



# Administrative Decisions Tribunal

New South Wales

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**CITATION:** YX v NSW Medical Board [2010] NSWADT 12

**DIVISION:** General Division

**PARTIES:** APPLICANT  
YX  
  
RESPONDENT  
NSW Medical Board

**FILE NUMBER:** 093057

**HEARING DATES:** 17 September 2009

**SUBMISSIONS CLOSED:** 17 September 2009

**DATE OF DECISION:** 13 January 2010

**BEFORE:** Montgomery S - Judicial Member

**CATCHWORDS:** Costs

**LEGISLATION CITED :** Administrative Decisions Tribunal Act 1997  
Health Records and Information Privacy Act 2002  
Privacy & Personal Information Protection Act 1998

**CASES CITED:** BQ v Commissioner of Police, New South Wales Police Service [2002] NSWADT 64  
MG v Director General, Department of Education and Training [2004] NSWADTAP 45  
NBGZ v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 143 FCR 434  
Pickering v Centrelink [2008] FCA 561  
Rucom Pty Ltd and Anor v Multiplex & Ors [2010] NSWADT 1

**REPRESENTATION:** APPLICANT  
In person; M Duong, Solicitor  
  
RESPONDENT  
J Lucy, solicitor  
  
PRIVACY COMMISSIONER  
P O'Dowd, agent

**ORDERS:**

The Applicant is to pay the costs of the Respondent, as agreed or assessed, in regard to the planning meetings held on 21 April 2009 and 2 June 2009.

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**REASONS FOR DECISION**

1 In these reasons the names of private individuals have been anonymised so as to preserve the privacy of their personal affairs.

2 YX applied to the Tribunal in relation conduct of the Respondent, which he asserted was in breach of *Privacy and Personal Information Protection Act 1998* ("PIIP Act") and the *Health Records and Information Privacy Act 2002* ("HRIP Act").

3 YX's application to the Tribunal for review makes the following allegations:

A false "medical psychiatric report" has been kept on my file despite repeated requests to Mr Dix (Registrar of the NSW Medical Board) to remove it. It was sent to Mr Dix [by] his personal and close friend ... during previous litigation I was involved in against ... which was run by my Union (ASMOF). Much of this dispute played out in the ADT (Equal Opportunity) and it was finally settled / mediated in my favour ...

Mr Dix has subjected me to 5 psychiatric examinations in recent years, all of which come back as normal, no mental illness, no mental disorder, no personality disorder etc. He keeps referring only to the letter sent to him by ... which she paid for from a very elderly doctor who has never met me before in his life! I have never met him and I have never been clinically examined by him, that is for sure!

A written promise was made by Mr Dix to put my letters of protest at least attached to the false report, but they would not remove it. Now I have just found out that the 'report' is still there and with NO attachments or letters from me. It is still kept as a legal medical psychiatric report on me from a doctor I have never met before in my entire life!

Several inaccuracies also remain in my health and complaints records. A 'complaint' from the "RANZCP" was never made! Mr Dix also converted an inquiry made about my old rooms landlord in Macquarie St into a complaint - which the HCCC finally threw out as 'lacking in substance'. This correct conclusion by the HCCC has NOT been added to my record.

There is also reference to an "Alcohol problem" in my records which I obtained under FOI, but I am a teetotaler and the last alcohol I ever had was probably back in July 1995!

Each time I write to ask about progress on my complaint I am told I have "conspiracy" theories and/or I am asked for more and more and more "particulars of the conduct" - I think to put me off.

They 'pretend' not to understand what I am saying. Or they say, if possible, that it is all 'out of time' now (even though they have been responsible for all of the delaying!) I think this is deceptive and dishonest for any public sector agency. My newest FOI discoveries (above) are very definitely WITHIN the past 6 months. During and since the litigation against his close personal friend ..., Mr Dix has made repeated efforts to have me medically de-registered with (a) maintaining records that do not reflect my true practice complaint and/or Health status, (b) providing those records and information to others who are not within the NSW

Medical Board, (c) over-investigation of minor complaint matters that take 4-5-6 years to resolve, (d) contriving of complaints (as above) which, when investigated, are thrown out as lacking in substance ... and (c) multiple 'fishing exercise' psychiatric assessments which all come back as normal ...

