

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40165/96

HANDLEY JA Friday

26 July 1996.

**MAHENDRA SINGH ROHATGI v HEALTH CARE COMPLAINTS
COMMISSION**

APPEAL - right of appeal - from Medical Tribunal in review enquiry -

Medical Practice Act 1992.

PROFESSIONS AND TRADES - Medical Tribunal - review enquiry -

whether appeal lies to the Court of Appeal.

The appellant had been struck off the register of medical practitioners on 29 September 1988. On 5 February 1993 he applied to the Medical Tribunal for a review of the order for his removal and on 29 February 1996 the Tribunal made an order, subject to conditions, that the appellant be registered as a medical practitioner. The appellant appealed to the Court of Appeal and challenged the Tribunal's decision that each party should bear its own costs and certain adverse findings described as "Consequential Orders".

The respondent applied by motion for the appeal to be dismissed as incompetent.

HELD, allowing the motion: (1) The so-called "Consequential Orders" were merely findings forming part of the reasons; (2) Appeals lie only in respect of orders and not from reasons as such: see *Commonwealth of Australia v Bank of New South Wales (1950) AC 235 at 294*; *Driclad Pty Ltd v FCT (1968) 121 CLR 45 at 64*; (3) The appeal against the so-called consequential orders was therefore incompetent; (4) A right of appeal is dependent on statutory authority; (5) The appellant had no right of appeal from orders made by the Tribunal on a review enquiry either under s 32U of the 1938 Act or s 90 of the 1992 Act.

**THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL**

CA 40165/96

HANDLEY JA

Friday 26 July 1996.

**MAHENDRA SINGH ROHATGI v HEALTH CARE COMPLAINTS
COMMISSION**

JUDGMENT

HIS HONOUR: This is a motion by the Commission for an order that the appeal be dismissed as incompetent. On 29 September 1988 the Medical Tribunal ordered that the name of the appellant be removed from the Register of medical practitioners. On 5 February 1993 the appellant applied to the Medical Tribunal pursuant to s 32V of the *Medical Practitioners Act* 1938 for a review of the order for his removal. This initiated an enquiry under s 32(4). On 22 June 1993 prior to the commencement of the *Medical Practice Act* 1992 the Tribunal dismissed the application.

The appellant did not attempt to appeal, but subsequently commenced proceedings for prerogative relief in this Court which resulted in an order in

the nature of *mandamus*, requiring the Tribunal to hear and determine the application for review according to law. Following the re-hearing of this application, the Tribunal on 29 February 1996 made an order subject to conditions that the appellant be forthwith registered as a medical practitioner. On 3 May 1996 the appellant filed a notice of appeal with appointment pursuant to an earlier notice of appeal without appointment.

On 1 July 1993 the *Medical Practice Act 1992* had come into force. Schedule 5 contained savings and transitional provisions, and cl 11(1) provided that the 1938 Act should continue to apply to an enquiry commenced under that Act and pending immediately before its repeal, and cl 11(2) provided that any order, decision or determination resulting from such an enquiry should be taken to have been made under the 1992 Act and to have effect accordingly.

The notice of appeal challenged the decision of the Tribunal that each party should bear and pay its own costs and certain so-called consequential orders. These were as follows:

"Consequential Order 4

On particulars 7, 8 and 9 the finding of this Tribunal is that Dr Rohatgi was guilty of gross negligence.

Consequential Order 2

On particulars 3, 4 and 5 the findings of this Tribunal is that Dr Rohatgi was guilty of lack of clinical judgment.

Consequential Order 3

On particular 6 the finding of this Tribunal is that Dr Rohatgi was guilty of a failure to exercise due care in describing the nature of the surgery he actually performed".

Although the Tribunal described these findings as consequential orders, it is clear that they are not orders but merely findings. The Tribunal declined to find that these matters constituted professional misconduct (Judgment 66) and therefore had no power to make disciplinary orders on those findings. See *Datt v Law Society (1981) 148 CLR 319*. Moreover s 32V(4) of the 1938 Act did not authorise the making of such orders in an application for a review.

The so-called consequential orders were only findings forming part of the reasons of the Tribunal. Appeals only lie in respect of orders and not from reasons as such. See *Commonwealth v Bank of New South Wales (1950) AC 235 at 294*; *Driclad Pty Ltd v FCT (1968) 121 CLR 45 at 64*. Mr Waterstreet argued that these findings were nevertheless "decisions" from which an appeal lay on a question of law pursuant to s 90(1)(a) of the 1992 Act but in the present context, although not in the context of judicial review, the natural meaning of "decision" is the order of the Court or Tribunal. See *Commonwealth v Bank of New South Wales at 294*. The appeal against the so-called consequential orders is therefore incompetent, and the relevant parts of the notice of appeal should be struck out.

Mr Sexton for the Commission contended however that there was no right of appeal to the Supreme Court at all from a decision of the Tribunal on

a review of an earlier order. Although the enquiry was commenced while the 1938 Act was still in force, Sch 5 cl 11(2) previously referred to applied, and the orders made on 29 February 1996 were deemed to have been made under the 1992 Act and to have effect accordingly. Mr Waterstreet argued that this application having been dismissed on 22 June 1993 was not pending on 1 July when the 1992 Act came into force. This cannot be the case because on 20 April 1994 this Court held that the application had not been validly dismissed, and ordered that it be heard and determined by the Tribunal according to law. The appellant's right of appeal therefore depends on the 1992 Act. The only provisions in the 1992 Act authorising an appeal to the Supreme Court are ss 89 and 90. Section 89 authorises an appeal on a question of law arising during an enquiry and prior to its completion, and is not directly relevant. The present appeal was not commenced until after the Tribunal had completed its enquiry. Section 90(1) provides:

"A person about whom a complaint is referred to the Tribunal or the complainant, may appeal to the Supreme Court against:

- (a) A decision of the Tribunal with respect to a point of law;
- (b) The exercise of any power by the Tribunal under Division 4 (Disciplinary Powers of Committees and Tribunal) of Part 4".

