Civil and Administrative Tribunal

New South Wales

Case Name:	Singh v Health Care Complaints Commission
Medium Neutral Citation:	[2023] NSWCATAP 240
Hearing Date(s):	23 June 2023
Date of Orders:	25 August 2023
Decision Date:	25 August 2023
Jurisdiction:	Appeal Panel
Before:	Hennessy, ADCJ, Deputy President Dr R Dubler SC, Senior Member
Decision:	1. Appeal is dismissed. 2. The Appellant is to pay the Respondent's costs as agreed or assessed.
Catchwords:	OCCUPATIONS – whether an interlocutory decision in respect of a summons to produce in proceedings in the occupational division of the Tribunal is a decision made for the purposes of the Health Practitioner's Regulation National Law (NSW) within the meaning of clause 29(1)(d) of Schedule 5 of the Civil and Administrative Tribunal Act 2013 (NSW) – whether accordingly such a decision is 'not internally appealable' pursuant to s 32 of the Civil and Administrative Tribunal Act 2013 (NSW). APPEAL – whether an interlocutory decision in respect of access to documents produced on a summons is not internally appealable by reason of the decision being in proceedings made for the purposes of the Health Practitioner's Regulation National Law (NSW) within the meaning of clause 29(1)(d) of Schedule 5 of the Civil and Administrative Tribunal Act 2013 (NSW)

Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Health Practitioner Regulation National Law (NSW) Supreme Court Act 1970 (NSW)
Cases Cited:	HCCC v Robinson [2022] NSWCA 164 Health Care Complaints Commission v Livermore (No 2) [2021] NSWCATOD 115 Health Care Complaints Commission v Philipiah [2013] NSWCA 342 Health Care Commission v Wilcox (No 2) [2020] NSWCATOD 51
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Ugendra Singh (Appellant) Health Care Complaints Commission (Respondent)
Representation:	Counsel: J Donnelly, E Vuu, J Drew (Appellant) S McCarthy (Respondent) Solicitors: McGirr & Associates (Appellant) Legal Services, Health Care Complaints Commission (Respondent)
File Number(s):	2023/00140358
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Occupational Division
Citation:	N/A
Before:	Cole, DCJ, Deputy President
File Number(s):	2022/00301834

REASONS FOR DECISION

Introduction

1 On 28 April 2023, the parties appeared before Deputy President Judge Cole in respect of two summonses.

2 The Respondent objected to the Appellant having access to the documents produced. Deputy President Judge Cole reserved her decision, publishing written reasons later that day. Her Honour noted relevantly (the Decision):

> Order 2:
>
> The respondent's request to be given access to those documents, produced by the Police and the NSW Ministry for Health in response to summonses, in relation to which access was not granted on 27 April 2023, is refused.
>
> Order 4 Notes:
>
> 2. The request by the respondent for access to the documents referred to in Order 2, above, is refused because those documents are not relevant to these proceedings. It was argued, based on [61] of the decision of Bell P (as he then was) in Secretary of the *Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145, that the documents have relevance because it is proposed to use them to cross-examine Person A on an issue of credit. However, the issue in relation to which it is proposed to cross-examine Person A is an issue concerning her mental health at a point in time between 2002-2010, which is not a matter in issue in these proceedings. As I understand it, the proposal is to argue that she lied, during that time, about her state of mind at a particular moment in time, and so her evidence cannot now be relied upon. This is not the type of evidence contemplated by Bell P in the Blacktown City Council case. The course proposed by counsel for the respondent will be of no assistance to the Tribunal. It will result in a futile argument about Person A's state of mind at a moment some 8 years prior to the events the subject of these proceedings. It will not conduce to the just, quick and cheap resolution of the issues. In addition, it would be contrary to the public interest to permit a person who is the subject of an Apprehended Domestic Violence Order to obtain the medical records of the person for whose benefit that Order is in force unless those records relate to the proceedings.

3 The Appellant appeals from the Decision. He contends the Tribunal erred in refusing him access to the documents produced under the summonses.

4 However, a significant issue arises as to whether or not any appeal lies to the Appeal Panel of the Tribunal. The substantive proceedings in which the Decision was made were disciplinary proceedings against a registered nurse.

5 Clause 29(1)(d) of Schedule 5 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act) designates decisions made for the purposes of the

Health Practitioner Regulation National Law (NSW) (the National Law) (other than the decision for the purposes of clause 13 of Schedule 5F) as decisions that are 'not internally appealable'. That is, decisions that are not subject to the Tribunal's internal appeal jurisdiction as set out in s 32 of the NCAT Act.

