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DECISION NO. 2015-HA-002(a)

In the matter of an appeal under section 46 of the *Hospital Act*, R.S.B.C. 1996, c. 200.

BETWEEN:	Dr. David Kates	**APPELLANT**
AND:	Interior Health Authority	**RESPONDENT**
BEFORE:	A Panel of the Hospital Appeal Board Cheryl L. Vickers, Panel Chair	
DATE:	May 12, 2016	
PLACE:	Vancouver, BC	
APPEARING:	For the Appellant:	Katherine Arnold and Susan Precious, Counsel
	For the Respondent:	Penny A. Washington, Ryan Berger, and Rochelle Pauls, Counsel

DECISION ON PRELIMINARY APPLICATION

INTRODUCTION

[1] This is a preliminary application seeking direction on the scope of issues in this appeal brought by the Appellant from a July 6, 2015 decision of the Board of Directors of Interior Health Authority (the "IHA Board") declining to grant him a permit to practice at the Kelowna General Hospital ("KGH") or anywhere within the Interior Health Authority ("IHA"). The appeal is brought pursuant to section 46 of the *Hospital Act* establishing the Hospital Appeal Board ("HAB") for the purpose of providing practitioners, including doctors, appeals from a decision of a board of management that modifies, refuses, suspends, revokes or fails to renew a practitioner's permit to practise in a hospital. The appeal is scheduled for 20 days of hearing between October 24 and November 22, 2016.

[2] The Appellant has also filed a complaint with the Human Rights Tribunal (the "Tribunal") alleging discrimination in employment on the basis of physical disability contrary to section 13 of the *Human Rights Code* ("*Code*"). The IHA applied to defer the complaint under section 25 of the *Code* on the basis that another proceeding,

namely this appeal before the HAB, is capable of appropriately dealing with the substance of the complaint. In a decision rendered April 13, 2016, the Tribunal conditionally deferred the complaint on the basis that the parties advise the Tribunal on or before June 1, 2016, that proposed dates in September to November of 2016 for the hearing of this appeal have been scheduled, and that the IHA seeks a preliminary decision from the HAB regarding whether it intends to exercise its jurisdiction to apply the *Code* in the appeal. The parties have sought a ruling from the HAB on its jurisdiction to apply the *Code* in this preliminary application.

[3] The parties also seek direction related to the scope of the evidence that will be considered by the panel in this appeal.

[4] The Appellant characterizes the IHA Board's decision as either a "revocation" of privileges or a "refusal to renew" privileges following a leave of absence and thus characterizes the main issue in the appeal as whether the Appellant should be reinstated following a medical leave of absence. The Appellant says community need is not relevant. The Respondent characterizes the main issue as whether the Appellant should be granted privileges to practice at IHA's facilities. It says the HAB must consider community need. I am asked to determine as a preliminary matter what the main issue is and whether community need is relevant.

[5] The Appellant submits that events prior to July 1, 2012, which was the date of his last annual renewal of privileges prior to taking a leave of absence, ought not to be considered in the appeal. The Respondent says I ought not to restrict the scope of evidence at this stage of the proceedings. I am asked to determine on a preliminary basis whether events prior to July 1, 2012, should be considered.

ISSUES

[6] The issues for this preliminary application are:

a) What is the central issue in the appeal and is evidence of community need relevant?
b) Can the HAB consider events prior to July 1, 2012?
c) Should the HAB exercise its discretion to apply the *Human Rights Code*?

BACKGROUND

[7] This skeletal summary of key background events is not to be construed as findings of fact on any matter in issue in this appeal. It is taken from the summaries provided by counsel, and is not based on evidence. While key events appear not to be in dispute, the characterization of various events and the inferences to be drawn from them are very much in dispute. For that reason, the summary does not include much of the detail provided by counsel, so as to avoid having to make findings that characterize the events in favour of one or the other party. The exclusion of detail is not to be construed as a finding that particular events did not occur or as to their significance in determining any issues in the appeal. The summary is simply an attempt to set out the basic background as neutrally as possible.

