Hospital Protected by Public Hospitals Act in Physicians' Wrongful Dismissal Claim

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Overview

This decision highlights that subsection 44(5) of the *Public Hospitals Act* ("PHA") will provide a hospital protection where the board of the hospital determines that the hospital will cease to provide a service.

In this case, an action was brought by physicians related to the cancellation of the physicians' privileges as a result of the closure of the Urgent Care Centre ("UCC") of Women's College Hospital ("the Hospital"). The physicians claimed that they were either employees or alternatively, dependent contractors, and therein entitled to damages in lieu of reasonable notice. BLG Lawyers John J. Morris and Kate Deakon successfully defended the Hospital in the action for damages for wrongful dismissal and punitive damages resulting from the alleged tort of civil fraud.

Public Hospitals Act Bars the Physicians' Claim

The Ontario Superior Court of Justice ("the Court") found that the claim was barred by the operation of section 44 of the PHA. Under subsections 44(1.2) and 44(2) of the PHA, when the board of a hospital determines that the hospital will cease to provide a service, that board may cancel, revoke, substantially alter or refuse the hospital privileges of any physician related to the provision of that service. Subsection 44(5) provides a hospital immunity from a proceeding for damages where a decision under subsection 44(2) is made in good faith.

The physicians argued that they were either employees or dependent contractors, and, therefore, those sections of the PHA ought not to apply. They also argued that there was a gap in the legislation such that by operation of section 44, the physicians had no recourse to proceed civilly nor to proceed to a hearing under the legislative scheme. The physicians submitted that an "absolute indemnification" pursuant to subsection 44(5) conflicts with the statutory and common law protections provided to employees and dependent contractors and that they should accordingly have a remedy.

The physicians further argued that there was no evidence to indicate that the hospital made a decision under subsection 44(2). They argued it simply closed the UCC and that there was no evidence that their privileges were actually cancelled.

The Court found that the physicians could not rely "on evidence of their termination without accepting that their privileges, which are the means by which physicians practice in hospitals, were not cancelled or substantially altered by the hospital board."

The Court ruled that section 44 of the PHA applied and that the "entirety of the doctors' claim in relation to their "termination" is statute-barred." Further, Justice Ferguson wrote that "if the PHA had intended for there to be an exception to these provisions for any type of physician with privileges, it would have provided one."

The Physicians Were Dependent Contractors

The Court also considered the nature of the physicians' relationship to the Hospital. The Court found that had the PHA not applied to bar the physicians' claim, the physicians would be entitled to damages in lieu of reasonable notice by virtue of their being dependent contractors. In determining that the physicians were dependent contractors, the Court focused on their economic dependence on the hospital and their high level of exclusivity.

The Court considered that the physicians had held privileges at the Hospital for 21 years and 31 years. Both physicians claimed they "worked full-time." The majority of the physicians' annual income came from their practice at the Hospital.

Takeaways for Hospitals

This is the first judicial interpretation of section 44 which was added to the PHA in 1996 at the time that the Health Services Restructuring Commission ("HSRC") was established. The section was intended to enable hospital closure and service terminations or transfers without triggering the requirement for a board hearing with respect to the privileges of physicians impacted by such activities. Section 44 has been amended since it was first introduced to extend the protection to actions taken by a hospital as a result of an integration decision made by a local health integration network ("LHIN") or an order made by the Minister of Health and Long Term Care ("Minister") under the *Local Health System Integration Act* ("LHSIA").

This decision confirms that subsection 44(5) will provide a hospital protection where the board of the hospital makes a decision that impacts the privileges of a member of the medical staff, including a decision to revoke or suspend an appointment, to cancel or substantially alter privileges, or to refuse to appoint or re-appoint a member of the medical staff in circumstances where the hospital has made a determination that the hospital will cease to provide a service or close, or the hospital is implementing an integration decision of a LHIN or an order of the Minister under the LHSIA.

In order to rely on the immunity offered by section 44 for a decision to cancel, revoke, substantially alter, or refuse privileges, hospitals should ensure they have taken the proper steps for its application. Documentation is important where a hospital ceases to operate or provide a service in accordance with subsection 44(1) or (1.2). One example

of ensuring effective documentation lies in the careful drafting of hospital board resolutions to align with the requirements of the PHA.

Where privileges are cancelled, revoked, refused or substantially altered and section 44(5) does not apply, hospitals should consider whether a physician may legally be considered a dependent contractor, and potentially entitled to damages for reasonable notice. While this case presented a unique set of circumstances with respect to the physicians' exclusivity and economic dependence, hospitals should nonetheless consider the potential pecuniary consequences and what steps could be taken to reduce or avoid those consequences before making changes to a physician's privileges. Therefore, we encourage consultation with counsel when decisions of this nature are being made.

By

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