

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

**OCCUPATIONAL & BUSINESS
REGULATION LIST**

VCAT REFERENCE NO. B112/2010

CATCHWORDS

Sections 97 and 98 *VCAT Act*; change from proposed agreed statement of facts

APPLICANT	Chiropractic Board of Australia
RESPONDENT	Dr Malcolm Hooper
WHERE HELD	Melbourne
BEFORE	H Lambrick, Deputy President Member J Waterhouse Member B Draper
HEARING TYPE	Hearing
DATE OF HEARING	14 November 2011
DATE OF ORDER	19 December 2011
DATE OF REASONS	19 December 2011
CITATION	

ORDER

1. The application made by the Respondent to have the proceedings set down for hearing is granted.
2. The matter shall be listed for a **directions hearing at 10.00 on 22 December 2011** at which time the Tribunal will hear from the parties as to the future conduct of the case.

**H Lambrick
Deputy President
Presiding Member**

APPEARANCES:

For Applicant

Dr Freckelton, of Senior Counsel

For Respondents

Dr Hooper, in person

REASONS

Introduction

- 1 On 8 April 2010 the Chiropractic Board of Australia referred this matter to the Tribunal pursuant to section 59(2)(g) of the *Health Professions Registration Act 2005*. The allegations surround Dr Hooper's use of hyperbaric oxygenation and Lokomat treatments for a patient with cerebral palsy during the period 2007 to 2008 and are serious in nature. Dr Hooper was at all relevant times a registered chiropractor.
- 2 The matter was first listed for hearing with an estimated duration of 10 days commencing on 11 April 2011 before Deputy President H. Lambrick and Members J. Drinkwater and M. El Moussalli. At that time Dr Hooper was represented by Mr Kewley of Counsel. At the commencement of the hearing the parties indicated to the Tribunal that further time was required to complete discussions which would dramatically reduce the anticipated hearing time. The parties advised the Tribunal that there would be certain admissions to the allegations which had come about as the result of an extensive and lengthy discussion and negotiation process. The Tribunal would be invited in due course to consider a joint submission as to the facts, although the appropriate determination would be the subject of vigorous debate.
- 3 On the resumption of the hearing, the Tribunal was told that a further matter had arisen. Dr Hooper made an application pursuant to section 108(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (the "VCAT Act") that the Tribunal be reconstituted for the purposes of the proceeding. Following submissions the Tribunal, on 13 April 2011, made findings that apprehended bias was established, however ruled that the matter should proceed as the balance was in favour of applying the doctrine of necessity to avoid the failure of justice.
- 4 Dr Hooper then made application pursuant to section 108(2) of the *VCAT Act* that the Tribunal be reconstituted as to the chiropractic Members only. On 1 September 2011 Justice Ross ordered that the Tribunal be reconstituted. The proceeding was then listed to commence before the reconstituted panel on 24 October 2011.
- 5 In the interim, a compulsory conference took place chaired by Justice Ross. At the compulsory conference, Dr Hooper was represented Mr M. R Titshall of Queens Counsel and Mr B J Murphy of Counsel. Proposed agreed findings and determinations were filed on 13 October 2011.
- 6 On 24 October 2011, we heard submissions from the parties in support of the Proposed agreed findings and determinations. We reserved our decision. Dr Hooper was represented by Mr Murphy of Counsel. Dr Freckelton has appeared on behalf of the Board on all occasions.

- 7 On 31 October 2011 the Respondent wrote to the Tribunal in the following terms:

“I withdraw the proposed Agreed Findings and Determination (“the Proposal”) submitted by my legal counsel to VCAT on 13 October 2011 and seek a trial of the matter as soon as possible.

I vehemently reject all particulars detailed in the Proposal and look forward to a full examination at the trial of all material supplied to date by my legal advisers.

The Proposal was negotiated under a position of “extreme duress” as I had advised my legal advisers my financial resources were exhausted and that I would be unable to fund their fees for a trial. To date my legal expenses have exceeded \$450 000.

Today I have terminated the services of my legal advisors and will now act for myself in all future proceedings.

