



## Health Professional Councils Authority

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### CASE NOTE:

#### **Solomon v Australian Health Practitioner Regulation Agency and the Psychology Board of Australia [2015] WASC 203 – significant implications**

##### **Background**

The context for this decision of Judge Mitchell in the Supreme Court of Western Australia was an application by a registered psychologist for judicial review of a decision made by a Performance and Professional Standards Panel of the Psychology Board of Australia. The Panel had found that there was unsatisfactory professional performance by the psychologist and had cautioned her, imposed conditions on registration and requirements for further education and training. A subsequent appeal by the practitioner to the responsible tribunal in Western Australia was withdrawn. In the Supreme Court proceedings the psychologist, who was self-represented was successful in having the Panel's decision and orders set aside.

One of the grounds for setting aside the Panel's decision was the lack of reasons for the Panel's decision. The judgment emphasises the rationale underpinning, and the standards for, reasons given by Panels under the *Health Practitioner Regulation National Law (WA) 2010*, which can be extrapolated to statements of decision and reasons provided by panels and Councils under the *Health Practitioner Regulation National Law (NSW)*.

##### **Rationale and standard for reasons in a Panel decision**

In examining the appropriate standard that the Panel's reasons should meet, Judge Mitchell considered the appropriate case law and adopted the following comments of Judge Wheeler in an unreported WA Supreme Court case in *re a Medical Assessment Panel ex parte Hays*:

So far as the 'reasons' of the panel are concerned, it is fair in my view, to characterise the mere listing of matters allegedly considered by the panel as a complete failure to provide reasons. The essence of reasons for decision is that they disclose the reasoning processes of the Tribunal. Fulfilment of the obligation to give reasons ensures that a person whose interests may be adversely affected by a decision understands why the decision has been made, and allows a party dissatisfied with a decision to determine whether there has been reviewable error.

As has been said on many occasions, no standard of perfection is required in preparation of the reasons, and they are to be considered fairly and not combed through 'with a fine appellate toothcomb to find error'. At a minimum however, it seems to me that in a case of this kind the panel must not merely list the materials upon which it relied, without any hint as to what portions of those materials it considered particularly relevant or the way in which it reconciled any portions of those materials which might have been in conflict. It should at least have set out what it considered to be the material facts which emerged from the materials to which it referred, and its process of reasoning from those material facts to its

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conclusion. Although each case must be considered individually, having regard to the purpose of the obligation to provide reasons, it is generally sensible for a fact finding body of this kind to make particular reference to material which would appear to be inconsistent with the conclusion which it reached ... and to explain why such material was considered not to be relevant, or to be outweighed by other considerations.

The above comments highlight the rationale behind the statutory obligation to provide reasons; that the person affected by the decision understands why the decision was made and whether to seek a review or to appeal that decision. More importantly, the above passages highlight that the standard for the reasons supporting a decision of an expert panel of health professionals is not expected to be legalistic i.e. that of an appellate court.

In applying the above approach to the circumstances of this case Judge Mitchell noted that the Performance and Professional Standards Panel was comprised of professional persons and a lay member, none of which were required to have legal qualifications or experience (two registered psychologists and one community member). This composition meant that the Panel's reasons would not be subject to close legal scrutiny, saying at paragraph 145 of the decision:

The statutory requirements for the composition of the panel also indicate the importance of reading reasons fairly and as a whole, taking account of the decision maker's lack of legal expertise, without applying a fine-tooth appellate comb.

#### **Multiple factors which rendered the reasons inadequate**

The inadequacy of the Professional Standards and Performance Panel's decision was illustrated by the following factors:

- a. The structure of the decision did not include any explanation or reasoning for reaching the conclusion that the practitioner had engaged in unsatisfactory professional performance. The decision consisted of a recitation of the facts, the allegations which were referred to the Panel, the submissions made and conclusions. The allegations were restated as conclusions for establishing unsatisfactory professional performance.
- b. A failure to deal with the conflicting factual information in the decision and to make any findings of fact. The conclusions made by the Panel recited the allegations including the use of the phrase "and/or" which attracted judicial criticism because of the multitude of variations that arose such that it was not possible to discern the findings.
- c. A failure to refer to and apply the statutory definition of unsatisfactory professional performance and the relevant criteria to the circumstances of the case. The failure to address or refer to the statutory definition in the reasons, in Judge Mitchell's view, gave rise to the inference that the statutory definition of unsatisfactory professional performance was not applied to the circumstances of this case.

Judge Mitchell acknowledged that the above factors considered in isolation might not equate to a failure to provide reasons but when considered together lead to that finding that the reasons were inadequate to support the Panel's decision.

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### **Impact of not providing adequate reasons**

The source of the Panel's power to take action was under the National Law (WA). The statutory framework required the National Board and the Panel to give notice of the decision. That notice required the inclusion of the reasons for making the decision. In this case the Panel did not provide reasons and did not appear to apply the statutory criteria of unsatisfactory professional performance to the facts of the case. In failing to do this the Panel had misunderstood its role and had acted beyond the scope of its statutory power in concluding that there had been unsatisfactory professional performance by the practitioner. The decision refers to a number of cases including that of *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43. In that case there was a statutory duty to give reasons and the decision given disclosed inadequate reasons. The outcome was an error of law on the face of the record.

### **Concurrent hearing as to breach and penalty**

Judge Mitchell also expressed the view that where the practitioner was not legally represented that it was "undesirable" in disciplinary proceedings to have a concurrent hearing as to breach and penalty. Although there was no determination on whether the failure to have a separate hearing as to penalty was a denial of procedural fairness, it was suggested that a future Panel have a separate hearing as to penalty. In NSW a two stage hearing is considered by the parties frequently at Tribunal level but not necessarily for less serious complaints or appeals from health and performance panel matters.

### **Conclusion**

In NSW under the *Health Practitioner Regulation National Law (NSW)* there are statutory obligations on Councils [s.148H(3)] and Performance Review Panels [s.156E(2)(a)] to provide a written statement of decision with reasons. This decision, albeit in another State, indicates that disciplinary panel decisions need to disclose a reasoning process, which does not need to be couched in legalese.

Although there is no statutory duty to furnish reasons for a decision to take urgent interim action under section 150 of the *Health Practitioner Regulation National Law (NSW)*, it is prudent to do so. The decision should explain the reasoning process in language understandable to the practitioner. Delegates and Council members can be assured that such reasons will not be expected to read like a court or tribunal decision.

Extrapolating this case to the NSW context means that adjudicating bodies reviewing a decision made by a Council or Panels dealing with health or performance matters under the *Health Practitioner Regulation National Law (NSW)* will look at the decision as a whole and fairly having regard to the decision makers' lack of legal expertise and that the Council delegates or Panel members are not required to have legal qualifications to make decisions about a practitioner's conduct, health or performance. The full text of this decision is available at: <http://www.austlii.edu.au/au/cases/wa/WASC/2015/203.html>

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