

ALBERTA COLLEGE OF PHARMACISTS

IN THE MATTER OF
THE HEALTH PROFESSIONS ACT

AND IN THE MATTER OF AN APPEAL FROM A
DECISION OF THE HEARING TRIBUNAL REGARDING
THE CONDUCT OF **ADEL AGINA**, A PHARMACIST

DECISION of the COUNCIL

April 25, 2016

I. INTRODUCTION

The Appellant, Mr. Adel Agina, Pharmacist, appeals pursuant to section 87 of the *Health Professions Act* from the September 8, 2015 order of the Hearing Tribunal that he pay the full costs of the investigation and hearing into his conduct.

Mr. Agina received the Hearing Tribunal's written decision in this matter by letter dated September 8, 2015. In the letter accompanying the Hearing Tribunal's written decision the Hearings Director for the Alberta College of Pharmacists ("ACP") notified Mr. Agina that the Hearing Tribunal had ordered him to pay the costs of the investigation and hearing and that an itemized listing of those costs to date was enclosed. The Hearings Director's letter indicated that a final listing of those costs and a payment schedule acceptable to the Complaints Director would be sent to him within the following 30 days. On October 6, 2015 the Hearings Director sent Mr. Agina a final listing of the costs of the investigation and hearing totaling \$18,465.18 and proposing a monthly payment of \$513.00.

On November 6, 2015 Mr. Agina submitted a Notice of Appeal seeking to appeal only the Hearing Tribunal's order that he pay the full costs of the investigation and hearing. Mr. Agina's Notice of Appeal requested that the appeal proceed through written submissions alone. On November 25, 2015, a panel of the Council met to consider Mr. Agina's preliminary request for the appeal to proceed in writing. Council members in attendance at this preliminary meeting were:

Taciana Pereira, Panel Chair
Jennifer Teichroeb, Council Member
Brad Couldwell, Council Member
Bob Kruchten, Public Member of Council
Al Evans, Public Member of Council (alternate)

After noting that the Complaints Director did not object to Mr. Agina's proposal, the panel issued a preliminary written decision that the appeal would be heard in writing only and setting deadlines for written submissions.

Mr. Agina and the Complaints Director provided written submissions on the appeal. On March 4, 2016 the panel of Council met to consider the written submissions. Mr. Kruchten was unavailable to participate on March 4, 2016 so Al Evans, also a public member of the Council, participated on the panel and Mr. Kruchten took no part in the decision. There were no objections to any of the Council members participating on the panel or any preliminary objections or jurisdictional issues brought forward by either party.

II. HISTORY

The hearing before the Hearing Tribunal proceeded on June 17, 2015. The hearing proceeded through an Agreed Statement of Facts and Admission of Unprofessional Conduct. One allegation in the Notice of Hearing was not pursued by the Complaints Director. The

Agreed Statement of Facts was reproduced in the Hearing Tribunal's Decision and included the following facts.

On November 2, 2014 Mr. Agina was working as a relief pharmacist at a Shoppers Drug Mart location in Calgary, Alberta when he administered influenza vaccinations to two minor children. Mr. Agina prepared two syringes with Fluviral doses from a multidose vial. After administering the injection to the first child, Mr. Agina placed the used syringe and needle back on the table next to the unused syringe rather than in the designated sharps/biohazard container. After preparing the second child for his injection, Mr. Agina picked up the empty syringe and placed the used needle in the second child's arm. Mr. Agina realized his mistake when he was unable to depress the plunger on the empty syringe. Mr. Agina advised the child and his mother of his error and that he would need to administer the injection using the full syringe and he then administered the injection and requested the children and their mother return to the pharmacy in 15 minutes to check for any adverse reactions to the vaccine.

Mr. Agina did not initiate any steps to provide care for the minor patient or provide advice or a referral to him or his mother about the needle stick incident. Mr. Agina also failed to put into effect any management or quality assurance process to minimize the risk of harm to the child, to respond to the needle stick incident, or to report the needle stick incident to the licensee of the pharmacy.

The Hearing Tribunal reviewed the Agreed Statement of Facts and Admission of Unprofessional Conduct and found the admitted allegations were well founded. The Hearing Tribunal accepted Mr. Agina's admission that he committed unprofessional conduct in that he:

1. Administered seasonal influenza vaccination injections for HM and CM in the presence of their mother JM;
2. After injecting HM, through error and omission, failed to properly dispose of the needle/syringe he had used for HM and subsequently caused a needlestick injury for CM when he reused the needle/syringe he had used on HM;
3. Failed to properly care for the injury to CM and the further risk of communicable disease by failing to provide proper needlestick injury management for CM, by providing care to CM or referring CM to another health care provider; and
4. Failed to properly initiate a quality assurance process to report and document the needlestick injury to the licensee and other applicable parties and in particular;
 - a. Failed to advise the licensee or anyone else at the Pharmacy that the needlestick injury had occurred;
 - b. Failed to document the needlestick injury in any way;
 - c. Failed to complete a drug incident report;
 - d. Only acknowledged the error and spoke with the licensee and other pharmacy co-owner when the licensee and pharmacy co-owner phoned Mr. Agina on November 3, 2014 after being notified of the incident by the Complaints Director.

