

Administrative Law and Practice Points

FOR MORE INFORMATION

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This newsletter will discuss new developments in administrative law, major trends or changes in administrative tribunals, recent administrative law cases decided by courts and tribunals and practical advice for staff/members of administrative tribunals and lawyers practising in this area. Please consult with a lawyer for specific legal advice.

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Comments and suggestions are also welcome.

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ROLE OF PREVIOUS DECISIONS IN PENALTY ORDERS

Administrative tribunals are often considered to be the same as courts even though they are very different from one another and have been created to fulfill distinct functions. The Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia (Liquor Control, General Manager)* acknowledged that there is a fundamental distinction between administrative tribunals and courts. One of the differences between courts and tribunals is that courts are bound by precedent while tribunals are not. Even though tribunals are not bound to follow previous decisions or precedents they have an interest in considering and following previous decisions to promote fairness, certainty and consistency.

In particular, in determining the penalty to be ordered after findings of professional misconduct have been made, courts have emphasized that it is important for tribunals to consider and review the range of penalty orders made in cases with similar facts. In fact, in a recent case, the Ontario Divisional Court went as far as setting aside portions of a penalty order for failing to fully consider prior penalty decisions.

In the case of *Duval v. College of Nurses of Ontario*, [2007] O.J. No. 3992, a panel of the Discipline Committee of the College

made findings of professional misconduct against a nurse for having an improper relationship with a former patient of the hospital at which the nurse was employed as a psychiatric nurse. The panel ordered a penalty of an oral reprimand; an 18 month suspension of the nurse's certificate of registration; terms, conditions and limitations on the nurse's return to practice for 24 months after the completion of the suspension including a restriction from engaging in mental health and psychiatric nursing and a requirement to work with an expert in the field of nurse-client therapeutic relationships. Subsequently, an appeal was brought from the findings of professional misconduct and the penalty. On appeal, the Court upheld the findings of professional misconduct but set aside portions of the penalty order.

The Court reduced the suspension and one of the terms, conditions and limitations on the nurse's certificate of registration, in part, on the basis that the Discipline Committee panel did not fully consider prior penalty decisions of the College.

In coming to this decision, the Court said the following:

...In addition, we are also of the view that in so far as it was practicable, the Panel should have had regard to past decisions of the Discipline Committee in similar circumstances in an effort to place the instant case within a range of previously imposed penalties for comparable misconduct.

We are of the opinion that the Panel in imposing a suspension of 18 months meted out a penalty that was beyond the limits of reasonableness

in the circumstances of this first-time, young offender, considering the findings of misconduct and having regard to prior penalty decisions of the College to which our attention was directed. While admittedly, most of these decisions arose in circumstances involving a plea of guilty and a joint submission of counsel on behalf of the member and the College, we are of the opinion that the proposed suspension of 18 months is excessive in the circumstances and hence unreasonable.

...Therefore, we would set aside the 18 month suspension and substitute a suspension of six months.

In addition, the further 24 month limitation imposed in respect of the Appellant's ability to seek and obtain employment as mental health or psychiatric nurse...is excessive in that it does not appear to accord with the conditions contained in the cases to which we have been directed...Given those conditions, the 24 month restriction on psychiatric nursing is excessive and unreasonable and it is set aside.

PRACTICAL TIPS:

Aside from this decision, a number of other Ontario decisions and also decisions from other jurisdictions across Canada have considered and provided guidance on the appropriate role of previous decisions in making decisions about the appropriate penalty. In order to avoid or, at least, reduce the possibility of penalty decisions being set aside by the courts on the basis of

failing to consider prior penalty decisions, the following information from these cases provides some practical tips:

- Before making a penalty order, the discipline committee should consider and review previous penalty decisions with similar facts to get a sense of the type and range of penalty order that would be appropriate.
- Previous decisions should come to the attention of the discipline committee by way of counsel for the College and/or counsel for the member. The discipline committee should not do its own legal research to determine what previous decisions might be helpful because this would be unfair to the parties because they have not had an opportunity to consider and make submissions about those decisions. Alternatively, if the discipline committee does do its own legal research, it must make the parties aware of these decisions and then give the parties the opportunity to make submissions about the applicability of the decisions to the case.
- Previous decisions of the tribunal should be made accessible to the public including counsel for the College and/or counsel for the member to make it easier for the parties to bring relevant decisions to the attention of the discipline committee. This can be done in a number of ways including publishing summaries of decisions and reasons for decision in the tribunal's newsletter, annual report and/or website. The tribunal can also maintain a binder of decisions and reasons for decisions at its office which would be available to the public.
- The discipline committee should consider and review its own previous penalty decisions with similar facts. If the discipline committee has not decided similar cases in the past, it should review decisions for other professions in its province and/or decisions for that profession in other provinces. As a last resort, it should review decisions for other professions in other provinces.
- If the discipline committee is going to depart from previous penalty decisions with similar facts, especially their own prior decisions, the discipline committee should prepare clear and adequate reasons. For example, it is acceptable for a discipline committee to make a higher penalty order than previous decisions as long as the reason for doing so is included in the decision and is justifiable such as where a particular type of misconduct is a continuing and increasing problem for that profession and the discipline committee wants to adequately deter other members of that same profession from engaging in that kind of misconduct in the future.