Divisional Court Upholds Hospital Board Decision to Revoke Physician Privileges

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In *Gupta v. William Osler Health System*, the Divisional Court provides clarity on relevant considerations when deciding whether to revoke a physician's privileges by reason of disruptive and inappropriate conduct.

Background

The physician, Dr. Milan Gupta, was a cardiologist with active staff privileges at the Brampton Civic Hospital site of William Osler Health System (the "Hospital").

In June 2008, he and his wife separated. This led him to develop or nourish what was, at first, a consensual friendly relationship with a nurse who worked with him in the Hospital's catheterization lab. Unfortunately, this relationship deteriorated over the ensuing months.

In February 2012, Dr. Gupta sent the nurse a threatening letter. Following an investigation, this letter was found to have constituted a "threat" under the Hospital's Workplace Violence Prevention Policy and Procedure.

On March 14, 2012, Dr. Gupta and the Hospital signed a letter signifying their agreement to a return to work plan. In the letter, which constituted a reprimand, Dr. Gupta acknowledged that his behaviour was inappropriate, and agreed that he would have no personal contact with the nurse. The letter also specified that further violation of the Hospital's Code of Conduct or other policies could result in discipline including termination of privileges.

On August 18, 2012, Dr. Gupta sent the nurse an unwanted card and a letter. The nurse filed a complaint, and the Hospital advised Dr. Gupta that he would be suspended under the Hospital's by-laws. However, in lieu of an immediate suspension, Dr. Gupta agreed that he would take a voluntary leave of absence pending a mental health assessment.

On October 3, 2012, it was discovered that Dr. Gupta had accessed the nurse's personal health records at the Hospital. This revelation resulted in the immediate temporary suspension of Dr. Gupta's privileges.

The immediate suspension was confirmed by the Medical Advisory Committee on October 30, 2012, and by the Hospital's Board of Directors on November 23, 2012. The suspension was granted on condition that a further Medical Advisory Committee meeting be held to consider the issue of whether Dr. Gupta be allowed to return to work or have his privileges revoked.

In October 2013, the Medical Advisory Committee met and recommended that Dr. Gupta's hospital privileges be revoked. The recommendation was based on fourteen reasons, including that Dr. Gupta had displayed gross misconduct and that his actions and behaviours justified revocation.

Dr. Gupta requested a hearing before the Hospital's Board of Directors, which took place over nine days. On July 31, 2014, the Hospital's Board of Directors issued a decision accepting the Medical Advisory Committee's recommendation that Dr. Gupta's privileges be revoked.

Dr. Gupta appealed the decision of the Hospital's Board of Directors to the Health Professions Appeal and Review Board ("HPARB"). After a six day *de novo* appeal hearing, HPARB dismissed the appeal by decision and reasons dated April 5, 2016, concluding that: "even though [Dr. Gupta] does not pose a continued threat to the safety of patients or staff at [Brampton Civic Hospital], his actions through to October of 2012 were sufficiently serious or egregious to justify the revocation of his privileges."

Dr. Gupta appealed HPARB's decision to the Divisional Court. He asked the Court to consider a number of issues including whether HPARB applied the correct test for revocation, and if so, whether HPARB's decision upholding the revocation of his privileges was unreasonable and disproportionate.

Decision of the Divisional Court on Appeal

Past Conduct Relevant to Deciding Whether to Revoke a Physician's Privileges

At the Divisional Court, Dr. Gupta argued that HPARB erred in its conclusion. In his view, his past conduct should *only* be taken into consideration to the extent it presented an ongoing risk to the safety of patients or staff. And since he was not found to be a continued threat to the safety of patients or staff, he maintained that HPARB erred in revoking his hospital privileges.

The Court rejected the narrow construction of the test for revocation of privileges advanced by Dr. Gupta. Instead, the Court affirmed that the *Public Hospitals Act* exists to further multiple public interest objectives that must be balanced, which, in turn, entitles HPARB to consider other factors in addition to legitimate concerns for patient or staff safety when deciding whether to revoke a physician's privileges:

It is clear that the Court in *Rosenhek* was not suggesting that the only public-interest factor to be considered related to the quality of care provided by the hospital. I appreciate, as stated by this Court in *Soremekun* at para. 16, that ensuring patient safety in the provision of hospital services is a main purpose of the *Act* and it was the one factor singled out in the *Rosenhek* case. However, the Court there referred to "various public-interest factors". As [HPARB] held, there must be a balance of several disparate interests, including the [Hospital's] right to expect that its professional staff will

follow its policies and their responsibilities. As the [Hospital] argues, public interest must include maintaining public confidence in public institutions, and egregious misconduct by people working in those institutions, particularly physicians, attacks this public confidence. Furthermore, as [HPARB] noted, [the nurse] has a right to a safe working environment, free from harassment and threats of violence. [at para 64, emphasis in original.]

In reaching this conclusion, the Court cited HPARB's broad statutory authority pursuant to the *Public Hospitals Act* to direct "such action as [HPARB] considers ought to be taken in accordance with this *Act*, the regulations and [hospital] by-laws."

In this case, the Hospital's by-laws explicitly permit non-immediate mid-term action to be taken with respect to a physician's privileges under a variety of circumstances, which are not limited to conduct, performance or competence that is reasonably likely to be detrimental to patient or staff safety, but also conduct that is "reasonably likely to be detrimental to Hospital operations; or the same is, or is reasonably likely to constitute abuse; … or the same is contrary to the by-laws, Professional Staff Rules, the *Public Hospitals Act* or the regulations made thereunder or any other relevant law or legislated requirement."

In light of the foregoing, and given the finding that Dr. Gupta had seriously breached Hospital by-laws and other legislative requirements with respect to workplace harassment and privacy, the Court reasoned that his past conduct was properly the subject matter for consideration before HPARB.

Decision to Revoke Privileges Not Disproportionate

Having found that HPARB made no error in arriving at its decision to revoke Dr. Gupta's privileges, the Court then addressed the issue of whether the decision itself is disproportionate, and therefore, unreasonable. Dr. Gupta had argued that a revocation of his privileges is the most extreme measure, and that lesser measures were available.

The Court rejected Dr. Gupta's argument. It did not accept the notion that a revocation of Dr. Gupta's hospital privileges was the most extreme measure that could be taken with respect to his career (a more drastic outcome, which the Court equates to career "capital punishment," would actually be a revocation of licence by the College of Physicians and Surgeons of Ontario).

In assessing proportionality, the Court considered Dr. Gupta's repeated failure to comply with expected standards of behaviour despite multiple opportunities. The Court also noted the factual finding that Dr. Gupta's practice had continued and expanded since 2012, with hospital work becoming only a small component of it.

Comment

The clarity provided by the Court is appreciated. Importantly, the Court affirmed that legitimate concerns for patient or staff safety is not the sole and overriding concern when deciding whether to revoke a physician's privileges, but that other considerations are in play and must be balanced in order to fulfill the public interest objectives of the *Public Hospitals Act*. As such, a physician's pattern of disruptive conduct, even if it

presents no risk to patient or staff safety on a go-forward basis, may nevertheless be a relevant consideration.

The Court's approach to the proportionality analysis is also of interest. The analytical framework established by the Court's reasons is not whether lesser measures were available, but whether the decision to revoke a physician's privileges can be reasonably supported in light of factors such as the severity of the physician's conduct and the failure to respond to progressive action.

Postscript

Patrick Hawkins (partner) and Stephanie Young (senior associate) of BLG were counsel to William Osler Health System at HPARB and the Divisional Court.

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