

Labour & Employment

Regulator can determine dispute process, no procedural unfairness found, court rules

By **Amanda Jerome**

(September 4, 2018, 9:31 AM EDT) -- The Ontario Court of Appeal has upheld the decision of a discipline committee in a complaint against a pharmacist as it determined there was no prejudice in the dispute process.

Counsel involved in the case said this ruling will have implications for regulators across Canada.

In *Abdul v. Ontario College of Pharmacists* 2018 ONCA 699, the court heard, that in 2012 the appellant, the Ontario College of Pharmacists, was informed that the respondent, Salam Abdul's pharmacy, was taking back unused medications and redispensing them to other patients.

This tip came orally from the pharmacy manager at the Hôtel Dieu Grace Hospital in Windsor, Christine Donaldson, who is also member of the College Council, and in writing from a territory manager with the pharmaceutical company Janssen Inc., known in the court documents as G.V.

According to court documents, the college didn't take any action under s. 25 of the *Health Professions Procedural Code* in relation to G.V.'s written complaint, even though s. 25(6) required notice of the complaint to Abdul within 14 days, and s. 28 required the complaint be dealt with within 150 days.

In 2013, the college's Manager of Investigations and Resolutions, Maryan Gémus, called G.V. to explain the process. She advised that the complaint could be continued or withdrawn, so that it could proceed as a complaint begun by the registrar. According to court documents, G.V. chose the latter approach. At this time, Gémus also spoke to Donaldson about her allegations against Abdul.

The information received by Gémus was submitted to the registrar to determine whether a threshold for a "Registrar-initiated investigation" under s. 75(1)(a) had been met. The investigation was approved, and Abdul was given an opportunity to respond before the college issued a notice of hearing with the discipline committee.

According to court documents, Abdul brought a motion to "quash the charges on the ground that the College had lost jurisdiction to prosecute the allegations by failing to abide by the complaints process mandated by its own legislation" as it "improperly proceeded" with a registrar-initiated investigation after an informal investigation.



Neil Abramson, Torkin Manes LLP Barristers & Solicitors

The motion was dismissed by the majority of the discipline committee as it noted that while the college's handling of the complaint was "irregular" and that abuse of process may be a concern, Gémus's investigation was not improper. The committee determined that: "the college properly handled the information provided by the complainant; the respondent suffered no prejudice; and the college satisfied the procedural conditions for a referral pursuant to a Registrar-initiated investigation."

One dissenting member of the committee determined that by offering the complainant the option to withdraw the complaint, the college was "really seeking to redo and bury its processing failures by replacing the written complaint with a Registrar-initiated investigation grounded in the same subject-matter." According to court documents, this dissenting member noted that this was an abuse of process, but did not find malice or bad faith on the part of the college.

Therefore, the discipline committee resolved that the college had jurisdiction to continue with the adjudication of the charges.

Abdul then brought an application for judicial review to the Divisional Court. He alleged that the discipline committee's failure to "recognize either that non-compliance with the Code resulted in loss of jurisdiction, or that he had been so prejudiced that the proceedings amounted to an abuse of process."

According to court documents, the application was allowed, and the Divisional Court quashed the committee's decision. The court prohibited the college from prosecuting the charges as the Code did not permit "the avoidance of the mandatory complaints process under s. 25 by the withdrawal of a complaint, and that there is no statutory provision in the Code that permits a complainant to control the process by choosing to withdraw his or her complaint."

In some circumstances, the Divisional Court noted, it may be fitting for a registrar-initiated investigation to begin parallel to addressing a complaint. However, according to court documents, the court resolved that in this case it was not appropriate and the college's "departure from strict compliance with s. 25 of the Code" resulted in a loss of jurisdiction.

The college turned to the Court of Appeal, arguing that the Divisional Court erred in finding the discipline committee's decision unreasonable and that it had no jurisdiction to proceed with the charges.

On the appeal, Abdul maintained that Divisional Court's decision was correct. According to court documents, he argued that the college's "total disregard for the Code engages principles of fundamental justice that underlie the community's sense of fair play and procedural fairness."

Justice Paul Rouleau, for the Court of Appeal, did not agree with Abdul's submissions and wrote that there is nothing in the Code that "forbids the withdrawal of a written complaint by a member of the public when the College agrees and the complaint is taken up by investigation under another provision with full procedural safeguards provided to the accused member."

"The interpretive principle of strict compliance with and construction of professional discipline legislation to ensure procedural fairness to accused members is not exclusive or overriding. The Discipline Committee is required to interpret its enabling statute with a view to protecting the public interest in the proper regulation of the professions," he noted, adding that a balance of interest is required.

Justice Rouleau determined that the issue in this case was whether the college's "irregular treatment" of G.V.'s complaint and permitting the withdrawal of the complaint created "a breach of its duty of fairness to the respondent despite a properly commenced Registrar-initiated investigation, encompassing the complaint made by G.V."

If a breach occurred, Justice Rouleau noted, then the registrar-initiated investigation would be an abuse of process and the college would have "exceeded its jurisdiction." However, he wrote, a breach did not occur.



