SUPREME COURT OF YUKON

Citation: *Bretlyn v. Yukon Medical Council*, 2015 YKSC 3

Date: 20150202
S.C. No. 13-A0134
Registry: Whitehorse

Between:

LORRAINE BRETLYN

Petitioner

And

YUKON MEDICAL COUNCIL

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Lorraine Bretlyn	Appearing on her own behalf
Richard A. Buchan	Counsel for the Yukon Medical Council
Jonathan D. Meadows	Counsel for Dr. Peyman Shoshtari

REASONS FOR JUDGMENT

INTRODUCTION

[1] The petitioner brings an application for judicial review of the summary dismissal of her complaint against Dr. Shoshtari by the Yukon Medical Council (the "Council") pursuant to s. 27(7) of the *Medical Profession Act*, R.S.Y. 2002, c. 149 (the "*Act*"). That section permits the Council to summarily dismiss a complaint where it is unfounded or without sufficient evidence to substantiate the complaint. Although the *Act* allows for an appeal of a Council decision to this Court under s.36, the petitioner has filed her material as a judicial review.

[2] The petitioner is self-represented and has been unable to obtain legal representation despite the urging of the Court. The judicial process is unfortunately very difficult for self-represented people to understand and effectively participate in.

[3] Pursuant to Rule 54(7), the Court has ordered that counsel for Dr. Shoshtari may take part in the proceeding.

BACKGROUND

[4] The petitioner filed a complaint with the Council on September 10, 2013, and on various occasions up to and including December 10, 2013, has filed in excess of 100 pages of material relating to her complaint.

[5] Dr. Shoshtari is a general practitioner who has had a family practice in Whitehorse since February 2009. He first saw the petitioner on July 3, 2009, and treated her until August 6, 2013, when he gave her a prescription renewal.

[6] During the four years Dr. Shoshtari treated her, the petitioner would often be accompanied by a male person, who Dr. Shoshtari understood to be the petitioner's common-law partner. The nature of their relationship was never specifically discussed. The complaint is based on Dr. Shoshtari's alleged indiscretion with respect to the relationship.

[7] On August 6, 2013, the petitioner expressed the concern that Dr. Shoshtari and his staff considered her to be married to the male person. Dr. Shoshtari indicated that her attendance at the clinic was confidential and that he did not tell any third parties that she attended appointments with the male person or that they were married. It was around this time that the Council began receiving material from the petitioner.

[8] After receiving ten initial documents from the petitioner, the Council, by letter dated September 12, 2013, enclosed a blank complaint form and requested that she provide “a fully completed complaint form”. The Council also advised that “a fully completed and signed complaint form” would be presented to the Council for review.

[9] On October 3, 2013, the petitioner returned the letter and incomplete complaint form with the following handwritten notation on the letter:

> Sept 28/13, faxed and mailed.
>
> Karen: I wrote 27 pages per my complaint, covering name of doctor & details of complaint – better expressing myself than the confines of your form. Using my style of text.

[10] Under a section of the complaint form, the petitioner wrote:

> My Appointment Records Re Viagra Samples Given Out
> Initiated Conversation By My Doctor For No Reason of Mine.

[11] The Record of Complaint filed by the Council contains among other things, the following:

- On January 18, 2013, after the petitioner had challenged the Canada Revenue Agency’s determination that the male person was her common-law partner over the tax period in question, the Canada Revenue Agency (the “CRA”) wrote to the petitioner requesting specific information and confirmation that she and the male person did not in fact reside together over the time period at issue.
- Contained within her complaint materials to the Council was correspondence from the petitioner to a Women’s Advocate with the Victoria Faulkner Women’s Centre in Whitehorse. On March 28, 2013, the

Women's Advocate wrote a letter to the CRA stating that the petitioner had never lived with the male person.

