



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 277

BETWEEN:

FRESH BREATH DENTAL LTD

Applicant

-and-

THE BERMUDA DENTAL BOARD

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Marc Daniels, Marc Geoffrey Ltd, for the Applicant**
Mrs Shakira Dill-Francois, Deputy Solicitor General,
for the Respondent

Date of Hearing: **6 November 2019**

Date of Judgment: **28 November 2019**

JUDGMENT

Policy of the Bermuda Dental Board in relation to locum tenens under section 21(2) of the Dental Practitioners Act 1950; whether the policy should be set aside on the ground that it is ultra vires; whether the policy is Wednesbury unreasonable

Introduction

1. Under section 19(1) of the Dental Practitioners Act 1950, (“the Act”), the Bermuda Dental Board, (“the Board”), may authorise a qualified person (locum tenens) to practice dentistry in Bermuda where it appears to the Board that any registered dental practitioner is, or will be, absent from his practice and that it is desirable that another person should undertake his duties for the period during which the registered dental practitioner is so absent.
2. Section 19(2) sets out the provisions which shall have effect with respect to the granting to a locum tenens of an authorisation to practice dentistry and those provisions are:

“(a) the Board shall satisfy themselves (i) as to the need for the authorization; and (ii) as to the professional qualifications and general suitability of the locum tenens to satisfy that need;

(b) the authorization shall be in the prescribed form;

(c) the authorization shall not be expressed to have effect for a period longer than three months from the date of its being granted, subject to a power of the Board to extend the period by a further period of six weeks;

(d) the authorization shall specify the nature and extent of the practice which is permitted;

(e) the authorization shall specify such other special conditions or restrictions connected with the practice of dentistry in Bermuda by the locum tenens as the Board may think fit to impose.”

3. Section 21(5) expressly provides that nothing in section 21 shall abridge or derogate from the Bermuda Immigration and Protection Act 1956, (“the 1956 Act”).

4. Given that section 19(2)(a) requires that the Board be satisfied that there is in fact “*the need*” to authorize locum tenens in Bermuda in a given situation, the Board has adopted a policy that in the ordinary case locum tenens should only be engaged for a minimum period of two weeks (10 working days) up to the statutory maximum of three months, (“the Policy”).
5. In these proceedings Fresh Breath Dental Ltd, (“the Applicant”), seeks to challenge this Policy of the Board on the ground that it is *ultra vires* the Act and in particular that the adoption of the Policy is unreasonable in the *Wednesbury* sense.

Factual background

6. The Applicant is a relatively new company having commenced operations in December 2015. It assists the Bermudian community and operates under the business name Fresh Breath Dental and offers the full range of dental services offered by a dental practice to adults and children on a consistent basis without unnecessary interruption.
7. By a letter dated 14 June 2019, the Applicant made a request to the Board for a letter of no objection for Dr Adrian Cummins to cover as a locum tenens during the period 15 July 2019 through to 19 July 2019 (five working days) when Dr Michael Lopez, the general dentist at the Applicant, was scheduled to be on leave.
8. The Applicant asserts that no local general dentists applied to its advertisement for a locum to provide care to adults and as a consequence a work permit was required for Dr Cummins. Dr Cummins had previously acted as a locum in 2016 for an eight day period and is a general dentist in good standing. The Applicant also points out that during the period 14 to 18 July 2017 (five working days), the Board also allowed Dr Keisha Broomes to act as a locum but expressly stated at that time that “*in the future there will be a minimum of two weeks as per the policy*”

9. Dr Christopher Allington, the Chairman of the Board, explains that when the application for Dr Cummins was received from the Applicant in June 2019, he immediately responded to the Applicant and advised the Applicant of the two-week Policy. He did so, he says, in order to allow them to provide more documentation, amend the application, or plan accordingly. The Applicant submitted further documentation which was included in the application.
10. In his affidavit Dr James Fay, a member of the Board, explains that whilst the Policy requires that applications for a General Dentist must be for a minimum of two weeks, the Board still proceeded to consider the application on its merits and all documentation submitted was reviewed during its deliberations. Dr Fay states that that the application did not contain any information which would cause the Board to derogate from the Policy and it was determined that there was no need for the application for the locum to be granted. In its letter dated 27 June 2019 from the Board advised the Applicant:

“The Dental Board has considered your application for a Locum tenens for Dr Cummins under section 21 of the Dental Board Act 1950. In considering the application and supporting information, further to section 21(2)(a)(i) the Board is not “satisfied as to the need for authorisation” because a five day period of absence does not represent patient risk requiring locum coverage. Coverage for urgent care during a five-day absence can be obtained from other local practices as is standard practice in the community. Consequently, the Board does not grant authorisation for the application”.

The rationale for the policy

11. Dr Allington explains that the Board has long held the Policy that locums should only be engaged for a two-week period or more up to the statutory maximum of three months. Whilst there is no minimum provided for in the Act for a visiting

dental practitioner, section 19(2)(a)(i) provides that the Board must satisfy themselves "*as to the need for the authorisation*".

12. He explains that it is usual and customary that dental offices close or operate without a dentist for a short period of time such as during the Christmas holiday period or during a vacation, with no harm to patients. When the time off is planned, dentist will attempt to arrange their schedule to suit their time out of office by not booking patients during that time, and would complete the work upon their return to office. During this time off, the dentist customarily asks another dentist to cover for them for emergencies that arise.
13. Dr Allington points out that section 3.7 and 3.9 of the Board's *Standard of Practice for Dentists* provides guidance for arranging office coverage when on holiday, sick leave or training. He says there should be a dentist who can provide emergency care; the Board does not have to approve the dentist who covers, but they must have a licence and can work in Bermuda.
14. In relation to the advertisement placed by the Applicant in the newspaper seeking local coverage, Dr Allington believes that the advertisement requested that the local dentist actually come to the Applicant's office and work during that period and not merely cover during that period. He says if that is the case, this is an unusual and unreasonable request and therefore it was not surprising that no one responded to the advertisement. If it was just to have another dentist cover for emergencies, then to his knowledge this has not been done before and no dentist would think to look for it and respond. It is usual to contact another dentist directly to provide cover for emergencies.
15. In relation to the Policy, Dr Allington states that even in relation to requests for a locum for less than a two-week period the Board would still consider all information submitted with the application and would not automatically refuse it. The Board would give the Applicant the opportunity to provide further information.

Whilst there is no specific guidance as to whether this need is on a public-health level or individual office level, the Board's position is that both can be considered.

Applicant's main contention

16. Counsel for the Applicant challenged the Policy followed by the Board on the ground that the policy which requires that the application for a locum must be for a minimum of 10 days is arbitrary in that no explanation is given as to why the period of 10 days is chosen. He says that even if the policy is long-standing it should be struck down on the basis that it is merely arbitrary.

17. Counsel also argues that the Policy is unreasonable in the *Wednesbury* sense in that the Policy is such that no reasonable professional body could have adopted it. He says this is particularly so as no reasons have been put forward.

Discussion

18. The scheme of the Act contemplates that any application in relation to engaging a locum has to be made to and determined by the Board. In determining that application the Board is statutorily required to be satisfied that there is "*need*" for such authorization. As noted by Dr Allington, the Act does not give any guidance in relation to the requirement of "*need*" but it is the practice of the Board to consider the requirement of "*need*" both on the public-health level and also on the individual office level.

19. It is also apparent that an application for a locum would ordinarily also involve an application to the Department of Immigration for a work permit under the 1956 Act. As noted in section 21(5), any authorisation under section 21(1) does not abridge the need to obtain a work permit under the 1956 Act. The scheme of the Act is that an applicant is required to obtain an authorisation to engage a locum under the Act and also require a work permit from the Department of Immigration under the 1956 Act.