On several separate occasions, Health and Private information has also got into the hands of others outside of the NSW Medical Board. This is extremely distressing to me and I would like to show the ADT these examples.

4 YX sought the following orders:

1. Full written apology
2. Accountability - with better and clearer guidelines as to what constitutes a legitimate and valid medical or medical psychiatric report.
3. Removal from my file of the false medical psychiatric report from the individual who has never met me before in my life. In the alternative, proper documentation ADDED to that 'report' which anyone reading my file will easily see.
4. Improvement in standards - improved policies and adherence to those policies which are in strict compliance with PPIP and HRIP principles, This may require a further formal and independent external review and/or further staff training.
5. Direction from the Tribunal that it is a dishonest and dishonourable policy for a public sector agency in these circumstances to seek further and further and further 'particulars' in order to delay their responses - and then claim that it is all 'out of time' now.
6. Mr Dix should be directed to desist from his ongoing smear campaign in which he seeks to reduce my concerns about his own conduct as the ramblings of a mentally ill person. Despite his position, and despite his letter to us admitting to his close personal relationship with ... (whilst at the same time denying that this affects his judgment), Mr Dix needs to learn how to maintain proper confidentiality and perform his duties without fear or favour.
7. Costs of my unnecessary psychiatric examinations (for which I had to travel down from Queensland) and the costs for the failed Removalists complaint (for which I had to seek legal advice and assistance, and costs for having to make this application to the ADT.

#### **Background to Application for dismissal**

5 The matter was listed for a planning meeting on 21 April 2009. At the planning meeting, Mr Duong, Solicitor, appeared on behalf of the Applicant. However, Mr Duong had no instructions, and had not been given a copy of the internal review application or the internal review determination. Due to his lack of instructions, the planning meeting was of little value in preparing the matter for hearing. The matter was listed for a further planning meeting to be held on 2 June 2009 and a timetable was set for filing of particulars on behalf of the Applicant and submissions on behalf of the Respondent and the Privacy Commissioner.

6 No further material was filed on behalf of the Applicant prior to the planning meeting held on 2 June 2009. There was no appearance on behalf of the Applicant at that planning meeting. However, the Applicant had advised the Respondent that these proceedings were about to be subsumed into a larger matter in the Tribunal. Ms Lucy indicated that the Respondent intended to file an application for dismissal. A timetable was set for filing of that application and any response on behalf of the Applicant and the matter was listed for a dismissal hearing on 20 July 2009.

7 On 15 June 2009 the Respondent filed an application for dismissal along with evidence in

support. The Applicant filed his reply on 26 June 2009.

8 The Respondent lodged an application with the Tribunal for an order that the application be dismissed under section 73(5)(g) of the *Administrative Decisions Tribunal Act 1997* ("the ADT Act") or, in the alternative, an order that parts of the application are outside the Tribunal's jurisdiction. The Respondent also sought orders that the Applicant pay to the Respondent the costs of:

- a. The planning meeting held on 21 April 2009;
- b. The planning meeting held on 2 June 2009;
- c. The application for summary dismissal.

9 The matter was heard on 20 July 2009. The Applicant appeared in person and presented argument as to why his application ought not be dismissed. I reserved my decision on the issue.

10 On 14 August 2009, prior to a decision in the matter, the Applicant filed a notice of discontinuance.

11 The parties were unable to reach agreement on the discontinuance and the matter was again listed on 17 September 2009. The Respondent does not oppose the discontinuance but has sought orders for costs.

#### **Applicable legislation**

12 Section 73(5)(g) of the ADT Act is in the following terms:

73 Procedure of the Tribunal generally

...

(5) The Tribunal:

...