In particular I look forward to a full consideration of the extensive video evidence submitted of the Applicant’s prime witness X relating to his favourable treatment responses under my care”

- 8 The matter was set down for hearing on 14 November 2011 in order for the Tribunal to hear submissions as to the future conduct of the matter.

Legal Principles

- 9 There are no well established legal principles to guide the Tribunal in this instance.
- 10 Dr Hooper in arguing that he should be entitled to change his position relies predominantly on sections 97, 98 and 102 of the *VCAT Act*. (Dr Hooper referred to other legal principles such as the doctrine of necessity and unconscionable conduct. Neither of these principles assists Dr Hooper in this case and we do not propose to explore them).
- 11 The Chiropractic Board of Australia (“the Board”) whilst acknowledging that there is no civil or administrative law directly on point, argues that the Tribunal should be guided by the “change of plea” authorities taken from the criminal domain, as being analogous to the current situation. The Board contends that the proper application of those authorities would lead the Tribunal to refuse Dr Hooper’s application.
- 12 Dr Hooper vehemently opposed the Tribunal utilising the criminal law jurisprudence in this way, arguing that the situation was not analogous. He emphasised that he was not charged with any criminal offence, had not been required to formally enter a plea and he was not awaiting a criminal sentence. Dr Hooper emphasised that the position of a party changing their position in civil or administrative proceedings, following an intense settlement process, was vastly different to criminal law proceedings.

- 13 Dr Hooper implored that we look to the *VCAT Act* for guidance. He directed us to consider, inter alia, section 97 which requires that the VCAT must “act fairly and according to the substantial merits of the case in all proceedings” and section 98 which provides as follows:

The Tribunal

- a is bound by the rules of natural justice
 - b is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures
 - c may inform itself on any matter as it sees fit
 - d must conduct each proceeding with as little formality and technicality and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.
- 14 He also referred us to section 102 of the *VCAT Act*, which requires the Tribunal to allow a party a reasonable opportunity to call or give evidence, examine, cross-examine or re-examine witnesses and make submissions to the Tribunal.
- 15 The Board contends that the criminal domain “change of plea” authority is applicable to the disciplinary context. Accordingly, it submits we should find, in accordance with the appellate decisions to which we were referred, that the balance of persuasion rests upon Dr Hooper to establish the legitimacy of changing his “plea”.
- 16 It was submitted that the yardstick was “whether a refusal of such a change of plea at any time prior to sentencing would be likely to constitute a miscarriage of justice”. A formulation in respect of the risk of a miscarriage of justice to which we were referred is that of Scholl J in *R v Murphy* [1975] VR 187 at 191:
- for some other reason which enabled one to say that her plea was not really attributable to a genuine consciousness of guilt.
- 17 Following on from the above, we were urged to apply the “principle of restraint” and approach the attempt by Dr Hooper to change his “plea” with caution bordering on circumspection.

Ruling

- 18 We do not agree with the submission of the Board.
- 19 We consider that a health practitioner defending his professional integrity before the Tribunal is in an entirely different position to a person awaiting sentence following the entry of a formal plea of guilty. Dr Hooper has *not* entered a “plea” to any charge. Using the alternative dispute mechanisms

available to litigants in the Tribunal, Dr Hooper agreed to place before the Tribunal a Statement of Agreed Facts together with Proposed findings and determinations.