20. Given the statutory requirement that the Court has to be satisfied of the “*need*” before it can give authorisation for engagement of a locum it is not in principle objectionable for the board to adopt a policy in relation to the requirements of “*need*” and the consequent authorization. An advantage of adoption of a policy is that it promotes a consistent approach to individual cases.
21. It is accepted by the Respondent that in order for a policy to be lawful it must comply with certain basic requirements. In *Walumba Lumba v Secretary of State Home Department* [2011] UKSC 12 Lord Dyson referred to three such requirements at [20]:

“Here too, there is little dispute between the parties. Mr Beloff QC rightly accepts as correct three propositions in relation to a policy. First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations.”

22. Here, the policy is not a blanket policy as confirmed by Dr Allington. He has confirmed that the Board would assess the need for a locum even for a period less than two weeks and would not automatically refuse such an application. Furthermore, the Board would give the applicant the opportunity to provide further information, as was in fact the case in the application made by the Applicant.
23. Secondly, the Policy is published and consistently applied. Again as Dr Allington confirms that after receiving the 2017 application from the Applicant, the Policy was put on the Board’s website in 2017 which advised that effective 1 January 2018, the two week Policy would be adhered to. Further, the implementation of the Policy was also announced at the Bermuda Dental Association meeting on at least two occasions between 2017 and 2019. Subsequent to that meeting, the Board did

not receive any objection from the Applicant or any other dentists challenging the impartiality of the policy.

24. Third, the discretion of the Board allows for representations to be made. As noted earlier it is Dr Allington's evidence that in relation to applications for less than a two-week period the Board would consider any representations made by the applicant in relation to that application. Indeed in this case the Board invited the Applicant to submit any additional information in support of the current application. The Applicant did indeed submit additional information which was taken into account by the Board in making its decision.

25. In my judgment the current Policy is not arbitrary or unreasonable in the *Wednesbury* sense. As Dr Fay explains it is not unusual for a dentist to be away from their practice for a period of less than two weeks, but in those instances coverage for urgent care during that time can be obtained from other dentists. In this regard Dr Allington confirms that it is usual and customary that all dental offices close or operate without a dentist for a short period of time such as during Christmas holiday period or during a vacation, with no harm to patients. When the time off is planned, a dentist will attempt to arrange their schedule to suit their time out of office by not booking patients during that time, and would complete the work on the return to office. The evidence of Dr Fay and Dr Allington shows that the policy is not arbitrary but is based upon past experience within the profession.

26. Dr Allington also confirms that this Policy does not appear to have caused any great anxiety within the profession. He says that to his knowledge there were only two applications for a period less than two weeks and both applications were made by the Applicant. These applications were submitted without reaching out to the Board first to confirm the position of the Board. The Applicant's application was granted because despite the fact that it was common knowledge within the profession that there was no need for a locum for a one-week period the policy was not in a written form.

27. In his written Skeleton Argument, counsel for the Applicant also claimed that the Applicant had a legitimate expectation that the present application would be approved. In my judgment an argument based upon legitimate expectation is difficult on the facts for the Applicant to sustain. As noted, prior to the current application the Applicant had only submitted two previous applications, both for periods less than two weeks. As Dr Allington points out the Applicant was specifically advised on 27 July 2017, in an email from the Administrative Assistant Karen Thomas advising her that the second application had been approved but going forward, the Board's position is that such applications would only be granted in accordance with the Policy.

28. At times Counsel also suggested that no reasons were given for the refusal of the current application. The letter from the Board refusing to authorise the engagement of the locum dated 27 June 2019 is set out at paragraph 27 above. In my view that letter sufficiently sets out the reasons why the Board so decided.

29. In light of these findings and conclusions no issue of damages arises. For sake of completeness it should be noted that counsel for the Applicant accepted that the Applicant could not pursue damages as he had not shown that the Board had incurred any tortious liability towards the Applicant.

Conclusion

30. For the reasons set out above I dismiss the Applicant's application for a declaration that the Board's Policy regarding a minimum period within which an application for a locum is ultra vires or otherwise unlawful.

31. I shall hear the parties in relation to the issue of costs, if they so wish.

Dated 28 November 2019

NARINDER K HARGUN
CHIEF JUSTICE