Mr Sexton submitted that Dr Rohatgi was not relevantly "a person about whom a complaint is referred to the Tribunal", and clearly he was not the complainant. See cl 1 of the dictionary at the end of the 1992 Act and Sch

2 d 8. Mr Waterstreet in answer submitted that Dr Rohatgi was "a person about whom a complaint is referred to the Tribunal" because of the complaint originally made against him on 18 August 1988.

The Commission was granted leave to intervene in the enquiry initiated by the appellant. See 1938 Act s 32 0 (3) (b) and compare Sch 4 cl 9. Compare 1992 Act s 162 (2) and Sch 2 d 9. The natural meaning of s 90 (1) is that the persons referred to are parties to the proceedings before the Tribunal, and both are to have a right of appeal. However there is no complainant in proceedings under s 92 of the 1992 Act for a review of an order.

While s 90(1)(a) which refers to "a decision of the Tribunal with respect to a question of law" is in general terms capable of applying to a decision on a review enquiry under s 94, s 90 (1)(b) has no application to such an enquiry. Division 4 of Pt 4 defines the disciplinary powers of the Tribunal in a case where a complaint has been proved or admitted (~s 60). The Tribunal cannot make such orders on a review enquiry (s 94 (1)).

There was, as I have said, no complainant in the review enquiry, the Commission as intervener was not a complainant, and on any view it had no right of appeal. Although Dr Rohatgi is a person about whom a complaint "was" referred to the Tribunal under the former Act in 1988, it would not be correct to describe him as a person about whom a complaint "is" referred to the Tribunal under the 1992 Act. The former complaint as such was not referred to the Tribunal under the 1992 Act, and that Tribunal made no

decision, and exercised no power, in relation to that complaint. The subject matter of a review enquiry is the application for review, and not the original complaint which will only be relevant in the new enquiry to the extent that it was upheld in the decision under review.

In considering the present question it must be borne in mind that rights of appeal depend on statutory authority, there being no such thing as a right of appeal at common law. See *Victorian Stevedoring Pty Ltd v Dignan* (1931) 46 CLR 73 at 108.

It is relevant to note that in some cases a review enquiry under Div 3 may be conducted by the Medical Board, but there is no right to appeal from the Board's decision on such an enquiry either to the Tribunal or the Supreme Court. It is also relevant that under s 32 U of the 1938 Act there was no right of appeal to this Court from the decision of the Tribunal in a review enquiry because of the specific reference in sub s (1) to ss 31, 32 and 32H of that Act. Under that Act a review was conducted pursuant to s 32 V. This has added relevance in the present case because the Tribunal initially dismissed this application for review on 22 June 1993 prior to the commencement of the 1992 Act and at a time when clearly there was no right of appeal to this Court.

Mr Waterstreet's submissions involve the conclusion *that* the appellant acquired a right of appeal from that decision on 1 July 1993 following the commencement of the new Act (see Sch 5 cl 13 (1) and *Rohatgi v MedicalTribunal* (CA u/r 20/4/94) at pp 4-5). These considerations reinforce the

conclusion which I have independently reached on the language of s 90 (1). Although the question is not without its difficulty, I have in the end concluded that Dr Rohatgi has no right of appeal in this case. It was quite clear that there was no right of appeal from the decision of the Tribunal in a review enquiry under the 1938 Act. If Parliament had intended to confer such a right in the 1992 Act it would have been very easy to express that intention in clear and simple language. In my opinion the language relied upon by Mr Waterstreet is too obscure and indirect for the purpose relied on and should not be held to confer the one sided and even more restricted right of appeal for which he contends.

Mr Waterstreet however referred me to the decision of this Court in *Rohatgi v Medical Tribunal* (above) and especially at p 28 (see also pp 19, 22). The observations at p 28 of the reasons for judgment in that case appear to support the existence of a right of appeal from a review decision under s 32U of the 1938 Act and s 90 of the 1992 Act. However it is dear that the question was not the subject of any argument (19) and the dictum was entirely unnecessary for the decision which concerned an application for prerogative relief. Moreover it is clear, with respect, that there was no right of appeal under s 32 U from a decision on a review enquiry under the 1938 Act.

In these circumstances I am bound to give effect to my clear conclusion that there is no right of appeal in this case notwithstanding the dictum relied upon by Mr Waterstreet. The appellant may possibly have a right to

prerogative relief in respect of the decision of the Tribunal to make no order as to costs but such a decision was within its jurisdiction (Sch 2 d 13 (1)) and the prospects of discovering an error of law on the face of the record do not appear promising, having regard to *Craig v South Australia* (1995) 184 CLR 163.

The appeal should be dismissed as incompetent, and the appellant must pay the respondent's costs of the appeal and of this motion.

I Certify that this and the *seven* (7) preceding pages are a true copy of the reasons for judgment herein of The Honourable Mr. Justice Handley and of the Court.

26 July 1996.
Date

Jennifer Donaldson.
Associate