

**IN THE MEDICAL TRIBUNAL
CONSTITUTED UNDER s146
OF THE *MEDICAL PRACTICE ACT 1992***

No. 40018 of 2008

Dr WILLIE CALIMBAS

Appellant

NSW MEDICAL BOARD

Respondent

Deputy Chairperson:

HIS HONOUR JUDGE PUCKERIDGE QC

Tribunal Members:

DR V DE CARVAHLO

DR J KENDRICK

MS G ETTINGER

Determination as to Costs

1. On Thursday 30 July 2009, the appellant withdrew his appeal. The appeal was in relation to an assessment by the Medical Board which refused his application for a position in an area of need. Under s 7(1)(D) of the Medical Practice Act a person may be registered for the purpose of enabling an unmet area of need to be met if the Board is satisfied that the

person has suitable qualifications and experience to practice in that area of need.

2. Section 17 of the Medical Practice Act provides for an appeal from a determination because of which a person's application for registration has been refused or a condition has been imposed on the person's registration. The appeal arose as a result of a refusal by the Board to have the appellant registered to enable him to be registered for the purpose of an unmet area of need at the Medisense Health Care Taree.
3. In an assessment made in September 2008, the Medical Board assessed the written application of the appellant for variation of his GP registration from Access Health Care Medical Centre Taree to the new area of need location, Manning River Family Practice and Medisense Health Care Taree.
4. The Medical Board through its delegate Melanie Wroth found that the concerns of his supervisor Dr John King of the Access Health Care Medical Centre were genuine, not driven by personality issues and were of potentially serious clinical significance. In her assessment report of 11/09/08, the delegate further stated:-

"I do not think that another face to face panel interview would have much to contribute, as his knowledge is not in question. In the previous interview, Dr Calimbas stated frequently that he would consult his supervisor and yet he does not do this in his recent clinical practice despite explicit requests. He obviously knows how to write adequate medical records as his performance in this regard improves with counselling but is not sustained.

I think that the issue in this case is not knowledge but that manner of his practice. It is worrying that he has been specifically in a supervision position but does not consult his supervisor. Areas of his practice could possibly be unsatisfactory, and in a non-AON doctor these concerns would raise the possibility of performance assessment. Dr Calimbas is neither registered currently, nor in clinical practice so this is not possible although an independent audit of his recent records would be feasible.

In summary, I do not recommend that Dr Calimbas be approved for the new position until the issues raised in his previous position have been addressed. I do not think that a new panel interview would address the issues raised satisfactorily. "

5. As a result of the unsatisfactory supervisor's report by Dr John King, the appellant ceased being registered as a practitioner in the area of need with Access Health Care Manning Centre Taree. As a result of the assessment by the Medical Board of 11/09/08, the appellant was not registered for the purpose of enabling him to fill an unmet area of need at the Manning River Family Practice and Medisense Health Care.
6. In a letter dated 29/09/08 to Dr Nguyen of Medisense Health Care, that doctor was advised that the appellant's application for an AON position had been unsuccessful as the assessor did not consider that he was suitable to the identified AON position. Dr Nguyen was further advised that the appellant's unsuccessful application did not preclude him from applying for other more suitable positions. A copy of the assessment report by Melanie Wroth and information on the appeal's process as set out in the Medical Practice Act was forwarded to Dr Calimbas.

7. The appeal was listed for directions on 29/01/09 and 21/05/09. On 21/05/09 the matter was fixed for hearing on 28/07/09 for 3-4 days and the appellant was directed to file and serve any affidavits and documents in reply by 11/06/09.
8. On 22/05/09 under cover of letter dated 21/05/09 file copies of the affidavits relied upon by the respondent were served on VassiliFossard Lawyers. Included in the affidavits served on VassiliFossard was an affidavit of John King affirmed on 20/05/09.
9. Dr King in his affidavit of 20/05/09 stated that from January 2005 to August 2008 he had been the primary supervisor for Dr Calimbas. In a letter dated 26/06/08, Dr King applied to the Medical Board for an extension of registration for Dr Calimbas whose registration expired on 31/08/08. Dr King stated that he agreed to continue to supervise Dr Calimbas from 01/09/08. On 24/07/08 Dr King wrote to the Board with concerns that he had regarding Dr Calimbas. He stated that since the last progress report there had been a series of errors which he considered could not be tolerated in the general practice setting. He briefly stated what those concerns were and concluded by stating that he had to make the regrettable decision to discontinue his supervision because of inappropriate and unsafe practices.
10. In his affidavit of 20/05/09 Dr King stated that he considered that Dr Calimbas was not maintaining improvements he had made in the period from early 2008 up to the report to the Medical Board in June 2008. He stated that errors and Dr Calimbas' records were being brought to his attention and due to his concerns he undertook a review of some of the

