



Health Professional Councils Authority

Level 6 North Wing 477 Pitt Street Sydney NSW 2000

Locked Bag 20 Haymarket NSW 1238

Phone: 1300 197 177 Fax: (02) 9281 2030

Email: mail@hpca.nsw.gov.au Online: www.hpca.nsw.gov.au

Our Ref: HP14/4815

HCCC v Perceval [2014] NSWCATOD 38 – significant implications

In the decision of the NSW Civil and Administrative Tribunal in the matter of *HCCC v Perceval* the Tribunal considered complaints based on, amongst other things, the practitioner's alleged failure to comply with conditions on her registration as an enrolled nurse. In the Tribunal's decision it made a number of informative and useful comments on the clarity and rigour that are required in the drafting of orders and conditions.

Background

As the Tribunal noted *The practitioner is a woman with a tragic history of mental illness.*

The practitioner was an enrolled nurse being first registered in 1993. Her illness first came to the attention of the former Nurses and Midwives Board ("the Board") in September 2006 and her registration was cancelled whilst she was an involuntary patient under the then Mental Health Act 1990 (NSW).

In April 2007 the practitioner applied for re-registration and, after an inquiry, the Board re-registered her subject to conditions. Due to ongoing health issues a different set of conditions were imposed on her registration in 2010 and her registration was subsequently suspended.

For the purpose of this case note the relevant conditions on the practitioner's registration were that she:

1. Regularly attend Narcotics Anonymous;
2. Regularly attend a counsellor of her choice and authorise that counsellor to report to the Board, in writing, any failure to continue to attend for counselling and of any concerns about her mental health which may impact on her capacity to provide safe patient care as an enrolled nurse .

The complaint before the Tribunal in this matter included a complaint that the practitioner was in breach of the above conditions on her registration.

NOTE:

This HPCA *Legal Case Note* (Our Ref.: HP14/4815) has been prepared by legal staff of the Health Professional Councils Authority. The content of the Case Note is for information only and does not constitute legal advice. Appropriate legal advice relevant to your own circumstances should be obtained before taking any action on the basis of the information contained in this document.

Findings and Comments of the Tribunal

The Tribunal in finding that the practitioner was not in breach of the conditions requiring regular attendance at Narcotics Anonymous and regular attendance at counselling commented on the need for precision in the drafting of conditions. In this case the imprecision in the conditions includes the following matters:

- Time
The conditions did not specify when the practitioner was to commence attending Narcotics Anonymous or seeing the counsellor. Similarly the conditions did not specify how long attendance at Narcotics Anonymous and at counselling was required.
- Frequency
Each condition required the practitioner to attend “regularly”. In criticising this terminology the Tribunal noted the definition of regular in the Macquarie Dictionary and went on to note that the Board had not explained to the practitioner what it meant by the term.
- Specifics of counselling
In addition to its comments about imprecision as to time and frequency the Tribunal noted that the counselling condition did not specify the type of counselling the practitioner was to receive, the qualifications of the counsellor, and if counselling expenses were to be borne by the practitioner.
- Monitoring
The very nature of Narcotics Anonymous (and similarly Alcoholics Anonymous) means that independent verification of a person’s attendance cannot be obtained. Notwithstanding the imprecision of the overall drafting of the Narcotics Anonymous condition it was for all intents and purposes incapable of being independently verified.

As an overall comment on drafting the Tribunal said:

A condition must be drafted with precision, so that the practitioner understands the obligations placed on her or him, and its compliance capable of objective, not subjective, assessment. (emphasis added)

And

.. the ramifications of contravention of either a condition or an order, or review of them, makes precision of drafting of either particularly relevant.

NOTE:

This HPCA *Legal Case Note* (Our Ref.: HP14/4815) has been prepared by legal staff of the Health Professional Councils Authority. The content of the Case Note is for information only and does not constitute legal advice. Appropriate legal advice relevant to your own circumstances should be obtained before taking any action on the basis of the information contained in this document.

Analysis

While it may superficially appear that the Tribunal's approach in analysing the relevant conditions is highly legalistic such an approach is appropriate in terms of the ramifications of contravention, in this case cancellation of registration. Those ramifications are also illustrated by a number of earlier decisions dealing with the consequences of non-compliance with conditions including the decision of the Medical Tribunal in *Dr Tan Thanh Le and the Medical Practice Act of New South Wales [2001]* in which the Tribunal said at paragraph 95

*Conditions are imposed on the registration of medical practitioners in the public interest. As with disciplinary proceedings generally, such conditions are intended to maintain proper ethical and professional standards, primarily for the protection of the public, but also for the protection of the profession: cf. **Health Care Complaints Commission v. Litchfield** (1997) 41 NSWLR 630 @ 637. .. Particularly when imposed in a disciplinary context, such restrictions are not lightly imposed nor may they be treated lightly. (emphasis added)*

Those comments were endorsed by NCAT in the context of the nursing profession in *HCCC v Lopez (NO 2) [2014] NSWCATOD 15*. They are equally relevant to all registered health practitioners.

Conclusion

This decision is important because it clearly illustrates the consequences that may result from poorly drafted conditions or orders. This is increasingly important due to the consistent emphasis that is now placed on the Councils' monitoring of conditions and orders and the making of complaints when breaches are detected.

The full case can be accessed here:

<http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=171085>

NOTE:

This HPCA *Legal Case Note* (Our Ref.: HP14/4815) has been prepared by legal staff of the Health Professional Councils Authority. The content of the Case Note is for information only and does not constitute legal advice. Appropriate legal advice relevant to your own circumstances should be obtained before taking any action on the basis of the information contained in this document.