Ho Paul v Singapore Medical Council
[2008] SGHC 9

Case Number : OS 615/2007

Decision Date : 16 January 2008

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Rebecca Chew, Mark Cheng and Loke Pei-Shan (Rajah & Tann) for the appellant; Ho Pei Shien Melanie, Agnes Chan and Kylee Kwek (Harry Elias Partnership) for the respondent

Parties : Ho Paul — Singapore Medical Council

Administrative Law – Disciplinary tribunals – Relevant precedent not brought to attention of tribunal – Whether sentence manifestly excessive

Administrative Law – Disciplinary tribunals – Standard of natural justice – Doctor not represented by counsel – Whether Disciplinary Committee was expected to warn doctor of legal implications of not cross-examining witnesses – Whether Disciplinary Committee was expected to ensure doctor appreciated importance of mitigation plea

Administrative Law – Disciplinary tribunals – Whether Disciplinary Committee directing itself to right inquiry

16 January 2008

V K Rajah JA (delivering the grounds of decision of the court):

1 This was an appeal against the decision of the respondent, the Singapore Medical Council ("the SMC"), which found the appellant, Dr Paul Ho ("Dr Ho"), guilty of 19 charges of professional misconduct, and ordered that he be, *inter alia*, suspended from practice for a period of three months with effect from 21 April 2007 as well as fined $1,000. We allowed the appeal in part, in that while affirming the SMC's finding of culpability, we set aside the three-month suspension and increased the fine to $2,500. We now give the reasons for our decision.

The facts

2 Dr Ho is a medical practitioner who has been in practice for more than 20 years. Between 2002 and 2005, the prescription of Subutex – often used in the management of opioid dependence – formed part of his practice. In August 2006, Subutex was made a controlled drug after the authorities learnt that drug addicts were misusing Subutex.

3 In December 2003, Dr Ho's patient records were reviewed by the Ministry of Health ("MOH"). Concerns were raised by MOH regarding Dr Ho's practice of prescribing Subutex, and MOH later referred the matter to the SMC. Subsequently, 19 charges of professional misconduct under s 45(1)(*d*) of the Medical Registration Act (Cap 174, 2004 Rev Ed) were presented against Dr Ho. Each charge was identical, the essence of which asserted:

> a. Your management of the said patient was inappropriate in that you did not formulate and/or adhere to any management plan for the treatment of the said patient's medical condition by the prescription of Subutex; and

b. You did not record or document in the said patient's Patient Medical Records details or sufficient details of the patient's diagnosis, symptoms and/or condition and/or any management plan such as to enable you to properly assess the medical condition of the patient over the period of treatment …

4 During the inquiry before the disciplinary committee of the SMC ("the DC"), Dr Ho chose not to have legal representation and conducted his own defence. The hearing took place over two days. The DC found Dr Ho guilty of all 19 charges and ordered, *inter alia*, that he be fined $1,000 as well as suspended from practice for three months with effect from 21 April 2007.

5 In justifying its decision, the DC referred extensively to a report prepared by the SMC's expert witness, Dr Tan Yew Seng ("Dr Tan"), dated July 2006. The report, a copy of which was given to Dr Ho prior to the inquiry, concluded that Dr Ho had neither put in place any management plans for the 19 patients concerned nor recorded sufficient details of their symptoms and conditions or information as to how their treatment could be properly administered.

6 The DC agreed with Dr Tan's observations that Dr Ho had failed to follow the prescription guidelines supplied by Subutex manufacturers. Further, it doubted if Dr Ho's purported management plan – namely, imposing pecuniary penalties on patients who exceeded the recommended dosage – had any positive effect on the patients' addiction. Dr Ho had also argued that, as a sole proprietor, it was more difficult for him to keep fully documented records of his patients, but this was not accepted by the DC as a legitimate excuse. Nevertheless, for the purposes of sentencing, the DC took into consideration Dr Ho's unblemished record of 26 years of practice as well as the apparently genuine interest which he had demonstrated in the treatment of drug addiction over the years.

7 Pursuant to s 46(7) of the Medical Registration Act, Dr Ho appealed against the DC's decision. He argued that the DC had: (a) misdirected itself on the charges which he had to answer in the inquiry; and (b) made an error of law in imposing a sentence which was manifestly excessive.

Whether the DC misdirected itself during the inquiry

8 Before us, it was argued that the DC had operated under a misdirection because, instead of inquiring as to whether Dr Ho had put in place *any* management plan, the DC had focused on whether there was *an adequate or a proper* management plan. According to counsel, the charges brought against Dr Ho had clearly contemplated only the issue of whether a management plan existed and nothing else.

9 While a court is generally precluded from reviewing the merits of a lower tribunal's decision, an exception exists where the tribunal has failed to direct itself to the right inquiry: see *Leong Kum Fatt v AG* [1984-1985] SLR 367 at 372, [13]. It is also trite law that in disciplinary proceedings, the required response to a charge is circumscribed by the precise framing of that particular charge: see *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR 709 at [26]. It is for these reasons that the precise wording of the charge is crucial in assessing the case that the person charged has to meet.

10 A simple perusal of the charges in the present case revealed a fundamental flaw in Dr Ho's argument. The very first line of limb (a) of the charges read, "Your management of the said patient was *inappropriate* …" [emphasis added]. The wording of this part of the charges flatly contradicted Dr Ho's claim that the inquiry had been confined to the question of whether a management plan existed. Moreover, limb (b) of the charges, which stated that Dr Ho "did not record or document in the said patient's Patient Medical Records details or *sufficient* details of the patient's diagnosis,

symptoms and/or condition and/or any management plan …" [emphasis added], confirmed that Dr Ho had chosen to focus selectively on one aspect of the charges while ignoring the other aspects.

11 We were satisfied that the DC had carefully sieved the relevant evidence during the inquiry. There was, therefore, no basis to interfere with its findings or to add anything *vis-à-vis* the issue of culpability. We therefore affirmed the DC's decision that Dr Ho was guilty of all 19 charges.

12 Be that as it may, a couple of clarifications are necessary at this juncture. What happens when an individual chooses to appear unrepresented before a tribunal such as the SMC, as occurred in the case here? Would such proceedings be subject to a different standard of natural justice? For example, would the tribunal be expected to warn the individual of the legal implications if he fails to cross-examine witnesses? In a similar vein, would the tribunal have to ensure that the individual appreciates the importance of making a mitigation plea?

13 The answer to these questions are obvious. Additional duties are not foisted on a tribunal merely because the individual is unrepresented – advising a person who has been charged of his litigation strategies and options is the duty of an advocate and solicitor, not the adjudicator. This is quite apart from the general premise that tribunals are masters of their own procedures. Where breaches of the rules of natural justice are alleged, the key question lies in asking whether the individual concerned was given the opportunity to present his case and whether he suffered any prejudice as a result of any unfairness in the conduct of the proceedings. Having reviewed the transcript of the inquiry in the present case, we found that there had not been any such breach of the rules of natural justice. Dr Ho had been given the opportunity to present his case and cross-examine the witnesses, and had also been invited to make a mitigation plea. There was simply no basis to suggest that fairness had been compromised.

Whether the sentence was manifestly excessive

14 Turning to the issue of sentencing, we were concerned to learn of a directly pertinent precedent that was, regrettably, only brought to light in the proceedings before us. That was the case involving Dr John Heng ("Dr Heng"). Like Dr Ho, Dr Heng was found guilty of 19 charges of professional misconduct relating to the prescription of Subutex. His case was heard and decided in November 2006, *ie*, before Dr Ho's case. Unfortunately, the sentence imposed in Dr Heng's case was not brought to the attention of the DC during its inquiry into Dr Ho's practice. This, rather surprisingly, was despite the fact that the SMC's solicitors in Dr Heng's case were from the same firm that represented the SMC in the present case. Whatever the reason for such an omission, an injustice appeared to have been occasioned.

15 In Dr Heng's case, he was fined $2,500, but he was not suspended from practice. This called into the question why Dr Ho received a heavier sentence. Like cases should be treated alike unless there are good reasons to depart from the applicable precedents: see, for instance, *Tan Kay Beng v PP* [2006] 4 SLR 10 at [45]. In fact, unlike Dr Ho, who had an unblemished record, Dr Heng had previously been sanctioned, as well as suspended for 18 months, by the SMC in 2004 for dispensing cough mixtures and sleeping pills too freely. This must, surely, have served as an aggravating factor for the purposes of sentencing in Dr Heng's case.

16 Admittedly, there were some differences in the length of the prescriptions between these two cases. In Dr Heng's case, the periods of prescription ranged from three to 12 months, and only two of the 19 patients were treated for a year or more. In Dr Ho's case, the periods of prescription ranged from four to 23 months, and 13 of the 19 patients were treated for a period of 12 to 23 months. Yet, these differences alone could not be described as critically material for sentencing purposes. Even if

they could be thus described, Dr Heng's antecedent stood in stark contrast to Dr Ho's unblemished record. What was particularly disturbing – and could not be papered over – was the fact that a largely similar sentencing precedent was not drawn to the SMC's attention by its counsel, who ought to have known better. Given the similarity between the two factual scenarios, we were not satisfied that the SMC would have arrived at the decision which it did had its attention been drawn to Dr Heng's case. Accordingly, we found the three-month suspension to be excessive, and ordered it to be set aside. At the same time, we ordered the fine imposed on Dr Ho to be increased from $1,000 to $2,500 and, in view of all the circumstances, each party to bear its own costs.

Conclusion

17 We hope that this case serves as a timely reminder that doctors have an important – and continuing – duty to keep proper documentation of their patients' records. On the other hand, it should be emphasised that this decision is not designed either to circumscribe the powers of the DC in future inquiries or to set a tariff for future cases as it is only right that, as a general rule, each case is decided on its own facts. That said, like cases should broadly be treated similarly. The SMC and its counsel should ensure that proper records of all previous decisions are maintained. This will ensure that a similar oversight does not occur again. Finally, we wish to reiterate that counsel should draw to an adjudicator's attention all relevant material, regardless of whether such material supports their case.