

Court of Queen's Bench of Alberta

Citation: Mohamed v College of Physicians and Surgeons of Alberta, 2019 ABQB 657

Date: 20190822
Docket: 1801 11035
Registry: Calgary

Between:

Dr. Mamdouh Mohamed

Applicant

- and -

College of Physicians and Surgeons of Alberta

Respondent

**Reasons for Judgment
of the
Honourable Madam Justice M.H. Hollins**

[1] Dr. Mohamed is an anesthesiologist with three medical degrees from Benha University in Egypt and 16 years of experience. In order to practice in Alberta, he was required to complete a Practice Review Assessment (PRA). The College of Physicians and Surgeons of Alberta (the "College") terminated his PRA before completion. The Appeals Committee upheld the decision of the College to deny him registration to practice and to impose a requirement of a further 2 years' education before he could attempt another PRA.

[2] Dr. Mohamed has applied for judicial review of the decision of the Appeals Committee. I find that the College did not conduct the PRA in a procedurally fair way and Dr. Mohamed's application for judicial review is allowed.

[3] In 2017, Dr. Mohamed applied to the College for permission to practice as an anaesthesiologist in Alberta, having been recruited to fill a position in a clinic in Medicine Hat. In order to practice as a registered member of Alberta's Provisional Register, he was required to complete a PRA as outlined in the *Health Professions Act*, RSA 2000, c.H-7. In advance of the PRA, the College outlined its process and expectations in a letter to Dr. Mohamed referred to as the Letter of Understanding.

[4] Dr. Mohamed began the PRA on July 18, 2019. It was scheduled to take 3 months to complete but after a matter of weeks, his assessor, Dr. Breitling, wrote to the Assistant Registrar of the College, Dr. Ulan, saying that he did not see any likelihood of Dr. Mohamed successfully completing the PRA. Dr. Ulan asked for Dr. Mohamed's response but ultimately accepted Dr. Breitling's recommendation and terminated Dr. Mohamed's PRA 3 weeks after it began.

[5] Dr. Mohamed appealed that decision to the Appeals Committee of the College which dismissed his appeal. While the *Health Professions Act* allows applicants two chances to complete a successful PRA, the Appeals Committee accepted the recommendation of Dr. Ulan that Dr. Mohamed be required to complete an additional 2 years of university education before he could reapply for a second PRA.

[6] His application for judicial review from the decision of the Appeals Committee is based on two grounds; (1) that the PRA was procedurally unfair; and (2) that the decision of the Appeals Committee was unreasonable.

Standard of Review

[7] The parties agreed that the two issues before this Court are subject to two different standards of review.

[8] The substantive decision of the Appeals Committee to dismiss Dr. Mohamed's appeal from Dr. Ulan's decision terminating his PRA, effectively denying him the ability to join the Provisional Register of the College, is reviewed on a standard of reasonableness as it clearly involves the interpretation of its own statute by an administrative body; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 54 and *Farhat v College of Physicians and Surgeons of Alberta*, 2014 ABQB 731 at paras.24-25.

[9] However, the process employed by the College to conduct the PRA is reviewed for procedural fairness because the decision resulting from that process affects Dr. Mohamed's rights, privileges and interests; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 at para.20 and *Farhat* at paras.26-27, 52. The College was duty-bound to employ a fair, impartial, open and transparent process which allowed Dr. Mohamed to understand what was expected of him; *Farhat* at para.53.

Fresh Evidence

[10] Before applying the foregoing standards of review to the evidence, I must deal with an additional evidentiary issue. Before this Court, Dr. Mohamed sought to rely on an Affidavit deposing that there are no medical programs available in which he could take the 2 years of additional education required by the Appeals Committee. That evidence was not part of the record before the Appeals Committee and is presumptively inadmissible without leave; Rule 3.22 of the *Alberta Rules of Court*.

[11] The threshold for admitting fresh evidence on a judicial review is very high. This Court can only properly review the decision-making process of the Appeals Committee if it is looking at the same evidence that was in front of that body when it made its decision. Additional evidence is only permitted to establish procedural defects such as bias or a breach of the rules of natural justice and only where the facts alleged in support do not already appear on the record; *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 at paras.40-42 and *Thurm v. Alberta Labour Relations Board*, 2018 ABQB 300 at para.11.