patient records and progress notes of patients seen by Dr Calimbas. The review reinforced the concerns of Dr King and on 24/07/08 he telephoned the Board and subsequently wrote the letter of 24/07/08.

11. In his affidavit he set out several examples of his concerns after he reviewed the progress notes of the patients he had randomly selected for review.
12. On 11/09/08 Melanie Wroth telephoned Dr King in relation to the AON position Dr Calimbas had applied for in Medisense Taree. Dr King discussed his concerns with Ms Wroth and in particular his concerns as expressed in his letter to the Board on 24/07/08.
13. In an affidavit of 19/03/09, Dr Calimbas stated that he considered that the decision not to extend his registration in an AON position at Medisense Taree was based primarily on the letter written by Dr John King dated 24/07/08 and addressed to the Medical Board. Dr Calimbas did reply to the letter of Dr King and his response is annexed to his affidavit of 19/03/09. He stated that the incidents referred to in the letter of July 2008 could have been resolved by providing him the opportunity to discuss and/or explain the actual cases. He further stated that he accepted that proper documentation reflecting actual practice was needed and that he had personally put strategies in place to resolve the issue.
14. The affidavit of Dr King of 20/05/09 was replied to by an affidavit of Dr Calimbas of 04/06/09. The affidavit of Dr King of 20/05/09 expanded on the letter to the Medical Board of July 2008 and the concerns of Dr King. In his affidavit Dr King stated that he had no problem with Dr Calimbas as a person and that Dr Calimbas was well liked by his patients. He further

stated that financially it had been a loss to the practice that Dr Calimbas was no longer practicing but at paramount concern to him was that Dr Calimbas was not fulfilling the requirements of a competent GP and so putting patient welfare at risk.

15. Dr Nguyen in an affidavit of 06/03/09 stated that he made application to the Medical Board as supervisor for Dr Calimbas in the practice known as Medisense Health Care located in Taree. He stated that he considered he had the professional capacity to supervise Dr Calimbas, that he was familiar with the supervision guidelines for AON doctors and was happy and capable to supervise Dr Calimbas in any capacity that the Board considered appropriate. He also stated that he is currently supervising 2 other general practitioners who were international medical graduates (IMGs).
16. The affidavit of Dr King 20/05/09 was not referred to Dr Nguyen until he attended at court on 29/07/09 to give evidence in the appeal. In an affidavit of Caroline Fossard of 05/08/09 it is stated that at a conference on 03/06/09 the solicitor for the appellant read the affidavit of Dr King of 20/05/09 to Dr Nguyen, and Dr Nguyen indicated that the issues raised by Dr King were issues which he could address with supervision of Dr Calimbas and that the issues raised were "not a problem" for Dr Nguyen. After he attended court on 29/07/09 and the matters raised by Dr King in his affidavit were canvassed with him, the following question was put to Dr Nguyen by the Deputy Chairperson:-

Q: As I understand it, having seen Dr King's affidavit, having had regard to the question of the exam results in relation to Dr Calimbas, the question is put as

to whether or not you would have reservations in appointing now Dr Calimbas to that particular position which is available. Is that not so Mr Vassili?

Vassili: Yes Your Honour.

Witness: I feel that in all honesty I would love for Dr Calimbas to work in Medisense Health Care, but knowing all this information that's just been presented to me I feel that I might do him a disservice because of the other commitments I have to other doctors at Medisense Health Care. And that's my reservation. I might be doing him a disservice rather than helping him to pass exams.