Natasha Danson, Steinecke Maciura LeBlanc Barristers & Solicitors

"The College's failure to process the written complaint under s. 25 of the Code does not automatically result in the loss of jurisdiction to investigate the concerns raised by G.V. and others. As this court explained in *Volochay v. College of Massage Therapists of Ontario* 2012 ONCA 541, at paras. 48, 58 and 59, the notice and other provisions under s. 25 codify well-established rules of natural justice and statutorily impose a duty of procedural fairness on the College, even at the investigatory stage of its processes," determined Justice Rouleau.

The Court of Appeal noted that there was no "evidence of prejudice to the respondent" and that even the Divisional Court concluded Abdul's rights had not been denied.

"While there are procedural differences between a complaint and a Registrar-initiated investigation process, both ensure basic procedural fairness to accused members. Both involve the ICRC [Inquiries, Complaints and Reports Committee] in screening a concern about a member and affording fairness to that member, including that the member receives notice of the matters in issue and has the right to make representations to the ICRC before it makes a determination as to whether to refer allegations to the Discipline Committee," wrote Justice Rouleau.

The Court of Appeal recognized that Abdul had been given an opportunity to respond to the allegations and that he provided "very little detail or substantive arguments addressing the Investigator's detailed findings".

"That the respondent chose to provide what the majority found was 'simply inadequate to address the seriousness of the Investigator's findings' does not mean that the process was unfair," resolved Justice Rouleau.

Justice Rouleau, with Justices Lois Roberts and Gladys Pardu in agreement, determined to allow the appeal in a decision released Aug. 28, setting aside the order of the Divisional Court and reinstating the discipline committee's decision.

"As long as there is no procedural unfairness to the accused member, the choice to accept the withdrawal of a complaint and to proceed with the Registrar-initiated process cannot be criticized," wrote Justice Rouleau.



Brian Gover, Stockwoods LLP Barristers

"The College's failure to abide by its own procedural guidelines did not create any prejudice. The hallmark is prejudice. There was none here," he added.

Neil Abramson, of Torkin Manes LLP Barristers & Solicitors and counsel for Abdul with Robert Barbiero, said the Court of Appeal's decision is a surprising one because it seems to suggest that the notion of prejudice is of "paramount import" and in the absence of obvious prejudice a regulator "seems to be at liberty to play fast and loose with the governing legislation."

"It's something I would think is relevant to be considered by professionals and regulators from British Columbia to Newfoundland," he said, adding that the decision is about the rights of a regulator versus its obligations to comply strictly with the governing statute.

"This decision, it would seem, is rather novel and would similarly seem to have far-reaching implications. Not just to health professionals and health professional colleges, but to professionals and professional regulators more generally across the entire country. It really does speak to a balancing of the public interest versus the rights of the individual accused professional," explained Abramson, adding that they are considering seeking leave to appeal to the Supreme Court of Canada.

Brian Gover, of Stockwoods LLP Barristers and counsel for the college with Aaron Dantowitz and Benjamin Kates, said that the takeaway for lawyers is that highly technical arguments "where there's no prejudice resulting from a failure to comply with some aspect of the legislation, won't find favour with the courts."

"In this case there were two procedural streams available to the college for assessing whether a matter of concern should result in disciplinary proceedings against the member, Mr. Abdul. It was open, the Court of Appeal concluded, to the college to treat what had been a public complaint as an internally generated matter of concern because the complainant had no longer wanted it to proceed as a public complaint," he explained, adding that the court had the college's public interest in mind.

Gover said the Court of Appeal disagreed openly with the Divisional Court, which he takes as guidance to the lower court about the "interpretation of professional discipline legislation."



Richard Steinecke, Steinecke Maciura LeBlanc Barristers & Solicitors

Richard Steinecke and Natasha Danson, of Steinecke Maciura LeBlanc Barristers & Solicitors, who appeared as counsel for the intervener, the Federation of Health Regulatory Colleges of Ontario, said the Court of Appeal focused on the aspect of prejudice and power of regulators.

"I think that's what it boils down to when you're considering how to interpret the legislation and it seems to be largely informed by whether the member suffered prejudice in the way that the regulator approached the investigation of the concern," said Danson, adding that when it comes to interpreting whether the steps undertaken by a regulator are fair prejudice needs to be the main focus.

Steinecke noted there is this huge debate when it comes to regulating professions on whether there needs to be a strict or liberal interpretation of legislation.

"There seems to be some sort of feeling that you have to choose one or the other and only one can be correct, so that there's some sense of diversion in the two routes. People are scratching their heads and saying which one is accurate. And I think the Court of Appeal here was bypassing, or side-stepping, that issue and saying, 'Look, this is here to protect the public. Let's interpret it keeping that in mind without forgetting that we have to ensure that whatever interpretation you take is not unfair to the person whose livelihood is at issue,' " he said.

"I think that taking a more practical approach to statutory interpretation issues, especially when the standard of review is reasonableness, makes a lot of sense and will help practitioners going forward to say 'let's get away from the rigid paradigm and just be practical about how we approach this interpretive issue,' " he added.