

Credibility Findings

by Richard Steinecke
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One of the most difficult tasks of a tribunal is making findings of credibility. Perhaps even more difficult is to then articulate reasons for those findings. Two recent decisions involving a Saskatchewan physician illustrate how to explain such findings and, also, how not to explain such findings.

In the first case, *Dr. Ali v College of Physicians and Surgeons of Saskatchewan*, 2013 SKQB 37, Dr. Ali was alleged to have directed a staff person to alter billing documents for a colleague working with him so that the health insurance payment would be made to Dr. Ali's corporation rather than to the physician who provided the service. The context of the allegation was that Dr. Ali believed the other physician owed him money. Dr. Ali asserted that he told his employee to get the other physician to sign the paperwork so that Dr. Ali would be paid and that the employee altered the documents on her own initiative. A second allegation was that Dr. Ali provided false information to the regulatory College when asked about the matter.

Interestingly, the Court took the approach that the reasons of the discipline tribunal should withstand somewhat probing examination. This was the approach adopted by the Supreme Court of Canada in a couple of professional misconduct cases a decade ago. Many observers had thought that the more recent decision of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 signalled a less probing scrutiny of tribunal reasons, particularly where there was evidence on the record to support the finding. However, the Saskatchewan court did acknowledge that a "reviewing court should be alive to the difficulty of articulating reasons for credibility findings."

The Court commended the disciplinary tribunal because it "embarked upon a detailed analysis of the testimony of these three individuals in the context of the whole

circumstances of the case, the relationship that these witnesses had to one another at work and the documentary evidence tendered as exhibits."

The Court then praised the disciplinary tribunal because it had "outlined those facts and factors which prompted it to conclude that the evidence of Ms. Moody [the staff person] and Dr. Emokpare [the other physician] were credible and reliable and the evidence of Dr. Ali was not. In doing so, the Hearing Committee exercised care to identify each and every factor which informed and ultimately determined their credibility analysis. The decision did not simply reflect a conclusory statement that it found so-and-so believable and others not believable, but rather reflected a credibility analysis based upon the circumstances including, where it existed, the corroboration provided by each of Ms. Moody and Dr. Emokpare respecting the evidence of the other. The Hearing Committee was particularly influenced by the very considerable contradictions it found in the evidence of Dr. Ali on material points or aspects of the case."

Finally, the Court found the examples given of the inconsistencies in Dr. Ali's evidence compelling. For instance, the fact that Dr. Ali did not speak to his employee about the alteration of the documents when he was informed of it supported the contention that he was not surprised that she had made the alterations.

However, in the second case, *Dr. Ali v College of Physicians and Surgeons*, 2013 SKQB 38, the Court reversed one of the credibility findings. That issue related to a completely separate matter in which Dr. Ali was accused of altering his patient chart to record a temperature of a patient when, it was asserted, he had not even touched the patient (a child with a urinary tract infection). In addition to the evidence of the child (who was eight at the time) and her mother (who was present during the examination), there was also forensic evidence that three different inks were used on one fairly brief chart entry.

Dr. Ali acknowledged that he had not actually taken the temperature, but indicated he had touched the child's cheek and been told by the mother that the child did not

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have a temperature. The entry, made as much as two days later, was simply an ill-advised attempt to indicate that the child's temperature was normal.

The Court was concerned that the disciplinary tribunal had characterized the child's evidence as possessing "vivid clarity" when her evidence actually was uncertain on many points. The Court was also concerned by the tribunal's statement that the child would have recalled if Dr. Ali had touched her. The Court felt that the tribunal, "in the name of a "probability analysis", engaged in much guesswork, conjecture and speculation as opposed to an analysis of the evidence that it had received. There is an important distinction between guessing, conjecture and speculation on the one hand, and drawing legal inferences from evidence where inferences can appropriately be drawn."

The Court was also concerned about the tribunal's conjecture and speculation about the significance of three different inks used: "Contrary to this analysis as made by the Hearing Committee, there was absolutely no evidence and therefore were no facts – only conjecture or speculation supporting the conclusion that the temperature notation was added "much later". The only evidence on the point was that the notation was made with a different pen, which Dr. Ali addressed in his evidence."

The Court reversed the finding of falsifying the patient's temperature on the chart. However, the Court did support the second finding of the tribunal: that Dr. Ali's recording of an alleged racist remark by the patient's mother was falsified. The Court found the tribunal's view that there was no reason for Dr. Ali to record the comment with such detail in the chart as reasonable. The Court also supported the conclusion of the tribunal that the entry was likely an attempt to minimize his culpability to the complaint made by the patient's mother. It was an appropriate inference and not impermissible conjecture or speculation.

Tribunals, when dealing with credibility matters should therefore:

1. conduct a detailed analysis of the credibility of witnesses based on the factors identified by numerous court cases (e.g., probability, consistency, corroboration,

motivation, ability to recall, etc.). Conclusionary statements are inappropriate.

2. use of examples from the evidence that illustrate the tribunal's concern. These examples, if convincing, can be particularly effective.

3. try to ensure that they distinguish between reasonable inferences based on actual evidence and speculative conjecture. Obviously, that distinction is sometimes a fine one, even as the second Dr. Ali case illustrates.

The two Dr. Ali cases can be found at www.canlii.org.

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