

Reference No. HRRT 004/2014

UNDER SECTION 50 OF THE HEALTH AND
DISABILITY COMMISSIONER ACT 1994

BETWEEN GARY LANCE GRAVATT

PLAINTIFF

AND DAVID BULMER

DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr GJ Cook JP, Member

Mr BK Neeson, Member

REPRESENTATION:

Mr GL Gravatt in person

Mr WG Manning for defendant

DATE OF DECISION: 1 September 2014

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM

Introduction

[1] On 8 July 2009 Mr Gravatt's son, Zachary Gravatt (Zachary) died suddenly at Auckland Hospital of meningococcal septicaemia which was not diagnosed in a timely fashion. Dr Bulmer was the referring GP who earlier in the day had arranged for Zachary's transfer to hospital.

[2] In proceedings brought under s 51 of the Health and Disability Commissioner Act 1994 (HDC Act) Mr Gravatt alleges that Dr Bulmer breached the Code of Health and Disability Services Consumers' Rights (the Code of Rights) by failing to record in his clinical notes or hospital referral letter Zachary's blood pressure and pulse. In making this allegation Mr Gravatt relies on a report dated 1 November 2012 from Dr David

Maplesden, the Health and Disability Commissioner's in-house clinical adviser whose two conclusions were:

[2.1] The clinical management of Zachary by Dr Bulmer on 8 July 2009 was consistent with expected standards.

[2.2] The standard of clinical documentation was "mildly deficient".

[3] The remedies sought by Mr Gravatt in the statement of claim are an apology from Dr Bulmer, compensation for hurt, stress and humiliation together with compensation for Mr Gravatt's health and his loss of employment.

The appearance under protest to jurisdiction

[4] Dr Bulmer appears under protest to object to the jurisdiction of the Tribunal to hear and determine these proceedings. The grounds are:

[4.1] As there has been no finding by the Health and Disability Commissioner that Dr Bulmer breached the Code of Rights, the Tribunal has no jurisdiction to hear the case.

[4.2] Mr Gravatt is not an "aggrieved person" under the HDC Act and therefore has no standing to bring these proceedings.

[5] We address the jurisdiction challenge before turning to the issue of standing.

The challenge to jurisdiction

[6] For Dr Bulmer it is submitted that an aggrieved person who brings proceedings must show:

[6.1] That the proposed defendant is a person to whom s 50 of the HDC Act applies ie is a provider in respect of whom **an investigation has been conducted** under Part 4 of the HDC Act in relation to any action alleged to be in breach of the Code of Rights; and

[6.2] That the Health and Disability Commissioner has **found a breach of the Code** on the part of the provider; and

[6.3] That the Commissioner has not referred the person to the Director of Proceedings under s 45(2)(f) of the HDC Act **or** that the Director has declined or failed to take proceedings.

[7] Dr Bulmer points out that the evidence shows not only that there was no investigation but also no finding by the Commissioner that he (Dr Bulmer) breached the Code of Rights.

[8] In response Mr Gravatt argues that there was an investigation by the Commissioner and that a finding was made that Dr Bulmer breached the Code of Rights. Mr Gravatt's submissions also appear to suggest that if Dr Bulmer's interpretation of the facts is correct, the Commissioner acted unreasonably in failing to carry out an investigation and in failing to conclude that a breach of the Code of Rights occurred. As to this alternative argument the Tribunal has no jurisdiction to engage in a judicial review of the Commissioner's decisions. Such jurisdiction belongs to the High Court alone.

[9] To resolve this dispute we turn to the evidence.

[10] It is common ground that the Commissioner has not referred Dr Bulmer to the Director of Proceedings under s 45(2)(f) of the HDC Act.

THE EVIDENCE

[11] By letter dated 9 March 2012 the Health and Disability Commissioner wrote to Dr Bulmer advising that the Commissioner had received a complaint from Mr Gravatt about the care provided by Dr Bulmer to Zachary. We do not intend setting out the letter in full. We reproduce only the three paragraphs relevant to the jurisdiction issue. In those paragraphs it can be seen that the Commissioner does not give notice of an investigation. Rather, the Commissioner refers specifically to the gathering of information to allow the Commissioner to decide what action, if any, to take. This language becomes significant when determining whether the Commissioner was at this stage making a **preliminary assessment** of the complaint or whether the Commissioner was actually **investigating** the complaint:

One of the Commissioner's functions, as set out under section 14(1)(m) of the Health and Disability Commissioner Act 1994, is "*to gather such information as in the Commissioner's opinion will assist the Commissioner in carrying out the Commissioner's functions under this Act*".

