

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20170531
Docket: S114963
Registry: Kelowna

Between:

Brigitta Pelcz

Petitioner

And

College of Licensed Practical Nurses of British Columbia

Respondent

Before: Master S. Wilson

Corrected Oral Reasons for Judgment

In Chambers

Appearing on her own behalf:

B. Pelcz

Counsel for the Respondent:

J.K. Herbert

Place and Date of Trial/Hearing:

Kelowna, B.C.
May 29 and 31, 2017

Place and Date of Judgment:

Kelowna, B.C.
May 31, 2017

[1] **THE COURT:** This is an application brought by the College of Licensed Practical Nurses of British Columbia ("the College") in regard to a petition brought by the petitioner, Brigitta Pelcz.

[2] The background of the matter is that there was a disciplinary proceeding by the College that was initiated by a complaint by Tara-Lee Calhoun. The matter took some time to proceed; however, following a ten-day panel hearing, a decision was rendered in March of 2017. Pursuant to the *Health Professions Act*, there is a right of appeal to the British Columbia Supreme Court.

[3] Ms. Pelcz filed her petition to the Supreme Court on time and she also served the College on time. The issue with regard to the service relates to the fact that she did not serve the complainant, Ms. Calhoun, on time.

[4] The relevant statutory provisions are set out in the *Health Professions Act* which provides that s. 40(2) sets out the appeal.

40(2) An appeal under this section must be commenced within 30 days after the date on which the order described in subsection (1), or the written notice described in section 20 (7), as the case may be, is delivered to the person who has the right to appeal under this section.

[5] Section 3 provides:

(3) An appeal under this section must be commenced by filing a petition in any registry of the Supreme Court, and the *Supreme Court Civil Rules* relating to petition proceedings apply to the appeal, but Rule 18-3 of those rules does not apply.

[6] Paragraph 4 reads:

(4) The petition commencing an appeal under this section must, within 14 days of its filing in the court registry, be served on.

(a) the college, effected by service on the registrar, if the appellant is a respondent described in section 38 (2) or a registrant described in section 39.1 (1),

-- and

(c) the complainant, if the matter relates to a complaint.

[7] Clearly this matter related to a complaint and Ms. Calhoun was the complainant.

[8] Paragraph 40(5) of the *Health Professions Act* goes on to say the following:

(5) Only the persons required to be served under subsection (4) (a) and (b) may be parties to an appeal.

[9] This means that the complainant, Ms. Calhoun, although she must be served under s. 40(4), is not entitled to be a party to the appeal itself.

[10] The applicant College says that the deadline for the service on Ms. Calhoun was April 21, 2017, being fourteen days after the filing.

[11] On April 18 a letter was sent from counsel to the College advising of various procedural and substantive matters, including the fact that Ms. Calhoun would need to be served. The letter goes on to identify deficiencies with the form of the petition, which I will address later.

[12] The College says that the requirements of s. 40(4) are mandatory and that it is only in very rare circumstances that an order could be made *nunc pro tunc* to permit for service at a later time.

[13] I was referred to a number of cases, including *CIBC v. Green*, a decision of the Supreme Court of Canada at [2015] 3 S.C.R. 801. In that decision the court addressed the issue of service *nunc pro tunc*.

[14] The difficulty I have here is that Ms. Pelcz, who is representing herself, has advised in submissions that she made multiple attempts to serve Ms. Calhoun prior to the deadline. Unfortunately I have no evidence of that before me.

[15] That being said, the court is always reluctant to prevent somebody from pursuing a claim for what would be primarily technical reasons. This case is different from one of the authorities that I was referred to in that the College, who will be the active participant in the appeal if it is to proceed, was served in time and no issue was taken with that. It would appear, therefore, that the reason for notifying the

complainant is simply to ensure that they are aware of the appeal, but they play no role in the appeal.

[16] Some of the cases I was referred to involved appeals whereby the Crown was the respondent. Of course the Crown is much easier to locate. Ms. Calhoun is a nurse. At the time of the events that gave rise to the complaint, Ms. Calhoun was Ms. Pelcz's supervisor, and both worked at the Sutherland Hills Rest Home in Kelowna. However, Ms. Calhoun no longer works at the Sutherland Hills Rest Home. According to a registration pertaining to her licensing, she now works at the Kelowna General Hospital.

