FEDERAL COURT OF AUSTRALIA

Kitchen v Director of Professional Services Review Under s 83 of the Health Insurance Act 1973 (Cth) [2019] FCA 1978

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| File number: |  |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 20 November 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – investigation of whether medical practitioner engaged in inappropriate practice – urgent application for interim injunction to restrain hearing – allegation that applicant would be denied natural justice – application dismissed |
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| Legislation: | *Health Insurance Act 1973* (Cth) ss 93, 101, 106C, 106K and 106KD  |
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| Cases cited: | *Adams v Yung* (1998) 83 FCR 148*Health Insurance Commission v Grey* (2002) 120 FCR 470*Kutlu v Director of Professional Services Review* (2011) 197 FCR 177*Romeo v Asher* (1991) 29 FCR 343  |
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| Date of hearing: | 20 November 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Other Federal Jurisdiction |
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| Category: | Catchwords |
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| Number of paragraphs: | 20 |
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| Counsel for the Applicant: | Mr B O’Donnell QC with Mr A Scott |
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| Solicitor for the Applicant: | Russells Law |
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| Counsel for the First Respondent: | Ms KB Slack |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Counsel for the Second Respondent: | Ms A Rae |
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| Solicitor for the Second Respondent: | Clayton Utz |

ORDERS

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|  | QUD 699 of 2019 |
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| BETWEEN: | DAVID NORMAN KITCHENApplicant |
| AND: | DIRECTOR OF PROFESSIONAL SERVICES REVIEW UNDER S 83 OF THE HEALTH INSURANCE ACT 1973 (CTH)First RespondentTHE MEMBERS OF PROFESSIONAL SERVICES REVIEW COMMITTEE NO. 1157Second Respondent |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 20 NOVEMBER 2019 |

THE COURT ORDERS THAT:

1. The application for an interim injunction is dismissed.
2. Costs are reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(DELIVERED EX TEMPORE AND REVISED)

RANGIAH J:

1. The applicant has applied for an urgent interim injunction to restrain the second respondents, the Members of the Professional Services Review Committee No. 1157 (**the Committee**), from conducting a hearing on 20 and 21 November 2019.
2. The principal basis for the application is the applicant’s assertion that he will be denied procedural fairness or natural justice. He alleges that the Committee has provided him with insufficient notice of the proposed hearing and an inadequate opportunity to prepare for it.
3. On 14 November 2018, the first respondent, the Director of Professional Services Review (**the Director**) made a referral to the Committee under s 93 of the *Health Insurance Act 1973* (Cth) to investigate whether the applicant engaged in inappropriate practice in providing specified services.
4. The Committee has already conducted a number of hearings. In respect of those hearings, the applicant complained of the absence of particulars of the concerns held by the Committee.
5. On 5 November 2019, the Committee notified the applicant that it intended to conduct a further hearing on 20 and 21 November 2019 (**the proposed hearing**). The Committee provided particulars of its concerns. The applicant does not complain about the adequacy of the particulars. He maintains, however, that the time allowed to him to prepare for the hearing is inadequate.
6. The issues in the application are whether the applicant has demonstrated a prima facie case that he will be denied procedural fairness by the conduct of the proposed hearing and whether the balance of convenience favours the grant of an injunction restraining the Committee from conducting the proposed hearing.
7. In *Yung v Adams* (1997) 80 FCR 453, Davies J said, at 458:

As can be seen therefore, although the process undertaken by a Professional Services Review Committee is essentially investigative and the Committee does not in itself make an order of a disciplinary nature, the principles of natural justice apply so that, except in a simple case where the ambit of the investigation and the subject matter of possible findings are defined by the reference which has initiated the inquiry, the Committee should at some stage make it clear to the medical practitioner whose affairs are under investigation what are the possible findings which are the subject of the investigation and what are the grounds on which those findings might be made. The medical practitioner should be given a fair opportunity to explain why those findings should not be made.

…

Section 102 of the Act provides that the notice of hearing "must give particulars of the matter to which the hearing relates". However, compliance with that requirement does not end the responsibility of the Committee to provide information in the nature of particulars. At the beginning of the inquiry, the Committee may well not have formulated likely or possible findings or the grounds upon which they might be made. As the inquiry proceeds, the Committee should give such further particulars or information of a like nature as is necessary to make it clear to the medical practitioner what are the matters to which he or she should respond.

The judgment of Davies J was approved on appeal and in subsequent cases: see *Adams v Yung* (1998) 83 FCR 148; *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177 at [86]; *Health Insurance Commission v Grey* (2002) 120 FCR 470 at [97]–[120].