To assist the Commissioner to decide what action, if any, to take on this matter, we would appreciate receiving a response to the issues raised in Mr Gravatt's complaint, and comments about the Coroner's findings, particularly in relation to differential diagnosis of meningococcal septicaemia. Please provide this information by 30 March 2012.

Once this information has been reviewed, and a decision made on what action to take on this complaint, we will write to you again.

[12] On 14 May 2012 Dr Bulmer provided the Commissioner with a detailed response.

[13] On 1 November 2012 Dr Maplesden provided a report to the Commissioner in which he (Dr Maplesden) concluded that the clinical management of Zachary by Dr Bulmer on 8 July 2009 was consistent with expected standards and that the standard of clinical documentation was mildly deficient (as mentioned above).

[14] By letter dated 21 December 2012 the Health and Disability Commissioner advised Dr Bulmer that a decision had been made under s 38(1) of the HDC Act that no further action would be taken on Mr Gravatt's complaint. The letter was in the following terms:

I write further to Dr Lance Gravatt's complaint about the care provided to his son, Zachary, by your client, Dr David Bulmer. I apologise for the delay in writing to you again.

After carefully reviewing all information on file, I have made a decision, in accordance with section 38(1) of the Health and Disability Commissioner Act 1994, to take no further action on this aspect of Dr Gravatt's complaint. I have attached the relevant parts of my letter to Dr Gravatt explaining the reasons for my decision in more detail. Parts of this letter have been excluded as they relate to other providers involved in Dr Gravatt's complaint. I also enclose the advice I received from my in-house clinical advisor, Dr David Maplesden, who I asked to comment on Dr Bulmer's care.

[15] The contemporaneous letter from the Commissioner to Mr Gravatt relevantly stated:

What happened to Zachary was tragic and I can only imagine how devastating it must have been, and continues to be, for you. However, Dr Maplesden has carefully examined all the information on file and concluded that the care provided to him by Dr Bulmer was reasonable in the circumstances. Therefore, I have made a decision, in accordance with section 38(1) of the Health and Disability Commissioner Act 1994, to take no further action on your complaint about Dr Bulmer.

[16] Asked by the Tribunal to comment on the jurisdiction issue the Health and Disability Commissioner by letter dated 12 March 2014 advised that the Commissioner had not conducted a formal investigation into Mr Gravatt's complaint and no finding had been made as to whether Dr Bulmer breached the Code of Rights:

As you know, section 51 of the Health and Disability Commissioner Act 1994 (the HDC Act) allows an "aggrieved person" to bring proceedings before the Tribunal against any person to whom section 50 of the HDC Act applies. Section 50 applies to any health or disability service provider that the Commissioner has formally investigated and found in breach of the Code of Health and Disability Services Consumers' Rights (the Code).

As you will note from the Deputy Commissioner's letter, dated 21 December 2012, she decided to take no further action on Mr Gravatt's complaint about Dr David Bulmer under section 38(1) of the HDC Act. There was no formal investigation into Mr Gravatt's complaint and therefore no finding was made as to whether Dr Bulmer breached the Code.

[17] We now address the statutory provisions referred to in the correspondence.

JURISDICTION

The preliminary assessment

[18] Complaints, preliminary assessments and investigations are governed by the new Part 4 of the HDC Act as inserted by the Health and Disability Commissioner Amendment Act 2003. This Act gave effect to recommendations in the report by H Cull QC *Review of Processes Concerning Adverse Medical Events* (Wellington, Ministry of Health, 2001) and granted the Commissioner greater flexibility in handling complaints. There is an initial **preliminary assessment** stage at the conclusion of which the Commissioner has a range of options, one of which is to carry out an investigation. If an **investigation** is conducted, the Commissioner has a further range of options at its conclusion.

[19] As pointed out by Ron Paterson, former Health and Disability Commissioner, in "Assessment and Investigation of Complaints" in Skegg and Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) at [22.2.5], at the conclusion of the **preliminary assessment** the Commissioner may refer the complaint to another agency, refer the complaint to the provider, refer the complaint to an advocate, call a mediation conference, take no action on the complaint or investigate the complaint. See s 33 which provides:

