Lim Teng Ee Joyce v Singapore Medical Council
[2005] SGHC 129

Case Number : OM 16/2005

Decision Date : 19 July 2005

Tribunal/Court : High Court

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JC; Yong Pung How CJ

Counsel Name(s) : Edwin Tong and Tham Hsu Hsien (Allen and Gledhill) for the appellant; Doris Chia and Peter Chean (Harry Elias Partnership) for the respondent

Parties : Lim Teng Ee Joyce — Singapore Medical Council

Administrative Law – Administrative discretion – Discretionary powers – Whether notion of completely subjective or unfettered discretion contrary to rule of law

Administrative Law – Disciplinary proceedings – Costs – Whether principles on costs in normal civil proceedings applicable to disciplinary process – Whether appellate tribunal entitled to interfere with costs order if manifestly wrong or exercised on wrong principles – Whether disciplinary committee's failure to explain order for appellant to pay costs in respect of unsubstantiated third charge was prima facie error – Whether necessary for tribunal to make proper apportionment on costs in relation to disciplinary inquiry

Administrative Law – Disciplinary tribunals – Singapore Medical Council – Whether disciplinary committee having unfettered discretion to impose costs – Whether inconsistent with principle and contrary to notion of fairness for disciplinary committee to punish medical practitioner with costs if practitioner acquitted of charge – Section 45 Medical Registration Act (Cap 174, 2004 Rev Ed)

19 July 2005

Chao Hick Tin JA (delivering the judgment of the court):

1 This was a motion in which the appellant, Dr Lim Teng Ee Joyce, appealed against an order on costs which was made against her by the Singapore Medical Council ("SMC") pursuant to certain disciplinary proceedings instituted against her. We heard the appeal on 27 May 2005 and allowed it in part by reducing the amount of costs, which she was required to pay, to only one-third. We now explain why, in our opinion, the order on costs was erroneous.

The background

2 The appellant is a dermatologist in private practice. The disciplinary proceedings arose from a complaint from one of her patients, Wendy Lim Ai Beng ("the patient"), who consulted her for treatment of facial acne and other skin problems. The appellant saw the patient during the period 18 February 2003 to 31 May 2003.

3 There is no necessity for us to go into details regarding the skin problems or the precise treatment she applied. Suffice it to say that on 28 April 2003, the appellant prescribed laser treatment for the patient's left cheek in order to stimulate the formation of collagen and reduce the redness. Her nurse, one Ms Evelyn Lee, was tasked to give the laser treatment.

4 On 29 May 2003, the patient returned to see the appellant for further treatment of her left cheek. She was given the same laser treatment by the nurse. On this occasion, while receiving treatment, the patient complained of pain and heat. She was assured that this was normal and was given a cold compress to cool her skin. Thereafter treatment resumed. Later, when the patient was

at her hairdresser's saloon, she noticed fluid dripping from her left cheek. She returned to the clinic at about 7.15pm. The appellant saw the patient and recorded in her notes that the area was well and that there was slight serum oozing, slight redness. There were no ulcers or breaks.

5 The next day, the swelling at the cheek became worse. The patient went back to the appellant who then dressed up the swollen part. The following day, not only did the swelling not get better, it got worse, prompting the patient to seek treatment from other dermatologists. A few days later the patient lodged a complaint with the SMC.

6 Investigations ensued. As a result, three charges of professional misconduct under s 45(1)(*d*) of the Medical Registration Act (Cap 174, 2004 Rev Ed) ("the MRA") were preferred against her. The first two charges related to the appellant improperly delegating to her nurse the administration of the laser treatment to the patient on the two days, 28 April and 29 May 2003, in contravention of the licence issued to the appellant. The third charge was for:

> Failing to properly manage the treatment of the patient by recommending the use of the Coolglide Vantage Laser on the patient's facial skin on 29 May 2003 when the patient's facial skin allegedly displayed certain symptoms that were allegedly adverse to the use of the laser.

