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**CASE SUMMARY: NO HARM, NO FOUL. WHERE A BREACH OF PROCEDURAL FAIRNESS HAS BEEN ESTABLISHED, THE COURT WILL NOT FIND THERE WAS A REVIEWABLE ERROR UNLESS THE BREACH AFFECTED THE OUTCOME**

Ontario Supreme Court dismisses application for judicial review of remedial order made by College of Physicians and Surgeons of Ontario.

**Administrative law – Decisions reviewed – Investigations – College of Physicians and Surgeons – Judicial review – Investigations – Procedural requirements and fairness – Standard of review – Reasonableness – Abuse of process – Physicians and surgeons – Competence – Records – Training requirements**

*Al-Kazely v. College of Physicians and Surgeons of Ontario*, [2022] O.J. No. 32, 2022 ONSC 44, Ontario Superior Court of Justice, January 5, 2022, F.E. McWatt A.C.J.S.C.J., K.D. Coats and L.G. Favreau JJ.

On March 10, 2020, the College of Physician and Surgeons' Inquiries, Complaints and Reports Committee ("ICRC") ordered Dr. Luay Ali Al-Kazely (the "Applicant") to undergo a specified continuous education or remediation program as a result of concerns about his medical record keeping (the "Decision"). The Applicant brought this application for judicial review of that decision, seeking to set it aside on the basis that the ICRC's conduct constitutes an abuse of process. In the alternative, he applied to set aside two provisions of the Decision, on the basis they are unreasonable.

On January 20, 2016, the ICRC considered the Applicant's medical practice following the investigation of a complaint by a patient. The ICRC advised the Applicant on improving the quality and completeness of his records.

On October 13, 2016, the ICRC again considered the Applicant's medical practice following the investigation of a complaint by a second patient. The ICRC advised the Applicant to make sure his notes were complete, and that his diagnosis and treatment were supported by his documentation.

On December 14, 2017, the ICRC again considered the Applicant's medical practice following the investigation of two further patient complaints. The ICRC expressed concerns related to the Applicant's record keeping practices, clinical care, and communication with patients.

The ICRC then required the Applicant to complete a specified continuous education or remediation program to address his record keeping deficiencies. It ordered a reassessment to take place approximately six months after completion of the program.

The College retained an independent physician, Dr. Jacqueline Goscimski, to complete the reassessment. Dr. Goscimski was provided with 25 of the Applicant's patient charts which post-dated the program he had participated in.

On July 11, 2019, Dr. Goscimski completed an initial assessment report, outlining several concerns with the Applicant's documentation and clinical care. On August 10, 2019, the Applicant responded. He pointed out that several of the charts provided to Dr. Goscimski were in respect of patients the Applicant had not provided care to. He had been receiving documentation from other physicians in respect of those patients, and Dr. Goscimski had raised concerns with care that had been provided by physicians other than the Applicant.

Accordingly, on September 12, 2019, Dr. Goscimski provided a revised report, incorporating responses provided by the Applicant to her initial report. She concluded there were a number of deficiencies, primarily related to record keeping. On October 8, 2019, the Applicant responded, rejecting Dr. Goscimski's criticisms of his record keeping.

Dr. Goscimski prepared an addendum to her revised report addressing the Applicant's response. The Applicant provided a third response, reiterating his earlier comments.

On November 5, 2019, the College wrote to the Applicant and advised his file was being returned to the ICRC for review, and asked if the Applicant was willing to enter an undertaking to address the reassessment outcomes, which would include three months of low-level supervision; a review and written summary of CMPA modules; and a practice reassessment with a different assessor. The Applicant did not agree to the undertaking.

An appointment of investigators was subsequently approved by the ICRC. On February 7, 2022, his counsel provided submissions. The ICRC reviewed and considered the results of the investigation, Dr. Goscimski's three reports, the Applicant's responses dated August 10 and October 8, 2019, and counsel's submissions dated February 7, 2022. The ICRC accepted Dr. Goscimski's conclusions regarding deficiencies in the Applicant's practice, and ordered a specified continuing education and remediation program, three months of clinical supervision, and a reassessment.

The Applicant argues the process was not fair as the ICRC did not consider his third and response, made in respect of Dr. Goscimski's addendum to her revised report. He further argued the true purpose of the investigation was to force him into terms and conditions he would not voluntarily agree to, and as such the investigation was improper. He argued the Decision did not fall within a range of possible, acceptable outcomes, and that it amounted to an abuse of process.

The Court agreed the ICRC panel should have been given the Applicant's third response, to Dr. Goscimski's addendum to her revised report. However, it found that was a minor breach of procedural fairness that had no impact on the final decision. Where a breach of procedural fairness has no impact on the decision, the matter need not be returned to the decision-maker for reconsideration. The Court agreed with the College's submission that, had that third response been considered, the panel may well have concluded it only exemplified the Applicant's lack of insight and could have served to further confirm their decision.

The Court found there was nothing improper in the investigation as alleged by the Applicant. There was no evidence before the Court to support the claim that the purpose of the investigation was to force terms and conditions upon him that he would not voluntarily agree to. The Court held it would be a dereliction of the College's duty to protect the public if it failed to act in the face of evidence that a physician was practicing below the standard and was unwilling to engage in required remediation.

The Applicant had argued, in reliance on *Zaki*, that the ICRC was inappropriately subjecting him to a “never-ending cycle of reassessment”. The Court found that the ICRC’s intervention was reasonable and proportionate, being the second attempt to remediate the Applicant, directly related to record keeping concerns identified by Dr. Goscimski. The intervention was a targeted escalation of education intervention aimed at remediating the Applicant’s lack of success with lower level remediation.

The Court found that the issues raised by the Applicant did not amount to an abuse of process. The ICRC had an ample basis to intervene to address the Applicant’s substandard record keeping, and that the means it chose to do so were fully justified and proportionate in light of the concerns that had been identified. The form of remediation selected was found not to have been unduly onerous, and the terms of the order reasonable. The petition was dismissed, with costs.

This case was digested by [Mollie A. Clark](#), and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Mollie A. Clark at [mclark@harpergrey.com](mailto:mclark@harpergrey.com).