33 Preliminary assessment

- (1) As soon as reasonably practicable after receiving a complaint, the Commissioner must make a preliminary assessment of the complaint to decide—
 - (a) whether to take 1 or more of the following courses of action:
 - (i) to refer the complaint to an agency or person in accordance with section 34 or section 36:
 - (ii) to refer the complaint to an advocate:
 - (iii) to call a conference, under section 61, of the parties concerned:
 - (iv) to investigate the complaint himself or herself; or
 - (b) whether to take no action on the complaint.
- (2) The Commissioner must promptly notify the complainant and the health care provider or the disability services provider to whom the complaint relates of the Commissioner's preliminary assessment.
- (3) This section does not preclude the Commissioner from revising a preliminary assessment and from subsequently exercising 1 or more of his or her other powers in relation to the complaint concerned.
- (4) If the Commissioner revises a preliminary assessment, the Commissioner must promptly notify the following persons and agencies of the revised assessment:
 - (a) the complainant:

- (b) the health care provider or the disability services provider to whom the complaint relates:
- (c) any agency or any person to whom the complaint has, in accordance with section 34 or section 36, been referred:
- (d) any advocate to whom the complaint has been referred.

Investigations

[20] Mr Paterson observes at op cit [22.2.5] that in practice, investigations are reserved for a minority of more serious complaints that are not suitable for resolution by other means and where further action appears appropriate.

[21] Given the serious consequences which can flow from a decision to investigate (eg disciplinary proceedings before a professional body and proceedings before the Tribunal), the HDC Act prescribes a formal, highly structured process for any investigation which follows on from a preliminary assessment. In particular s 41 requires the Commissioner to give to the provider written notice of intention to investigate and that notice must inform the provider of the details of the complaint. The provider has a right to submit a written response within 15 working days of the date of the notice. Where an investigation directly concerns a health practitioner, s 42(1) requires the Commissioner to give prompt notice of the investigation to the appropriate registration authority. We address shortly the significance of the fact that none of these steps were taken in the present case.

[22] At the end of an investigation the Commissioner cannot publish any report or recommendation adverse to any person unless that person has been given a reasonable opportunity to be heard and to make a written statement in answer to the adverse comment. See HDC Act s 67. This duty is discharged by the provision by the Commissioner of a provisional opinion on which the parties may comment.

[23] At the conclusion of the investigation the Commissioner is under a duty (s 43(1)) to advise the results of the investigation and what, if any, further action he or she proposes to take. As observed by Mr Paterson at op cit [22.3.9], the critical finding to be made by the Commissioner at the end of an investigation is whether the provider's conduct breached the Code of Rights. The Commissioner must set out the basis for that finding. So long as there is a finding that the provider was in breach of the Code of Rights, the Commissioner has a wide range of recommendatory, reporting and referral powers. See s 45:

45 Procedure after investigation

- (1) This section applies if, after making an investigation under this Part, the Commissioner is of the opinion that any action that was the subject matter of the investigation—
 - (a) was in breach of the Code; or
 - (b) in the case of an action of a health practitioner that was taken at a time before 1 July 1996, affected a health consumer and was, at the time that it was taken, a ground for bringing disciplinary proceedings against the health practitioner under a former health registration enactment.
- (2) If this section applies, the Commissioner may do all or any of the following:
 - (a) report the Commissioner's opinion, with reasons, to any health care provider or disability services provider whose action was the subject matter of the investigation, and may make any recommendations as the Commissioner thinks fit:
 - (b) report the Commissioner's opinion, with reasons, together with any recommendations that the Commissioner thinks fit, to all or any of the following:
 - (i) any authority or professional body:
 - (ii) the Accident Compensation Corporation:
 - (iii) any other person that the Commissioner considers appropriate:
 - (c) make any report to the Minister that the Commissioner thinks fit:
 - (d) make a complaint to any authority in respect of any person:

- (e) if any person wishes to make such a complaint, assist that person to do so:
- (f) refer 1 or more health care providers or disability services providers to the Director of Proceedings for the purpose of deciding whether any 1 or more of the following actions should be taken in relation to those providers:
 - (i) any of the actions contemplated by section 47:
 - (ii) the institution of proceedings under section 50:
 - (iii) the institution of disciplinary proceedings.
- (3) On referring 1 or more health care providers or disability services providers to the Director of Proceedings under subsection (2)(f), the Commissioner must advise the Director of Proceedings of any relevant factors of the kind specified in section 44(3).
- (4) Subsection (2)(f)(ii) does not apply if this section applies because of subsection (1)(b).

[24] Only after the Part 4 statutory processes relating to the preliminary assessment and any subsequent investigation have been followed may proceedings before the Tribunal be taken and then only if the Health and Disability Commissioner has found that the provider has breached the Code of Rights.

