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CASE SUMMARY: A PHARMACIST IS TOLD “NO” FOR THE SECOND TIME AFTER TRYING TO DISPUTE A REMEDIAL DECISION BY THE COLLEGE

The Applicant pharmacist, Mr. Jaffer, was unsuccessful in attempting to seek judicial review of a decision of the Health Professions Appeal and Review Board (“HPARB”). The HPARB dismissed his appeal from a decision made by the Ontario College of Pharmacists relating to a remedial disposition in a complaint matter.

Administrative law – Decisions reviewed – College of Pharmacists – Judicial review – Procedural requirements and fairness – Pharmacists – Professional misconduct or conduct unbecoming

Jaffer v. Ontario (Health Professions Appeal and Review Board), [2019] O.J. No. 5937, 2019 ONSC 6770, Ontario Superior Court of Justice, Divisional Court, November 25, 2019, K.E. Swinton, N.L. Backhouse and L.G. Favreau JJ.

The Applicant, Akeel Jaffer, is a pharmacist licensed to practice in Ontario by the Ontario College of Pharmacists (the “College”).

Mr. Jaffer is the designated manager of a pharmacy in Toronto. In June 2016, a pharmacist employed at the pharmacy dispensed 100mg of morphine to a patient when the prescription called for 10mg. The patient suffered significant medical consequences. The prescribing physician made a complaint to the College regarding this incident and also alleging that he had experienced other unspecified errors with this pharmacy but that they had been more minor.

Pursuant to the Health Professions Procedural Code (the “Code”), the Inquiries, Complaints and Reports Committee of the Ontario College (“ICRC”) was tasked with reviewing and adjudicating the complaint. After the ICRC makes its decision, the Code allows a complainant or the pharmacist to apply to the Respondent Health Professions Appeal and Review Board (“HPARB”) to seek a review of the ICRC decision.

Mr. Jaffer responded to the complaint and asserted that the processes in the pharmacy were adequate and not in need of change. Mr. Jaffer thought the incident was caused by human error and not by any default or problem with the pharmacy’s processes. The ICRC concluded that Mr. Jaffer should receive an oral caution and be required to successfully complete an educational program called, “Medication System Safety Review for a Community Pharmacist On-Site Assessment”. The ICRC considered Mr. Jaffer’s previous history with the College as well as the indications that the pharmacy’s processes were not sufficient to prevent this type of error.

Mr. Jaffer applied to the HPARB to request a review of the ICRC’s decision. Mr. Jaffer argued the ICRC made findings about his role as designated pharmacist without giving him sufficient notice. He argued the ICRC should have focused on the pharmacist’s error rather than his role as designated pharmacist. He argued the ICRC failed to ask him to make submissions on his previous history with the College. He argued the ICRC failed to consider a positive practice assessment review conducted in 2016.

The HPARB found the ICRC's investigation was reasonable. The HPARB disagreed with the first three arguments made by Mr. Jaffer but did not address the fourth argument regarding the 2016 assessment.

Mr. Jaffer applied to the court for review of the HPARB decision. Mr. Jaffer's counsel focused on two procedural issues at the hearing. First, Mr. Jaffer argued the HPARB's decision was procedurally unfair because the HPARB should have found the ICRC breached Mr. Jaffer's right to procedural fairness by not giving him an opportunity to comment on his past College issues. Second, Mr. Jaffer argued the HPARB and the ICRC's reliance on his past discipline was unfair.

Mr. Jaffer also argued the HPARB decision was unreasonable because the HPARB and ICRC misapprehended the evidence provided by Mr. Jaffer regarding the pharmacies policies and procedures. Also, Mr. Jaffer argued the Board and the ICRC failed to consider the College's assessment in 2016.

The Court first commented on the law relating to the admissibility of affidavit evidence on an application for judicial review. In this case, Mr. Jaffer's affidavit was only relied upon for the exhibits, which were documents before the original decision makers. The Court still commented that Mr. Jaffer's affidavit was unnecessary and improperly argumentative.

The Court also addressed a preliminary issue relating to the role of the College and HPARB on the judicial review application. Both entities filed facts that addressed the merits of the application. The Court held this was appropriate for the ICRC, but not for the HPARB.

The Court rejected all of Mr. Jaffer's arguments relating to procedural fairness. The HPARB concluded that there was no information that the ICRC failed to obtain or that it could have obtained that would have affected the outcome of the decision. Mr. Jaffer's communication was a clear theme of the complaint and Mr. Jaffer did attempt to address communication issues in his response. Similarly, the Code specifically states that the ICRC is required to consider a member's discipline history when addressing a complaint and this was specifically referenced in the ICRC's letter to Mr. Jaffer.

The Court next rejected Mr. Jaffer's arguments relating to the substantive decision. The Court held the ICRC and HPARB both reasonably concluded that the pharmacy's processes and procedures may not be as robust as they should be and Mr. Jaffer missed an opportunity to review them. The Court held that the ICRC did reference the 2016 general assessment report and so did the HPARB but neither were required to specifically explain their response to Mr. Jaffer's argument on this point when they were adjudicating a specific complaint indicating deficient processes.

The Court dismissed the application for judicial review. The parties agreed there would be no costs awarded.

This case was digested by [Scott J. Marcinkow](#), 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 Scott Marcinkow at smarcinkow@harpergrey.com.