(g) may dismiss at any stage any proceedings before it in any of the following circumstances:

- (i) if the applicant (or, if there is more than one applicant, each applicant) withdraws the application to which the proceedings relate,
- (ii) if the Tribunal considers that the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance,
- (iii) if the applicant (or, if there is more than one applicant, each applicant) has failed to appear in the proceedings,
- (iv) if the Tribunal considers that there has been a want of prosecution of the proceedings, and

13 Section 88 of the ADT Act is in the following terms:

88 Costs

(1) Each party to proceedings before the Tribunal is to bear the party's own costs in the proceedings, except as provided by this section.

(1A) Subject to the rules of the Tribunal and any other Act or law, the Tribunal may award costs in relation to proceedings before it, but only if it is satisfied that it is fair to do so having regard to the following:

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings by conduct such as:

- (i) failing to comply with an order or direction of the Tribunal without reasonable excuse, or

- (ii) failing to comply with this Act, the regulations, the rules of the Tribunal or any relevant provision of the enactment under which the Tribunal has jurisdiction in relation to the proceedings, or
- (iii) asking for an adjournment as a result of a failure referred to in subparagraph (i) or (ii), or
- (iv) causing an adjournment, or
- (v) attempting to deceive another party or the Tribunal, or
- (vi) vexatiously conducting the proceedings,
- (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
- (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
- (d) the nature and complexity of the proceedings,
- (e) any other matter that the Tribunal considers relevant.
- (2) The Tribunal may:
  - (a) determine by whom and to what extent costs are to be paid, and
  - (b) order costs to be assessed on a basis set out in Division 11 of Part 3.2 of the Legal Profession Act 2004 or on any other basis.
- (3) However, the Tribunal may not award costs in relation to proceedings for an original decision unless the enactment under which the Tribunal has jurisdiction to make the decision provides for the awarding of costs.
- (4) In this section, costs includes:
  - (a) costs of or incidental to proceedings in the Tribunal, and
  - (b) the costs of or incidental to the proceedings giving rise to the application, as well as the costs of or incidental to the application.

#### The Respondent's case

14 The Respondent submitted that it was entitled to an order that the proceedings should be dismissed under section 73(5)(g) of ADT Act on the grounds:

- a. the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance within section 73(5)(g)(ii);
- b. the Applicant has failed to appear in the proceedings within section 73(5)(g)(iii); and
- c. there has been a want of prosecution of the proceedings within section 73(5)(g)(iv).

15 In the alternative, should the Tribunal decline to dismiss the proceedings, the Respondent submitted that it was entitled to an order that part of the application is outside the Tribunal's jurisdiction.

16 In the circumstances, the Respondent submitted that it was entitled to an order for costs.

17 The Respondent relies on the evidence of its Legal Director, Ms Miranda St Hill and Ms Juliet Lucy, solicitor.

18 Ms Lucy submits that the complaints are frivolous or vexatious or otherwise misconceived or lacking in substance. She argues that a case is frivolous "if, despite whatever attempts are made to discern a cause of action in a case, it is still not arguable" and it is also frivolous "when it is without substance or groundless or fanciful": *Pickering v Centrelink* [2008] FCA 561 at [27], *NBGZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 434. The words "frivolous" and "vexatious" are often used interchangeably: *NBGZ v Minister*

*for Immigration and Multicultural and Indigenous Affairs* at [21].

19 Further, the "authorities make it dear that, in any case in which summary dismissal of a proceeding is sought, the focus must be on whether the case is arguable, and not upon whether it is likely to succeed": *NBGZ v Minister for Immigration and Multicultural and Indigenous Affairs* at [23].

20 The Respondent submits that the Applicant does not have an arguable case in respect of any of his complaints.

21 The Respondent submits that the Applicant had been aware of the psychiatric report for more than six months when he made his internal review application, received by the Respondent on 21 October 2008. The internal review application was not made within six months of the Applicant becoming aware of the conduct concerned, and so did not comply with section 53(3)(d) of the PPIP Act. The Tribunal does not have jurisdiction to review conduct where an internal review application is not lodged within the time stipulated in section 53(3)(d) of the PPIP Act and the agency does not allow further time: *BQ v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 64 at [21]-[27]; *MG v Director General, Department of Education and Training* [2004] NSWADTAP 45. In this case, the Respondent made it clear that it was not allowing further time.