[25] For these reasons the Commissioner has properly been described as a “gatekeeper” in respect of all proceedings that can be brought under the HDC Act to the Tribunal. See *Perfect v Bay of Plenty District Health Board* [2004] NZHRRT 3 (4 March 2004) at [40] and [44] to [46].

Transiting from the investigation to proceedings before the Tribunal

[26] An aggrieved person (ie the patient or a person authorised to act on his or her behalf) may bring proceedings before the Tribunal only if the person against whom the proceedings are brought is a provider in respect of whom an investigation has been conducted under Part 4. See s 51 of the HDC Act:

51 Aggrieved person may bring proceedings before Tribunal

Notwithstanding section 50(2) but subject to section 53, the aggrieved person (whether personally or by any person authorised to act on his or her behalf) may bring proceedings before the Tribunal against a person to whom section 50 applies if he or she wishes to do so, and—

- (a) the Commissioner, having found a breach of the Code on the part of the person to whom that section applies, has not referred the person to the Director of Proceedings under section 45(2)(f); or
- (b) the Director of Proceedings declines or fails to take proceedings.

[27] The persons to whom s 50 of the HDC Act applies are described in s 50(1) in the following terms:

- (1) This section applies to any health care provider or disability services provider in respect of whom or of which an investigation has been conducted under this Part in relation to any action alleged to be in breach of the Code.

[28] It follows that Dr Bulmer is correct in submitting that an aggrieved person who brings proceedings must accordingly show:

[28.1] That the proposed defendant is a person to whom s 50 of the HDC Act applies ie is a provider in respect of whom **an investigation has been conducted** under Part 4 of the HDC Act in relation to any action alleged to be in breach of the Code of Rights; and

[28.2] That the Health and Disability Commissioner has **found a breach of the Code** on the part of the provider; and

[28.3] That the Commissioner has not referred the person to the Director of Proceedings under s 45(2)(f) of the HDC Act **or** that the Director has declined or failed to take proceedings.

[29] It is inescapable that the “investigation” referred to is the formal investigation of which notice has been given under ss 40 and 41 and which has been conducted under Part 4, not the preliminary assessment under s 33. It is equally incontestable that the prerequisite of a finding by the Commissioner that a breach of the Code of Rights has occurred is a reference to a finding made by the Commissioner as a consequence of the investigation, not an assertion by the aggrieved person or an inference sought to be drawn by the aggrieved person from the evidence considered by the Commissioner either in the course of the preliminary assessment or in the course of the investigation itself.

The evidence – analysis

[30] The two documents of critical importance are the letters sent by the Health and Disability Commissioner to Dr Bulmer on 9 March 2012 and 21 December 2012 respectively. In our view they are capable of one reading only namely, that after a preliminary assessment of the complaint the Commissioner did not proceed to the investigation stage. See particularly:

[30.1] The initial letter (dated 9 March 2012) makes specific reference to the Commissioner’s function in s 14(1)(m) “to gather” information to assist the Commissioner to decide what action, if any, to take on this matter. The information gathering nature of this preliminary step is emphasised by the final paragraph which states that once the requested information had been reviewed, a decision would be made “on what action to take on this complaint”. The letter makes no reference to an investigation.

[30.2] The second letter (dated 21 December 2012), in advising Dr Bulmer that the Commissioner had decided to take no further action on Mr Gravatt’s complaint, explicitly cites s 38(1) which has application only in the context of a preliminary assessment. It is clear that the Commissioner did not at any stage carry out an investigation as that term is understood in ss 40 to 46 and in s 50 of the HDC Act.

[30.3] The letter dated 12 March 2014 sent by the Commissioner to the Tribunal underlines that which is unmistakably clear from the 21 December 2012 letter namely, there was no formal investigation into Mr Gravatt’s complaint and no finding was made that Dr Bulmer breached the Code. The evidence being all one way there is no good reason for the Tribunal to go behind this letter as in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation* [2014] NZHRRT 1 (30 January 2014) at [33] to [36]. Even were the Tribunal to go behind the letter the facts would not change.

[31] Mr Gravatt submits that the term “investigation” in s 50(1) is to be given its ordinary meaning and thus construed, the preliminary assessment was in truth an investigation. This argument is misconceived. The meaning of an enactment must be ascertained from its text and in the light of its purpose. See the Interpretation Act 1999, s 5:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[32] As observed in Burrows and Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 231, the initial impression made by a word, a sentence or even a paragraph may have to undergo modification when read in the context of the material that surrounds it. It is imperative that a particular word whose meaning is under consideration be read in the context of the section in which it appears or that Part of the Act in which it appears. At op cit 237 the authors state:

The interpretation of a section is often assisted by reading it in the context of all the sections in the same Part, subpart, or group of sections under a cross-heading. The theme or purpose of the Part, subpart, and group of sections may often influence interpretation.