The parties did not agree on the appropriate sanctions. The Hearing Tribunal received submissions on sanction from the Complaints Director and Mr. Agina. On the issue of costs, the Complaints Director argued that Mr. Agina's conduct resulted in the hearing and therefore it would be appropriate that he pay the full costs. In its written decision the Hearing Tribunal noted that the full costs were "estimated to be around \$10,000 to \$12,000 after the hearing." Mr. Agina argued that there should be a cap on the costs of \$5,000 to \$7,000 and that Mr. Agina should be permitted to pay the costs in installments.

The Hearing Tribunal deliberated and decided that, among other orders, Mr. Agina would be ordered to pay the full costs of the investigation and hearing, payable in installments agreed to by the Complaints Director. The Hearing Tribunal elected not to impose any cap on these costs as Mr. Agina had proposed, but the Tribunal did comment that a "rough estimate suggests the costs to be around \$12,000" and that these costs were "smaller than most." In its reasons for the Orders, the Hearing Tribunal acknowledged that Mr. Agina was cooperative but the Tribunal held this would have the effect of minimizing the costs payable and benefitting Mr. Agina.

The Hearing Tribunal issued its decision on September 8, 2015. By covering letter dated the same date, Mr. Agina was provided a copy of the Hearing Tribunal's decision and an itemized list of the costs of the investigation and hearing to date totaling \$16,422.54. Mr. Agina was also advised that a final listing of the costs and a payment schedule acceptable to the Complaints Director would be sent to him within 30 days. On October 6, 2015, the Hearing Director sent to Mr. Agina a final listing of the costs of the investigation and hearing totaling \$18,465.18 and proposing monthly installment payment of \$513.00.

III. STANDARD OF REVIEW

The parties agree that the Council should apply the reasonableness standard of review to the issue on appeal. See for example *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253 at para. 94 and *Wright v. College and Assn. of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 at para. 35.

A decision will be reasonable if it is justifiable, transparent and intelligible and if it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47. When conducting a review for reasonableness, the Council will not conduct its own analysis of the question and substitute its view for that of the Hearing Tribunal.

IV. ISSUES ON APPEAL

Mr. Agina appeals only from the Hearing Tribunal's order that he pay the full costs of the investigation and hearing. Mr. Agina's Notice of Appeal contained several grounds of appeal but in his written argument Mr. Agina advanced only the following two grounds of appeal:

- (a) After the Hearing Tribunal's decision was rendered, there was a change in the circumstances regarding costs which would have affected the decision if the information had been available at the time of the hearing; and
- (b) Further, and in the alternative, the decision to order that Mr. Agina pay the full costs of the investigation and hearing was unreasonable.

V. ANALYSIS

(a) Whether there was a Change in Circumstances

Mr. Agina asserted that the order requiring him to pay the full costs of the investigation and hearing was erroneous because the Hearing Tribunal made the order based on the suggestion at the hearing that the costs would be roughly \$10,000 to \$12,000. Mr. Agina points out that the Hearing Tribunal characterized the \$10,000 to \$12,000 range of costs as "smaller than most" hearings but it recognized that costs of this quantum could still be a "financial burden" for members of the profession. Mr. Agina argued that the Hearing Tribunal likely would have changed its decision had it been aware that the actual costs would be \$18,465.18.

The Complaints Director argued that the suggestion at the hearing that costs would be roughly \$10,000 to \$12,000 was subject to several qualifications. In the hearing transcript, it was clear that counsel for the Complaints Director explained that he was unable to provide a final figure. He explained that the costs of the hearing on June 17, 2015 were not yet known because costs were still accruing at that point for the Hearing Tribunal members, the Court Reporter and Independent Legal Counsel to the Hearing Tribunal. Counsel for the Complaints Director's own fees were also still accruing at that point in time. The Complaints Director argued that the Hearing Tribunal was aware that the \$10,000 to \$12,000 figures were at best estimates made before final figures were available and that those figures would be subject to adjustment.

The Council has carefully considered the record before the Hearing Tribunal when it made its decision to order that Mr. Agina pay the full costs of the investigation and hearing, as well as the subsequent itemized lists of costs provided to Mr. Agina. The Hearing Tribunal received an estimate of the likely costs in the \$10,000 to \$12,000 range. The Hearing Tribunal was advised that the estimate of costs included items for which final figures were unknown and could not be known until much later. In its decision, the Hearing Tribunal ordered Mr. Agina to pay the full costs of the investigation and hearing. The Hearing Tribunal did not accede to Mr. Agina's submission that the costs should be capped at \$5,000 to \$7,000 and it did not order the costs to be capped at the \$10,000 to \$12,000 range either. While the costs were ultimately higher than either of the parties expected, this was not a change in the circumstances upon which the Hearing Tribunal made its decision. It is speculative to say what the Hearing Tribunal would have directed if it had been aware of the actual costs figure and the Council is not permitted to determine whether the Hearing Tribunal's order was correct.