6 The Respondent contends that this provision applies to the Decision and hence the Appeal Panel has no jurisdiction to hear the appeal.

7 For the reasons which appear below, we have decided that we agree with the Respondent's submission and are of the view that the Appeal Panel has no jurisdiction to hear this appeal.

8 Accordingly, we will dismiss the appeal and, in the circumstances, we see no benefit in considering the question of whether or not the Tribunal erred in refusing to grant the Appellant access to the documents in question.

Does the Appeal Panel have jurisdiction to hear an appeal from the Decision?

9 Section 32 of the NCAT Act is as follows:

> 32 Internal appeal jurisdiction of Tribunal
>
> (1) The Tribunal has "internal appeal jurisdiction" over--
>
> (a) any decision made by the Tribunal in proceedings for a general decision or administrative review decision, and
>
> (b) any decision made by a registrar of a kind that is declared by this Act or the procedural rules to be internally appealable for the purposes of this section.
>
> (2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its internal appeal jurisdiction—
>
> (a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,
>
> (b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.
>
> (3) However, the internal appeal jurisdiction of the Tribunal does not extend to—
>
> (a) any decision of an Appeal Panel, or
>
> (b) any decision of the Tribunal in an external appeal, or
>
> (c) any decision of the Tribunal in proceedings for the exercise of its enforcement jurisdiction, or

(d) any decision of the Tribunal in proceedings for the imposition of a civil penalty in exercise of its general jurisdiction.

Note : The decisions above may be appealable to the Supreme Court and, in some cases in relation to civil penalty decisions made by the Tribunal (whether under this Act or enabling legislation), the District Court. See section 73 and Part 6.

(4) An "internally appealable decision" is a decision of the Tribunal or a registrar over which the Tribunal has internal appeal jurisdiction.

(5) An "internal appeal" is an appeal to the Tribunal against an internally appealable decision.

(6) Subject to the procedural rules, if a decision of a registrar is an internally appealable decision, the provisions of this Act relating to the making and determination of an internal appeal are taken to apply as if—

(a) any reference to the Tribunal at first instance (however expressed) included a reference to a registrar, and

(b) any requirement concerning the granting of leave to appeal against particular kinds of decisions of the Tribunal or on particular grounds extended to decisions of the same kind made by a registrar or grounds of the same kind.

10 Section 80 of the NCAT Act provides as follows:

80 Making of internal appeals

(1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

Note: Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27(1).

(2) Any internal appeal may be made—

(a) in the case of an interlocutory decision of the Tribunal at first instance--with the leave of the Appeal Panel, and

(b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance--as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

(3) The Appeal Panel may—

(a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and

(b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.

11 Clause 1(2) of Schedule 5 of Part 4 of the NCAT Act provides as follows:

(2) Except as otherwise provided by this Schedule, a provision of this Schedule that provides for, or limits or excludes, an appeal against a decision of the Tribunal that is made for the purposes of specified legislation (or a specified provision of legislation) is taken to extend to any ancillary or

interlocutory decision of the Tribunal in the proceedings in which that decision was made.

12 Clause 29(1)(d) of Schedule 5 of the NCAT Act relevantly provides as follows:

> 29 Certain profession decisions to be appealed directly to Supreme Court or Land and Environment Court
>
> (1) Profession decisions not internally appealable Despite section 32 of this Act, each of the following Division decisions (a "profession decision") is not an internally appealable decision for the purposes of an internal appeal--
>
> …
>
> (d) a decision for the purposes of the *Health Practitioner Regulation National Law (NSW)* (other than a decision for the purposes of clause 13 of Schedule 5F to that Law).

13 The substantive proceedings in which the Decision was made concerns disciplinary proceedings brought by the Respondent against the Appellant under the National Law. It was accepted by the parties that accordingly any substantive or final decision made by the Tribunal in the proceedings between the parties the subject of the appeal 'under' the National Law would be a 'profession decision' pursuant to clause 29(1)(d) of Schedule 5 of the NCAT Act and would not be internally appealable to the Appeal Panel of the Tribunal.

14 The issue between the parties and for determination by us is whether or not the Decision, being an interlocutory decision of a procedural nature dealing with the question of access to the documents produced on summons can be characterised as a 'profession decision' and a decision made for the 'purposes of' the National Law.

15 The Appellant accepted that Schedule 5F of the National Law is not relevant to the present case.

16 The Appellant referred to the notation to the clause that a Division decision other than a profession decision that is a general decision or administrative reviewed decision may be subject to an internal appeal.