[8] The Appellant is a nephrologist. In 1996, he was appointed to the active medical staff in the Department of Nephrology at KGH within the IHA. For 16 years, the Appellant was annually reappointed to the medical staff of KGH. On July 25, 2012, IHA confirmed the Appellant's re-appointment for the period July 1, 2012 to June 30, 2013.

[9] Prior to that, by letter dated May 24, 2011, IHA advised the Appellant that it had received complaints from staff including allegations of "not responding to calls or attending to patients, as well as verbal communication addressed in a way that was considered as intimidating, undermining confidence or demeaning to staff." Following a meeting on June 13, 2011, IHA wrote to the Appellant on June 15, 2011, setting out expectations and follow up from the complaints. A couple of incidents occurred following the letter of expectations. IHA advised the Appellant in a letter dated February 6, 2012 that it had determined no discipline was required. On May 24, 2012, IHA advised there was no anticipated need for involvement of the Health Authority Medical Advisory Committee ("HAMAC") but the "recommendations of June 15, 2011 letter…remain in place".

[10] Throughout the summer of 2012 other issues were raised and the Appellant was asked to respond to new allegations. During this time, the Appellant experienced a number of personal and work stressors and some medical issues. In this context, he was asked to attend an unscheduled meeting on September 18, 2012. The Appellant was not prepared to respond to issues raised during this meeting; voices were raised and a nurse manager felt threatened.

[11] On September 19, 2012, the Appellant took a leave of absence from KGH. On the advice of his healthcare professionals, the Appellant took a medical leave of absence from his entire practice (both hospital and office) in mid-October 2012.

[12] The IHA's Medical Staff Bylaws (the "Bylaws") provide that a member of medical staff may apply for a leave of absence for a continuous period of no longer than twelve consecutive months. IHA extended the Appellant's leave of absence for an additional 12 months beyond the 12 month period allowed in the Bylaws.

[13] Over time, and with treatment, the Appellant's medical condition improved. Through counsel in a letter dated November 23, 2013, the Appellant requested that he return to active privileges and proposed a graduated return to practice plan (the "November 2013 proposal"). By letter dated February 26, 2014 IHA's counsel advised that medical administration had considered the November 2013 proposal, but "cannot support the proposal" and "cannot recommend to HAMAC or the Board that he be returned". IHA's counsel advised it would require the matter to proceed to HAMAC and that its position before that Committee would be that the Appellant's privileges should be revoked. The Appellant suffered a relapse.

[14] At a meeting on June 24, 2014, HAMAC passed the following motions:

> Motion: That HAMAC recommend to the IHA Board of Directors the extension of [the Appellant's] leave of absence until September 19, 2014.
>
> Motion: That HAMAC recommend to the IHA Board of Directors that after September 19, 2014 [the Appellant] be given no further consideration to extend his leave of absence. At that time, his privileges will be considered lapsed.

> [The Appellant] may reapply at such time, however the current outstanding issues which are awaiting a HAMAC hearing would need to be addressed by HAMAC in consideration of any reapplication.

[15] The Appellant had no advance notice of this motion. The motion was conveyed to him through correspondence from IHA legal counsel to his legal counsel in August 2014.

[16] On September 18, 2014, through counsel, IHA was advised that the Appellant's healthcare providers and the College of Physicians and Surgeons had cleared him for a gradual return to practice. A completed Application for Review and Reappointment to Medical Staff was enclosed with that correspondence. Accommodation of the Appellant's disabilities was formally requested of IHA. Through the fall of 2014, requests were made for IHA's response to the request for accommodation of the Appellant's disabilities as well as IHA's position as to the process it would require to address the Appellant's return to practice given the medical treatment undergone by him during his leave of absence. In a letter dated December 22, 2014, IHA confirmed a HAMAC hearing would be required.

[17] A HAMAC hearing was scheduled for February 19 and 20, 2015. It was adjourned at the request of IHA to consider medical evidence produced by the Appellant.

[18] On March 18, 2015, the Appellant filed a complaint against IHA with the Tribunal, as there is a strict six month limitation period.