(b) Whether Full Costs of the Investigation and Hearing was Unreasonable

Mr. Agina also argued that \$18,465.18 is unjustifiably high in the circumstances of the case and therefore the order to pay it is unreasonable. Mr. Agina reviewed factors relevant to the assessment of costs in *Jaswal v. Newfoundland (Medical Board)*, [1996] N.J. No. 50 at para. 51. Mr. Agina argued that he cooperated fully with the ACP and admitted the allegations brought against him limiting the complexity of the investigation and simplifying the hearing and avoiding the need for witnesses. He said that despite his cooperation and agreement the hearing required a full day and that this was unnecessary so he should not be responsible for the full costs. Mr. Agina also reiterated evidence from the record as to his personal and financial circumstances and he reviewed factors relevant to the assessment of orders generally, commenting on the relatively minor nature of his admitted conduct.

The Complaints Director referred to twelve previous Hearing Tribunal decisions since May of 2012 that proceeded as one day hearings based on admissions of unprofessional conduct. The costs of the investigations and hearings in these cases were reported to have ranged from \$9,233 to \$21,862 with full costs having been ordered in nine of the twelve cases. For example, in the pharmacist registrant case dated October 21, 2013 a one day hearing proceeded on agreed facts and admissions resulting in an order for full costs of the investigation and hearing totaling \$19,135. Similarly in the case of E. Joyce Chen Pon dated October 27, 2015 a one day hearing based on agreed facts, admissions of unprofessional conduct and a joint submission on sanction resulted in an order for full costs of the investigation and hearing totaling \$18,658. The Complaints Director submitted that the costs of \$18,465.18 in this case clearly fell within the range of costs ordered in other, similar cases and were therefore within the range of possible acceptable outcomes. The Complaints Director also argued that the Hearing Tribunal was aware of the likely range of costs as it commented that the \$10,000 to \$12,000 costs estimate would be “smaller than most” hearings.

The Council has carefully considered the detailed written submissions of the parties and the record of the hearing. In its decision, the Hearing Tribunal reviewed Mr. Agina’s submissions on costs. The Tribunal noted that Mr. Agina acknowledged he should have handled the matter differently and the Tribunal considered the evidence of his personal circumstances and financial situation. The Tribunal commented that Mr. Agina had already received a severe message due to the incident and that he lost his job. The Tribunal noted that Mr. Agina submitted that CM suffered no real harm and that Mr. Agina is a dedicated Pharmacist with no previous discipline history. The Tribunal also noted Mr. Agina’s proposal to limit the costs to a range of \$5,000 to \$7,000 and for the costs to be payable in installments.

In its decision the Hearing Tribunal ordered that Mr. Agina would receive a letter of reprimand, that he pay the full costs of the investigation and hearing in installments acceptable to the Complaints Director, that there be a condition on his practice permit prohibiting him from providing injections until he had completed a paper on the subject and that until the condition has been satisfied Mr. Agina must provide a copy of the Tribunal’s decision to any future employers. The Tribunal declined to limit the costs as proposed by Mr. Agina but it did order that the costs could be paid in installments agreeable to the

Complaints Director. The Hearing Tribunal also declined to order certain other sanctions sought by the Complaints Director, namely a fine and a practice permit condition requiring Mr. Agina to perform 20 injections under supervision.

The Hearing Tribunal's reasons confirm that it considered who should bear the burden of the costs and determined that the burden should fall on Mr. Agina. The Tribunal said that since all of the allegations advanced at the hearing were proven, the full costs should be paid by Mr. Agina. The Tribunal was aware of Mr. Agina's personal and financial circumstances but it exercised its discretion to order that he pay the full costs in installments, recognizing that the costs would be significant and the need to be fair to Mr. Agina. The Tribunal considered that Mr. Agina had cooperated with the ACP and that his cooperation helped to simplify the investigation and hearing and thereby lowered the costs. Mr. Agina was cooperative but the parties did not agree on sanction and the hearing took a full day.

The Council is not permitted to re-weigh the evidence in the record before the Hearing Tribunal or to re-apply the factors relevant to the determination of costs. The Hearing Tribunal's decision clearly contains an analysis of the costs issue, including consideration of the arguments relied upon by Mr. Agina in this appeal. Although costs of \$18,465.18 are higher than anticipated when they were approximated during the hearing, they are not out of line with costs in similar cases. The Council is unable to conclude that the Hearing Tribunal's order or the quantum of the costs are unreasonable.

VI. CONCLUSION

The appeal is dismissed. The Council has considered whether Mr. Agina should be directed to pay any portion of the costs and expenses of this appeal pursuant to section 89(6) of the *Health Professions Act*. In the circumstances of this case the Council declines to order any costs or expenses of the appeal.

Signed on behalf of the Council by the Panel
Chair

Dated: April 25, 2016

Per: [Taciana Pereira]

Taciana Pereira, Chair