[33] At op cit 239-241 further relevant points are made:

[33.1] When read as a whole, the Act may evince a clear theme or enacted purpose that clarifies the meaning of the section in question.

[33.2] Provisions of ambiguous or doubtful import may have their meaning clarified when they are set alongside other provisions of the same Act. Provisions which are at first sight ambiguous may cease to be so when read in context.

[33.3] A section that, at first blush, seems to mean one thing when read in isolation, may turn out to bear a rather different meaning when read in the context of the Act as a whole.

[33.4] There is a presumption that the drafter has used words consistently throughout the Act. This presumption may have added strength when a word or expression is used many times in the Act.

[33.5] A thorough reading of the Act as a whole may reveal a number of indications as to the direction of the Legislature's thinking.

[34] In our view it is plain that in the context of Part 4 of the HDC Act the term "investigation" is used as a term to describe not the process involved in carrying out the preliminary assessment, but the process that follows downstream if and when the Commissioner makes a determination under s 33(1)(b) to investigate the complaint. Part 4 could not be clearer in making a distinction between the "preliminary assessment" on one hand and the "investigation" on the other. The fact that the Health and Disability Commissioner may "gather" information in order to make the preliminary assessment does not mean that he is thereby embarking upon the distinct process of an investigation as understood in the context of Part 4. Mr Gravatt's argument collapses the two processes into one. This is not a sustainable interpretation of the Act.

[35] For these reasons we find that Dr Bulmer was not a person in respect of whom an investigation was conducted under Part 4 of the HDC Act. This is sufficient to hold that the Tribunal has no jurisdiction and that the claim should be struck out.

[36] It is best, however, that we address also the question whether the other jurisdictional pre-requisite has been made out, namely a finding by the Commissioner that Dr Bulmer has breached the Code of Rights. The point can be disposed of shortly:

[36.1] As no investigation was conducted, no finding of a breach of the Code of Rights could logically have occurred.

[36.2] It follows as an irresistible inference from the Commissioner's letter dated 21 December 2012 that the decision under s 38(1) to take no further action means that no finding of breach has been made.

[36.3] In any event the letter from the Commissioner dated 12 March 2014 to the Tribunal reinforces the point that no finding was made that Dr Bulmer breached the Code.

[36.4] Mr Gravatt relies on the conclusion by Dr Maplesden that "[t]he standard of clinical documentation was mildly deficient". This, however, is not a finding that the Code of Rights has been breached. More particularly, however, this is an expression of an opinion by Dr Maplesden, it is not an opinion which can be ascribed to the Commissioner.

[37] There being no finding of a breach of the Code of Rights, the Tribunal has no jurisdiction to hear and determine Mr Gravatt's proceedings.

The challenge to standing

[38] In the circumstances it is academic to embark on a detailed consideration of Mr Gravatt's standing to bring these proceedings as Administrator of the Estate of Zachary Gravatt.

[39] In the interests of brevity we note, without comment, that in *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151, [2009] 3 NZLR 108 at [65] the Court of Appeal accepted that the term "aggrieved person" as used in s 51 extends to cover a deceased person's executors or administrators. However the Court added a rider that there may be uncertainty as to whether proceedings can be taken under s 51 where there is no subsisting complaint and where the person who died did not authorise a complaint being lodged before his or her death.

[40] Even were we to accede to Mr Gravatt's belated request of 22 August 2014 that a new plaintiff be substituted (Mr Gravatt in his capacity as Administrator of the Estate of Zachary Gravatt) none of the objections to jurisdiction would be affected to the slightest degree. We accordingly decline to deal with the application.

DECISION

[41] For the foregoing reasons the decision of the Tribunal is that:

[41.1] The Tribunal has no jurisdiction to hear and determine these proceedings.

[41.2] The statement of claim is struck out in its entirety.

Costs

[42] In his submissions dated 22 August 2014 Mr Manning advised that Dr Bulmer seeks an order for costs. That being the case costs are reserved:

[42.1] Dr Bulmer is to file his submissions within fourteen days after the date of this decision. The submissions by Mr Gravatt are to be filed within a further fourteen days with a right of reply by Dr Bulmer within seven days after that.

[42.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

[42.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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Mr RPG Haines QC
Chairperson

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Mr GJ Cook JP
Member

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Mr BK Neeson
Member