7 The appellant was given notice of the charges on 23 August 2004. Nothing of significance occurred until 20 January 2005 when the appellant notified the SMC that she would be pleading guilty to the first two charges and would only be making a mitigation plea in relation thereto. However, she would be defending the third charge.

8 The appellant was given the deadline of 18 February 2005 to submit her mitigation. However, as the SMC intended to rely on certain documents (which included expert evidence and correspondence with the Health Sciences Authority) which it could not furnish to the appellant in time, the appellant was only able to submit her mitigation on 23 February 2005, the same day the documents were made available to her.

9 The hearing before the Disciplinary Committee ("DC") commenced on 1 March 2005 and continued until 3 March 2005. We should add that the third charge was amended by the SMC on 18 February 2005, after the appellant had submitted her expert reports to the SMC's solicitors the day before. The third charge was further amended on 28 February 2005.

10 At the conclusion of the hearing on 3 March 2005, the DC acquitted the appellant of the third charge. In respect of the first two charges for which the appellant had pleaded guilty, the DC, after hearing mitigation, imposed the following punishments, namely that:

(a) she be censured;

(b) she be suspended for a period of three months;

(c) she be fined the sum of $10,000;

(d) she give an undertaking that she would abstain in future from the conduct complained of or from similar conduct;

(e) that she pay all the costs of and incidental to these proceedings, including those of

the solicitors to the SMC and the Legal Assessor ("the costs order").

11 Following the decision of the DC, the SMC's solicitors wrote to the appellant's solicitors asking for the costs of the whole inquiry which the former had assessed at $60,000, plus disbursements and another $15,000 for the attendance of the Legal Assessor at the inquiry. Further correspondence ensued. The appellant's solicitors asked for a breakdown of the sum of $60,000 and, in particular, enquired whether the quantum took into account the fact that she was acquitted of the third charge. No clarification was forthcoming on these queries from either the DC or the SMC's solicitors.

12 This impasse prompted the appellant to file the present appeal to the court of three judges in respect only of the order on costs. Subsection (7) of s 46 of the MRA accords a right to a registered medical practitioner ("RMP"), who is aggrieved by an order of the DC, to appeal to the High Court. There is no restriction on the right of appeal even where the order that is being challenged relates only to costs.

Issue on appeal

13 On the face of the costs order it would appear that the DC had required the appellant to pay the full costs of the three-day hearing, including the costs of the Legal Assessor for the period. The question which this court had to address and answer was whether, bearing in mind that the appellant was successful in defending the third charge, it was correct in principle for the DC to have ordered her to bear the costs of the whole inquiry or should she only be required to bear the costs for the time spent or work done in relation to the first two charges.

Extent of discretion of disciplinary committee

14 Section 45(4) of the MRA provides that a DC may, in pursuance of its powers of punishment under s 45(2), "order the [RMP] concerned to pay to the [SMC] such sums as it thinks fit in respect of costs and expenses of and incidental to any [inquiry]".

15 It seems to us clear that the power under s 45(4) should not be read in isolation but together with ss 45(1) and 45(2). Subsection (1) of s 45 provides that the DC may exercise one or more of the powers set out in sub-s (2) where, *inter alia*, the RMP has been found guilty of professional misconduct or other specified infractions. The premise of the DC exercising the powers of punishment under sub-s (2) is the fact that the RMP has been found guilty of professional wrongdoing or other misconduct. It is true that s 45(4) provides that the DC may order the RMP to pay to the SMC "such sums as it thinks fit in respect of costs and expenses" but that power should only be exercised within the framework of ss 45(1) and 45(2). In the scheme of things under s 45 of the MRA, an order requiring the RMP to pay costs of the proceedings is a form of punishment even though the provision conferring the power to order costs against the RMP is set out in sub-s (4) instead of sub-s (2) of s 45, as sub-s (4) merely expands the powers of the DC under sub-s (2). Section 45(4) does not confer an unfettered discretion. The notion of a completely subjective or unfettered discretion is contrary to the rule of law: see *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132 at 156, [86]. It would be inconsistent with principle, and contrary to the notion of fairness, for the DC to punish a RMP with having to pay the costs of the SMC if he is exonerated from the charge preferred against him. The function of a disciplinary process is to determine wrongdoing and to punish the person, be he an employee or a member of a profession or association, for having committed the wrong. There is no justification for punishing a person with having to pay costs if he is acquitted of the charge. As Kirby P said in *Walton v McBride* (1995) 36 NSWLR 440, a decision of the Court of Appeal of New South Wales at [25], such a power "is one to be exercised judicially, for the purpose of

