government entities were issued subpoenas, and further addresses in Hughes (from 2014) and Mawson were elicited, but these also proved unsuccessful when service was attempted. The process server advised Dr Dhaimat was not known at the Hughes address, and was no longer at the Mawson address with the current occupant believing he had left Australia in 2014.

    (f) Enquiries with the practice manager of Dr Dhaimat's previous practice and with the Jordanian embassy were unsuccessful.

    (g) Searches of Facebook and the Whitepages were unproductive.

(h) A subpoena to the Australian Customs and Border Protection Service produced records which indicated that Dr Dhaimat had not left Australia under his own name, in the past year.

(i) An advertisement had been placed in the legal notices section of the Canberra Times on 28 March 2015 in the following terms: "Notice is given to **DR AMMAR DHAIMAT**, you should contact the ACT Government Solicitor on **(02) 6205 2502 or actgso@act.gov.au** by COB 8 April 2015, otherwise legal proceedings may be determined in your absence." No telephone call or email was received in response to that advertisement.

19. The Board advised that in accordance with section 193 of the National Law Dr Dhaimat had been notified of the referral to the tribunal by letter dated 6 May 2014.[13] That letter had been sent to the Isaacs address. The Board also advised that Dr Dhaimat had failed to comply with the requirement under section 131 of the National Law that he advise the Board of any change in the address to be used to correspond with the practitioner.

20. I noted that on the tribunal file, the registry had received marked 'return to sender' earlier correspondence notifying Dr Dhaimat of the time and place of the previous directions hearings. That correspondence had been sent to both the Mawson and Hughes addresses.

21. From this evidence I was satisfied that Dr Dhaimat was likely to be still in Australia, and that attempts to serve him by post with the application at the addresses suggested by the Board were not likely to bring the application to his attention, but on the contrary were likely to be completely ineffective.

22. I was in addition concerned that Dr Dhaimat had not received any documentation advising him of the time and place of the hearings in this matter, as those letters had been returned to the tribunal.

23. In its submissions in support of the application for service to be dispensed with, or to occur by post, the Board commenced by acknowledging that the Tribunal is obliged to observe procedural fairness, and that the content of procedural fairness

[13] Exhibit A-5

usually requires that a person know the case against him or her, and have an opportunity to meet it.[14] It was submitted on behalf of the Board that procedural fairness is not a fixed set of rules, and rather that the Tribunal is required to implement a fair process in the context of the relevant legislation and factual circumstances.[15] The Board submitted that the registration of health practitioners involves protection of the public, and that this should be taken into account in considering whether to proceed to a hearing in the absence of Dr Dhaimat. The Board pointed out that, should he subsequently become aware of the proceedings and orders made, section 56 of the ACAT Act provided a mechanism by which an application to set aside orders made after a hearing in his absence might be made.

24. This matter raised two aspects of the hearing rule. First, a health practitioner is entitled to know the case brought against them. Secondly, they should be given opportunity to respond or be heard. Neither of these requirements had been met in the usual manner – that is, by receiving a copy of the application and notice of the date, time and place of hearing. However, I was satisfied from the processes undertaken by the Board prior to the application being made, in which the practitioner had engaged, and the letter of 6 May 2014, that the practitioner was well aware of the nature of the complaints and that application for his registration to be cancelled was to be made. The failure to notify the practitioner of the date, time and place of the proceedings was to my mind a more significant issue than the failure to give him a copy of the application, the content of which was in general terms known to him.

25. It is only in the most extreme and urgent cases that the Tribunal would be satisfied that it could dispense with the requirements of service. Given that Dr Dhaimat was already temporarily suspended from practice, I was not persuaded that this was such a case. Consequently, I did not make orders dispensing with the requirements of service but instead made orders that service would be effected by the placing of an advertisement in the Canberra Times and one national publication in the following terms:

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[14] *Minister for Immigration and Ethnic Affairs v Bhardwaj* (2002) 209 CLR 597, 611
[15] *Kioa v West* (1985) 159 CLR 550, 585

TAKE NOTICE that at 2:00 pm on Monday 22 June 2015 the ACAT at level 4, 1 Moore St Canberra City will decide an application to cancel the registration of Dr Ammar Dhaimat on the grounds of professional misconduct.

Conclusion

26. When the matter came before the Tribunal on 22 June 2015, Dr Dhaimat was not present. The Board provided evidence of advertisements in the specified terms having been placed in two suitable publications. I was satisfied that service had been effected, and that it was appropriate to proceed in Dr Dhaimat's absence to determine the matter without hearing from him.

27. After consideration of the material filed by the Board and its submissions, I was satisfied that the alleged behaviour had occurred. The behaviour in relation to each of the female patients was in my view, both individually and taken collectively, so far short of the standard of practice reasonably expected of a practitioner of Dr Dhaimat's level of training and experience as to amount to professional misconduct[16].

28. The material filed by the Board further indicated that Dr Dhaimat's misbehaviour was not an isolated occurrence. Dr Dhaimat had trained in Jordan, and was in practice in the United Kingdom when on 29 September 2007 police were notified of an allegation that he had sexually assaulted a female patient. Dr Dhaimat was arrested that day, interviewed by the police and granted bail which he subsequently breached. At the time of the hearing before the Tribunal he was still wanted by UK police. The UK General Medical Council (**GMC**) in 2008 suspended his registration, and advised the Jordanian authorities of this action.

29. It transpired that Dr Dhaimat had moved quickly to obtain a certificate of good standing from the GMC only weeks after his arrest and had relied upon this to obtain registration in Australia. When a further certificate of good standing was required in 2008, it seems that he submitted a fraudulent document to the Australian authorities.

[16] Section 5, National Law

30. Police executing a search warrant at Dr Dhaimat's residential premises in 2013 found evidence of fraudulently created documents, and numerous appointment cards containing the names and telephone numbers of women, including the details of one of the complainants in this matter.

31. Against this background, I was satisfied that the continued practice of Dr Dhaimat posed such a risk to the public that the only appropriate orders[17] to make were those cancelling Dr Dhaimat's registration as a health practitioner.

……..
Presidential Member M-T Daniel

[17] Sections 3 and 4, National Law

HEARING DETAILS

FILE NUMBER:	OR 1/2015
PARTIES, APPLICANT:	Medical Board of Australia
PARTIES, RESPONDENT:	Dr Ammar Dhaimat
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	ACT Government Solicitor
SOLICITORS FOR RESPONDENT	N/A
TRIBUNAL MEMBERS:	Presidential Member M-T Daniel
DATES OF HEARING:	15 May 2015