- On April 24, 2013, the CRA wrote to the petitioner confirming its decision that it considered the male person to be her common-law partner.
- On June 15, 2013, the petitioner emailed the Women's Advocate to say that she had recently thought back to an appointment with her doctor – she does not refer to Dr. Shoshtari by name – where he surprised her by asking her about the male person, and then intensely interrogated her about sex. She alleged that the doctor offered her a free sample of Viagra.
- In an email from the petitioner to the Women's Advocate dated July 4, 2013, the petitioner went on to state that her doctor had provided her with a Viagra sample to give to the male person, which she alleges could have caused him to have a heart attack due to his high blood pressure. She also asserted that the doctor provided her with the Viagra for the sake of silently proving that she and the male person were having sex in order to prove to the CRA that they were indeed common-law partners.
- On September 12, 2013, the Council wrote to the petitioner to confirm receipt of her materials and to request that she fully complete a complaint form, including specific details regarding the physician's name and nature of her complaint.
- On September 28, 2013, the petitioner sent a copy of the Council's letter back to it annotated with her handwriting insisting that the material she already submitted was an adequate representation of her complaint.

- The petitioner provided further documents and correspondence regarding her dispute with the CRA to the Council, which were received on September 18, 2013, October 4, 2013, October 7, 2013, October 15, 2013, October 22, 2013, November 22, 2013, and December 10, 2013.
- Between October 3 and October 7, 2013, the Council received an incomplete complaint form from the petitioner referring to previous pages she had sent. She still did not name Dr. Shoshtari in the form, but she did reference him by name in a letter to the Council dated October 9, 2013, in which she enclosed CRA correspondence to the named person as well as a one-page document (p. 66 of the Record of Complainant) which set out details of her complaint under the heading “No matter the reason.” She set out the issue of having a “sex conversation” with her doctor and being given a sample box of Viagra.
- On October 21, 2013, the Council wrote to Dr. Shoshtari providing a copy of the complaint materials and offering him an opportunity to provide a written response.
- By way of letter dated November 22, 2013, the petitioner asked the Council for an update regarding her complaint. On November 26, 2013, the Council responded to the petitioner advising that it was scheduled to review her complaint at the next regular meeting on December 5, 2013.
- In his response letter to the Council dated December 5, 2013, Dr. Shoshtari stated that he had no record or recollection of providing the petitioner with a sample of Viagra, and that he had not had any samples of

> Viagra in his office to give away in the past two and a half years. He said if he provided her with a sample medication, he would have documented it in the chart as per his standard practice.

[12] To summarize, the petitioner complained to the Council that Dr. Shoshtari acted inappropriately when he allegedly provided her with a sample of Viagra. She asserted that he gave her the Viagra for the male person to try, and did so in order to prove to the CRA that the two were having sex, and were thus common-law partners. The petitioner subsequently suggested that Dr. Shoshtari gave the Viagra to her to give to the male person because he knew the male person had high blood pressure and he wanted to cause him to have a fatal heart attack. Dr. Shoshtari denied the allegations; specifically, he denied giving her a sample of Viagra, and denied corresponding with any third parties, including the CRA, about her marital status.

[13] On December 10, 2013, the Yukon Medical Council made the following written decision:

> On December 5, 2013, the Yukon Medical Council met to consider your complaints against Dr. Peyman Shoshtari.
>
> The correspondence and material provided were carefully reviewed. In addition, Dr. Shoshtari provided a letter in response to your complaints. Based on the review of all evidence provided at that time, the Yukon Medical Council determined that there is no evidence to support a decision of unprofessional conduct against Dr. Peyman Shoshtari.
>
> As per Section 36(1) of the *Medical Profession Act* "… any person who has been affected by any decision of the council under sections 20 to 30, may appeal from the decision or direction of the council to a judge of the Supreme Court at any time within 30 days from the date of the decision or direction of the council."

> Thank you for your patience and cooperation during this process.

[14] On January 24, 2014, after the service of the Petition in this case, the Council wrote a supplementary decision letter advising the petitioner that the Council relied on s. 27(7) of the *Act* to summarily dismiss the complaint and added the following:

> After reviewing and considering the volume of material that you submitted in support of your complaint against Dr. Shoshtari, the Medical Council was unable to identify any clear allegation or grounds of complaint which could form the basis for a finding of unprofessional conduct on the part of Dr. Shoshtari. Accordingly, the Medical Council's opinion was that the complaint should be summarily dismissed without further action by the Council.
>
> As stated above, this letter is intended as further clarification of the Medical Council's decision of December 10, 2013, and therefore should be read as supplementary to that decision, not a replacement of it.