achieving the objects of the legislature".

16 In this regard it is pertinent to note that while costs in normal court proceedings are always a matter in the discretion of the trial judge, an appellate tribunal is nevertheless entitled to interfere with a costs order if it is manifestly wrong or was exercised on wrong principles: see *Tullio v Maoro* [1994] 2 SLR 489 at 496, [22].

17 Another established rule on costs is that costs should always follow the event unless the circumstances of the case warrant some other order: see *Elgindata Ltd (No 2)* [1992] 1 WLR 1207 at 1214 ("*Elgindata*"). In *Tullio v Maoro* this court set aside that part of the trial judge's order which deprived the successful appellant of half his costs. There, this court noted (at 496, [23]) that the judge below had "disregarded the principle that a successful party who had acted neither improperly nor unreasonably ought not to be deprived of any part of his costs".

18 We are unable to see why the above principles on costs in normal civil proceedings should not apply to the disciplinary process.

The present case

19 In the present inquiry, much of the time of the DC was spent in hearing evidence and arguments in relation to the third charge. The appellant's guilty plea on the first and second charges was expeditiously taken on the first day of the hearing. The DC then proceeded to inquire into the third charge. Even on the third day of hearing, much of the time was taken up by submission on the third charge and by the DC in deliberating on its verdict. It was after the DC had acquitted the appellant of the third charge that mitigation was heard in relation to the first two charges. The appellant's mitigation was that it was a common practice in Singapore for practitioners to delegate the use of the laser to properly trained and experienced nurses. Apparently, some time was spent with going through this assertion of the appellant.

20 We noted that the DC did, in relation to the third charge, observe that the appellant's record-keeping was far from ideal. It singled out the following inadequacies:

(a) poor record-keeping in her case notes;

(b) sloppy use of ambiguous terms and incorrect terminology; and

(c) omission of important input parameters from the operative notes.

21 However, the DC did not explain in its report why the appellant should have to bear the costs of the entire proceedings over three days when the third charge was not established and when much of the time was spent in relation thereto. *Prima facie*, this is an error.

22 A case which is very much on point to the present is *Hasan v College of Physicians & Surgeons (New Brunswick)* (1994) 152 NBR (2d) 230. There, Hasan, a medical practitioner, faced two charges of professional misconduct. He successfully defended one charge but was ordered to bear the costs of the whole inquiry. That order was set aside by the New Brunswick Court of Appeal. Ryan JA said at [17]:

> Hasan argues that he should not be required to pay all of the costs because he was successful in defending the first charge against him which related to wrongfully obtaining

> medical records of a person by means of a consent not signed by that individual. Here, I think there is some validity to his argument. The costs should be apportioned. This does not necessarily mean that the costs should be halved. Both charges related to the wrongful obtaining of documentary information to which Dr. Hasan was not entitled. These charges were closely linked such that most of the evidence was necessary to support the charge upon which Hasan was found guilty, professional misconduct. I would assess the costs of the Council payable by the appellant, in these circumstances, at seventy per cent.