17 According to the Appellant, the question is whether or not the Decision in question here can be characterised as a 'profession decision' or a 'general decision'.

18 The Appellant pointed out that the summonses were issued under s 48(1) of the NCAT Act. It was noted that the Tribunal under the NCAT Act enjoys

general jurisdiction; administrative review jurisdiction; appeal jurisdiction; and enforcement jurisdiction: see s 28(2) of the NCAT Act.

19 The Tribunal also is expressly given power to make 'ancillary and interlocutory decisions' in the exercise of its general jurisdiction.

20 Nextly, the Appellant submitted that the Tribunal is not exercising any jurisdiction or power 'under' the National Law when making the orders in question. This is reinforced by the fact that the National Law does not confer any express power to make 'ancillary and interlocutory decisions' on the Tribunal. The Appellant referred to section 165B(5A) of the National Law which provides that:

> 165B Constitution of Tribunal for complaints, applications and appeals [NSW]
>
> (5A) The Tribunal, when constituted to make an ancillary decision or an interlocutory decision within the meaning of the *Civil and Administrative Tribunal Act 2013*, is to be constituted by the Tribunal List Manager or the member referred to in subsection (2) (a).

21 The reference to the 'Tribunal List Manager' is a reference to a member of the Occupational Division of the Tribunal designated under clause 11(1) of Schedule 5 of the NCAT Act to be the List Manager of the Health Practitioner List, (required by subclause 10(10) to be created in the Occupational Division), and who, by subclause 11(2), is required to be an Australian lawyer of at least seven years' standing: see *HCCC v Robinson* [2022] NSWCA 164 (*Robinson*) at [78] (Simpson AJA with whom Leeming and Kirk JJA agreed).

22 Subsection (2)(a) refers to the Tribunal being constituted by one Division Member who is an Australian lawyer of at least seven years' standing or, in the case of medical practitioner proceedings, one Division member who is a senior judicial officer.

23 The Appellant submitted that this meant the Deputy President exercised the powers conferred upon her under the NCAT Act to make an 'ancillary decision or an interlocutory decision'. Further, the Deputy President was sitting as either the Tribunal List Manager or a Division Member who is an Australian lawyer of at least seven years' standing.

24 According to the Appellant, the mere fact that the Tribunal is constituted by the Deputy President sitting as the Tribunal List Manager, does not deprive the

character of the orders in question being interlocutory and that the plain and ordinary language of the NCAT Act reinforces the order being an 'interlocutory decision'.

25 Section 4(1) of the NCAT Act, which defines an interlocutory decision to include the issuing of a summons, was referred to by the Appellant as supporting the proposition that the orders in question were interlocutory.

26 For the purposes of this appeal we can accept that the Decision was an interlocutory decision and we do not understand the Respondent to take a different view.

27 In the result, the Appellant submitted that the Deputy President exercised powers conferred upon her Honour under the NCAT Act and in particular s 29(2)(a) of the NCAT Act when making the orders in question in respect of the summons issued by the Tribunal.

28 Accordingly, the Tribunal was not exercising powers directly *under* the National Law (emphasis applied by the Appellant).

29 For the purposes of the present argument, we are prepared to accept the NCAT Act was the source of the power to deal with the summons that was before the Tribunal at the relevant time.

30 The Appellant submitted that the Court of Appeal's decision in *Robinson* supported his contentions. *Robinson* was focused on whether the Health Care Complaints Commission enjoyed a right of appeal to the Court of Appeal on a question of law from a 'Stage 1' decision in a 'non-lawyer appeal'.

31 *Robinson* held that a decision made at 'Stage 1' of an enquiry that a Health Practitioner was guilty or not guilty of misconduct under the National Law was not an ancillary or interlocutory decision for the purposes of the clause.

32 We considered carefully the Appellant's submissions on *Robinson* but have come to the view that the case does not provide any guidance on the question before us. *Robinson* did not hold that a decision in relation to the setting aside of summonses or limiting production of documents produced on summons was not an 'ancillary or interlocutory decision'.

33 The Appellant then referred to the fact, not disputed by the Respondent, that by operation of s 48 of the *Supreme Court Act 1970* (NSW), if an ancillary or interlocutory decision is a profession decision then the Court of Appeal of the Supreme Court of New South Wales is the appropriate jurisdiction for the Appellant's appeal.

34 Accordingly, the Appellant submitted that it would be absurd and unreasonable to construe all interlocutory decisions and decisions such as those raised in this appeal as a profession decision as this would mean that relatively inconsequential decisions such as with respect to adjournments, directions and costs would have to be appealed to the Court of Appeal.