1. I accept that the Committee owes an obligation of procedural fairness to the applicant in the conduct of the investigation. However, it must be examined whether the applicant has demonstrated a prima facie case that he will be denied procedural fairness by reason of the conduct of the proposed hearing.
2. It is relevant that on 8 November 2019, the Committee wrote to the applicant indicating that it was open to the applicant providing affidavit evidence about the concerns raised in its letter of 5 November 2011, with questioning about the contents of the affidavit to follow at a later time. Implicitly, the Committee accepted that the proposed hearing would not proceed in respect of those concerns on the scheduled dates.
3. The Committee’s letter of 8 November indicated that the proposed hearing would instead proceed upon three matters. The Committee’s counsel has clarified that those matters are:
4. general questions about how records are kept and stored, and when records are created, in the applicant’s practice;
5. general questions about how the applicant provides procedures for the types of services the subject of the review; and
6. questions concerning the qualifications of assistants, which will involve clarification of material already provided by the applicant.
7. The applicant has not responded to the Committee’s offer to address its concerns by way of affidavit. The applicant has complained that he has not been given enough time to address those matters. However, when given the opportunity for more time, he has not taken it up. It remains open to him to agree to present his evidence upon those matters by affidavit or, alternatively, to seek to provide oral evidence about those matters at a later stage.
8. The Committee’s counsel has made it clear that the Committee is open to the provision of any further information and evidence by the applicant at a later stage. The applicant asserts, nevertheless, that he requires more time to prepare to answer the Committee’s questions concerning the matters that it has indicated it intends to proceed upon in the proposed hearing. I do not accept that claim. The subjects of the proposed questioning are matters of general practice and clarification of information that the applicant has already provided. I consider that the applicant has had adequate time to prepare to answer questions upon these matters.
9. In considering whether there is a prima facie case of denial of procedural fairness, it is relevant that a substantial part of the Committee’s role is to investigate whether the person under review has engaged in inappropriate practice and that such an investigation is likely to proceed in stages. As Davies J observed in *Yung* at 458, particulars do have to be provided “at some stage” before the preliminary report is provided. However, it is far from clear that that stage has been reached. The investigation is ongoing.
10. The statutory scheme provides for the Committee to investigate whether the person under review engaged in inappropriate practice in relation to specified service: s 93(1). Where it appears to the Committee that the person under review may have engaged in inappropriate practice, it must hold a hearing: s 101(2). The Committee must prepare a draft report of preliminary findings, setting out, inter alia, its reasons for the preliminary findings: s 106KD(1). The Committee must give the person under investigation the preliminary findings and invite the person to provide, within one month, written submissions suggesting changes to the draft report: s 106KD(2). The Committee then prepares a final report: s 106C(1). If a finding of inappropriate practice is made, the matter then proceeds before the Determining Authority.
11. In *Romeo v Asher* (1991) 29 FCR 343, Morling and Neaves JJ stated at 349–350:

It is, however, quite a different question whether the court should interfere in the conduct of a hearing in the manner suggested by the appellants. While this Court has a general supervisory role under the *Administrative Decisions (Judicial Review) Act* in relation to the conduct of inquiries for which the *Health Insurance Act* provides, the court will not, unless compelling circumstances are shown, examine the material before a Committee at any particular stage of a hearing which it is conducting in order to determine, in the abstract, whether, if a particular finding is made, the making of that finding may vitiate the Committee's report because of an absence of procedural fairness. It is only after the findings of the Committee are known that such an inquiry can profitably be undertaken...In the circumstances of the present case, the court would not, we think, be justified in assuming that the Committee will proceed to make findings upon any matter of which the appellants have not had adequate notice. That is to say we do not think the conclusion can yet be reached that the Committee has denied the appellants their undoubted right to natural justice.

1. That passage has application in the present case. I do not think that a conclusion can yet be reached that by proceeding with the proposed hearing the Committee will, or is likely to, deny the applicant his right to natural justice.
2. The Committee has made it clear that the proposed hearing will not be the final hearing held. The Committee has also indicated that it will provide the applicant with further opportunities to call evidence and to make submissions. The proposed hearing must be considered as part of the whole of the investigation. In my opinion, it has not been demonstrated, on a prima facie basis, that if the hearing proceeds on the limited basis now proposed, the applicant will or may be denied procedural fairness.
3. In these circumstances, I am not satisfied that the applicant has demonstrated a prima facie case of denial of procedural fairness by reason of inadequate notice of the hearing.
4. The applicant has also submitted that the Committee has no jurisdiction because the methodology required for the use of samples under s 106K of the Act has not been used. Even assuming a prima facie case in that regard, the applicant has not adequately explained his delay in commencing the present proceedings and seeking an injunction on that basis. I consider that, in the circumstances, an urgent interim injunction should not be granted on that basis.
5. The application for an interim injunction will be dismissed.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 26 November 2019