23 The decision of the Court of Appeal of New South Wales in *Ohn v Walton* (1995) 36 NSWLR 77 is also enlightening. The case too concerned how the power of the Medical Tribunal to award costs should be exercised. There, the relevant regulation provided that the Tribunal could order "the complainant, if any, [or] the registered medical practitioner … to pay such costs to such person as the Tribunal may determine". Under that regulation, it was clear that a registered medical practitioner could be ordered to pay the complainant's costs and *vice versa*. In that case, the complaint against Dr Ohn was dismissed but the Medical Tribunal refused to award him costs. The court held that the principles to be applied by the Tribunal in exercising this power were similar to those applied by a court in similar circumstances, so that costs should follow the event unless the circumstances of the case should require that the discretion be exercised differently. It accordingly held the Tribunal to have erred. It would be noted that in this case the court basically applied the principles set out in *Elgindata* ([17] *supra*).

24 Another case which illustrates the need to make proper apportionment on costs in relation to a disciplinary inquiry is *Gage v General Chiropractic Council* [2004] EWHC 2762. There, the disciplinary tribunal found Dr Gage guilty of unacceptable conduct and decided that he should be suspended for a period of time. Being dissatisfied, and pursuant to a right of appeal laid down in the Chiropractors Act 1994 (c 17), he appealed to the Administrative Court of the Queen's Bench Division. Dr Gage failed on all the substantive issues except on the question of punishment. Nevertheless, Jackson J held that Dr Gage should be liable only for 80% of the General Chiropractic Council's costs of the proceedings before him and explained it (at [48]) as follows:

> In my judgment there must be some adjustment of the costs order in this case to reflect the fact that the victory won by the General Chiropractic Council is, from one point of view, a Pyrrhic victory. In my judgment, the proper order for costs is that Dr. Gage should pay 80 per cent of the General Chiropractic Council's costs. This order reflects the fact that Dr. Gage has lost on all the issues in the appeal but has nevertheless established that he should not serve any period of suspension.

25 Reverting to our present case, the SMC had argued that, in making the cost order, the DC was entitled to take into account its comment that while the appellant was not guilty of the third charge, there were "errors of judgment" and bad note-keeping on her part. In this regard the Australian case of *Beard v Wilde* (1985) 41 SASR 226 is helpful. There, although the medical board did not find Dr Beard guilty of unprofessional conduct, it was nevertheless critical of Dr Beard's practice of not making sufficient notes. Legoe J held that, notwithstanding the criticism, Dr Beard should not be denied his costs since the charge had not been established. The following observation of Legoe J (at 231) is germane:

> Was the discretion wrongly exercised? In my judgment there was insufficient reason connected with the case of unprofessional conduct to warrant the Board exercising its discretion to deny the successful party his costs of the proceedings. The insufficiency of the notes may as a matter of individual judgment be something that another medical

> practitioner would not have done in the circumstances, but in my judgment that does not go to the question of unprofessional conduct. If it had done so with the professional consequences resulting from these proceedings, then the decision would surely have been contrary to that which the Board in fact found as a primary fact, namely that there was no unprofessional conduct. … it is therefore insufficient to warrant a special reason or any particular reason connected with the case for denying costs.

26 In our opinion, the reasoning above should apply with even greater force to the present case as the appellant here was not asking for indemnification of her own costs but was contending that the costs incurred by the SMC in relation to the unsubstantiated charge should not be thrust upon her. In a disciplinary process, the respondent is only required to respond to the charge and nothing more. If, in the course of an inquiry, certain aspects of the respondent's conduct should crop up which do not meet with the approval of the disciplinary committee, that would be no ground to impose any punishment on the respondent. This is because the new point is not something which the respondent would need to answer.

27 We would hasten to add that, in a normal court proceeding, the conduct of a party before or during trial could be a ground to deprive a party of his entitlement to costs even if he were successful. Here, the appellant was not asking for indemnification of her costs. In any event, in the present case, the question of conduct did not arise as there was no allegation by the SMC that the appellant had not properly conducted herself either before or during the inquiry.

28 Bearing in mind the time spent by the DC in relation to the first two charges and taking a broad view of things, we held that an appropriate order on costs would be that the appellant should bear only one-third of the costs and expenses incurred by the SMC in relation to the entire proceedings before the DC.

Appeal allowed in part.