[12] In her submissions to the Appeals Committee, Dr. Ulan recommended that, before Dr. Mohamed could apply for a second PRA, he should be required to complete “a minimum of two years’ further education at a university based accredited Anesthesiology residency training program”. Dr. Mohamed knew this was the College’s recommendation before the Appeals Committee heard his appeal and so had an opportunity to argue there that no such training program existed. The Affidavit of Dr. Mohamed is not admitted.

[13] However, although the Appeals Committee may not have known that such a program was not available in Canada, it did know at the time of the hearing that such a program was not available in Alberta. Its response was simply that it was not responsible for the provision of training or education. Therefore, whether the Affidavit is admitted or not, the disinterest of the College in the effect of its ruling on Dr. Mohamed is apparent.

Procedural Fairness

[14] The Supreme Court in *Baker* outlined five factors to consider in determining the level of procedural fairness required by any particular administrative body, paras.21-28:

1. The nature of the decision being made and the process involved in making it;
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. The importance of the decision to the individual or individuals affected;
4. The legitimate expectations of the person challenging the decision; and
5. The choices of procedure made by the agency itself.

[15] Keeping these factors in mind and reviewing Dr. Mohamed’s particular complaints about the College’s processes, I find that the degree of procedural fairness required is “relatively high”, as was the finding in two very similar cases; *Farhat*, para. 63 and *Alfahem v College of Physicians and Surgeons of Alberta*, 2018 ABQB 539 at para. 70.

[16] Dr. Mohamed’s complaints focus on: (i) the PRA Manual on the College’s website; (ii) the lack of any orientation to the practice setting prior to the PRA; (iii) the inconsistency in the assessment tools used versus those Dr. Mohamed was told to expect; (iv) the lack of feedback during the process, along with the early termination of the PRA.

The PRA Manual

[17] The PRA Manual contains numerous provisions describing the PRA process which were not followed at all in Dr. Mohamed’s case. For example, the Manual said that the assessment tools to be used in the PRA would be provided to the applicant in advance, along with an opportunity to discuss those tools and the PRA objectives, so that the applicant would have a clear understanding of the College’s expectations. The assessment tools identified to Dr.

Mohamed before the PRA were, in fact, not the tools used by Dr. Breitling. The Manual also called for an orientation or “observership” of the particular practice setting to be used for the PRA so that the applicant would have some familiarity therewith, which opportunity was not afforded Dr. Mohamed.

[18] The College argues that the Manual is outdated and therefore ought to be disregarded. It relied on various cases dealing with historical internet searches, presumably asking me to infer that no one should accept material on the College’s own website as accurate without some further investigation.

[19] That argument is unpersuasive. In fact, at various points, College representatives have themselves suggested or indicated that the website should or would be updated. If the College is not responsible for its own website content, who is? Or perhaps more to the point, if the information is not accurate, why post it at all?

[20] Dr. Mohamed admits that he did not find or consult the website PRA Manual until after the termination of his PRA. The College says, and I therefore accept, that Dr. Mohamed’s personal expectations regarding the process were instead informed by the Letter of Understanding sent to him before the PRA began. However, the College also failed to honour certain provisions of the Letter of Understanding. Further, I accept Dr. Mohamed’s submission that the College’s posted PRA procedure is evidence of what it thought was a fair process.

Lack of Orientation

[21] Notwithstanding that Dr. Mohamed had not seen the Manual’s provisions for a PRA orientation, he made two express requests for this prior to his PRA, one of which was rejected by the College and one of which was ignored by Dr. Breitling. I do not accept the College’s argument that an opportunity to observe the clinic practice in Medicine Hat was the equivalent of the University of Alberta hospital where Dr. Mohamed did his PRA. The differences in terminology for particular drugs, dosages/concentrations and medical equipment and the lack of opportunity to familiarize himself with the peculiarities of the U of A environment put him at an unfair disadvantage. Even Dr. Breitling observed that Dr. Mohamed arrived for his PRA with no identification, access cards or parking, in short, no orientation to this working environment at all.