35 The Appellant contended that this could not have been the intention of Parliament.

36 The difficulty with this submission is the terms of clause 1(2) of Schedule 5 to the NCAT Act which we have quoted above.

37 This appears clearly to contemplate that certain 'ancillary and interlocutory decisions' are to have the same appeal rights as other decisions made for the purposes of the specified legislation.

38 At the hearing there was some debate as to whether or not the reference to 'a proceeding in which that decision was made' should be taken to be a reference to the 'ancillary and interlocutory decisions' earlier referred to in the clause or to the 'decision' where that word first appears in the clause.

39 The Appellant sought to argue that where in clause 1(2) the following appears, 'in the proceedings in which that decision was made', the decision refers to the final or non-interlocutory decision made in the proceedings and that as a result clause 1(2) has no relevant work to do in this instance as no substantive or final decision has been made in the proceedings yet.

40 We have some difficulty with this contention. It would mean that clause 1(2) would only have application in a situation where the relevant 'ancillary' or 'interlocutory decisions' came after a substantive decision in the proceedings but not beforehand. For example, as we understood the submission, clause 1(2) would apply to a costs decision or even minor interlocutory decisions such

as time tabling of submissions for costs or adjournment applications after a final decision but would not apply to interlocutory decisions where there had not yet been a final decision.

41 It is difficult to see how this could be consistent with Parliament's intention.

42 A further difficulty with the Appellant's submission is the fact that if an interlocutory decision predates any final decision and if then a final decision is made, this would appear to have, on the Appellant's submission, the effect of enlivening from that point the operation of clause 1(2) so as to take away the appeal rights that otherwise would apply prior to any substantive decision being made to which clause 1(2) refers.

43 The alternative approach is to overcome the difficulty of the strict language of clause 1(2) and regard the phrase 'in which that decision was made' as encompassing the slightly broader proposition of 'in which that decision was made or *would be made*'.

44 According to the Respondent, the fact that there is a reference to a decision that 'was made' should be taken to be a reference to the ancillary or interlocutory decision referred to in the subclause. In other words, the reference to 'that decision' is simply a reference back to the words, 'any ancillary or interlocutory decision of the Tribunal'.

45 We also have some difficulty with this submission as a more natural reading, in our view, of the subclause is that, as the Appellant contends, the 'decision' as it lastly appears in that subclause is a reference back to the 'decision' where it first appears in the subclause.

46 We do not need to decide this question as in our view, the terms of clause 29(1)(d) of Schedule 5 are sufficiently clear for the reasons we explain later. In other words, even if we were prepared to accept the Appellant's contention as to the correct construction of clause 1(2), in our view the decisions in question here come within the terms of clause 29(1)(d) of Schedule 5 so as to be a 'profession decision' and not internally appealable.

47 We note by way of background, that clause 1(2) was not dealt with by any of the parties in their written submissions and was raised by the Appeal Panel

with the parties' representatives at the hearing. In such circumstances, we have decided we should not come to any definite view as to the proper construction to be given to clause 1(2).

48 Nextly, and in our view, most crucially for the determination of the question of jurisdiction, the Appellant submitted that an interlocutory or ancillary decision made under the NCAT Act and not under the National Law should not, correctly construed, be regarded as being 'for the purposes of the' National Law.

49 The Appellant contended that whilst the phrase 'under the [name of the Act]' was commonly used, the expression 'for the purposes of' was less usual.

50 According to the Appellant, the term 'for the purposes of', in all of the circumstances here, including the submissions made above, should be given a meaning closer to that of 'under the' relevant Act.

51 Accordingly, an ancillary and interlocutory decision, such as in respect of the issuing of a summons, should not be regarded as being for the purposes of the National Law but simply a decision for the purposes of the NCAT Act.

52 We are not able to agree with this contention.

53 In our view, consistent with the ordinary meaning of the term 'for the purposes of', the Decision which dealt with the production of documents under summonses issued in the disciplinary proceedings under the National Law were for the 'purposes of' those proceedings and hence, also the National Law itself within the meaning of clause 29(1)(d) of Schedule 5 of the NCAT Act.

54 Where the ordinary meaning of the term 'for the purposes of' is broader than 'under' there is no reason to assume that Parliament intended that the former phrase should be interpreted consistently with a different and narrower phrase.

55 If one were to ask the question what were the 'purposes of' issuing the summonses for production, the obvious and sensible answer is that the summonses were issued for the purposes of pursuing the Appellant's defence in the disciplinary proceedings pursuant to or under the National Law. Similarly, it seems reasonably clear to us, that the purposes of the orders in question

were to allow for the orderly and efficient course to be taken in the conduct of the disciplinary proceedings under or pursuant to the National Law.