[15] I should add that the petitioner filed an affidavit on September 10, 2014, 2 days before this hearing. The affidavit clarified the nature of the complaint for the first time as a sexual assault with a medical weapon and inappropriate discussion and touching. I informed the petitioner that it could not be considered in this judicial review as it is the Council decision that she is challenging and her amplified complaint was not before the Council.

ISSUES

[16] There are three preliminary submissions for dismissal of the petition:

1. The petitioner failed to exhaust her available remedies before filing for judicial review;
2. Judicial review is not available as the Council has exercised its discretion to dismiss her complaint and the petitioner has no standing; and

3. The relief sought by the petitioner seeking a custodial sentence or financial compensation is beyond the scope of judicial review.

ANALYSIS

1) Failure to exhaust remedies before filing judicial review

[17] The petitioner did not file her material as an appeal as permitted under the *Act* as follows:

> 36(1) Any person making a complaint in respect of which an inquiry has been held, or any person who has been affected by any decision of the council under sections 20 to 30, may appeal from the decision or direction of the council to a judge of the Supreme Court at any time within 30 days from the date of the decision or direction of the council.
>
> (2) The judge may, on the hearing of an appeal pursuant to subsection (1), reverse, confirm, or amend the decision or direction of the council or order a further inquiry by the inquiry committee and make any other order, either as to costs or otherwise, as the judge may determine, including a direction that any registration removed be restored or that any suspension or probation be terminated.
>
> (3) An appeal lies from the decision of the judge to the Court of Appeal within 30 days thereafter, and the Court of Appeal has all the powers that may by this Act be exercised by the judge appealed from.
>
> (4) An appeal taken from a decision or direction of the council shall be deemed to include an appeal from the findings and report of the inquiry committee.
>
> …

[18] The appeal section provides a broad jurisdiction to challenge the decision of the Council without the limiting principles of judicial review and offers a broader scope of remedies than what could be ordered under judicial review.

[19] Although counsel for Dr. Shoshtari takes the position that the petition should be dismissed because the petitioner did not exhaust her remedies under the *Act*, and specifically her right to appeal under the *Act,* I am not prepared to accede to that argument in these circumstances.

[20] While it is true that an individual is generally required to exhaust any administrative remedies before seeking judicial review of a decision, it would be unfair and somewhat nonsensical to apply that principle to this case. The petitioner is self-represented. She has filed material that sets out her disagreement with the disposition of her complaint by the Council within the timeframe allowed for an appeal of that decision and to the Court that has jurisdiction over an appeal. In this context, the fair thing to do is proceed on her petition as if it were an appeal, especially since, as noted by the Supreme Court of Canada in *Dr. Q. v. College of Physicians and Surgeons,* 2003 SCC 19, the term "judicial review" is expansive enough to "[embrace] review of administrative decisions by way of both application for judicial review and statutory rights of appeal" (para. 21). For a self-represented litigant, the distinction between a right of appeal and a judicial review is likely not at all apparent, and to deny the petitioner the right to a potential recourse essentially on the basis that she filed the wrong form in the proper forum would unnecessarily impede access to justice.

2) Standing to bring application

[21] For a similar reason, I am not prepared to dismiss the petitioner's application on the basis that she has no standing to bring it. Unlike the cases relied on by counsel for the Council, the petitioner here clearly has standing to appeal the dismissal of her complaint to this Court. Her complaint was summarily dismissed by Council pursuant to

s. 27(7). As a “person who has been affected by any decision of the council under sections 20 to 30”, she has standing to bring an appeal, and, in light of my determination above, the fact that she filed her material as a judicial review does not detract from her right to seek a remedy under s. 36(2).

3) The relief sought is beyond the scope of judicial review

[22] The third preliminary ground is that the relief of a custodial sentence or financial compensation is beyond the scope of judicial review. To the extent that the remedies sought by the petitioner lie outside the remedies available to the Council, they cannot be imposed by the Court either on a s. 36(2) appeal or on a judicial review.