22 The Respondent submits that it attached a notation to the report as the Applicant had requested, and that notation remains attached to the report. For this reason, the Applicant already has the alternative relief that he seeks. Accordingly, his complaint is misconceived.

23 Similarly, the Respondent submits that the Applicant had been aware of the Royal Australasian and New Zealand College of Psychiatrists ("RANZCP") more than six months before he made his internal review application. The Tribunal therefore does not have jurisdiction to review the conduct.

24 The Respondent submits that the Applicant has provided no evidence to substantiate his claim that there is no record on the Board's file to the effect that the HCCC dismissed his claim. However, Ms St Hill's evidence is that there is a record on the Applicant's file to the effect that the Board's complaint to the Health Care Complaints Commission ("HCCC") was dismissed. As Ms St Hill's statement shows, there is a record of the HCCC termination of the complaint in the Board minutes dated 11 November 2008. Ms Lucy submits that this aspect of the complaint is frivolous or vexatious.

25 The Respondent submits that the Applicant's complaint concerning an "Alcohol problem" is vexatious because there is no evidence to show that it has any substance.

26 The Respondent holds a document recording the referral of the Applicant to an Impaired Registrants Panel in relation to his consumption of alcohol on 21 October 1997. The Report also records that the decision to refer the Applicant to the Impaired Registrants Panel was rescinded on 28 November 2007. The Applicant has produced no evidence to show that the record is inaccurate. The Report does not allege that the Applicant still consumes alcohol.

27 The Respondent submits that the Applicant's complaint concerning disclosure is made in very general terms and that there is no evidence to suggest that the Applicant's health or personal information was disclosed by the Board to his former landlord. The Applicant has provided no evidence to support his allegations, despite repeated requests for explanation. Accordingly, the Respondent submits, the complaint is vexatious.

28 Alternatively, the Respondent submits that if the Applicant is alleging that the Respondent

had disclosed certain information to his former landlord, as a new complaint this may be beyond the Tribunal's jurisdiction.

29 The Respondent submits that the Applicant's complaint regarding over-investigation of complaint not disclose conduct capable of breaching an information protection principle or a health privacy principle, so is misconceived. It says that even if it did, it is not a complaint raised in the internal review application, and is for both reasons outside the Tribunal's jurisdiction. It further says that the Applicant has provided no evidence to support his allegations that the Respondent contrived complaints about him. It says that even if he were to do so, this complaint does not relate to the alleged breach of an information protection principle or a health privacy principle, but rather is a complaint about the way the Respondent exercises its statutory functions. It is, accordingly, vexatious and misconceived.

30 The Respondent submits that the Applicant's 'Fishing Exercise' complaint also relates to the exercise of the Respondent's statutory functions. It does not allege a breach of an information protection principle or a health privacy principle, so is misconceived. It is not a complaint which was raised in the Applicant's internal review applications so is, in any case, beyond the Tribunal's jurisdiction.

31 The Respondent submits that the proceedings should be dismissed pursuant to section 73(5)(g)(iii) of the ADT Act, on the basis of the Applicant's failure to appear.

32 The Respondent submits that the Applicant constructively failed to appear at the first planning meeting held on 21 April 2009 and that the Applicant failed to appear in person or through a representative on 2 June 2009.

33 The Applicant's failure to appear twice, in circumstances where his claim appears to be without merit and where he has failed to respond to the Respondent's requests for clarification of his claim, constitutes grounds for dismissal.

34 The Respondent submits that the proceedings should be dismissed pursuant to section 73(5)(g)(iv) of the ADT Act, on the basis of the Applicant's failure to prosecute the proceedings. It says that the Applicant's internal review applications were not particularised and did not make clear, in relation to most of complaints in the applications, what alleged conduct the Applicant sought to have reviewed, and how such conduct was said to contravene the privacy legislation. He failed to clarify the scope and nature of his internal review applications, as he was requested to do by the Respondent before the internal review determinations were made.