[19] The HAMAC hearing took place on April 22 and 23, 2015. On April 28, 2015, HAMAC recommended to the IHA Board that the Appellant not be reappointed to medical staff anywhere within the IHA. On July 2, 2015, the IHA Board approved HAMAC's recommendation. On September 16, 2015, the Appellant appealed that decision to the HAB.

DISCUSSION AND ANALYSIS

a) What is the central issue in this appeal and is community need relevant?

[20] In characterizing the issue in this appeal as whether the Appellant's privileges should be reinstated following a leave of absence, counsel for the Appellant references the vital nature of privileges for physicians and argues that when a physician is granted a leave of absence, they are entitled to return during the period of the leave of absence. In support of this proposition, counsel quotes the following paragraphs from the decision of the Ontario Superior Court of Justice in *Buttar v. Hamilton Health Sciences Corp*, 2012 ONSC 3844 in support:

> [14] The defendants say that because the action claims constructive dismissal and because Dr. Buttar says she was "forced" to take a leave of absence, that what happened here was a de facto revocation of her hospital privileges and thus the PHA [*Public Hospitals Act*] review and appeal procedures ought to have been followed.

> [15] There are a number of difficulties with this submission: no such decision was ever made; Dr. Buttar was "*granted* a leave of absence" in May, 2005 – she did not resign or walk out; and she could have returned as an Emergency Room physician whenever she felt ready to do so (provided of course that it was within the one-year appointment period). Indeed there was no evidence to the contrary. (Emphasis added)

[21] Counsel for the Appellant submits that the Appellant was on a leave of absence and was entitled to return. She submits the Appellant did not simply exercise his entitlement to return to work during the leave of absence period, but that he took the responsible step of preparing a well thought-out, thorough, good faith return to work proposal, namely the November 2013 proposal, with the aim of ensuring a smooth return for himself, his colleagues and his patients. Counsel submits IHA blocked the Appellant's return and instead forged ahead to HAMAC on a disciplinary path to revoke his privileges. She submits this was an incorrect approach. Counsel for IHA submits the Appellant was well aware while he was on leave that an investigation relating to various issues and complaints was ongoing, and that he knew HAMAC would have to deal with these concerns before he returned. She submits the HAMAC process was adjourned because the Appellant was too ill to participate.

[22] An appeal before the HAB is a new hearing (*Hospital Act*, section 46(2.3)). It is a *de novo* proceeding where the HAB is to place itself in the shoes of the original decision maker (*Dr. Timothy Ng. v. Richmond Health Services Society*, February 6, 2003, Hospital Appeal Board). The hearing before the HAB "is intended to provide a new hearing on the merits, taking into account all the evidence including the manner in which privileges are addressed in the Medical Staff By-laws, following which the HAB must make its own determination regarding the Appellant's privileges" (*Ng, supra*).

[23] Under the Bylaws, each member of medical staff shall have his or her appointment and privileges reviewed on an annual basis (Bylaw 4.4.1). There is no automatic right to renewal of privileges. The authorities reiterate that a permit to practice within a hospital is a privilege and not a right (*Ng, supra*; *Dr. Y v. Z, a Health Authority*, September 28, 2007, Hospital Appeal Board).

[24] The authorities and other studies and reports also reiterate the importance of privileges to physicians and the calamitous consequences of having them altered or revoked. Bearing in mind the importance of privileges to the Appellant, the HAB must afford him a high degree of procedural fairness.

[25] On an appeal from a decision respecting privileges, whether following a first time application, on an annual review or in circumstances where privileges have been revoked, the HAB must place itself in the shoes of the original board and consider the terms of appointment and criteria for membership set out in the Bylaws. In accordance with Bylaw 3.1.5, appointments to medical staff are dependent on the "human resource requirements of the facilities and programs operated by the Health Authority", "the needs of the population served by the Health Authority, and "the ability of Health Authority's resources to accommodate the appointment". In accordance with Bylaw 3.2.2, applicants must, among other criteria, "demonstrate the ability to provide patient care at an appropriate level of

quality and efficiency" and "demonstrate the ability to communicate and work with colleagues and staff in a cooperative and professional manner".