Choice of Assessment Tool(s)

[22] In the Letter of Understanding, Dr. Breitling identified two assessment tools he intended to use in Dr. Mohamed’s PRA, the Direct Observation of Procedural Skills (DOPS) and the Final In-Training Evaluation Report (FITER). The letter cautioned Dr. Mohamed to review the information relating to those tools carefully prior to the PRA, yet it is conceded that these were not used. Dr. Breitling used an assessment tool called the Anesthesia Non-Technical Skills tool (ANTS). He disclosed this to Dr. Ulan when he recommended termination of the PRA but in fact, never disclosed it to Dr. Mohamed.

[23] Although the College argued that the tool which was used in Dr. Mohamed’s assessment was sufficiently similar to the DOPS and FITER tests, I do not accept that argument. Frankly, if it mattered so little which tool was used, neither the Manual nor the Letter of Understanding would have required the chosen assessment tool(s) to be identified to and discussed with the candidate prior to the PRA.

[24] The Appeals Committee said that using a different tool would not have changed the outcome but that cannot be known since Dr. Mohamed was told to carefully prepare for an assessment involving tools that were, without his knowledge, replaced with others. And while this case is not an assessment of the assessor, there was evidence that Dr. Breitling was himself confused about the parameters of the assessment for the specific position for which Dr. Mohamed was attempting to qualify.

Lack of Feedback

[25] Similarly, whether it was contained in the Manual or not, the requirement for feedback as part of a “high stakes” assessment such as this is fairly expected by the applicant. Even though there is a disclaimer in the pro-forma portion of the Letter of Understanding saying that the College is not obligated to provide feedback, there is also a subsequent paragraph saying that an applicant in the Preliminary Clinical Assessment (the first part of the PRA) will be interviewed at the midpoint of the assessment and “will be asked to confirm if he is reviewing feedback from the assessor”. At best, these are mixed messages within the same document. At worst, the specific mention of discussing feedback would override the general disclaimer.

[26] The PRA was to last for 3 months, with an interim report due at the 6-week mark. Instead, the PRA was terminated after 3 weeks. While there is no question that the College retains the discretion to terminate any PRA before completion, the very early termination of Dr. Mohamed’s PRA aggravated the other circumstances arising from the lack of orientation and the uncertainty of the assessment process.

[27] Dr. Breitling made his recommendation to terminate the PRA without consulting with several other physicians who had had an opportunity to observe Dr. Mohamed and without sharing his own observations with Dr. Mohamed before providing them to Dr. Ulan.

[28] Had there been any meaningful feedback before termination, perhaps any confusion regarding the applicable tools or differences in the work environments could have been addressed. Certainly, Dr. Mohamed’s responses to the specific complaints – which complaints were only provided to him after the PRA was terminated - suggest as much.

Conclusion on Procedural Fairness

[29] In light of all the factors enumerated in *Baker*, particularly the nature of this decision-making process and its impact on Dr. Mohamed, the College has failed to meet the relatively high requirement of procedural fairness.

[30] The fact that the College has the latitude to determine its own procedure for qualifying foreign-trained health professionals raises the expectation that those procedures will be fair and fairly followed; *Farhat*, paras.55-62.

Decision of the Appeals Committee

[31] I appreciate that the College must have and retain discretion over the licensing of physicians. As has been said in many cases, professional colleges are best positioned to know who meets and does not meet the appropriate criteria for practice; *Lum v Council of Alberta Dental Association and College, Review Panel*, 2016 ABCA 154 at para.21. That is the rationale

behind the adoption of the reasonableness standard applied to the decision of the Appeals Committee.

[32] However, cases applying the reasonableness standard to the ultimate decision in the absence of procedural unfairness are not particularly helpful. As Justice Pentelchuk said in *Farhat*, “the denial of a right to a fair hearing must always render a decision invalid because it is an independent, unqualified right that any person affected by an administrative decision is entitled to have”; para.69.

[33] Put another way, I cannot properly review the decision regarding the licensing of Dr. Mohamed when the procedure used to evaluate him was not procedurally fair because I simply cannot know what the result would have been under a fair process.

[34] The decision of the Appeals Committee is quashed. Whether successful or not, Dr. Mohamed shall have the right to undertake another PRA, to be considered his first attempt, with a different assessor.

Heard on the 12th day of March, 2019.

Dated at the City of Calgary, Alberta this 22nd day of August, 2019.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Sabri M. Shawa, QC / Ryan Phillips
Jensen Shawa Solomon Duguid Hawkes LLP
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Craig D. Boyer
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for the Respondent College of Physicians and Surgeon of Alberta