IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-259

IN THE MATTER OF	an appeal pursuant to section 106(2)(a) of the Health Practitioners Competence Assurance Act 2003
BETWEEN	SURESH KUMAR VATSYAYANN Appellant
AND	PROFESSIONAL CONDUCT COMMITTEE Respondent

Hearing: 9 December 2009 (On Papers)

Counsel: A H Waalkens QC and A L Credin for Appellant
J C Hughson for Respondent

Judgment: 9 December 2009

JUDGMENT OF SIMON FRANCE J
(Leave to appeal)

Introduction

[1] This is an application for leave to appeal to the Court of Appeal on a question of law of general or public importance. It has been agreed it should be dealt with on the papers following receipt of submissions.

[2] In December 2008 Dr Vatsyayann was found guilty of professional misconduct. The charge was initially supported by 5 particulars, but 2 were not pursued. The remaining particulars stayed numbered as 3, 4 and 5.

[3] All 3 particulars were found to be established. The Tribunal decided the conduct merited a sanction and fined Dr Vatsyayann $5,000. All decisions were upheld in a judgment issued by me on 14 August 2009. The proposed further appeal concerns issues arising from Particular 3 which is the most serious allegation.

Charge and facts

[4] Particular 3 alleged that Dr Vatsyayann:

> Produced false and/or misleading clinical notes that he was consulted by patient X when X did not consult with Dr Vatsyayann on that date.

[5] The context was that a sixteen year old woman visited Dr Vatsyayann's practice on the day in question. Dr Vatsyayann runs a sole practice; at the time he was assisted by a Dr Gilgen who was a suspended doctor able to do practice nurse type functions. The allegation is that the young woman was seen by Dr Gilgen, not Dr Vatsyayann. A prescription for anti-depressants for the sixteen year old was signed on the day by Dr Vatsyayann. Another doctor on a different day at a difference practice had previously declined to prescribe such medication.

[6] The clinical notes of the visit recorded Dr Vatsyayann as being the clinician who saw the patient. Dr Vatsyayann remained of the view that he had indeed seen the woman so the notes were not false or misleading. The Tribunal disagreed and found on the evidence that Dr Gilgen had seen the patient. This aspect was not appealed.

[7] At the appeal hearing I was concerned about the lack of clarity in terms of the culpability allegation. If the prosecution made good on its allegation, then what was it saying about the notes (and the fact that Dr Vatsyayann had signed the prescription)? Ms Hughson said the allegation was fraud. She pointed to her opening which accepted the onus of proof was at the high end of the scale and to the fact that the prosecution had sought for Dr Vatsyayann to be suspended from practice.

[8] Mr Waalkens QC said the allegation was never fraud, and advanced reasons why. I reviewed the judgment and concluded that the Tribunal had understood the situation in the same terms as Mr Waalkens. This could be inferred from how it structured its ruling but primarily, at least in my view, from the fact that a $5,000 fine was otherwise totally inadequate. For this reason I concluded Dr Vatsyayann had not been disadvantaged by the lack of clarity in this area.

Proposed appeal ground one

[9] In closing submissions before the Tribunal Mr Waalkens had advanced an argument that the charge was inherently flawed. That is not how he worded it, but it is its effect. His proposition was that if the prosecution was right and Dr Vatsyayann had not seen the patient, then Dr Vatsyayann cannot have produced the notes. Dr Gilgen must have.

[10] That argument depends on giving "produce" a literal meaning. It is also technical in nature, in that the core allegation was always understood. The allegation was that the notes record Dr Vatsyayann as seeing the patient when he never did. There was no dispute about the internal accuracy of what the notes record, just their record of who had conducted the consultation.

[11] I held that against that background, and against the background that it was a sole practice in which Dr Vatsyayann was the only doctor licensed to see patients, the allegation should be read as "was responsible for false and/or misleading clinical notes…". Underlying that conclusion was a difference of opinion with Mr Waalkens as to the meaning and intent of s 92(1)(b) and (c) of the Health Practitioners Competence Assurance Act 2003. He argued for a level of precision and binding effect of the specific words used in the Particulars that in my view went beyond the intention of the provision which was to ensure the practitioner was fairly informed of the allegation.

[12] I do not consider that the point raises a question of law of general or public importance. It is in essence a dispute about whether the word produce can be given a meaning that suits the context, or must it be read as meaning "wrote". There is no

dispute as the requirements of the section, just whether the particular application of it was adequate.

[13] A related proposition is that my judgment errs in how it resolves this lack of clarity about what was being alleged against Dr Vatsyayann; i.e. fraud, or very poor business systems that would allow this to happen. The criticism is that the judgment focuses on how the Tribunal treated the charge, rather than on how Dr Vatsyayann understood it. It is emphasised that the section requires the charges to inform the practitioner.

[14] The difficulty with this as a further appeal ground is that before me Mr Waalkens was very firm in his submissions that there was no fraud alleged, that the case had not been conducted by him on the basis that fraud was alleged, and the Tribunal had not treated the allegation as involving fraud. That being so, all my judgment does is in effect accept this submission. The implied consequence is to hold that if the prosecution had wanted to allege fraud, and obtain a sanction that reflects that, it had failed to make it clear and could not now do so.

[15] No question of law can arise from these circumstances.

[16] The next proposition is that the practitioner did not understand from the charges that he was being held responsible for the inaccurate records. Had he done so, evidence of good systems could have been led. I remain unsure as to how that evidence would explain the prescription, but the submission is Dr Vatsyayann did not have the opportunity.

[17] That complaint was not advanced before me. The technical argument about the charge had been raised before the Tribunal and rejected because "produce" was not to be read so literally. The interpretation I gave the word was a variant on the Tribunal's but its effect was the same. The topic now raised was available for argument before me.

[18] I have reviewed the applicant's written submissions and the point is not addressed. I do not consider it is open to raise at this point. Nor, for the reasons

given, do I consider it has sufficient potential merit to justify a second appeal, or is of sufficient importance.

[19] Concerning whether the proposed grounds of appeal meet the statutory test, I have had regard to the applicant's submission that a finding of misconduct is a serious consequence, but even allowing for that I do not consider any of the matters, on their own or together, should receive leave to appeal.

Proposed appeal ground two

[20] The applicant submits that the facts did not meet the threshold for a sanction. It is submitted that in accordance with *F v MPDT and CAC*, HC Auckland, AP 113/02, 17/5/04 this proposition should be treated as a question of law.

[21] The application for leave does not contend that my judgment wrongly states the legal test. That being so, I do not consider a dispute as to the application of those principles to the particular facts is a question of law. Further, for reasons given in the judgment which I will not repeat, I do not consider the underlying proposition is tenable.

[22] Leave to appeal on this ground is also declined.

[23] The respondent is entitled to costs. Memoranda can be filed if agreement is not reached.

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Simon France J

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