35 The Respondent submits that the Applicant failed to respond to a letter from the Respondent's legal advisers seeking particulars of his claim before the planning meeting of 21 April 2009. He failed to comply with the Tribunal's direction to file and serve particulars of his claim by 8 May 2009. His failure to provide instructions to his legal representative at the planning meeting of 21 April 2009, his failure to cooperate with the Respondent's legal advisers in clarifying the scope and nature of his claim, and his failure to appear at the planning meeting of 2 June 2009, collectively constitute a failure to prosecute the proceedings.

36 In regard to its application for costs, Ms Lucy submitted that that it is fair to award costs to the Respondent, having regard to the following:

- The Applicant's failure to comply with the Tribunal's direction to particularise his claim unnecessarily disadvantaged the Respondent because it prolonged the proceedings, occasioned the Respondent further costs, and made it difficult for the Respondent to resolve the matter.
- The Respondent submits that the Applicant vexatiously conducted the proceedings

in the following ways:

- a. By pursuing complaints which he had already made to the Board years before despite knowing, through previous claims made in the Tribunal, that the Tribunal does not have jurisdiction to deal with claims made six months after the Applicant became aware of the alleged conduct;
  - b. By failing to respond to the Respondent's request to clarify the matters the subject of his applications prior to the first planning meeting (in the context of not having clarified his internal review application when requested to do so);
  - c. By failing to provide any instructions to the legal representative attending the first planning meeting;
  - d. By failing to comply with the Tribunal's direction to particularise his claim;
  - e. By copying a facsimile addressed to his legal representative to the Respondent's legal representative, as if this either constituted a response to the Respondent's request for clarification or compliance with the Tribunal's direction;
  - f. By failing to attend the second planning meeting;
  - g. By sending vexatious emails to the Respondent's legal representative, particularly those stating that he was going to write a psychiatric report about the legal representative and send it to the Legal Services Commissioner; and
  - h. By twice informing the Respondent's legal representative that the proceedings will be "subsumed" into other, larger proceedings, then indicating that he had no intention of discontinuing the present proceedings.
- The Respondent submits that the Applicant unreasonably prolonged proceedings due to factors including the Applicant's failure to appear, failure to particularise his claim and failure to cooperate.
  - The Respondent submits that the Applicant's claims are weak, and many are either outside of the Tribunal's jurisdiction or do not disclose a cause of action under the privacy legislation.
  - The Respondent submits that the Applicant is an experienced litigator in the Tribunal, and is familiar with the privacy legislation and the need to comply with the Tribunal's directions. It submits that it is also relevant that the Applicant has failed to comply with the Tribunal's directions on previous occasions.

37 Ms Lucy submits that the Respondent has already been put to significant time and expense in dealing with the Applicant's internal review applications, and previous Tribunal applications made by the Applicant in which the Applicant raised some of the same issues raised again in these proceedings. Ms St Hill's evidence is that the Respondent has incurred \$7,700 in legal costs in relation to the Applicant's internal review applications and \$7,854 in relation to these proceedings.

38 Ms Lucy submits that a substantial amount of the costs of these proceedings relates to attendance at planning meetings which did not achieve any purpose due to the Applicant's non-attendance or constructive non-attendance, dealing with vexatious correspondence from the Applicant and seeking particulars which have not been provided. She says that the Respondent is a small agency, with limited resources. In this context, the Respondent submits, it is appropriate that the Applicant pay the Respondent's costs.

#### **The Applicant's case**

39 The Applicant denies that the proceedings are "frivolous" or "vexatious" or that there were no arguable matters to resolve. He submits that the Respondent has acted upon some clarifications and suggestions made by the Tribunal and the Privacy Commissioner and that these were positive outcomes.

40 The Applicant submits that that fact that some clearly useful outcomes have been achieved

contradicts the Respondent's contention that the entire proceedings were brought on frivolously and vexatiously, and that there was no point to them.

41 He contends that this also raises an important 'costs' issue as to why the Respondent could not have acted similarly and previously by itself. He says that unnecessary costs to the community and to himself could easily have been avoided through the Respondent's common sense and co-operation. The matters were finally and easily resolved, and could have been resolved earlier if there was a will to do so.