[26] Members of medical staff must have their privileges reviewed on an annual basis in accordance with Bylaw 4.4.1. The "review process may involve an in-depth performance evaluation of the member" in accordance with Bylaw 4.4.4. The Bylaws also set out provisions for discipline and appeal.

[27] In making a decision respecting a physician's privileges, whether on an initial application, in the context of an annual review, or in the context of disciplinary action, the importance of privileges to the physician must be remembered and a high degree of procedural fairness observed. But the issue will always be whether privileges should be granted considering the requirements set out in the Bylaws, the evidence in the particular case, and on a careful consideration and balancing of the interests of both the hospital authority and the physician. Community need, being one of the factors that must be considered under the Bylaws, is relevant. The relative balancing of the various factors set out in the Bylaws and the competing interests of the health authority and the physician will be determined by the panel on a proper weighing of all of the evidence in determining the facts of each case and the appropriate characterization of events.

[28] In this case, the characterization of events is in dispute. What can be said however is that whether or not the Appellant could or should have been allowed to go right back to work in November 2013 or thereafter, and whether he should on this appeal be granted a *remedy* based on what happened in the past – a matter on which I do not rule and which will be addressed on the appeal itself after hearing full arguments and all the evidence – events in the real world took a different path after the period of leave expired. By the time the board of management made its decision in July 2015, the Appellant's leave of absence was over, and the question whether he should be granted privileges *going forward* was a live issue from the perspective of the board of management. Importantly, the board of management's decision is the only decision that can be appealed to the HAB.

[29] I wish to make it clear that I am not foreclosing the Appellant's ability to argue that events that took place in relation to the leave of absence justifies a remedy that overrides other factors, including factors regarding community need. However, I am not prepared on this preliminary application to categorically exclude that evidence as being irrelevant to this appeal. That would artificially limit the scope of the appeal given the HAB's role.

b) Can the HAB consider events prior to July 1, 2012?

[30] IHA's Reply to the Appellant's Notice of Appeal references unspecified concerns dating back to 1998. It also alleges that between 2010 and 2012 there were numerous concerns with respect to both the Appellant's conduct and the quality of care he provided to patients.

[31] The Appellant argues that events prior to July 1, 2012, being the date of the Appellant's last annual review prior to him going on a leave of absence in September 2012, are not relevant to this appeal. Counsel refers to the authorities finding delay in administrative processes to be a breach of procedural fairness in

arguing that it would be unfair to consider events prior to the last annual review. With reference to the January 2016 Sharp Report respecting doctors at the Capital District Health Authority and Dalhousie University in Halifax, counsel argues it is not appropriate to deal with longstanding issues if they could have been dealt with during a normal review. Counsel argues any issues prior to July 25, 2012 ought to have been processed as part of that annual review process.

[32] Counsel for IHA argues that earlier events are not referred to in an effort to pursue disciplinary proceedings for those earlier events, but to demonstrate a pattern of behavior that IHA sought to remediate in response to the medical evidence provided by the Appellant that his behavior was explicable due to a medical condition. Of course neither evidence of any specific events, nor the medical evidence is before me at this time, so it is not possible to assess whether evidence is properly responsive to the medical evidence. To the extent it is, however, it may be relevant in addressing some of the criteria that must be demonstrated by an applicant for a permit to practice under the Bylaws. It is best left to the panel hearing the merits of the appeal to rule on the relevancy of any particular events.

[33] Further, the IHA submits that the HAB's Rules of Practice and Procedure specifically require that the HAB be provided with "a copy of the decision of the Board of management under appeal and the record relating to the decision." The "record" is defined in the HAB's Rules as "all documentation, including hospital committee reports referred to in that documentation that was before a board of management when the decision was made".

[34] To the extent the record may contain evidence of events prior to July 1, 2012, that evidence will be before the HAB. The panel hearing the merits of the appeal will have to consider that evidence and determine its relevance and weight. None of this evidence is before me at this time, and it would be improper for me to fetter the panel hearing the merits of the appeal by making any ruling on the relevance of any evidence that will be before it as part of the record, or that may be tendered specifically to address issues in this appeal.