[23] This disposition of the preliminary issues does not necessarily end the matter. As noted in the Council’s response, although not included in the Petition itself, the petitioner’s affidavits make extensive reference to her belief that she was not given an opportunity to be heard by the Council and that the Council was wrong to summarily dismiss her complaint.

Procedural Fairness

[24] Procedural fairness is a concept that arises in the context of the Court exercising its supervisory jurisdiction in the course of a judicial review. It has been observed that when a tribunal’s governing statute provides a right of appeal to a superior court, that court’s appellate jurisdiction gets conflated with its supervisory judicial review jurisdiction and this can lead to confusion about, among other things, the applicable standard of review. However, regardless of whether a court is judicially reviewing a decision or acting as an appeal body under a statute, it is engaged in a review of an

administrative decision, and the principles of administrative law apply. This point has been made by the Supreme Court of Canada in *Dr. Q., supra.*

[25] When it comes to procedural fairness, a reviewing court must be satisfied that the procedure was fair. As stated by Groberman J.A. in *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.,* 2013 BCCA 55:

> [52] I agree … that the standard of review applicable to issues of procedural fairness is best described simply as a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[26] It is clear that a professional regulatory body like the Yukon Medical Council owes a high duty of fairness to the professionals it regulates. In contrast, the duty of fairness owed to complainants was described as "quite low", *King v. Yukon Medical Council,* 2003 YKSC 74. While I do not necessarily agree that the duty to a complainant is "quite low", it is dependent upon a number of factors, including the applicable statute, which may be somewhat limiting.

[27] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ("*Baker*"), the non-exhaustive factors to be considered in a determination whether a procedure meets the requirements of fairness are:

a) The nature of the decision;

b) The nature of the statutory scheme and terms of the statute pursuant to which the tribunal operates;

c) The importance of the decision to the individual affected;

d) The legitimate expectations of the person challenging the decision; and

e) The choice of the procedure made by the tribunal, particularly where the statute leaves that choice to the tribunal.

[28] There is no doubt that the context of this decision, which the petitioner characterizes as the right of a woman to be safe in a doctor's office, is an important issue to the petitioner and women generally, and certainly there is a reasonable expectation on the part of every medical patient that a complaint implicating this right will be seriously considered.

[29] Here, the Council acted pursuant to s. 27(7) that allows it to summarily dismiss a complaint, where, in its view, the complaint lacks sufficient foundation to be acted on. The *Act* does not set out a process for how this decision is to be made. It is clear from the correspondence that the Council received and reviewed the petitioner's material and sought a response from Dr. Shoshtari to the specific allegations arising from it. The *Act* does not require more. While the response from the Council could have provided more detailed and transparent reasons for its summary dismissal of the petitioner's complaint, in light of the low duty of fairness, the reasons it provided to her were adequate. I cannot find that the Council breached its duty of fairness to the petitioner.

[30] I also find that the Council's decision is supportable on the merits, to the extent that I am able to consider them under s. 36 of the *Act.* As a self-governing professional body with disciplinary authority, the Council is entitled to deference with respect to its decisions (*King, Dr. Q.*).

[31] The Council went to some length to encourage the petitioner to clearly specify the nature and specifics of her complaint in writing. The petitioner declined to explain her concern in the complaint form leaving the Council with a variety of assertions that, even if true, were confusing and would be difficult to construe as sufficient to form a complaint.

CONCLUSION

[32] The Council must exercise its discretion in the context of information provided by both the patient and the doctor and, in my view, the discretion was appropriately exercised and its decision to summarily dismiss the petitioner's complaint was reasonable.

[33] Finally, to the extent that the petitioner's materials may suggest that the Council discriminated against her, I can find no basis for concluding there was actual bias or a reasonable apprehension of bias based on the test that a well-informed person, viewing the matter realistically and practically and having thought the matter through would have concluded there was a reasonable apprehension of bias.

[34] The petition is dismissed but given the petitioner's inability to retain counsel, it is not appropriate to award costs against her.

VEALE J.