- 20 Whilst at first glance it is appealing to adopt the criminal law “change of plea” jurisprudence, on closer scrutiny the analogy is somewhat tenuous. The “miscarriage of justice” grounds, which can form a proper basis for a change of plea, are inextricably linked with the criminal law. They include such notions as where the “plea was not really attributable to a genuine consciousness of guilt” or is not a “free and voluntary confession” or where there was “mistake or other circumstances affecting the integrity of the plea as an admission of guilt.”¹ A party to an administrative or civil law proceeding who has agreed to placing before the Tribunal proposed determinations as to findings and determinations is simply not in the same position as an accused person who has formally entered a plea of guilty to criminal charges.
- 21 The Tribunal acts independently. It was not bound to follow the proposals put forward by the parties. The Tribunal requires parties to attend before it and make submissions in support of any proposed findings and determinations. Had the Tribunal disagreed with the proposals put forward, and no satisfactory alternative resolution been found, the usual process of the Tribunal would have been to remove the Statement of Agreed Facts, the proposed findings and determination from the file and reconstitute the Tribunal². The matter is not finally resolved until such time as the Tribunal enters judgment.
- 22 In rejecting the submissions of the Board, the Tribunal is left with taking its guidance from the *VCAT Act* itself.
- 23 The *VCAT Act* has parallel requirements of efficient justice; encouraging the use of alternative dispute resolution and the requirement to afford parties natural justice. These sometimes competing obligations place on Tribunal Members a requirement to perform a delicate balance between the need for efficient certain justice and the right to a fair hearing.
- 24 We turn then to a consideration of the issues put by the parties.
- 25 Dr Hooper submitted that he had only acquiesced to the settlement process because he was under extreme financial stress at the time, which he described to the Tribunal in some detail. He also detailed the anticipated legal fees he thought he would be paying if he proceeded with the case represented by Counsel and his insecurity about whether he would be able to adequately represent himself given the complexity of the allegations.

¹ Spiegelman CJ in *R v Hura* [2001] NSWCCA 61; (2001) 121 A Crim R 472 at 478

² *Nursing and Midwifery Board of Australia v Chapman* [2010] VCAT 2042 (13 December 2010)

- 26 Dr Hooper stated that immediately following the hearing on 24 October 2011 he received unwanted and, in his opinion, colourful media attention, which made him realise the enormity of the impact on his professional reputation of agreeing to something simply for the sake of expediency and cost-effectiveness. He emphasised that he does not consider his career and reputation to be able to be “settled” on the same grounds as commercial civil litigation.
- 27 Dr Hooper stated that he had subsequently received a great deal of support from past and present patients and that accordingly he has “*since found strength from my patients and a desire to fully defend my name and my character and to continue my service to my patients.*” Dr Hooper believes that he will be able to demonstrate to the Tribunal, if given the opportunity, that the allegations made against him cannot be sustained. He submits that there are real questions to be tried in the proceedings.
- 28 The Board pressed the Tribunal to view the current situation suspiciously, it being the second time that Dr Hooper had “withdrawn a plea of guilty”. The Board stressed that Dr Hooper is an intelligent, tertiary qualified health practitioner who had been represented by very experienced counsel. Relying predominantly on the change of plea jurisprudence the Board emphasised the fact that Dr Hooper was unable to allege mental illness, impropriety or incompetence on the part of Counsel or that he did not understand the nature and repercussions of agreeing to the proposed findings of fact and determinations. Accordingly it was said that the Tribunal should not permit Dr Hooper to simply change his mind and that the Tribunal should take a robust approach and carefully scrutinise the reasons given by Dr Hooper.
- 29 The Board also pointed to policy reasons which it says mitigate against permitting Dr Hooper to change his stance. These include the “problematic precedent that allowing Dr Hooper to change his position would have for the disciplinary jurisdiction of VCAT”.
- 30 We do not propose to require Dr Hooper to persevere with the Proposed Statement of facts and determination. The impact of Tribunal hearings on the career and reputation of a health professional cannot be under-stated.
- 31 We do not consider it likely that the course taken by Dr Hooper will “open the floodgates”. The vast majority of people who enter into the compulsory conference process are satisfied that they can live with the consequences.
- 32 Dr Hooper finds that he cannot. Should he thereby be deprived of the opportunity to have his case heard? We do not think he should. We fail to see that there will be any particular disadvantage to the Board, other than costs.

- 33 We furthermore consider that allowing Dr Hooper to proceed in no way impacts upon VCAT and its policy and practices. To the contrary, it demonstrates that the Tribunal will adopt a flexible and sensible approach to each proceeding before it as it sees fit.
- 34 The matter shall be listed for a directions hearing at 10.00 on 22 December 2011 at which time the Tribunal will hear from the parties as to the future conduct of the case.

H Lambrick
Deputy President
Presiding Member