[35] As I have found above, however, the issue is whether the Appellant should be granted a permit to practice in IHA's facilities considering all of the requirements set out in the Bylaws and in the particular circumstances of this case. The panel must put itself in the shoes of the IHA Board and consider any and all evidence before it relevant to the various requirements in the Bylaws. The relevance and weight of any particular evidence of events occurring before or after July 1, 2012, to that inquiry should be left to the panel hearing the merits of the appeal.

c) Should the HAB exercise its discretion to apply the *Human Rights Code*?

[36] Both parties submit that the HAB has the jurisdiction to apply the *Code* and the discretion to decline to apply the *Code* in this appeal. I agree.

[37] Section 46(4.2) of the *Hospital Act* sets out the provisions of the *Administrative Tribunals Act* that apply to the HAB. One of those sections is section 46.2 which provides:

Limited jurisdiction and discretion to decline jurisdiction to apply the *Human Rights Code*

46.2 (1) Subject to subsection (2), the tribunal may decline jurisdiction to apply the *Human Rights Code* in any matter before it.

(2) The tribunal does not have jurisdiction over a question of whether there is a conflict between the *Human Rights Code* and any other enactment.

(3) Without limiting the matters the tribunal may consider when determining whether to decline jurisdiction under subsection (1), the tribunal may consider whether, in the circumstances, there is a more appropriate forum in which the *Human Rights Code* may be applied.

(4) This section applies to all applications made before, on or after the date that this section applies to a tribunal.

[38] Both parties submit that the HAB, which has jurisdiction to apply the *Code*, should not "decline jurisdiction" to apply the *Code*. I agree.

[39] The *Hospital Act* gives the HAB exclusive jurisdiction to inquire into, hear and determine all those matters of fact, law and discretion arising or required to be determined in an appeal (section 46(3)). The Appellant has raised human rights issues in the context of the appeal from the IHA Board's decision denying him a permit to practice alleging that he has been discriminated against in employment on the basis of disability and that the IHA has failed in its duty to accommodate his disability. As a specialized tribunal with the mandate to consider all of the various interests at play in determining whether a physician should be granted a permit to practice, the HAB is in the best position to consider how the human rights issues raised by the Appellant, such as the IHA's duty to accommodate, interact with all of the other factors that it must consider in determining the appeal. The remedy sought by the Appellant that he be granted privileges to practice at KGH is a remedy within the jurisdiction of the HAB to grant, and is arguably not within the jurisdiction of the Human Rights Tribunal. The HAB is permitted to consider evidence that would be prohibited from production before the Tribunal under section 51 of the *Evidence Act*. These proceedings are at a more advanced stage than the Tribunal's proceedings, with a hearing scheduled for the fall of this year. All of these factors weigh in favour of the HAB exercising its discretion to apply the *Code* in this appeal.

[40] While agreeing the HAB should exercise its discretion to apply the *Code*, the parties disagree on whether the *Code*, in fact, applies. The Appellant alleges discrimination in employment on the ground of disability contrary to section 13 of the *Code*. Counsel for IHA says it will take the position at the hearing of the appeal that the relationship between the parties is not an "employment" relationship for the purposes of the *Code* and that the *Code*, therefore, does not apply. Counsel submits I cannot determine the *Code* applies in the absence of evidence relating to the relationship between the parties. Counsel for the Appellant submits there is an "employment" relationship for the purposes of the *Code* and, with reference to various authorities, submits that I can determine that the *Code* applies now.

[41] Section 13(1) of the *Code* prohibits discrimination "against a person regarding employment or any term or condition of employment". The *Code* is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes. Discrimination "regarding employment" is broadly and purposively defined (*McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39). "Employment" for the purposes of the *Code* is defined inclusively and a traditional employer-employee relationship is not required to invoke the *Code's* protection (*Hunter v. Centanni Tile*, 2012 BCHRT 38). There are a number of factors or considerations which may be relevant in determining whether a relationship is one of "employment" as contemplated by the *Code*, including whether the alleged employer utilized or gained some benefit from the employee, whether the alleged employer exercised control over the employee, whether the alleged employer bore the burden of remunerating the employee and whether the ability to remedy any discrimination lay with the alleged employer (*Crane v. British Columbia (Ministry of Health Services)* 2005 BCHRT).

