



Hospital Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923
Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1
Website: www.hab.gov.ca
E-mail: hab@gov.bc.ca

DECISION NO. 2018-HA-002(a)

In the matter of an appeal under section 46 of the *Hospital Act*, RSBC 1996, c 200.

BETWEEN: Dr. Andrew Campbell **APPELLANT**

AND: Provincial Health Services Association **RESPONDENT**

BEFORE: A Panel of the Hospital Appeal Board, David Perry, Chair

DATE: Conducted by way of written submissions concluding on June 18, 2018

APPEARING: For the Appellant: Nevin Fishman, Counsel
Susan Precious, Counsel

For the Respondent: Penny Washington, Counsel
Ryan Berger, Counsel
Kayla Strong, Counsel

Preliminary Decision on Jurisdiction

BACKGROUND

[1] This is an appeal brought by Dr. Andrew Campbell following the termination of his contract for services with the Respondent, Provincial Health Services Association. Dr. Campbell had contracted to provide neonatal surgical services at BC Children's Hospital ("BCCH"). His contract was terminated on March 14, 2018, following the provision of 12 months' notice.

[2] Dr. Campbell subsequently sought a hearing before the Board of Directors of the Respondent. This request was refused by letter, dated December 18, 2017, which stated "[t]ermination of contracts is an operational decision which the Board has delegated to administration."

[3] The Respondent has raised a preliminary objection. It submits the Hospital Appeal Board (the "HAB") has no jurisdiction to hear the appeal because termination of the contract has no effect on Dr. Campbell's privileges. It submits that contractual issues are operational and not subject to appeal.

[4] The Respondent argues that the question of jurisdiction is a question of "pure law" which should be determined prior to a hearing on the merits.

[5] The Appellant disagrees that the question of jurisdiction is one of pure law, and instead characterizes the question as a matter of mixed law and fact. Although the Appellant concedes that when a question of jurisdiction has been raised by a party it should be addressed by the Board on a preliminary basis, he also argues that as a question of mixed fact and law the matter should be determined at the hearing, and not before.

[6] Following a pre-hearing conference, the parties were directed to produce submissions on the preliminary objection, not to exceed four pages in length. Neither party adhered to this direction, with both parties' submissions exceeding the length ordered. However, I have considered the submissions as a whole.

[7] For the reasons that follow, I have decided that it is not appropriate in this case to decide the jurisdictional issue raised by the Respondent prior to a full hearing on the merits.

ANALYSIS

[8] The complicated facts behind this appeal are reflected in the Appellant's Notice of Appeal and Statement of Facts, affidavits submitted by both parties, and the existence of parallel proceedings between the parties before an arbitrator who is apparently addressing breach of contract issues pursuant to an arbitration clause in the Appellant's contract for services.

[9] The Appellant has objected to the HAB's consideration of portions of the Respondent's submissions having to do with the outstanding arbitration proceedings. Although I have not relied on the material provided, I have reviewed it. As I have found that the issue of jurisdiction can only be determined on the basis of a full evidentiary record, I will defer to the panel hearing this matter to make evidentiary rulings with respect to admissible documents.

[10] The HAB's jurisdiction to hear this appeal is contained in sections 46(1)-(2.2) of the *Hospital Act*, RSBC 1996, c 200 as follows:

Hospital Appeal Board

46 (1)The Hospital Appeal Board, consisting of the members appointed under subsection (4), is continued for the purpose of providing practitioners appeals from

(a) 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, or

(b) the failure or refusal of a board of management to consider and decide on an application for a permit.

(1.1) and (1.2)[Repealed 2004-45-102.]

(2)The Hospital Appeal Board may affirm, vary, reverse or substitute its own decision for that of a board of management on the terms and conditions it considers appropriate.

(2.1)A practitioner may appeal to the Hospital Appeal Board if

- (a) the practitioner is dissatisfied with the decision of a hospital's board, or
- (b) a hospital's board fails to notify the practitioner of its decision within the prescribed time.

(2.2) A practitioner who wishes to appeal under subsection (2.1) is not required to first proceed by way of an application to the hospital's board.

[11] The Appellant argues the decision to terminate his contract, which was subsequently at least tacitly approved by the Board (as they declined to disturb the decision), has had an effect on his practice to permit. He argues the conduct of the Respondent during the term of his contract, as well as during and after the termination of his contract, has had the effect of severely restricting his ability to practice in the area of neonatal cardiac surgery. However, the Respondent submits that Dr. Campbell continues to have hospital privileges, and the contractual relationship between him and the Respondent is a private matter which is not subject to appeal.

[12] This issue is apparently one of first instance in BC, although the Respondent submits that similar issues have been addressed at the appellate level in other provinces: *Ready v Saskatoon Regional Health Authority*, 2017 SKCA 20 (*Ready*); *Horne v Queen Elizabeth II Health Sciences Centre*, 2018 NSCA 20 (*Horne*). The Appellant has purported to distinguish *Ready* based on what he submits are contractual differences in language. Given that I have determined that this objection to jurisdiction cannot be appropriately determined in the absence of a full hearing, I decline to comment further on these arguments. I likewise decline to comment on the various alternative submissions made by the parties, including various procedural objections made by the Appellant to the process whereby his contract was terminated, and including the Appellant's submission that the conduct of the Respondent has resulted in a "constructive revocation of privileges."

[13] It is settled law that a statutory tribunal faced with a challenge to its jurisdiction must make a determination before proceeding further (*Sorokan v Fraser Health Authority*, Decision No. 2014-HA-002(a); *Butler v Vancouver Coastal Health Authority*, Decision No. 2015-HA-003(a); *Hicks v Fraser Health Authority*, May 11, 2011). Both parties concede this is required.

[14] Where the parties differ, is whether the question of the HAB's jurisdiction over this matter is one of pure law which can be settled in the absence of a full evidentiary record, or whether it is one of mixed law and fact which requires an oral hearing before being determined.

[15] The parties have dedicated significant resources to this preliminary objection. The Respondent makes the very strong submission that for the HAB to accept jurisdiction "would represent an unprecedented intrusion into the operational decisions of a health authority." The Appellant submits that without an opportunity to present his entire case, his statutory right of appeal against a decision affecting his permit to practice would have significant professional and economic consequences for him.

[16] I am not convinced that this objection is one of “pure law” that can be determined in the absence of a full evidentiary record. Although the Respondent maintains that the Appellant’s privileges remain intact despite the termination of the contract, the Appellant has raised the issue of “constructive revocation of privileges”, which he argues has taken place in the present case through the change in the “allocation of facilities or resources” at BCCH. A proper understanding of whether and how the Appellant’s privileges have been affected both prior and subsequent to termination of the contract requires not only analysis of the terms of the contract, but also analysis of the surrounding factual context. Following *Hicks*; *Sorokan* and *Butler*, I find that this issue can only be properly resolved after a consideration of the evidence.

[17] There is also the potentially fraught issue of the possibility for inconsistent decisions between the HAB and the arbitrator tasked with determining the breach of contract claims by the Appellant. This is a potential problem that should be addressed by the panel hearing this appeal, and may require one of the proceedings to be stayed pending resolution of the other.

DECISION

[18] The preliminary objection is dismissed with leave to the Respondent to maintain the objection at the full hearing.

“David Perry”

David Perry, Chair
Hospital Appeal Board

September 21, 2018