56 In our view, interlocutory decisions which provide for the orderly conduct of disciplinary proceedings under the National Law can be fairly and correctly described as being decisions 'for the purposes of the National Law'.

57 Our conclusion that the orders should be regarded as being 'for the purposes of the National Law' is reinforced by s 4(2) of the NCAT Act which provides as follows:

> A reference in this Act (however expressed) to the exercise by the Tribunal of its functions in relation to other legislation includes a reference both to its functions under the legislation and its functions under this Act in relation to the legislation.

58 This encapsulates our conclusion that the interlocutory decision in question whilst made under the NCAT Act should also be taken to be for the purposes of the National Law within the meaning of clause 29(1)(d) of Schedule 5.

59 In addition, we note that clause 29(1), Schedule 5 applies in terms to 'Division Decisions', which means 'the decision of the Tribunal in the exercise of a division function', and 'division functions' means a function of the Tribunal allocated to the division. An interlocutory decision, exercising a power under the NCAT Act, in proceedings allocated to the Occupational Division, would be a Division Decision which is then a 'decision' under clause 29(1), Schedule 5.

60 This also tends to reinforce the conclusion that an interlocutory decision in the nature of a 'Division Decision' would be a decision for the purposes of the National Law within the meaning of clause 29(1)(d), Schedule 5 of the NCAT Act.

61 In conclusion, in our view, the Appeal Panel has no jurisdiction to hear an appeal against the orders in question as they are not internally reviewable as they are 'profession decisions' by reason of the fact that they are decisions for the purposes of the National Law within the meaning of clause 29(1)(d) of Schedule 5 of the NCAT Act.

62 In line with our conclusion that this panel has no jurisdiction to hear the appeal, we do not think it is appropriate to determine the merits of the appeal or the

contentions sought to be raised by the Appellant as to why the orders were wrongly made as contended for by the Appellant in his Notice of Appeal.

Costs

63 The Respondent sought an order that the Appellant pay the whole of the Respondent's costs of and incidental to the appeal.

64 The Respondent refers to clause 13, Schedule 5D of the National Law which allows the Tribunal to order that the registered Health Practitioner pay costs to another person as ordered by the Tribunal. That provision states that:

> 13 Tribunal may award costs [NSW]
>
> (1) The Tribunal may order the complainant (if any), the registered health practitioner or student concerned, or any other person entitled to appear (whether as of right or because leave to appear has been granted) at an inquiry or appeal before the Tribunal to pay costs to another person as decided by the Tribunal.
>
> (2) When an order for costs has taken effect, the Tribunal is, on application by the person to whom the costs have been awarded, to issue a certificate setting out the terms of the order and stating that the order has taken effect.
>
> (3) The person in whose favour costs are awarded may file the certificate in the District Court, together with an affidavit by the person as to the amount of the costs unpaid, and the Registrar of the District Court must enter judgment for the amount unpaid together with any fees paid for filing the certificate.
>
> (3A) The Tribunal may fix the amount of costs itself or order that the amount of costs be assessed by a costs assessor under the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.
>
> (4) This clause applies instead of section 60 (Costs) of the Civil and Administrative Tribunal Act 2013.

65 The Respondent submitted that in such a case costs normally follow the event in the absence of any disentitling conduct: see *Health Care Complaints Commission v Philipiah* [2013] NSWCA 342 at [45], *Health Care Complaints Commission v Livermore* (No 2) [2021] NSWCATOD 115 at [10] – [20] and *Health Care Commission v Wilcox* (No 2) [2020] NSWCATOD 51 at [9] – [12].

66 According to the Respondent as there are no factors which would be against a recovery by the Respondent of all of its costs in respect of and incidental to the appeal, if the appeal is dismissed or otherwise fails, the Appellant should be ordered to pay all of the costs of the Respondent of and incidental to the appeal.

67 In our view, even though the Appeal Panel of the Tribunal has no jurisdiction to hear the appeal, clause 13 of Schedule 5D of the National Law applies. The Appellant is a registered health practitioner and is entitled to appear at an appeal before the Tribunal.

68 The Respondent has, in fact, appeared in these internal Appeal Panel proceedings and has been wholly unsuccessful. The Appellant should pay the Respondent's costs.

Orders

69 The orders of the Appeal Panel will be:

(1) The appeal is dismissed.

(2) The Appellant is to pay the Respondent's costs as agreed or assessed.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar