

PERSPECTIVES FOR THE PROFESSIONS

BY FIELD LAW'S PROFESSIONAL REGULATORY GROUP

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JOINT SUBMISSIONS ON SANCTION: THE HEARING TRIBUNAL'S ROLE

Once a hearing tribunal has made a finding of unprofessional conduct, it is common practice in many professions for the hearing tribunal to be presented with a joint submission on sanction. A joint submission on sanction sets out a penalty (or penalties), which both the investigated member and the College have agreed constitutes a reasonable and appropriate response to the unprofessional conduct.

A hearing tribunal always retains the discretion to accept or reject a joint submission on sanction. Generally speaking, the principle of deference will apply and the hearing tribunal should accept the joint submission on sanction unless it is of the view that the penalty is unfit, unreasonable or is contrary to the public interest.

The principle of deference recognizes that joint submissions on sanction are often the outcome of an extended period of negotiations and discussions where the parties have addressed their minds to the issue of appropriate penalties. In doing so, the parties have streamlined the hearing process and saved time and resources. Accordingly, the parties' efforts in arriving at a joint submission on sanction should not be disregarded unless there are good and cogent reasons for doing so. Recent decisions of the courts have emphasized the importance of this approach.

In *Rault v. Law Society (Saskatchewan)*, 2009 SKCA 81, the College and the investigated member made a joint submission that a lawyer be permitted to resign in the face of discipline. The hearing tribunal instead ordered that the lawyer be disbarred and be ineligible to apply for reinstatement for five years. The Court of Appeal

reversed the sanction decision finding that the principles applied in criminal law with respect to joint submissions on sentencing should also be applied to professional disciplinary matters. The Court noted that there are good public policy reasons for the principle of deference to joint submissions and concluded that if the hearing tribunal was of the view that the joint submission sanction was inappropriate, it had a duty to give good or cogent reasons on why the proposed sanctions were inappropriate; not within the range of appropriate sanctions; unfit or unreasonable; or contrary to the public interest.

Similarly, in *Pankiw v. Chiropractors' Association (Saskatchewan)*, 2009 SKQB 268, the hearing tribunal rejected a joint submission on sanction and imposed different penalties on the investigated member. The court overturned the sanctions imposed by the hearing tribunal on the basis that it had not put its mind to or concluded that the joint submission was unfit, unreasonable or not in the public interest. The court then imposed the penalties set out in the original joint submission on sanction. The court noted that joint submissions are to be encouraged not ignored. If they are ignored, lengthy discipline hearings and increased costs to be borne initially by members of the profession and perhaps ultimately by the public they serve will result.

In practice, if members of a hearing tribunal are concerned that a joint submission on sanction is unfit, unreasonable or not in the public interest, they should make their specific concerns known to the parties and provide them with an opportunity to make further submissions, either

RECENT CASES OF INTEREST TO REGULATORS

Reasonable Apprehension of Bias

Lim v. Association of Professional Engineers of Ontario, 2011 ONSC 106

A complaint against an engineer was referred to a discipline hearing. The Manager of Legal and Regulatory Affairs, who was the support staff who assisted the discipline tribunal in its duties, engaged in correspondence with the parties to try to set a date for the hearing. Counsel for the member indicated he had not received full disclosure and therefore the proposed dates would not work, but proposed some alternative dates. The Manager sent a response by e-mail indicating that the Chair of the Tribunal had an obligation to the public to proceed expeditiously, and that if assertions were made regarding the lack of availability for a hearing, evidence would have to be provided to support the assertions. Further correspondence was exchanged between the Manager and both counsel, in which the Manager warned that threats and intimidation would not be tolerated. The Manager threatened to report member's counsel to the Law Society, and demanded an apology from counsel. Counsel for the Association wrote stating that she also thought the Manager's communication was inappropriate. The member then made an application for further disclosure and also argued that there was a reasonable apprehension of bias. The Manager sought to be added as a party to the application. The member hearing the application refused to grant the Manager party status. The Chair of the Tribunal subsequently overturned the decision, and decided to add the Manager of the Tribunal as a party, without granting the parties an opportunity to make submissions. The member sought a stay of the hearing on the basis of reasonable apprehension of bias. The Court granted the stay and permanently quashed the proceedings.

Commentary: Tribunal staff, such as the Hearings Director or persons acting in an administrative capacity to assist discipline tribunals in carrying out their functions must not usurp the function of the discipline tribunal. Tribunal staff can act as a conduit between the parties and the discipline committee, but should

refrain from making any decisions on behalf of the discipline committee, or appearing as if they are controlling the process. Staff members acting in this capacity should ensure that (a) they do not communicate with the parties unless they have directions to do so from the tribunal or the Chair (b) they clearly indicate to the parties that the correspondence is being sent on behalf of the tribunal and (c) the tone and content of the communications does not give rise to a reasonable apprehension of bias.

Overlapping Jurisdiction

Nowoselsky v. College of Social Workers Appeal Panel (Alberta), 2011 ABCA 58

A social worker was found guilty of a number of allegations, including several boundary violations with clients. The social worker appealed to Council, which upheld the findings, and then to the Court of Appeal. The social worker raised a number of grounds of appeal, including that the same conduct was being dealt with by the employer and was the subject of a grievance pursuant to the governing collective agreement. The social worker argued that he was facing "double jeopardy" and the Hearing Tribunal should not have proceeded in these circumstances. The Court of Appeal rejected this argument, confirming that in matters of this nature, the employer could address the conduct via the mechanisms in the collective agreement, and the College could address the conduct under the HPA.

Commentary: The fact that the employer is addressing the subject matter of a complaint in the employment context does not deprive the regulatory body of jurisdiction to process the complaint under its own governing jurisdiction. Both the employer and the regulatory may have a legitimate interest in addressing the conduct.