[17] It is not clear to me how s. 40(4)(c) would work when the person is an individual and may not be located. Counsel for the College says that Ms. Pelcz could have made some efforts before; that what she says she has done, and for which there is no evidence before me, may or may not have happened; that a court could consider an order for alternative service within the 14 days. However, the court will generally be reluctant to grant an alternative service order without a number of attempts and it may not be possible to get into court and effect service by way of an alternative method within 14 days.

[18] The College also says that the policy of the College would be that if an attempt were made to send a copy of the appeal to the Kelowna General Hospital, being Ms. Calhoun's address based upon her registration as a nurse, that they would consider that to be service. That may be the policy, but, of course, that would also not be necessarily service in the true sense in terms of compliance with the statute, and if service on the College was sufficient this issue would not need to be argued today because the College has been served.

[19] On the issue of the matter of service I am not going to dismiss the petitioner's claim at this point.

[20] I will get back to what we will do with regard to service later.

[21] I will turn now to the issue of the petition.

[22] Ms. Pelcz was anxious to proceed with the petition, but it is very clear from a review of the petition that it is substantively deficient in many ways. Clearly her intention is to appeal, that much is clear. However, the petition does not include, for example, any statement of any factual basis; there is no legal basis; and no affidavits have been provided either. So it is clear that it would not be in the petitioner's best interests to proceed with the petition in its current form, notwithstanding her original wish to do so. When this was brought to her attention she sought the ability to amend the petition.

[23] Normally if pleadings are deficient, first consideration is can they be remedied? And in my view it is appropriate to provide Ms. Pelcz with an opportunity to amend her petition and to provide that petition in proper form, together with any affidavits, in order to comply with the *Rules*.

[24] I am going to give her time to do that. She said that she may seek legal advice and said that she wanted two weeks. This is a very technical area of the law, it is administrative law. There needs to be a consideration of the appropriate standard of review. Mr. Herbert indicated that the College would be prepared for a longer time if Ms. Pelcz seeks legal counsel.

[25] In my view, Ms. Pelcz should be provided with time to cure the obvious deficiencies with her materials and I am going to give her four weeks to do that.

[26] Returning to the notice of application filed by the respondent, I am not going to dismiss her appeal, but there is no application to remedy the service issue. So I am simply going to adjourn items 1 and 2 from the respondent's notice of application, that is to strike out the petition for having failed to serve Ms. Calhoun, and Ms. Pelcz has indicated that she believes she has some emails that may indicate some efforts on her part. Whether that turns out to be the case is something that she may need to address by way of an affidavit if the matter is reset.

[27] Similarly, the application to set aside the petition for failing to comply with the *Rules* is also adjourned. Those matters may be reset any time after the four-week period has passed in order to allow Ms. Pelcz to remedy the petition itself.

[28] I will order that the petitioner's notice of hearing filed on April 12 be set aside. Therefore the petition is adjourned generally, and that too will not be reset without first consulting with counsel for the College to identify a mutually agreeable date. As I indicated, it would not be in Ms. Pelcz's best interests to have the petition heard in its present form given its obvious deficiencies in any event.

[29] As for item 3 in the notice of application, paragraph (a) is granted. Paragraph (b) will be for a period of four weeks, or 28 days. Paragraph 3(c) is also granted.

[30] The respondent will have its costs as costs in the cause; both Monday and today.

[31] MR. HERBERT: Your Honour, will it be possible to waive the requirement to obtain Ms. Pelcz's consent for the order?

[32] THE COURT: Yes. So Ms. Pelcz, Mr. Herbert will draft the order which reflects what I have said, which adjourns items 1 and 2 and grants what I have ordered in paragraph 3. It will be checked by the registry, but I do not require you to proofread it. Mr. Herbert's office will then file it with the court and a copy will be sent to you promptly.

[33] MS. PELCZ: May I just re-ask what my time -- so I have four weeks to -- amend the petition? Because I am sorry, I ...

[34] THE COURT: You have four weeks to amend the petition that you have filed. You need to amend the one that you have filed already, because if you were to do a new one that one would be out of time. So it is to amend the one that you filed and

to make sure that you have all the materials that you need in order to proceed with your appeal in four weeks.

“Master S. Wilson”