[42] Counsel for the Appellant says the relationship between the Appellant and IHA was "employment-like" and that the *Code* applies. She relies on the British Columbia Supreme Court's decision in *Khan v. Vernon Jubilee and Interior Health Authority*, 2008 BCSC 1637 finding an "employment-like" relationship between Dr. Kahn and the IHA in an action for negligent misrepresentation and breach of contract. In *Kahn, supra*, the Court had to determine whether there was an "employment-like" relationship between the parties to determine the existence of an implied term of reasonable notice of termination. Considering factors including the level of control, who owned the "tools" of the business, the intended duration of the relationship, and the degree of economic reliance by the plaintiff doctor on the defendant hospital and health authority, the Court concluded there was an "employment-like relationship" and that the defendants were liable to the doctor for failing to provide reasonable notice, or payment in lieu of, for actions amounting to constructive dismissal. Counsel submits the relationship between the Appellant and the IHA is the same, and I can likewise find there is an "employment-like" relationship for the purposes of the *Code* given that the test for determining whether there is "employment" for the purposes of applying the *Code* is even broader. She submits that the provisions of the *Administrative Tribunals Act* granting the HAB jurisdiction to apply the *Code* would be meaningless unless it was the legislative intent that the *Code* would apply to the relationship between doctors and health authorities and to appeals under the *Hospital Act*.

[43] In argument before me, the IHA either disputes that the relationship between the Appellant and IHA is in all respects the same as that between Dr. Khan and the defendants in the *Kahn* case, or says it does not have sufficient information, particularly with respect to the degree of economic reliance, to agree that an employment-like relationship exists for the purposes of the *Code*. Counsel for IHA submits the issue of whether the relationship constitutes "employment" for the purposes of the *Code* is a question of mixed fact and law and that I cannot make that determination without evidence.

[44] I note that the *Kahn* decision is not a Human Rights case and does not establish as a matter of law, that for the purposes of applying the *Code*, that the relationship between doctors and health authorities is an "employment relationship".

[45] The Human Rights Tribunal authorities dealing with the application of section 13 and applying the factors set out in *Crane, supra*, reiterate that applying the various factors will depend on the circumstances of each case. As the Tribunal said in *Crane, supra*, "It should go without saying that the relative weight to be given to these four, and any other relevant factors, will depend on the particular factual context in which the issue arises." (para. [80]). Or, as the Tribunal said in *Kelly v. UBC (No. 3)*, 2012 BCHRT 32 at paragraph [474]: "Each case must be determined on its own facts".

[46] While the HAB is prepared to exercise its jurisdiction to apply the *Code* in this appeal, I am not able to determine on this preliminary application, without the benefit of evidence relating to the factors relevant to the legal test of "employment" for the purposes of the *Code*, that the *Code* in fact applies.

DECISION

[47] In response to the particular issues raised in this preliminary application, I find as follows:

a) The central issue in this appeal is whether the Appellant should be granted a permit to practice in IHA's facilities considering all of the requirements set out in the Bylaws, and in the particular circumstances of this case. Community need is relevant. The relative balancing of the various factors set out in the Bylaws and the competing interests of the health authority and the physician will be determined by the panel on a proper weighing of all of the evidence in determining the facts and the appropriate characterization of events in this case.

b) It will be for the panel to determine the relevance and weight of any events prior to July 1, 2012.

c) The HAB will exercise its jurisdiction to apply the *Human Rights Code* if, on the evidence, it determines the *Code* applies. The HAB cannot make that determination in the absence of evidence.

" Cheryl Vickers"

Cheryl L. Vickers, Panel Chair
Hospital Appeal Board

May 25, 2016