New Evidence

Barrington v. Institute of Chartered Accountants (Ontario), 2011 CarswellOnt 3623

Four accountants who worked at Deloitte were involved in conducting an audit approving the financial statements of a large company.



KATRINA HAYMOND

Under new management, serious financial irregularities were discovered in the company's books. Complaints were made against the four senior accountants who were involved in the audit. The complaints alleged that they failed to adhere to accounting and auditing standards. After a lengthy discipline hearing, the accountants were found guilty of several allegations. The Notice of Hearing alleged that the accountants failed to comply with generally accepted accounting standards (GAAP) and generally accepted auditing standards (GAAS) and gave multiple particulars relating to those charges. During the course of the hearing, evidence came to light that had not been disclosed to the Institute during its investigation relating to a dispute that the four accountants had with the company. The dispute related to an inappropriate agreement that the company had entered into that was affecting the validity of their financial statements. Although the company advised the accountants that it would cancel the agreement, the company failed to do so. The Discipline Committee found three of the accountants guilty of the specific allegations in the Notice of Hearing, concluding in part that their failure to follow up regarding the cancellation of the side agreement was a breach of the GAAP. They were ordered to pay a large fine and the costs of the hearing.

The members appealed to the appeal tribunal, which upheld the decision of the Discipline Committee. The accountants sought judicial review, on the basis that there was a breach of fairness. The court granted the application for judicial review in part, quashing some of the findings, and overturning the costs order.

The members appealed the findings to the Court of Appeal, and the Institute cross-appealed. The members raised several grounds of appeal, including that they had inadequate notice of the allegations and that the Discipline Committee failed to provide adequate reasons.

The Court of Appeal considered whether there was a breach of fairness, given that the Notice of Hearing and the particulars referenced therein did not specifically refer to the side

agreement that was referenced and material to the Discipline Committee's decision. The Court of Appeal held that there was no breach of fairness to the members, given that the side agreement was evidence that had not specifically been disclosed to the investigators prior to the hearing. It was raised by the accountants themselves during the hearing, and should have been anticipated by them given that they knew at least one witness would be testifying on the issue. Moreover, it did not change the essential elements of the charges, which were whether or not there was a breach of GAAP and GAAS. Just because the prosecutor had a different theory of the case did not prohibit the Discipline Committee from considering the new evidence, since there are potentially different "routes to liability."

Commentary: Where new evidence arises during the course of a hearing that is relevant to the charges, consideration of that evidence will not always result in a breach of fairness. If the member knew of the evidence, and the evidence is relevant to the allegations in issue, the discipline tribunal may be able to rely upon it notwithstanding the lack of specific notice. However, the specific statutory provisions need to be considered. Many statutes have a specific provision that allows a discipline tribunal to consider new evidence that arises in the course of a hearing, provided that notice is given and/or an adjournment is granted. If new evidence does arise, in order to avoid allegations of a breach of fairness, the hearing can be adjourned so that the member can respond to the new evidence. Each situation should be carefully assessed to determine the best course of action. ▲

Joint Submissions
Continued from Page 1...

orally before the hearing tribunal or by way of written submissions. Only after the investigated member and the College have provided their comments on the hearing tribunal's concerns with the joint submission should the hearing tribunal proceed with making its ultimate decision on sanction.

Indeed, as the case of *Visconti v. College of Physicians & Surgeons (Alberta)*, 2009 ABQB 742 demonstrates, this practice should be followed at any point where the hearing tribunal is considering varying from the penalties proposed by the parties whether or not the penalties were proposed by joint sanction. In *Visconti*, the legislation provided for an Investigating Committee to make recommendations to the Council of the College with respect to sanctions. Council imposed sanctions over and above those recommended by the Investigating Committee. Even though there was no joint submission on sanction in this case, the Court held that the investigated member should have been advised that Council was considering a higher penalty and been given the opportunity to make submissions.

While it remains up to hearing tribunals to determine whether they will accept joint submissions on sanction, they must be mindful of the public policy reasons for encouraging joint submissions on sanction. In cases where hearing tribunals choose to deviate from joint submissions, they must be prepared to set out in their written decisions cogent and well-developed reasons for why the sanction proposed by the parties was unfit, unreasonable, not in the public interest or not within the range of appropriate penalties for the unprofessional conduct in question. ▲

Training DVD for Hearing Tribunals is Now Available!

Over the past year, the lawyers at Field LLP had the opportunity to work on an important and groundbreaking project with the Alberta Federation of Regulated Health Professions (AFRHP). The project resulted in the production of a training DVD that will provide members of Hearing Tribunals under the HPA with an overview of the discipline process under the HPA and an introduction to some key concepts that members need to be aware of. The DVD, called "Hearing Tribunal Essentials" provides an overview of basic administrative law principles, the professional conduct process, contested and uncontested hearings, key evidentiary rules, assessing credibility of witnesses, imposing sanctions, and preparing reasons. The DVD also

includes a number of interesting demonstrations designed to give new members a realistic snapshot of the hearing process.

We appreciated the opportunity to collaborate on this exciting project with the Steering Committee of the AFRHP's Complaints Process Working Group, which included Kathy Hilsenteger (ACDMTT), Sharlene Standing (CLPNA) and Dr. Richard Spelliscy (CAP). If you want to obtain a copy of the DVD, you can order it online at www.afrhp.org.

While the DVD provides general training, we anticipate that many Colleges will still want individualized training for their tribunals. Our Professional Regulatory Group will continue to provide individualized and advanced training upon request. Please contact Katrina Haymond at 423-9584 for more information. ▲

DISCLAIMER

These articles should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in them. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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