42 The Applicant further submits that recent events have given rise to the opportunity for relevant issues to be raised in other proceedings in another division of this Tribunal and that in the circumstances it is appropriate that all issues be aired in those proceedings.

### Discussion

43 The remaining issue in these proceedings is whether an order for costs should be made. In order to determine that issue it is necessary that I form an opinion in regard to the Respondent's application for dismissal of the proceedings. In order to do so, it is necessary that I form an opinion of whether the Applicant's case was arguable. I note that the Applicant has discontinued the proceedings and consequently evidence and argument has not been presented on the substantive issues.

44 In most cases, section 88 of the ADT Act deals with question of costs which arise for determination from and after 1 January 2009. The Tribunal has, on a number of occasions, already dealt with the operation of that section. The most recent matter dealing with the issue is *Rucom Pty Ltd and Anor v Multiplex & Ors* [2010] NSWADT 1.

45 In the present matter the Respondent's case is largely that the proceedings should not have been commenced in the first place. In regard to that issue, it is my view that it is sufficient that I form an opinion of whether the Applicant had an arguable case.

46 Judicial Member Molloy observed at paragraph [37] of *Rucom*:

37 ... proceedings should only be commenced in this Tribunal after very careful consideration of the merits of the case: see *Trust Company of Australia Ltd v. Craig* [2005] NSWADT 65 at [44]. After all, commencing proceedings without such consideration inevitably results in considerable expense being incurred by the other party and one might not unreasonably ask: "why should the other party have to bear those expenses when the proceedings should not have been commenced in the first place?"

47 For present purposes, if the Applicant did not have an arguable case, the proceedings should have been dismissed. Several Tribunal decision have found that commencing proceedings, or (indeed) maintaining those proceedings when the prospects of success were, at all times, minimal or non-existent, would provide a basis for an order for costs: see *Rucom* at paragraph [55].

48 In this regard I do not agree that the Applicant's case was totally without merit. I generally agree with the respondent's case. In particular I agree with Ms Lucy that, prime facie, the Tribunal has no jurisdiction to deal with much of the Applicant's case. However, it is my view that there was some merit in the Applicant's case insofar as it concerns the psychiatric report. In my view, it is not in dispute that the Applicant had been aware of the psychiatric report for more than six months when he made his internal review application, received by the Respondent on 21 October 2008. The issue in dispute concerns the Respondent's lack of action in regard to the

psychiatric report. I do not agree that the Applicant's case was out of time in regard to that issue. Nor was it without merit.

49 I note the Applicant's submission that the Respondent has taken some action in regard to that report as a result of these proceedings and that if it had done so earlier the proceedings may have been avoided. In my view there is some merit in that argument.

50 For that reason, it is my view while the Respondent's dismissal application would have resulted in dismissal of much of the Applicant's case, it would not have been totally successful.

51 In the circumstances, it is my view that the Applicant should not be required to pay the Respondent's costs insofar as they relate to the dismissal application.

52 However, I agree with Ms Lucy that the Applicant should pay the Respondent's costs in regard to the planning meeting held on 21 April 2009 and the planning meeting held on 2 June 2009.

53 I agree that the planning meeting held on 21 April 2009 was of little value in progressing the matter because of Mr Duong's lack of instructions. The Respondent incurred costs in attending the planning meeting and it is my view that the Applicant should pay those costs.

54 Similarly, the matter was not progressed by the planning meeting held on 2 June 2009 because there was no appearance on behalf of the Applicant at that planning meeting. The Respondent incurred costs in attending the planning meeting and it is my view that the Applicant should pay those costs.

55 I note the Applicant's argument that the Tribunal and the Privacy Commissioner raised issues at those meetings and made suggestions that resulted in resolution of some issues. Notwithstanding that argument, it is my view that the Applicant could have prevented most of the Respondent's costs in attending the planning meeting if he had complied with the timetable previously set.

56 In my view, it is fair to award costs in relation to each of the planning meeting.

### **Order**

The Applicant is to pay the costs of the Respondent, as agreed or assessed, in regard to the planning meetings held on 21 April 2009 and 2 June 2009.

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