17. Following the indication by Dr Nguyen of his reservations, proceedings were adjourned to allow Mr Vassili to have a further conference with Dr Nguyen and also to seek further instructions from Dr Calimbas. Further time was allowed in order that Mr Vassili could seek instructions as to whether or not the AON position was still available to Dr Calimbas. This arose at 3:30 in the afternoon of 29/07/09. It was considered after a period of time.
18. The Tribunal resumed at 4:06pm. Following resumption the following question was put by Mr Vassili:-

Q: Just prior to the adjournment a question was put. It was a point end question if I can put it that way. Knowing now what you do, and having had the benefit of giving your evidence today, would you be prepared to offer that position of AON to Dr Calimbas?

A: Knowing what I know now, I would like to withdraw my offer of the area of needs to Dr Calimbas. I apologise unreservedly, to your Honour, the panel

members, Medical Board, and lawyers on both sides for any inconvenience caused.

19. Following that evidence the Tribunal adjourned to 30/07/09 to enable Mr Vassili to obtain further instructions.
20. On 30/07/09 the appellant withdrew the appeal. On behalf of the Medical Board, an application for costs was made. The Tribunal reserved the question of costs.
21. On 06/08/09 on the question of costs, an affidavit was tendered by Caroline Fossard. She stated in her affidavit what I have previously stated, that Dr Nguyen had been advised of the concerns of Dr King in March 2009 and that prior to 29/07/09 he had never expressed to the office any reservations he held regarding the supervision of Dr Calimbas. On 29/07/09 when the affidavit of Dr King was first referred to Dr Nguyen before he gave evidence he stated in evidence in chief that having been referred to that affidavit he stood by his opinion that he would be able to properly supervise Dr Calimbas. It was only after further questioning as to the details of the concerns of Dr King and the lack of progress that Dr Calimbas seemed to be making in necessary college examinations that he expressed his reservations. The Medical Board has submitted that in effect it has succeeded on the appeal and it is entitled to costs. The difficulty which the Tribunal has is that the appeal was in fact withdrawn after the reservations as expressed by Dr Nguyen and subsequently the position for an AON doctor was withdrawn so far as the applicant was concerned. There was therefore no position for him to fill and if the appeal was to proceed it would automatically have to be dismissed.

22. The solicitors for the appellant did explore with Dr Nguyen the concerns of Dr King. In his affidavit of 06/03/09 Dr Nguyen specifically stated that he was not aware of the circumstances of why Dr Calimbas was terminated from his practice by Dr King. Having regard to that statement I consider that the affidavit of Dr King and the details of same and his detailed concerns should have been referred to Dr Nguyen prior to 29/07/09. Had the affidavit been referred to Dr Nguyen, it may be that Dr Nguyen could have indicated at the time it was referred that he had concerns and the appeal may well not have proceeded. Nevertheless, when the affidavit was referred to him on 29/07/09 he proceeded to give evidence that he was still prepared to give evidence in support of Dr Calimbas' application and prepared to supervise Dr Calimbas.
23. The seeds of an appeal were sewn in the mind of Dr Calimbas by the Medical Board when he was advised that his application had been unsuccessful. Dr Nguyen encouraged him to appeal and advised him he would support him on any appeal.
24. The Tribunal considers the most appropriate order for costs in the circumstances is that each party pay their own costs up to 28/07/09. And that the appellant pay half the Medical Board's costs for the 28/07/09 and 29/07/08. The Medical Board also sought costs for 30/07/09 on the basis that they had doctors King and other medical practitioners available to give evidence. However, as of 29/07/09 the position for an AON doctor had been withdrawn by Dr Nguyen. There was no need, the position having been withdrawn, for any doctors to be available on 30/07/09. The Tribunal declines to make any order for costs for 30/07/09.

Dated: 07 August 2009

Judge A. F. Puckeridge QC

Deputy Chairperson

Dr J Kendrick

Member

Dr V de Carvahlo

Member

Ms G Ettinger

Member